

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

AB-8191

File: 20-361400 Reg: 03054626

ARTURO L. FLORES, JR., and DIANA A. FLORES
dba Mira Loma AM/PM
10015 Bellgrave Avenue, Mira Loma, CA 91752,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 2, 2004
Los Angeles, CA

ISSUED NOVEMBER 29, 2004

Arturo L. Flores, Jr. and Diana A. Flores, doing business as Mira Loma AM/PM (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 20 days for their clerk, German Gonzalez, having sold a 24-ounce can of Budweiser beer to Maria Elena Ochoa Guerra, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Arturo Lamberto Flores, Jr. and Diana Annabi Flores, appearing through their representatives, Charles Benninghoff, Gabriela Ramirez R., and Nancy Benninghoff, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

¹ The decision of the Department, dated September 4, 2003, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on June 16, 2000.

Thereafter, the Department instituted an accusation against appellants charging the unlawful sale of an alcoholic beverage to a minor. An administrative hearing was held on July 15, 2003, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Maria Elena Ochoa Guerra (Guerra), who was acting as a minor decoy for the Riverside County Sheriff, and by Carol Lorenz, a Riverside County deputy sheriff, in support of the accusation, and by German Gonzalez and Diana Flores on behalf of appellant.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged, and that appellants had failed to establish any affirmative defense.

Appellants thereafter filed a timely appeal in which they raise the following issues: the decoy did not present the appearance required by Rule 141(b)(2), and the administrative law judge (ALJ) improperly excluded the results of a poll which established that the decoy displayed the appearance of a person older than 21 years of age. The issues will be discussed together.

DISCUSSION

Guerra was approximately one week short of her twentieth birthday on the day of the operation. She testified that she selected the beer from the cooler, took it to the counter, and was sold the beer without having been asked her age or for her identification. Exhibits B-2 through B-4 are photographs taken of her on the night of the

operation.

Appellants contend that “the marked difference of appearance of the decoy on the day of the hearing as opposed to the night of the operation” impaired the usually impartial and independent judgment of the ALJ, resulting in a ruling in favor of the Department. They assert that, on the night of the decoy operation, the decoy had a very adult-like appearance, wearing heavy make-up and clothing “distinctly unlike those of an adolescent,” and had the “look, costume, carriage and deportment of a fully-adult person,” while at the hearing, she wore no makeup or glasses, wore her hair down in a juvenile style, and wore a T-shirt and jeans.

Appellants cite and quote from the Board’s decision in Circle K Stores, Inc.

(2000) AB-7265, where the Board stated:

We are well aware that the rule requires the ALJ to undertake the difficult task of assessing that appearance many months after the fact. However, in the absence of any discernible change in the appearance or conduct of the minor decoy between the time of the transaction and the time of the hearing, it would be reasonable to conclude that the ALJ’s impression of the apparent age of the minor at the time of the hearing would also have been the case had he viewed the minor at the earlier date.

Appellants also contend that the ALJ improperly excluded the results (Exhibit B-1) of a poll taken by Johanna Sanchez purporting to show the relative ages assigned to the decoy by various persons shown the photographs in Exhibits B-2 through B-4.

The ALJ’s findings regarding the appearance of the decoy (Findings of Fact D-1 through D-5) demonstrate that he took into account the purported differences in the appearance of the decoy on the two different dates:

D. The decoy’s overall appearance including her demeanor, her poise, her mannerisms, her size and her physical appearance were consistent with that of a person under the age of twenty one years of age and her appearance at the time

of the hearing was similar to her appearance on the day of the decoy operation even though the decoy was wearing contacts and her hair was in a ponytail at the time of the hearing.

1. On the day of the sale, the decoy was wearing eyeglasses, her hair was pinned up, she was wearing no jewelry, her makeup consisted of mascara and lip-gloss and her clothing consisted of blue jeans, a T-shirt with a white sweater over it and tennis shoes. The decoy is five feet four inches in height and she weighed one hundred forty something pounds on the day of the sale. The photograph depicted in Exhibit 2 was taken at the premises and it depicts what the decoy looked like and what she was wearing at the premises on the day of the sale.

2. The decoy gave straightforward answers at the hearing and there was nothing remarkable about her nonphysical appearance.

3. The decoy visited approximately twelve locations on October 22, 2002 and she was able to purchase an alcoholic beverage at a total of two locations.

4. The decoy had participated in approximately two or three prior decoy operations.

5. After considering Exhibit 2, the decoy's overall appearance when she testified and the way she conducted herself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

While it is true that there was a discernible difference in the decoy's appearance between the time of the decoy operation and the day of the hearing, we cannot say that it was such as to preclude an experienced ALJ from taking such difference into account in assessing the decoy's appearance on either occasion.

Nor can we say that the ALJ erred when he excluded the testimony of Johanna Sanchez about a survey she conducted of what people who viewed photographs of the decoy thought about the decoy's age.

A number of earlier decisions of the Board have sustained rulings by ALJ's excluding expert testimony purporting to address indicia of age on the ground that such

testimony would be unlikely to assist the ALJ. In *Prestige Stations, Inc.* (2000) AB-7248, the Board was guided by section 801 of the Evidence Code, which states that an expert may testify as to his or her opinion if the opinion is on a “subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” The Board did not consider determining a person’s age a matter beyond common experience: “He [the ALJ] must exercise a judgment that necessarily is based upon his own experience.”

We see a parallel between the survey results sought to be introduced in this case and the expert testimony offered in *Prestige Stations, Inc., supra*, and numerous other Board decisions. In each case, the expectation is that the ALJ is fully capable of making the determination required by Rule 141(b)(2) without the opinions of others. Of course, an ALJ must consider all aspects of a decoy’s appearance, both at the time of the sale and at the time of the hearing, and sufficiently articulate in his decision that he has done so, but when he or she does this, this Board will, in the absence of exceptional circumstances, defer to the ALJ, as we do here.

The survey itself shows why an ALJ would find it of little assistance, as well as why appellants could not have been prejudiced by its exclusion. According to the tabulation of results set forth in Exhibit B-1, 68 out of 103 persons questioned thought the decoy to be under 21; 37 of the 103 thought she was under 18. The photographs shown to the people interviewed include one showing the decoy holding a can of Budweiser beer. Would this have led people to think she was old enough to possess an alcoholic beverage? Or would it have raised suspicions that a minor was holding the

beer; otherwise what was the purpose of the question? Either way, it seems clear that the survey results were at a high risk of being skewed, and unreliable. The ALJ properly excluded this evidence.

ORDER

The decision of the Department is affirmed.²

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

² 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.