

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

AB-7808

File: 20-331820 Reg: 00049920

PRESTIGE STATIONS, INC. dba PSI #9578
9600 Murray Drive, La Mesa, CA 91942,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: February 7, 2002
Los Angeles, CA

ISSUED APRIL 18, 2002

Prestige Stations, Inc., doing business as PSI #9578 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for its clerk having sold an alcoholic beverage to a minor, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Prestige Stations, Inc., appearing through its counsel, Ralph Barat Saltsman, Stephen Warren Solomon, and Matthew Gorman, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on July 18, 1997.

¹The decision of the Department, dated April 19, 2001, is set forth in the appendix.

Thereafter, the Department instituted an accusation against appellant charging that, on July 27, 2000, appellant's clerk, Charles Harry Lambert, sold beer to Stacey Farrell, a person who was then nineteen years of age. Although not stated in the accusation, Farrell was acting as a decoy for the La Mesa Police Department.

An administrative hearing was held on March 8, 2001, at which time oral and documentary evidence was received. At that hearing, testimony was presented by La Mesa police officer Justin Smith and the decoy. Appellant presented no witnesses on its behalf.

Subsequent to the hearing, the Department issued its decision which determined that the sale had occurred as alleged,² and that appellant had not established any defense to the charge.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the fairness provisions of Rule 141 were violated when a police officer permitted the decoy operation to continue even though conducted during a "rush hour" and the clerk was interrupted by a third party inquiring about use of the restroom; (2) the decision fails to explain the basis for its credibility decisions; and (3) the decoy lacked the appearance required by Rule 141(b)(2).

DISCUSSION

I

Appellant contends that, because the store was busy at the time of the decoy operation (there were five or six customers in the register line ahead of the decoy), and a third party interrupted the clerk to inquire about the use of the restroom while the clerk was in the midst of the transaction with the decoy, the police officer, who was directly

² The parties stipulated that there had been a sale of beer to the decoy.

behind the decoy, was obligated to halt the operation, and when he did not do so, violated the fairness provisions of Rule 141.

The Department contends that there is no evidence the clerk was distracted; the clerk did not testify. The Department points to the fact that the clerk requested and examined the decoy's identification, commented on the decoy's youthful appearance, and recited the birth year - 1981 - on her driver's license, as evidence of the clerk's level of alertness.

The Board's decision in The Southland Corporation/Amir (2001) AB-7464a is instructive. The Board there said:

"The prevention of sales to minors requires a certain level of vigilance on the part of sellers. It is nonsense to believe a minor will attempt to buy an alcoholic beverage only when the store is not busy, or that the seller is entitled to be less vigilant simply because the store is busy.

"We believe it asks too much to require law enforcement to predict the time of day that, for a particular premises, would fairly be considered 'rush hour.'

"It is conceivable that where an unusual level of patron activity that truly interjects itself into a decoy operation to such an extent that a seller may be legitimately distracted and confused, and the law enforcement officials seek to take advantage of such distraction or confusion, relief might be appropriate."

This is not such a case.

A brief request by a patron as to where a bathroom is located simply does not, in our opinion, rise to a level at which it might be reasonable to infer that the person to whom the request was made could be so distracted as to unwittingly sell an alcoholic beverage to a minor, especially after examining her driver's license. In The Southland Corporation/Amir case, supra, the Board was concerned about an unusual level of patron activity. We do not see this as an unusual level of patron activity, or such an intrusion into a transaction as to confuse or distract to the extent that a sale to a minor

decoy was the product of unfairness.

Whatever the reason for the sale - intentional or negligent - we do not believe it can be blamed on patron activity. Thus, there is no basis to conclude that the decoy operation was unfair.

II

Appellant challenges Officer Smith's credibility, and contends (App. Br., at pages 11-13) that the Department's acceptance, without explanation, of his testimony that he was in charge of the decoy operation - a fact appellant says is untrue - is a ground for reversal. Because of such doubtful credibility, says appellant, Officer Smith's testimony that he heard the clerk comment on the decoy's youthful appearance was also not credible.

Appellant relies principally upon the testimony of the decoy that she believed Department Investigator Tyndall was in charge of the decoy operation, because he was the person who gave her instructions on the night of the operation. Given Officer Smith's undisputed testimony that he was not in charge of the decoy operation, appellant's basic premise is incorrect, so whatever the decoy may have thought is irrelevant.

Officer Smith was asked by appellant's counsel (RT 44-45):

"Q. You were the officer in charge of the decoy operation; correct?"

"A. No.

"Q. Who was?"

"A. Sergeant Bond.

"Q. Where was Sergeant Bond during the decoy operation?"

“A. Doing a separate decoy operation.”

We cannot help but note that the record authority given the Board for Officer Smith’s alleged misstatements is itself a misrepresentation. Appellant’s brief states: “Here, the decision is factually based upon a determination of the credibility of Officer Smith regarding who was in charge of the decoy operation.” In fact, the decision simply concludes only that Officer Smith “was in charge of the decoy at the premises,” a true statement. There is nothing in the decision that suggests the Administrative Law Judge (ALJ) believed Officer Smith was in overall charge of the decoy operation, or that the identity of the officer in overall charge was even material. Indeed, in footnote 2 to Finding of Fact II-B, the ALJ expressly found that Officer Bond was in charge.

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].) The record supports the ALJ’s findings.

III

Appellant contends that the decoy did not present the appearance required by Rule 141 - that she display an appearance which could generally be expected of a person under twenty-one years of age. Appellant refers to the decoy’s height and weight, to the fact that she was wearing a watch, was a college student studying Italian and Mathematics, and was not nervous during the transaction, and concludes from those facts that she “clearly” could not have displayed the appearance of a person under the age of twenty-one.

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he or she testifies, and making the determination whether the decoy's appearance met the requirement of Rule 141, that he or she possessed the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages. We are not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy lacked the appearance required by the rule, and an equally partisan response that he did not.

In this case, the ALJ considered at length the appearance of the decoy. Appellant refers to only a few of the indicia of age considered by the ALJ. Yet, to our mind, the several factors listed by appellant could just as well describe an 18-year-old college freshman; by themselves, they are of no help in gauging a person's age.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³ This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.