

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

AB-7624

PRESTIGE STATIONS, INC. dba Arco Station #9725
2811 West Lincoln Avenue, Anaheim, CA 92801,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 21-331760 Reg: 99047493

Administrative Law Judge at the Dept. Hearing: john P. McCarthy

Appeals Board Hearing: March 1, 2001
Los Angeles, CA

ISSUED APRIL 26, 2001

Prestige Stations, Inc., doing business as Arco Station #9725 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days, with five days stayed for a probationary period of one year, for appellant's clerk selling an alcoholic beverage to a person under the age of 21, 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 Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Prestige Stations, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated March 30, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on September 18, 1997.

Thereafter, the Department instituted an accusation against appellant charging that, on May 7, 1999, appellant's clerk, Habib Mohamed Abdulalim ("the clerk"), sold an alcoholic beverage (beer), to 19-year-old Joseph DiBenedetto III. DiBenedetto was acting as a decoy for the Anaheim Police Department at the time of the purchase.

An administrative hearing was held on January 19, 2000, at which time documentary evidence was received and testimony was presented by Anaheim police officer Michael Nichols, minor decoy DiBenedetto ("the decoy"), and a field supervisor for appellant, Ric Pelaez.

Subsequent to the hearing, the Department issued its decision determining the unlawful sale occurred as charged and that no defense was established pursuant to Business and Professions Code §25660 or Rule 141 (4 Cal. Code Regs. §141).

Appellant thereafter filed a timely appeal in which it raises the following issues: (1) Rule 141(b)(2) was violated; (2) Rule 141(b)(3) was violated; and (3) appellant's rights to discovery were violated.

DISCUSSION

I

Appellant contends Rule 141(b)(2) was violated because the ALJ "applied that rule to a paid employee of the City of Anaheim." Appellant characterizes the decoy as "a City jailer," asserting that "[t]his man processes misdemeanor and felony defendants into the City jail. . . . [and] transports misdemeanants and felons to and from the City jail and to and from the courts."

Rule 141(b)(2) provides: "The 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[.]" The rule does not prohibit decoys who work as paid city employees or jailers. It does not say that such work automatically disqualifies a person as a decoy. It only requires that the decoy present to the seller of alcoholic beverages an appearance that could generally be expected of a person under the age of 21.

The ALJ discussed, and rejected, this argument in paragraphs 2 through 5 of Determination of Issues I:

"[Appellant] contends that the accusation should be dismissed because the decoy did not present the appearance required by Rule 141(b)(2). That contention is rejected for the reasons set forth in Findings of Fact, paragraph III-A, above.

"[Appellant] argued that the achievements of decoy DiBenedetto in his work and the levels of responsibility he had obtained there, first as a police cadet and later as a paid employee of the Anaheim Police Department, are unfair and disqualify him under Rule 141(b)(2) from working as a decoy. That is quite a stretch.

"While the trier of fact must consider the entire person, physical and demeanor attributes, in determining the apparent age of a decoy, work or education experience and levels of responsibility attained do not, *ipso facto*, aid in that determination or otherwise produce a given result. A person, all things considered, appears to be a certain age. Achievements and responsibility, while they certainly have a bearing on the apparent age, are just an inherent part of the appearance the decoy projects. They do not, independently, become elements which permit a magic addition of a year or two or three to a person's physical appearance.

"Decoy DiBenedetto appeared at the hearing. He testified at length, on both direct and cross-examination. There was ample opportunity for the trier of fact to see and hear him at that time. The decoy's appearance at the hearing was that generally expected of one his age and that includes whatever life experiences he has attained up to that time.

"When decoy DiBenedetto appeared before [appellant's] clerk, at the time of the

unlawful transaction, the decoy said nothing and the time period was quite a bit shorter than his appearance at the hearing. [Appellant's] clerk did not have the same extended opportunity to both see and hear the decoy prior to the sale. The clerk had to rely, to a much greater degree than the trier of fact, on the decoy's physical appearance alone. Nevertheless, nothing was shown at the hearing which established that decoy DiBenedetto presented the appearance to clerk Abdulalim of one who was 21 years of age or older."

