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

AB-7793
File: 20-153410 Reg: 00049548

PRESTIGE STATIONS, INC. dba AM/PM Mini Mart #703
3205 University Avenue, San Diego, CA 92104,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 6, 2001
Los Angeles, CA

ISSUED MARCH 5, 2002

Prestige Stations, Inc., doing business as AM/PM Mini Mart #703 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for appellant's clerk selling an alcoholic beverage to a minor decoy, 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, Jonathon E. Logan.

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[1]The decision of the Department, dated March 22, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on May 24, 1984. Thereafter, the Department instituted an accusation against appellant charging that, on June 16, 2000, appellant's clerk, Tonda Talbott ("the clerk"), sold a six-pack of Miller Genuine Draft Beer to 18-year-old David West. West was acting as a police decoy for the San Diego Police Department (SDPD) at the time of the sale.

An administrative hearing was held on February 9, 2001, at which time documentary evidence was received and testimony was presented by West ("the decoy"), and by Kimber Hammond, a San Diego police officer. The testimony established that the decoy, who was a police cadet with the SDPD, was accompanied by another cadet, Jonathon Colby, but that Colby did not purchase anything, nor did he say anything during the transaction. He simply walked or stood beside the decoy. Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged and that no defense had been established.

Appellant thereafter filed a timely notice of appeal in which it raises the following issues: (1) the ALJ improperly prohibited appellant's counsel from questioning one of the officers who participated in the decoy operation; (2) Rule 141 was violated because two decoys were used; and (3) the appearance of both decoys violated Rule 141(b)(2).

DISCUSSION

I

Appellant contends the decision must be reversed because the ALJ refused to let it question SDPD Detective Larry Darwent, even though he was present and had been sworn in as a witness, because he had not been subpoenaed by appellant.

Appellant called Darwent as its witness after the Department rested its case. Darwent took the stand and was sworn by the ALJ. Counsel for the Department, Jonathon Logan, then asked if appellant had subpoenaed Darwent. When appellant's counsel, Joseph Budesky, admitted that Darwent had not been subpoenaed, Logan objected to Darwent testifying because Darwent needed to leave. The ALJ stated that he could not force Darwent to remain as a witness if he needed to leave and had not been subpoenaed. He left it up to Darwent whether he would stay and testify. When Darwent said that he needed to leave, the ALJ excused him. Budesky made an offer of proof that Darwent would have testified that, after the sale, the clerk stated that the decoy looked 22 or 23 to her.

Appellant argues that both due process and the provisions of the Administrative Procedure Act (APA) empower the ALJ to order a witness to testify when the witness is present and has been sworn in, even in the absence of a subpoena.[2] While we believe that appellant's position on this issue has some merit, we need not reach that question because appellant has not shown that any detriment to it arose from the ALJ's refusal to compel Darwent to testify. The only reason appellant gave for calling Darwent was to

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[2]Appellant also asks this Board to take official notice of the hearing transcript in another case heard before the same ALJ a week before the present case was heard, in which the ALJ "under identical circumstances" permitted Darwent to testify, even though appellant had not subpoenaed him. We see no reason to grant appellant's request, since the ALJ's action in the earlier hearing could not bind him in the present one. In addition, the transcript makes clear that the circumstances in the earlier case were not "identical." In the present case, the ALJ stated: "This has happened before where you wanted to call one of the officers. And in fact, this happened, I think, last week . . . , and I did give you at that time a five-minute break so you could go find the officer who you wanted to call, and you did have an opportunity to call him *because the officer complied*." (Emphasis added.) In the present case, Darwent did not comply.

present his testimony regarding what the clerk (who did not testify) told him about how old she believed the decoy to be. This testimony would clearly be hearsay and not sufficient to support a finding as to the decoy's apparent age. This Board has said before that it is not the perception of the clerk as to the age of the decoy that controls in determining whether there was compliance with Rule 141:

