ISSUED MARCH 5, 2001

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

PRESTIGE STATIONS, INC. dba AM/PM Station #9716 902 Orange Street Redlands, CA 92373 Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7580 File: 20-331293 Reg: 99047281 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: December 12, 2000 Los Angeles, CA

Prestige Stations, Inc., doing business as AM/PM Station #9716 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its off-sale beer and wine license for 15 days for its clerk, Berta Patterson, having sold a 16-ounce can of Budweiser beer to Florin Indries, a minor, then 19 years of age, acting as a police decoy for the Redlands Police Department, 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

[1]The decision of the Department, dated January 13, 2000, is set forth in the appendix.

Professions Code §25658, subdivision (a).

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

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on July 2, 1997. Thereafter, the Department instituted an accusation against appellant charging that appellant, through its clerk, committed a violation of Business and Professions Code §25658, subdivision (a).

An administrative hearing was held on December 15, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Florin Indries ("Indries"), the decoy, and Ralph Knapp ("Knapp"), a Redlands police officer. 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, and that appellant had failed to establish any defenses under Rule 141 (4 Cal. Code Regs. §141). In addition, the Department declined to consider the defenses asserted in appellant's special notice of defense, on the ground it had been untimely filed.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) Rule 141(b)(2) was violated; (2) Rule 141(b)(5) was violated; and (3) the decision erred in failing to address the issues raised by the special notice of defense.

DISCUSSION

I

Appellant contends the police used a decoy who did not present the appearance which could generally be expected of a person under the age of 21.

The decoy was a few days short of his 20th birthday on the day of the sale. He was 6' 1" tall and weighed 147 pounds. He was wearing a T-shirt with a Quicksilver logo over the right breast.

The Administrative Law Judge wrote that the decoy's "physical appearance and his demeanor was that of a person his age, such that a reasonably prudent licensee would request his age or identification before selling him an alcoholic beverage." He also, in the section of the decision entitled "Legal Basis For Decision," quoted the text of Rule 141(b)(2), and specifically rejected appellant's contention that the rule had been violated.

The Appeals Board is not entitled to second-guess the factual determination by the ALJ concerning the appearance of the decoy. That being the case, and there being no indication of the utilization of any improper standard in the application of the rule, this contention must be rejected.

II

Appellant contends there was no compliance with Rule 141(b)(5), in that the record is silent as to when the citation was issued. Appellant refers to the requirement of the rule that the face to face identification must occur before the issuance of the citation, and asserts (App.Br., at page 8) that "there is no testimony at all under any interpretation that states that the citation was issued

after the identification took place."

This theory of defense is of recent vintage, and the Board has yet to sustain it in any of the cases it has heard.

Appellant is mistaken as to what the testimony shows as to when the citation would have been written. Both the police officer and the decoy testified that the decoy had not even made it outside the premises after his purchase - he was called back even before the door had closed behind him. [RT 14, 21, 35.] Moreover, the officer testified that the identification was made even before he had revealed to the clerk that he was a police officer.

It is ludicrous to suggest that a citation would have been issued before the officer had even disclosed his identity as a police officer. It is equally absurd to suggest that he could have managed to complete the citation form during the few seconds which would have elapsed while the decoy walked a few feet to the door.

III

Appellant contends that the Administrative Law Judge (ALJ) erred in failing to consider and rule upon the issues raised in appellant's special notice of defense. The ALJ declined to consider the defenses which had been raised in that document, stating that it had not been filed in a timely fashion. Appellant contends that its filing was timely under Code of Civil Procedure §1013.[2] The Department contends that there is no statutory or case support for appellant's position.

Appellant has the best argument on the filing issue.

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[2] All further references to §1013 are to this section.

The accusation was served by mail on September 17, 1999. This is not in dispute. The special notice of defense was served by mail on October 6, 1999. This is also not in dispute.

Under the Administrative Procedure Act, a notice of defense must be filed within 15 days after service of the accusation. (See Government Code §11506.)[3]

Unless appellant's time to respond was extended by statute or rule, the notice of defense, to have been filed in a timely manner, must have been mailed on or before October 2, 1999.

Appellant contends, however, that it was entitled to an additional five days by virtue of §11440.20 of the Administrative Procedure Act (Government Code §11440.20),[4] and Code of Civil Procedure §1013.[5] Appellant also asserts that

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[3] This section provides, in pertinent part, that "within15 days after service of the accusation, the respondent may file with the agency a notice of defense ..."

[4] Government Code §11440.20 provides:

"Service of a writing on, or giving of a notice to, a person in a procedure provided in this chapter is subject to the following provisions:

> (a) The writing or notice shall be delivered personally or sent by mail or other means to the person or the person's last known address or, if the person is a party with an attorney or other authorized representative of record in this proceeding, to the party's attorney or other authorized representative. If a party is required by statute or regulation to maintain an address with an agency, the party's last known address is the address maintained with the agency.
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> (b) Unless a provision specifies a form of mail, service or notice by mail may be by first class mail, registered mail, or certified mail, by mail delivery service, by facsimile transmission if complete and without error, or by other electronic means as provided by regulation, in the discretion of the sender."