Appellant's argument verges on the frivolous. Appellant does not even allege that, in fact, the decoy's experience made him appear older. This Board is in agreement with the ALJ's comments quoted above which dispose of this argument, and we do not feel the need to add anything further. Appellant's contention with regard to this issue is rejected.

II

Appellant contends that Rule 141(b)(3) was violated when the decoy presented his expired driver's license to the clerk when asked for identification. Appellant questions whether, "in the context of this rule," an expired license can be considered the decoy's own identification, and speculates that, had the decoy chosen not to carry any identification, the sale would not have occurred. Appellant also asserts that the decoy operation was not conducted "in a fashion that promotes fairness," as required by Rule 141(a), because the decoy chose to use the expired license rather than not carry any identification at all.

Rule 141(b)(3) states: "A decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages[.]"

The ALJ addressed this contention in the second paragraph of Determination of Issues I:

"[Appellant] argued that the decoy operation was unfair, in general terms (Rule 141(a)), if the decoy in fact showed an expired driver's license as was found above in Findings of Fact, paragraph III. The argument was that 'anything out of the ordinary' which might serve to confuse respondent's clerk renders the decoy operation unfair. This contention is rejected. First, even an expired driver's license appears to comply with the requirement of Rule 141(b)(3). The rule merely requires that the identification shown belong to the decoy and that it contain his true date of birth. Both requirements were met here as to the expired identification, Exhibit 6. Additionally, there is no evidence in the record which establishes that the clerk was 'confused.' He looked at Exhibit 6 and made the sale. The record is silent as to why. It is sheer speculation to conclude something confused him. There is certainly no evidence in the record which even suggests confusion due to his having seen an expiration date. In this case, the fact that decoy DiBenedetto's California Driver[s] License was expired did not render the operation unfair."

Just as "[i]t is sheer speculation to conclude something confused [the clerk]," it is sheer speculation to say that the clerk would not have made the sale if the decoy had decided not to carry his expired license, so that he would have had no identification to present upon request by the clerk. Speculation is not a valid basis for reversal.

As the ALJ pointed out, the license, though expired, met the requirements of the rule that the license belong to the decoy and contain his true date of birth. Appellant cites no authority for the contention that, because the license was expired, it was not the decoy's own identification. It cites as purported authority for the proposition "that an expired driver's license did not constitute 'satisfactory evidence of identification,' " the case of People v. Green (1996) 46 Cal.App.4th 367, 372 [54 Cal.Rptr.2d 12, 14]. In spite of the pinpoint citations, we are at a loss to know why the case has been cited. We can find nothing in that case that supports the proposition for which it is cited; indeed, we find nothing in that case making it in any way relevant to the present appeal. The case does not involve an expired driver's license, but an expired vehicle registration, and use of either type of expired document as "satisfactory evidence of

identification" is simply not an issue in People v. Green, supra.

Appellant's contention on this issue is rejected.

III

Appellant claims it was prejudiced in its ability to defend against the accusation by the Department's refusal and failure to provide discovery with respect to the identities of other licensees alleged to have sold, through employees, representatives or agents, alcoholic beverages to the decoy involved in this case, during the 30 days preceding and following the sale in this case. Appellant states that the Department "inadvertently" provided a list showing the locations visited the night of the subject decoy operation, but "[t]he list did not coherently state the identities of other licensees who sold to the decoy in question, and the list was not accompanied by an explanation of its meaning or contents." (App.Br. at 11.)

It also claims error in the Department's failure to provide a court reporter for the hearing on its motion to compel discovery. Appellant cites Government Code §11512, subdivision (d), which provides, in pertinent part, that "the proceedings at the hearing shall be reported by a stenographic reporter." The Department contends that this reference is only to an evidentiary hearing and not to a hearing on a motion where no evidence is taken.

