

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

AB-8219

File: 20-386463 Reg: 03055234

BP WEST COAST PRODUCTS, LLC, dba Arco AM/PM Station # 6279
78-355 Varner Road, Palm Desert, CA 92211,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 2, 2004
Los Angeles, CA

ISSUED NOVEMBER 9, 2004

BP West Coast Products, LLC, doing business as Arco AM/PM Station # 6279 (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, John W. Lewis.

¹The decision of the Department, dated December 11, 2003, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on April 30, 2001. On May 9, 2003, the Department instituted an accusation charging that, on March 7, 2003, appellant's clerk, Maria Lomeli (the clerk), sold an alcoholic beverage to 18-year-old Bianca Virgen. Although not noted in the accusation, Virgen was working as a minor decoy for the Riverside County Sheriff's Department at the time.

An administrative hearing was held on October 21, 2003, at which time documentary evidence was received, and testimony concerning the sale was presented by Virgen (the decoy) and by Andy Gerrard, a Riverside County Sheriff's deputy. Two of appellant's employees also testified.

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 filed an appeal contending that Rule 141(b)(5)² was violated.

DISCUSSION

Rule 141(b)(5) requires that after a sale, but before any citation is issued to the alleged seller of alcoholic beverages, the "officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy . . . make a face to face identification of the alleged seller of the alcoholic beverages."

The decoy testified that after leaving the store with the beer she had purchased, she pointed out the clerk who sold to her, and said "She was the one that sold me the beer," while the clerk was still in the store. [RT 13.] The deputies then brought that clerk outside the store, where the decoy again identified the clerk as the seller by

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.

pointing at her and saying that she had sold her the beer. While identifying the clerk for the second time, the decoy was standing about three feet from the clerk.

Appellant contends that a face-to-face identification was not accomplished because there was not "mutual acknowledgment" between the seller and the decoy when the decoy first identified the seller for the officers. Appellant's contention relies on the following language from *Chun* (1999) AB-7287, where the Board said that "face to face" means that "the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller."

Appellant asserts that the first identification clearly does not comply with the rule, and we agree. Our agreement is not based on any lack of "mutual acknowledgment," however, but because the clerk could not reasonably know that she was being identified by the decoy under the circumstances. Appellant then argues that the second identification was "tainted" by the initial inadequate identification, and that the Department should not be allowed to "keep attempting to cure such violation until it gets it right." (App. Br. at p. 6.)

Appellant cites no authority in support of its argument regarding the second identification, and we are convinced there is none. The rule has no requirement that the decoy has only one opportunity to identify the seller. The identification of the clerk outside the premises fully complied with the requirement of a face-to-face identification as required by rule 141(b)(5).

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
KAREN GETMAN, 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.