

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

AB-8285

File: 20-386239 Reg: 03055817

BP WEST COAST PRODUCTS, LLC, dba Arco AM/PM # 643
Fifth & E Streets, Williams, CA 95987,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

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

ISSUED FEBRUARY 11, 2005

BP West Coast Products, LLC, doing business as Arco AM/PM # 643 (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, Robert Wieworka.

¹The decision of the Department, dated April 29, 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 September 10, 2003, the Department instituted an accusation charging that, on May 22, 2003, appellant's 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 Colusa County Sheriff's Department at the time.

An administrative hearing was held on March 24, 2004, at which time documentary evidence was received, and testimony concerning the sale was presented. 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 appealed the decision, contending: (1) The penalty imposed was based on an underground regulation; and (2) the ALJ erred in finding that the decoy's appearance did not violate rule 141(b)(2).²

DISCUSSION

I

Appellant contends that the 15-day suspension cannot stand because it is based on an "underground regulation" in violation of the Administrative Procedure Act. (Gov. Code, § 11340 et seq. (APA).)

Government Code section 11340.5, subdivision (a), states: "No state agency shall utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual,

²References 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.

instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.” Section 11342.600 defines regulation as “every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.” Section 11425.50, subdivision (e), provides that “a penalty may not be based upon a guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule subject to Chapter 3.5 (commencing with section 11340) unless it has been adopted as a regulation pursuant to Chapter 3.5 (commencing with section 11340).”

In *Vicary* (2003) AB-7606, the Board determined that the penalty guidelines found in the Department’s Instructions, Interpretations and Procedures Manual were “underground regulations,” i.e., regulations that have not been adopted as such under the provisions of the APA. Appellant alleges that these same penalty guidelines were the basis for the penalty imposed in the present case.

Appellant’s argument appears to be: The penalty guidelines specify a 15-day suspension for a sale-to-minor violation, Department counsel recommended a 15-day suspension, the ALJ ordered a 15-day suspension in his proposed decision, and the Department adopted the ALJ’s proposed decision, including penalty; therefore, the 15-day suspension must be based on the guidelines that have been determined to be an underground regulation.

There is no evidence in this record that would support a determination that the penalty proposed by the ALJ and adopted by the Department was pursuant to any guidelines.

The Department made no reference to any guidelines in its decision, nor did Department counsel when making the penalty recommendation on behalf of the Department. Hence, it would be unwarranted for the Board to assume that the penalty order was based upon guidelines, and appellants have offered nothing to support their argument that any guidelines were followed.

We cannot assume, simply because penalty guidelines exist, that they controlled the penalty imposed by the Department. The mere fact that Department counsel recommended, and the Department adopted, a 15-day suspension is not, by itself, proof that it was based upon an underground regulation. Appellant's approach, carried to its logical conclusion, would require the ALJ to deviate from the Department recommendation in proposing a penalty, whether or not he thought it reasonable and appropriate. We find this logic unpersuasive.

Although appellants included an objection to the penalty to be recommended by the Department as one of a number of defenses in a special notice of defense filed prior to the hearing, no reference was made to this defense in the course of the hearing, and no evidence was offered in support of the contention. In closing argument, appellant's counsel said merely that he was reasserting all the defenses set out in its special notice of defense. Even if this could be considered to raise the contention about an underground regulation in a manner that would reasonably put the ALJ on notice that appellant intended to preserve the objection (and we do not believe it does), the bare objection does not carry appellant's burden of proof. In fact, the ALJ overruled each of the demurs and objections in appellant's special notice of defense, "as [appellant] either failed to present any evidence at all or failed to present sufficient evidence to sustain those demurs or objections." (Finding of Fact VI.)

Without some evidence that suggests the ALJ felt bound by the Department's recommendation and/or its guidelines, we cannot say with sufficient certainty to justify reversal that the penalty was based on such guidelines. Surely the Department is not precluded from imposing a certain penalty simply because it is the same penalty as stated in the guidelines criticized in *Vicary*.

II

Rule 141 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 determining that the decoy's appearance complied with rule 141(b)(2) because his finding regarding the decoy's prior law enforcement training is not supported by substantial evidence, and the decoy's prior law enforcement experience made him appear to be at least 21 years old. Appellant argues that using this decoy "was the equivalent of sending a sworn law enforcement officer inside, and it is clear that [the decoy] did not display the appearance generally expected of a person under 21 years of age at the time of this incident, as it is highly unlikely that a person under 21 would have this same type of training and experience." (App. Br. at p. 10.)

The finding challenged by appellant is part of Finding of Fact II.C.: "[The decoy] was considering enrolling in community college law enforcement training classes when approached to work as an unpaid decoy for the Colusa County Sheriff's Department." Appellant contends that the decoy's testimony was that he was already enrolled in the Yuba College Police Academy before this decoy operation and that he was approached by a Department investigator about becoming a decoy, rather than the Sheriff's Department. The testimony at pages 22 through 23 is rather confusing, but it appears that appellant's description of the testimony is essentially accurate.

While we agree that the sentence in finding II.C. challenged by appellant is not accurate, that does not mean that it constitutes reversible error. To cause reversal, an error must be prejudicial and it must appear "that a different result would have been probable if such error" did not exist. (Code Civ. Proc., § 475; see *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 104 [87 Cal.Rptr.2d 754] .) There is no presumption of injury from an error, but the burden is on the appellant to show that the error was sufficiently prejudicial to justify reversal. (*Kyne v Eustice* (1963) 215 Cal.App.2d 627, 635-636 [30 Cal.Rptr 391].)

Appellant appears to argue that the error about the decoy's enrollment in the police academy was prejudicial because the ALJ ignored the decoy's training and experience in evaluating the decoy's appearance. Appellant states that the decoy did not have the appearance of a person under the age of 21, attributing his "mature" appearance to his experience with law enforcement.

A major problem with appellant's assertion is that appellant has pointed to no evidence indicating what kind of "law enforcement experience" (if any) the decoy had. The gist of the decoy's testimony was that he had started at the police academy, but on the advice of the director of the academy, had decided to discontinue his studies for a while because he would be qualified before he would be 21, and he could not be hired anywhere until he was 21. Whether he ever completed any courses at all is not known.

Since there is no basis for concluding that the decoy had significant experience with law enforcement, whether he was already enrolled in the police academy or whether the Department investigator or a sheriff's deputy approached him about the decoy operation is irrelevant. The error in the finding is of no significance, and

appellant has shown no prejudice arising from it. This one sentence lacking evidentiary support, out of five paragraphs in the decision dealing with the decoy's appearance, is of so little materiality that a finding either way would not influence the final conclusion as to the decoy's appearance.

We have said many times that we are not inclined to substitute our judgment for that of the ALJ regarding 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.

Similarly, this Board has previously addressed the contention that a decoy's experience necessarily made him or 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 his 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.

ORDER

The decision of the Department is affirmed.³

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

³This 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.