

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

AB-8914

File: 21-328511 Reg: 08067635

PROVOS, INC., dba Delano Ranch Market
820 Main Street, Delano, CA 93215,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: September 3, 2009
Los Angeles, CA

ISSUED: DECEMBER 10, 2009

Provos, Inc., doing business as Delano Ranch Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 25 days, 5 days of which were conditionally stayed one year, for its clerk, Claudia Rivera, having sold a six-pack of Bud Light beer, an alcoholic beverage, to Daisy Gomez, a 17-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Provos, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Alicia R. Ekland, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

¹The decision of the Department, dated August 6, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on April 29, 1997. Thereafter, on January 3, 2008, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a person under the age of 21.

An administrative hearing was held on June 18, 2008, at which time documentary evidence was received and testimony concerning the violation charged was presented by Daisy Gomez, a minor decoy participating in a decoy operation conducted by the Delano Police Department; by Juan Ceja, a Delano reserve police officer; and by Richard Stites, a Delano police detective. Luis Concalves, appellant's regional general manager, described the training provided to its employees and other actions aimed at preventing sales to minors. The clerk, Claudia Rivera, did not testify.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proved, and appellant had failed to establish an affirmative defense under Department Rule 141(b)(2) (4 Cal. Code Regs., §141, subd. (b)(2).)

Appellant filed a timely notice of appeal, and now contends that there was no compliance with Rule 141(b)(2), i.e., that the decoy failed to 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.

DISCUSSION

Appellant argues that the decoy's ability to purchase alcoholic beverages at four of the five locations she visited, coupled with the fact that she wore makeup, carried a purse, wore jewelry, and appeared confident and self-assured, demonstrates that she

gave the appearance of a person older than 21 years of age. Appellant also stresses the decoy's prior experience in decoy operations, as well as the training she got as a police Explorer.

The Board is once again asked to substitute its judgment for that of the trier of fact on the issue of the decoy's appearance. Appellant offers, as it did at the administrative hearing, its subjective assessment of why this 17-year-old decoy was able to present herself as a person over the age of 21. The administrative law judge (ALJ) was not swayed by these arguments, and neither are we.

Appellant also argues that the ALJ committed error in considering the fact that the clerk had requested identification from the decoy, citing Board decision *BP West Coast Products, LLC* (2004) AB-8131. In that case, the Board rejected the Department's argument that, once identification was requested, the decoy's appearance was no longer an issue. This case is different. The ALJ did not say that the decoy's appearance was not an issue. What he said was that a request for identification was a relevant factor in considering the decoy's purchasing experience, and that a high ratio of purchases with none of the locations visited asking to see identification might very well indicate the decoy's appearance was a major factor. In contrast, requests for identification by some sellers and not by others may be no more than a function of the vigilance of some and neglect of others.

Either way, appellant has not persuaded us to reject the decision of the trier of fact in this case. It is clear from his proposed decision that he carefully considered the decoy's appearance in light of appellant's arguments and the rule's requirements, and was satisfied the decoy "appeared her true age." (Finding of Fact 9.)

Appellant's discussion of the decision in *Department of Alcoholic Beverage*

Control v. Alcoholic Beverage Control Appeals Board (2003) 109 Cal.App.4th 1687 [1 Cal.Rptr.3d 1687], proceeds on the mistaken assumption that various guidelines proposed during the evolution of what became Rule 141 are to be read into the rule. We do not believe this is the case. It is not any one consideration that is controlling in assessing a decoy's appearance. Instead, it is the overall appearance of the decoy, in this case a female 17 years of age, that governed the ALJ's determination. We defer to his assessment.

ORDER

The decision of the Department is affirmed.²

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

² This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.