The Board has issued a number of decisions directly addressing these issues. (See, e.g., The Circle K Corporation (Jan. 2000) AB-7031a; The Southland Corporation and Mouannes (Jan.2000) AB-7077a; Circle K Stores, Inc. (Jan. 2000) AB-7091a; Prestige Stations, Inc. (Jan. 2000) AB-7248; The Southland Corporation and Pooni (Jan. 2000) AB-7264.)

In these cases, and many others, the Board has reviewed the discovery provisions of the Civil Discovery Act (Code of Civ. Proc., §§2016-2036) and the Administrative Procedure Act (Gov. Code §§11507.5-11507.7). The Board determined that the appellants were limited to the discovery provided in Government Code §11507.6, but that "witnesses," as used in subdivision (a) of that section was not restricted to percipient witnesses. We concluded that:

"A reasonable interpretation of the term 'witnesses' in §11507.6 would entitle appellant to the names and addresses of the other licensees, if any, who sold to the same decoy as in this case, in the course of the same decoy operation conducted during the same work shift as in this case. This limitation will help keep the number of intervening variables at a minimum and prevent a 'fishing expedition' while ensuring fairness to the parties in preparing their cases."

The Board also held in the cases mentioned above that a court reporter was not required for the hearing on the discovery motion.

In the present case, the Department has provided appellant with a copy of a "Decoy Program Worksheet" ("the Worksheet"). A copy of the Worksheet and a cover letter from Department counsel Matthew Ainley to appellant's counsel, dated December 16, 1999, is attached to the Department's brief as Exhibit A. The Worksheet is a form, at the top of which are noted the names of the agency, the officers, and the decoy involved. Handwritten near the document title are the words "Violation Compliance." The body of the form consists of six columns, the first three of which are headed "Date," "Licensee & Premises Address," and "On Sale." The headings for the fourth, fifth, and sixth columns are illegible on the copy in Exhibit A. However, above the fifth and sixth columns are handwritten the words "Yes" and "No," respectively. All other information in the columns themselves is also handwritten.

All the dates that are legible are "5-7-99," the date of the subject decoy operation. Sixteen names and addresses of licensees are listed, although one of them is not legible and parts of the name or address in several others are not legible. (Appellant is the fifth premises listed.) The "On Sale" column has no entries other than notations of "Closed" for two premises and a faint wavy vertical line through the rest of the rows in the column. The fourth column has check marks in each row. The fifth column, marked "Yes," has check marks in four of the rows, including the row for appellant. The sixth column, marked "No," has check marks in all rows but the four that have check marks in the "Yes" column.

Appellant is correct that some of the information on the Worksheet is illegible, and that there was no explanation of the contents. However, the application of a minimum of common sense would indicate that the fourth column indicates off-sale premises, since the third column indicates on-sale premises and since all the premises on the list appear to be either gas stations with mini-marts or liquor stores, all of which would ordinarily be off-sale premises. It is not difficult to understand that the last two columns indicate whether or not there was a violation at the particular premises. This is consistent with the check mark in the appellant's row. The assertion by appellant's counsel, who have dealt with hundreds, if not thousands, of ABC cases and police decoy operations from numerous California cities and counties, especially in Southern California, that the information on the Worksheet was not useful and did not comply with the discovery request, strains credulity.

It appears to us that the Department provided the information this Board has said they should provide to appellants. While it could have been more legible and an

explanation of the contents might have prevented appellant's complaints, there has been no showing that the defects were the result of bad faith on the part of the Department, and the Worksheet contains the information in a sufficiently understandable and usable form, if appellant's counsel will simply use good faith and common sense when looking at the list.

We follow our prior decisions and conclude that the discovery request was sufficiently complied with and that appellant was not entitled to a court reporter for the motion hearing.

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 §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.