> "The rule, through its use of the phrase 'could generally be expected' implicitly recognizes that not every person will think that a particular decoy is under the age of 21. Thus, the fact that a particular clerk mistakenly believes the decoy to be older than he or she actually is, is not a defense if in fact, the decoy's appearance is one which could generally be expected of that of a person under 21 years of age. We have no doubt that it is the recognition of this possibility that impels many if not most sellers of alcoholic beverages to pursue a policy of demanding identification from any prospective buyer who appears to be under 30 years of age, or even older.
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> "We think it worth noting that we hear many appeals where, despite the supposed existence of such a policy, the evidence reveals that the seller made the sale in the supposed belief that the minor was in his or her early or mid-20's, and for that reason did not ask for identification and proof of age. It is in such cases, and in those where there is a completed sale even though the buyer - not always a decoy - displayed identification which clearly showed that he or she was younger than 21 years of age, that engenders the belief on the part of the members of this Board that many sellers, or their employees, do not take sufficiently seriously their obligations and responsibilities under the Alcoholic Beverage Control Act."

(7-Eleven, Inc. & Williams (2001) AB-7591; see also Chevron Stations, Inc. (2001) AB-7725.)

Appellant's counsel said that the clerk's statement would go to the clerk's intent. However, the clerk's intent is not determinative of whether a violation occurred.

It is apparent that Darwent's testimony could not have made a difference in the Department's decision. Therefore, appellant suffered no detriment by not being able to present it.

II

Appellant contends that the use by the police of two decoys in appellant's premises violated the plain language of Rule 141. Referring to that part of the rule that states "a law enforcement agency may only use a person under the age of 21 years," appellant asserts that the rule must be strictly construed and this part of the rule is properly read to mean that the use of more than one decoy in a premises is not permitted.

Appellant misreads the intent of the rule, which, as we perceive it, is to limit the use of a decoy to someone who is under the age of 21.

According to Ballantine's Law Dictionary (3d ed. 1969), the word "a" is defined as an "indefinite article," meaning "one or anyone, depending on the context in which it appears."

Read in the context of a rule permitting the use of decoys to test and reenforce the level of compliance with the law prohibiting sales to minors, it seems to us that the real question to be asked when more than a single decoy is used is whether the second decoy engaged in some activity intended to or having the effect of distracting or otherwise impairing the ability of the clerk to comply with the law. The clerk did not testify, so there is no evidence or claim that the clerk was distracted.

We do not see the use of two decoys as doing anything more than replicating what is undoubtedly a common occurrence - a visit to the seller of alcoholic beverages by two underage persons hoping to buy. A clerk must be alert to such a situation, whether it be decoys or non-decoys who are attempting to purchase alcoholic beverages.

We do not read Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App. 4th 575 [73 Cal.Rptr.2d 126] as requiring a different result. Although that case held that the Department must adhere strictly to the rule, it did not say the rule must be construed so strictly as to reach an absurd result.

III

Appellant contends that "The overwhelming weight of the evidence presented at the hearing indicates that both [the decoy] and Colby had the looks and demeanor of an individual who appeared over 21 years of age at the time of the sale, in violation of Rule 141(b)(2)."

Appellant recites the same physical and non-physical features of the decoy that the ALJ did in Findings II-E and II-F, where he found that the decoy displayed an appearance that complied with Rule 141(b)(2). Nothing has been presented indicating that we should reject the ALJ's finding in favor of appellant's opinion, and we decline to do so.

With regard to Colby, he was not a decoy because he did not attempt to purchase an alcoholic beverage and, therefore, Rule 141(b)(2) does not apply to him. No evidence was presented which might warrant an inquiry into the fairness of Colby's presence (see Issue II, supra) or his appearance. He was not present at the hearing and the minimal information provided by the decoy as to Colby's appearance could not support a finding that Colby did not display the appearance of a person under the age of 21, even if we were to consider such an issue.

ORDER

The decision of the Department is affirmed.[3]

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

[3]This 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.