

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

**AB-8278**

File: 20-386301 Reg: 03056161

BP WEST COAST PRODUCTS, LLC, dba Arco AM/PM # 5165  
2015 West Main Street, Turlock, CA 95380,  
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: Jerry Mitchell

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

**ISSUED FEBRUARY 11, 2005**

BP West Coast Products, LLC, doing business as Arco AM/PM # 5165 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> 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, Thomas M. Allen.

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<sup>1</sup>The decision of the Department, dated April 22, 2004, is set forth in the appendix.

## FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on June 26, 2002. On October 21, 2003, the Department filed an accusation against appellant charging that, on July 25, 2003, appellant's clerk, Fernando Enriquez (the clerk), sold an alcoholic beverage to 18-year-old Manpreet Kaur. Although not noted in the accusation, Kaur was working as a minor decoy for the Turlock Police Department at the time.

At the administrative hearing held on February 24, 2004, documentary evidence was received, and testimony concerning the sale was presented by Kaur (the decoy) and by Brett Aamodt, a Turlock police officer. Robin Costello, the facilities manager at appellant's premises, testified about the training given to employees about alcoholic beverage sales.

Following the hearing, the Department issued its decision which determined that the violation charged was proven, and no defense had been established. Appellant filed an appeal contending that the Department's use of its own administrative law judges (ALJ's) violates due process; the Department's policy regarding employment of retired annuitant ALJ's is an underground regulation; and the decoy's appearance violated rule 141(b)(2).<sup>2</sup>

## DISCUSSION

## I

Appellant contends the Department's arrangement with its ALJ's violates due process because it gives the ALJ's a financial interest in the outcome of the proceedings. It asserts that this circumstance was condemned by the California

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<sup>2</sup>References to Rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

Supreme Court in *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017 [119 Cal.Rptr.2d 341]. They also contend the Department's practice of employing retired annuitants on an hourly basis results in a denial of due process, and the Department's policy governing the assignment of ALJ's is itself an illegal underground regulation.

We note that these issues were not addressed in any way in the course of the administrative hearing. Neither at the outset of the hearing nor during closing argument did appellant's counsel suggest in any way that Judge Mitchell should not hear the case.

It is true that the issue was one of 19 special defenses set forth in appellant's Special Notice of Defense, filed December 4, 2003, almost three months prior to the administrative hearing. However, we do not think it can be said that the issues were preserved merely because they were included in this boilerplate document, one which resembles an omnibus attempt to raise every issue which could conceivably emerge in the course of the hearing.

When a Special Notice of Defense is filed, it goes into the case file well before the case has been set for hearing. We cannot expect an ALJ to address with particularity any of the defenses asserted in the Special Notice of Defense unless, at the hearing, the ALJ is told that it is the licensee's contention that one or more of the defenses set forth there will be pressed. When that is done, the ALJ is fairly on notice that the issue has been preserved and should be dealt with. When that is not done, the issue must be considered waived. An ALJ cannot be expected to assume that the licensee intends to assert every one of the defenses in the Special Notice of Defense whether or not it has any relevance to the case, or to go through the evidence to find that which might support the "generic" defenses listed by appellant.

As stated in the Witkin treatise, "An appellate court will not ordinarily consider procedural defects or erroneous rulings with respect to relief sought or defenses asserted where an objection could have been, but was not presented to the lower court." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §394, p.444.)

## II

Rule 141(b)(2) requires that, at the time of the decoy operation, the decoy's appearance be that which could generally be expected of a person under the age of 21. Appellant contends the ALJ erred in his determination that the decoy's appearance complied with the requirement of rule 141(b)(2) because he failed to consider the decoy's prior experience as a decoy and her background as a police Explorer. The decoy had worked as an Explorer for about a year and a half before this decoy operation, and had acted as a decoy two or three times before.