(continued...)

Business and Professions Code §25760 also supports its position. Thus, under appellant's view, the special notice of defense was timely when it was served by mail on October 7, 1999.

Government Code §11440.20 does not refer to §1013, and the Law Revision Comment relates only to the manner of mailing, not the time of mailing. Hence, we do not see how this helps appellant.

Business and Professions Code §25760 applies to notices of the Department, and governs the manner in which such notices are served. Appellant's position appears to be that, by specifying that §1013 governed such service, the Legislature intended the section to apply to any document or pleading to be filed in response thereto.

The ruling in Pesce v. Department of Alcoholic Beverage Control (1958) 51 Cal.2d 310 [333 P.2d 15] lends considerable support to appellant's position.

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[4](...continued)

[5] Code of Civil Procedure §1013 provides, in pertinent part:

> (a) In the case of service by mail ... the service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or make any response within any period or on a date certain after the service of the document, which time period or date is prescribed by statute or rule of court, shall be extended five days, upon service by mail, if the place of address is within the State of California, ... but the extension shall not apply to extend the time for filing notice of an intention to move for new trial, notice of intention to move to vacate judgment pursuant to Section 663a, or notice of appeal. This extension applies in the absence of a specific exception provided for by this section or other statute or rule of court."

There, the California Supreme Court held that §1013 gave an appellant the benefit of the additional five days in connection with the filing of a notice of appeal from a decision of the Department. The court there stated:

> "Both section 1013 and section 25760 provide that the service is complete at the time of deposit in the United States post office. It is this service which is referred to in section 1013 where it is stated '... but if within a given number of days after such service ... .' a right is to be exercised or an act is to be done, the time for exercising that right or performing that act is extended. ... The Business and Professions Code and the Code of Civil Procedure are to be read and construed together under the 'well-recognized Rule that for purposes of statutory construction the codes are to be regarded as blending into each other and constituting but a single statute.' [Citations omitted.] Applying this rule, both the petitioner and the department are authorized to make service in the manner provided by section 1013."

Although the precise holding in Pesce appears to have been reversed by a later amendment of §1013, its reasoning remains intact - that is, that §1013 applies to proceedings under the Alcoholic Beverage Control Act.[6]

The Department argues that, even if §1013 applies, and the filing of the notice of special defense timely, appellant has suffered no prejudice. If this is true, we would be inclined to agree with the Department that the ALJ's failure to address the issues raised by the notice of defense was, if error at all, harmless error.

The Department cites Rolfe v. Munro (1958) 165 Cal.App.2d 726 [332 P.2d 404, 406], a case in which the appellants were unable to demonstrate any prejudice from the Department's failure to address the issues raised by his objections to the accusation.

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[6] The Pesce decision is cited for this proposition in California Administrative Hearing Practice (2d edition, 2000), §4.30, pp. 173-174.

In Rolfe v. Munro, appellants had objected to the accusation on the grounds it did not state acts upon which the agency could proceed, and was so indefinite and uncertain they could not identify the transaction or prepare a defense. Noting that it would have been the better practice for the Department to rule on appellants' objections either prior to or at the time of the hearing, the court found a lack of prejudice from the Department's failure to rule on the objections. It cited appellants' failure to raise the issue at the hearing, to express surprise at the evidence produced, to request a continuance to meet the issues presented, or seek a continuance because their objections had not been ruled upon.

Most of the issues raised by appellant in its notice of defense were directed at the form and content of the accusation, much like the objections in Rolfe v. Munro. Appellant's failure to raise these issues at the hearing, coupled with its apparent ability to respond to the factual issues, suggests the absence of any prejudice from the absence of a ruling on the special notice of defense. [7]

Other of the issues asserted in the special notice of defense bore no relationship to the case. These include a challenge to the constitutionality of Business and Professions Code §25658.1, and several objections to a supposed stipulation and waiver.

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[7] As the Department notes in its brief, appellant never objected to the accusation at the time of the hearing; never requested a ruling on the objections in the notice of defense prior to the hearing; never requested a continuance; and never raised the issue of surprise. We could add to this the fact that appellant never advised the administrative law judge that it was pressing its objection to the judge himself because of his employment.

Looking at the record as a whole, we are not convinced that appellant was prejudiced by the administrative law judge's failure to address the issues raised in the special notice of defense.[8]

ORDER

The decision of the Department is affirmed.[9]

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

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[8] Appellant has not, in its brief to this Board, explained how it was prejudiced by the ALJ's refusal to address the issues in the special notice of defense.

[9] 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.