

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

AB-7799

File: 20-331242 Reg: 00048470

PRESTIGE STATIONS, INC. dba AM/PM #9709
611 North Main Street, Corona, CA 91720,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: February 7, 2002
Los Angeles, CA

ISSUED APRIL 18, 2002

Prestige Stations, Inc., doing business as AM/PM #9709 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ 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, Stephen W. Solomon, and Matthew Gorman, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

¹The decision of the Department, dated April 5, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on July 1, 1997.

Thereafter, the Department instituted an accusation against appellant charging the sale-to-minor violation noted above.

An administrative hearing was held on June 2, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by 16-year-old decoy Megan Livingston ("the decoy") and by Corona Police Department officer Robert Newman concerning the transaction.

Subsequent to the hearing, the Department issued its decision which determined that the violation occurred as charged in the accusation and no defense was established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following contentions: (1) the ALJ erred in prohibiting appellant's counsel from certain questioning of the officer; (2) Rule 141(b)(2) was violated; and (3) the ALJ erred in failing to make proper findings regarding the credibility of witnesses.

DISCUSSION

I

Appellant contends the ALJ violated its due process and Administrative Procedure Act (APA) rights by prohibiting its counsel from asking the officer questions about a microphone's location on the decoy and its effect on the officer's ability to hear what transpired during the transaction between the decoy and appellant's clerk. More specifically, appellant argues that it was prevented from determining whether the clerk asked the decoy her age and whether the decoy responded with her correct age.

The decoy wore a "wire" during the transaction and officer Newman, several hundred feet away in his vehicle, listened through headphones. The receiver also recorded the conversation on a cassette tape. On direct examination, the officer testified, "I heard the total for the beer being told by the clerk to [the decoy], and then I believe I heard a cash register. And that was about it" [RT 63.] The decoy had earlier testified that the clerk did not ask her age or for her identification. [RT 12, 29.]

On cross-examination, appellant's counsel tried to ask questions about the location of the microphone on the decoy, the sound quality of the transmission, and noise during the transmission, such as static and feedback. In response to objections, counsel explained that he wished to establish whether the microphone was covered, adversely affecting the sound transmission. Rather than being interested in what was on the tape, counsel stated that he wanted "to know what the police officer heard" [RT 78]. The ALJ pointed out, correctly, that the officer had already testified to what he heard.

Counsel continued to ask questions about the microphone and the sound quality, and the ALJ stopped him, saying, "He told you what he heard. If you want to – you're not going to prove to me that he didn't hear what he said he heard by any sort of arrangement with the mike or the equipment." [RT 80.] Counsel responded that he was not trying to prove that the officer "did not hear what he heard," but "[t]hat there are things he would not hear because of the poor quality." When counsel then persisted with his line of questioning, the ALJ said, "The point is – if his answer doesn't matter[,] if he can say yes or no and it doesn't make any difference, that's not relevant or material, and that's where you are as far as I'm concerned" [RT 82].

Appellant emphasizes the APA provision giving the parties the right "to cross-examine opposing witnesses on any matter relevant to the issues" (Gov. Code §11513, subd. (b).) Appellant ignores, however, subdivision (f) of that section which gives the ALJ the "discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time." Appellant's questioning was not relevant, and its probative value was such that any time spent on it would be an undue consumption of time.

As the ALJ noted, a line of questioning is relevant when the answers will make a difference in resolving an issue. Here, even if appellant had been able to show that the officer was not able to hear everything said by the decoy and the clerk, it would not have made any difference. The decoy had already testified that the clerk did not ask for her age or identification. If the officer could not hear everything said, then he could not have effectively corroborated the decoy's testimony, but neither could he contradict it. In spite of appellant's characterization of the decoy's testimony as not credible, the ALJ found that it was credible, and, therefore, it did not need to be corroborated by the officer.

In addition, appellant had the opportunity for additional cross-examination of the officer because the ALJ continued the hearing to allow appellant to resolve questions raised about Exhibit 3, the copy of the tape recording made by the police during the transaction, and specifically ordered that the officer be available for testimony at the continued hearing. Appellant, however, did not avail itself of this opportunity; eight months after the hearing was continued, appellant sent a letter to the ALJ and Department counsel, stating that a further hearing was not necessary, and the matter

was submitted. Under the circumstances, it cannot be said that any of appellant's rights under due process or the APA were violated by the ALJ's curtailment of appellant's counsel's questioning.

II

Appellant contends that "The overwhelming weight of the evidence presented at the hearing indicates that [the decoy] had the looks and demeanor of an individual who appeared over 20 years of age at the time of the sale, in violation of Rule 141(b)(2)."

Appellant recites the same physical features of the decoy that the ALJ did in Finding VI-A, where he found that the decoy displayed an appearance that complied with Rule 141(b)(2), with one notable exception. Appellant failed to mention that **the decoy wore braces**, both during the decoy operation and at the hearing. Appellant has presented nothing indicating that we should reject the ALJ's finding in favor of appellant's opinion.

III

Appellant contends the ALJ failed to justify his credibility determinations as required by the case of Holohan v. Massanari (2001) 246 F.3d 1195 (9th Cir.).

The Board considered and rejected this contention in 7-Eleven, Inc. and Huh (2001) AB-7680, saying:

"We have reviewed the decision in [Holohan], and the court decisions cited in support of that portion of the court's holding, and are satisfied that the view expressed by the court is peculiarly related to federal Social Security disability claims, and does not reflect the law of the State of California. While it may be true that a statement of the factors behind a credibility determination may be of considerable assistance to a reviewing court, and is welcomed by this Board, we are not prepared to say that a decision which does not set forth such considerations is fatally flawed."

There is no reason for the Board to decide the issue any differently in the context of the present appeal.

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.