

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

AB-8221

File: 20-386358 Reg: 03055227

BP WEST COAST PRODUCTS, Inc., dba Arco Station # 9598
633 Birmingham, Encinitas, CA 92007,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

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

ISSUED FEBRUARY 7, 2005

BP West Coast Products, Inc., doing business as Arco Station # 9598 (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, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Julie Doi, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

¹The decision of the Department, dated December 24, 2003 , is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on August 7, 2002. On June 19, 2003, the Department instituted an accusation charging that, on November 22, 2002, appellant's clerk, Jason S. Eigner (the clerk), sold an alcoholic beverage to 17-year-old Diana C. Lavery. Although not noted in the accusation, Lavery was working as a minor decoy for the San Diego County Sheriff's Department at the time of the sale.

An administrative hearing was held on October 23, 2003, at which time documentary evidence was received, and testimony concerning the sale was presented by Lavery (the decoy) and by George Crawford, a San Diego County Sheriff's deputy.

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 in which it raises the following issues: (1) The administrative law judge erred when he determined that the decoy's appearance complied with rule 141(b)(2),² and (2) the penalty was based on an "underground regulation."

DISCUSSION

I

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." Appellant contends that the administrative law judge (ALJ) erred when he determined that the decoy complied with the rule because he relied on a photograph of the decoy taken six months after the decoy operation and he did not explain how he resolved inconsistent testimony regarding jewelry worn by the decoy.

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.

The photograph admitted into evidence as Exhibit 3 depicts the decoy wearing the same clothing she wore during the decoy operation on November 22, 2002, but was taken on May 21, 2003. Therefore, appellant argues, it is not a reliable indicator of how the decoy appeared to the clerk while in the licensed premises.

Appellant asserts that deputy Crawford's statement that the decoy was not wearing jewelry during the decoy operation is inconsistent with the decoy's testimony that she wore cubic zirconia earrings and "probably" wore a necklace with a silver cross. The ALJ did not explain how he reconciled this testimony, appellant argues, nor how he determined that the decoy was wearing stud earrings and no necklace.

The ALJ discussed the decoy's appearance in Finding of Fact II.D.:

D. The decoy's overall appearance including her demeanor, her poise, her mannerisms, her maturity, her size and her physical appearance were consistent with that of a person under the age of twenty-one and her appearance at the time of the hearing was similar to her appearance on the day of the decoy operation except that she was wearing glasses at the hearing.¹

¹The decoy took her glasses off during the hearing and the parties had an opportunity to see her without her glasses.

1. The decoy is five feet two inches in height, she weighs one hundred forty pounds and she has an extremely young looking face. On the day of the sale, her hair was worn back away from her face. She was wearing the same pink top at the hearing that she was wearing on the day of the sale and a similar tan skirt. She was wearing no makeup and the only jewelry she was wearing were stud earrings. The photographs depicted in Exhibit 3-A and 3-B were taken at the Sheriff's station a few months after the day of the sale, but they depict what the decoy was wearing on the day of the sale.

2. The decoy had not participated in any prior decoy operations. She provided straightforward answers at the hearing and she appeared to be a little nervous while testifying.

3. After considering the decoy's overall appearance when she testified and the way she conducted herself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be

expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

Appellant indulges in overstatement when it says the ALJ relied on photographs of the decoy taken six months after the decoy operation. The ALJ was fully aware the photographs did not necessarily depict precisely how the decoy appeared on the day of the sale, and he referred to them only as showing what the decoy was wearing at that time. Nothing indicates that he considered the photographs as the authoritative indicators of the decoy's appearance at the time of the sale. The photographs were just one of many indications of the decoy's appearance that the ALJ considered.

Appellant inaccurately describes the deputy's testimony regarding whether the decoy was wearing jewelry. Deputy Crawford was asked [RT 18]: "Did you observe any jewelry that she was wearing that night?" The deputy's answer that he failed to observe jewelry is not the same as saying that the decoy did not wear any jewelry. There was no inconsistency for the ALJ to reconcile.

Whether the decoy wore stud earrings and a necklace, or just earrings, or no jewelry at all, is not important in the present case. Appellant asserts that jewelry "can change [a] person's appearance," and that someone under the age of 21 would not commonly wear earrings that looked like diamonds (they were cubic zirconia earrings). As a general principle, we would agree with appellant that, conceivably, wearing jewelry could change a person's appearance. We might even agree that teenagers do not commonly wear diamond jewelry, although we do not find it particularly surprising that a 17-year-old girl would wear earrings that appear to be diamond studs. However, to say that jewelry may change a person's appearance does not equate to saying that wearing jewelry necessarily makes a person appear to be over 21 years of age.

The ALJ determined that the decoy's appearance complied with rule 141(b)(2). He saw the earrings and observed in person the decoy's physical appearance, her mannerisms, and her demeanor, while this Board has nothing more to consider than a written transcript of testimony and two photographs of the decoy taken six months after the sale. Even were we authorized to do so, this Board is not in a position to second-guess the ALJ's determination as to the decoy's apparent age. In any case, there was no testimony or other evidence offered by appellant that the decoy appeared old enough to legally purchase alcoholic beverages.

II

Appellant contends that the 15-day suspension cannot stand because it is based on an "underground regulation" in violation of the Administrative Procedure Act. (Gov. Code, § 11340 et seq. (APA).)

Government Code section 11340.5, subdivision (a), states: "No state agency shall utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter." Section 11342.600 defines regulation as "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." Section 11425.50, subdivision (e), provides that "a penalty may not be based upon a guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule subject

to Chapter 3.5 (commencing with section 11340) unless it has been adopted as a regulation pursuant to Chapter 3.5 (commencing with section 11340)."

In *Vicary* (2003) AB-7606, the Board determined that the penalty guidelines found in the Department's Instructions, Interpretations and Procedures Manual were "underground regulations," i.e., regulations that have not been adopted as such under the provisions of the APA. Appellant alleges that these same penalty guidelines were the basis for the penalty imposed in the present case.

There is no evidence in the record that would support a determination that the penalty imposed by the Department was pursuant to any guidelines. On the contrary, the ALJ made it clear that he proposed a 15-day suspension based on the particular facts involved in this case. In Finding of Fact G, the ALJ said: "No mitigating factors were established and the fifteen-day suspension recommended by the Department is an appropriate penalty based upon all the evidence presented at the hearing."

The Department made no reference to any guidelines in its decision, nor did Department counsel when making the penalty recommendation on behalf of the Department. Hence, it would be unwarranted for the Board to assume that the penalty order was based upon guidelines, and appellants have offered nothing to support their argument that any guidelines were followed.

We cannot assume, simply because penalty guidelines exist, that they controlled the penalty imposed by the Department, particularly where, as here, the ALJ articulated his reasons for deciding what penalty he thought appropriate under the particular circumstances of this case.

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.