The ALJ addressed the decoy's appearance in Factual Finding 4:

4. Section 141(b)(2) of Title 4, California Code of Regulations, provides that "[t]he decoy shall display 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 at the time of the alleged offense." Based on a photograph of Kaur taken on July 25, 2003, and her testimony, appearance and demeanor, during this hearing, it is found that she displayed the appearance which could generally be expected of a person under 19 years of age, under the actual circumstances presented to Enriquez during the decoy operation.

This Board has previously addressed appellant's contention that the decoy's experience necessarily made her appear to be over the age of 21. The Board rejected this type of contention in *Azzam* (2001) AB-7631:

Nothing in Rule 141(b)(2) prohibits using an experienced decoy. A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. While extensive experience as a decoy or working in some other capacity for law enforcement (or any

other employer, for that matter) may sometimes make a young person appear older because of his or her demeanor or mannerisms or poise, that is not always the case, and even where there is an observable effect, it will not manifest itself the same way in each instance. There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.

Appellant insists "it is clear" that the decoy did not appear to be under the age of 21 and that this was due to her experience with law enforcement. It ignores the language in *Azzam, supra*, which makes clear that there must be evidence presented that the decoy's experience actually made the decoy appear to be 21 years of age or older. The ALJ apparently saw no evidence of this at the hearing and appellant has not pointed out any evidence that might tend to support its assertion.

We note that the ALJ's finding regarding the decoy's appearance lacks the explanation of physical and non-physical factors considered that we have seen and approved in many other Department decisions. Although minimally so, we believe this finding is adequate.

While more detailed findings are desirable, making it easier for the Board to understand the reasoning behind the decision, the absence of such detail does not, per se, invalidate a decision. (See *Southland & Nat* (2000) AB-7391.) The Board's concern in cases of this kind is whether the ALJ has applied the correct standard to the evidence concerning the decoy's appearance. Where the findings have indicated that the ALJ considered nothing more than the decoy's physical appearance, we have generally reversed the decision and remanded the matter for further findings.

A case similar to this one that involved an allegedly insufficient finding regarding the decoy's appearance was *Southland & Hong* (2001) AB-7496. In that case, the

appellants argued that the decoy appeared mature and sophisticated due to his four years as an Explorer Scout and supervisor of other Explorer Scouts. They asked the Board to reject the ALJ's "rote finding" that did little more than recite rule 141(b)(2).

The discussion of this issue in *Southland & Hong, supra*, was as follows:

With regard to the decoy's appearance, the ALJ said (Finding II.C.):

"The decoy is youthful looking and his appearance at the time of his testimony was substantially the same as his appearance at the time of the sale. The decoy displayed the appearance and demeanor of a person which could generally be expected of a person under 21 years of age under the actual circumstances presented to the seller at the time of the alleged offense. The photographs in Exhibits 3 and 4 which were taken on October 23, 1998 accurately depict the decoy's appearance as of that date."

This Board has said that the ALJ's should provide some analysis of the decoy's appearance and this decision does not provide that. However, the decision also specifically refers to both the decoy's appearance and his demeanor, so we can infer, since all reasonable inferences in favor of the decision must be indulged in, that the ALJ did consider more than just the decoy's physical appearance. The use of the language of the rule does not lead this Board to infer, as appellants do, that the ALJ failed to perform his duty to observe the evidence, consider it carefully, and make reasonable findings based on substantial evidence.

Similarly, this Board does not infer from the appearance and demeanor of the decoy that the ALJ acted improperly, as appellants do. His size is certainly not extraordinary for a person of 18 and the ALJ was in a much better position than this Board to judge whether he was extraordinarily mature and sophisticated for a person under 21.

We have said many times that we are not inclined to substitute our judgment for that of the ALJ on the question of the decoy's apparent age, absent very unusual circumstances, none of which are present here. In the appeal of *Idrees* (2001) AB-7611, we said:

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.

This Board is 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 did not have the appearance required by the rule, and an equally partisan response that she did.

We find no valid reason to second-guess the ALJ's determination in the present case.

ORDER

The decision of the Department is affirmed.<sup>3</sup>

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

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<sup>3</sup>This 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.