

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

AB-8263

File: 20-386408 Reg: 03055707

BP WEST COAST PRODUCTS, LLC, dba Arco AM/PM # 5598
5987 Clark Road, Paradise, CA 95969,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: January 6, 2005
San Francisco, CA

ISSUED FEBRUARY 14, 2005

BP West Coast Products, LLC, doing business as Arco AM/PM # 5598 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for its clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant BP West Coast Products, LLC, appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

¹The decision of the Department, dated March 11, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 23, 1991. On August 6, 2003, the Department instituted an accusation against appellant charging that, on June 6, 2003, appellant's clerk, Linda Orr (the clerk), sold an alcoholic beverage to 18-year-old Jared Tomlinson. Although not noted in the accusation, Tomlinson was working as a minor decoy for the Paradise Police Department at the time.

An administrative hearing was held on December 16, 2003, at which time documentary evidence was received, and testimony concerning the sale was presented by Tomlinson (the decoy) and by Robert Nichols, a Paradise police officer.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellant filed an appeal raising the following issue: The penalty imposed is excessive and not supported by the findings.

DISCUSSION

Appellant contends the administrative law judge (ALJ) erred by aggravating the penalty when he had made no finding that would support his expressed basis for the aggravation, that the clerk knew the decoy was not 21 when she sold to him. Appellant also appears to argue that there is no evidence in the record that would support the ALJ's conclusion regarding the clerk's knowledge of the decoy's age; rather, appellant urges, the ALJ's conclusion about what the clerk knew is based on assumptions.

In Determination of Issues II, the ALJ discussed the penalty:

The Department recommended that Respondent's license be suspended for ten to fifteen days. It added a further recommendation for aggravation of the penalty, based on the fact that [the clerk] sold the beer

to the decoy knowing that the decoy was under twenty-one years old. Aggravation of the Department's customary penalty is justified. However, in this case, Respondent had been discipline-free for more than eleven years before the present violation occurred. Such a "clean" history constitutes grounds for mitigation of Respondent's penalty. The grounds for aggravation of Respondent's penalty and the grounds for mitigation of the penalty cancel each other.

Finding of Fact IV concerns the decoy's display of his true California driver's license to the clerk:

Before selling the beer, [the clerk] asked to see the decoy's identification. The decoy handed his California driver license to [the clerk]. The license showed the decoy's date of birth was October 10, 1984, and contained the words "AGE 21 IN 2005" in a red stripe and the words "PROVISIONAL UNTIL AGE 18 IN 2002". [The clerk] looked at the license, looked at the decoy, did something with the license on a machine, and returned the license to the decoy. [The clerk] later admitted to a police officer that the cash register had refused the sale, but she manually overrode the register in order to make the sale.

In Finding of Fact VII, the ALJ describes the decoy's appearance, and rejects appellant's contention made at the hearing that the decoy's prior experience as a decoy made him appear to be at least 21 years old. The ALJ then concluded that, when he purchased the beer from the clerk, the decoy displayed the appearance which could generally be expected of a person under 21 years of age.

When an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].) "Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal*

Camera Corp. v. Labor Bd. (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) In making its determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Although the ALJ did not state explicitly in his findings "that the clerk knew the decoy was not 21 when she sold to him," that finding is implicit in Findings of Fact IV and VII, *ante*. The evidence shows that the clerk looked at the decoy's California driver's license and it bore clear indications that the decoy was not yet 21: the decoy's birth date in 1984; the red stripe saying he would not be 21 until 2005 (the sale occurred in 2003); and the notice that the license was provisional until the decoy turned 18 in 2002, just the year before the sale. Additionally, the decoy's appearance was that of a person under the age of 21, and the evidence showed that when the clerk entered the decoy's birth date into the register, it indicated the identification was that of a person too young to legally purchase alcohol, so the clerk *manually overrode* the register in order to make the sale. We believe it was not unreasonable for the ALJ to infer from

this combination of evidence that the clerk knew the decoy was not 21, but sold him the beer anyway.

Appellant argues that the ALJ's conclusion is not based on evidence in the record, but on unproven assumptions. It urges that no evidence in the record showed the clerk actually computed the decoy's age when she saw his birth date on his driver's license or that she read the words on the red stripe. Appellant contends the ALJ assumed the clerk was able to read and understand English, that the clerk held the license so that the birth date and all the wording were visible, that the cash register was working properly, and that the clerk entered the correct birth date into the register. Finally, appellant asserts that, since the clerk did not testify at the hearing, it was not possible for the ALJ to determine what the clerk actually knew about the decoy's age.

Appellant's last point, about the failure of the clerk to testify, is ironic. While it may be true that the record contains no direct evidence of what the clerk saw or what she was able to read, the lack of such evidence is directly attributable to appellant's failure to produce that evidence, or any other evidence, for that matter. The Department presented a prima facie case by establishing that the decoy was underage and the clerk sold to the decoy. At that point, it was appellants' responsibility to present evidence rebutting that evidence. That was the time for them to attempt to prove that the clerk could not read English, or could not do math, or whatever other reason they had explaining or excusing the clerk's actions.

It is far too late now, in this appeal, to try to shift the burden, after the fact, to the Department. Nothing up to the time of the hearing or during the hearing indicated that any of the situations dreamt up by appellant existed. The Department did not need to show that a non-existent situation did not exist. If appellant chose not to present any

evidence, but to rely solely on its mistaken belief that the Department had not met its initial burden of producing evidence, it has no basis for complaint on appeal.

ORDER

The decision of the Department is affirmed.²

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

²This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

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