ISSUED MAY 25, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

PRESTIGE STATI0NS, INC. dba AM/PM Mini Market 12805 Poway Road Poway, CA 92064, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7024a File: 20-324410 Reg: 97041804 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: January 20, 2000 Los Angeles, CA

Prestige Stations, Inc., doing business as AM/PM Mini Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerk, William Allen Harris, having sold an alcoholic beverage (a six-pack of Michelob beer) to Jennifer Pepka, a minor decoy, said sale being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Prestige Stations, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the

[1] *The decision of the Department, dated December 17, 1998, is set forth in the appendix.*

Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on November 8, 1996. Thereafter, the Department instituted an accusation against appellant charging an unlawful sale of an alcoholic beverage to a minor.

An administrative hearing was held on August 26, 1998, and October 29, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the transaction in question.

Subsequent to the hearing, the Department issued its decision which determined that the evidence supported the charge of the accusation, and ordered a suspension.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the decoy did not present the appearance which could generally be expected of a person under 21 years of age; (2) appellant was denied proper discovery; and (3) the Department failed to provide a court reporter for appellant's discovery motion, as required by Government Code §11512, subdivision (d).

DISCUSSION

I

Appellant contends that the Department failed to comply with Rule 141(b)(2), by its use of an improper standard in its consideration of the appearance of the decoy. Appellant contends that by limiting his assessment to the physical aspects of the

decoy's appearance the Administrative Law Judge overlooked all other age-indicative considerations contemplated by the rule.

The ALJ found that the decoy was "a youthful looking female, whose physical appearance is such as to reasonably being considered under twenty-one years of age ...." His proposed decision does not refer to any other indicia of age.

This raises an all too frequently recurring issue on appeal.

In Circle K Stores, Inc. (1999) AB-7080, the Board stated:

> "Nonetheless, while an argument might be made that when the ALJ uses the term "physical appearance," he is reflecting the sum total of present sense impressions he experienced when he viewed the decoy during his or her testimony, it is not at all clear that is what he did in this case. We see the distinct possibility that the ALJ may well have placed too much emphasis on the physical aspects of the decoy's appearance, and have given insufficient consideration to other facets of appearance - such as, but not limited to, poise, demeanor, maturity, mannerisms. Since he did not discuss any of these criteria, we do not know whether he gave them any consideration.
>
> "It is not the Appeals Board's expectation that the Department, and the ALJ's, be required to recite in their written decisions an exhaustive list of the indicia of appearance that have been considered. We know from many of the decisions we have reviewed that the ALJ's are capable of delineating enough of these aspects of appearance to indicate that they are focusing on the whole person of the decoy, and not just his or her physical appearance, in assessing whether he or she could generally be expected to convey the appearance of a person under the age of 21 years.
>
> "Here, however, we cannot satisfy ourselves that has been the case, and are compelled to reverse. We do so reluctantly, because we share the Department's concern, and the concern of the general public, regarding underage drinking. But Rule 141, as it is presently written, imposes certain burdens on the Department when the Department seeks to impose discipline as a result of police sting operations. And this Board has been pointedly reminded that the requirements of Rule 141 are not to be ignored. (See Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr. 126]).

The Board's position finds its support in the teachings of the California Supreme Court in Topanga Association for a Scenic Community v. County of Los Angeles (1974)

11 Cal.3d 506, 516-517 [113 Cal.Rptr. 836] that "the 'accepted ideal is that the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.'"

We believe that this case must be reversed for the same reasons as expressed in the earlier Board reversals where this issue was presented.

II

Appellant claims it was prejudiced in its ability to defend against the accusation by the Department's refusal and failure to provide it discovery with respect to the identities of other licensees alleged to have sold, through employees, representatives or agents, alcoholic beverages to the decoy involved in this case, during the 30 days preceding and following the sale in this case.

This is but one of a number of cases which this Board has heard and decided in recent months. (See, e.g., The Circle K Corporation (Jan. 2000) AB-7031a; The Southland Corporation and Mouannes (Jan. 2000) AB-7077a; Circle K Stores, Inc. (Jan. 2000) AB-7091a; Prestige Stations, Inc. (Jan. 2000) AB-7248; The Southland Corporation and Pooni (Jan. 2000) AB-7264.)

In these cases, and many others, the Board reviewed the discovery provisions of the Civil Discovery Act (Code of Civ. Proc., §§2016-2036) and the Administrative Procedure Act (Gov. Code §§11507.5-11507.7). The Board determined that the appellants were limited to the discovery provided in Government Code §11506.6, but that "witnesses" in subdivision (a) of that section was not restricted to percipient witnesses. We concluded that:

> "We believe that a reasonable interpretation of the term "witnesses" in §11507.6 would entitle appellant to the names and addresses of the other licensees, if any, who sold to the same decoy as in this case, in the course

> of the same decoy operation conducted during the same work shift as in this case. This limitation will help keep the number of intervening variables at a minimum and prevent a "fishing expedition" while ensuring fairness to the parties in preparing their cases."

We believe the "discovery issue" in the present appeal must be disposed of in accordance with the cases listed above.

III

Appellant also contends that the decision of the ALJ to conduct the hearing on its discovery motion without a court reporter present also constituted error, citing Government Code §11512, subdivision (d), which provides, in pertinent part, that "the proceedings at the hearing shall be reported by a stenographic reporter." The Department contends that this reference is only to the evidentiary hearing, and not to a hearing on a motion where no evidence is taken.

This issue has also been decided in the cases mentioned in II, above. The Board held in those cases that a court reporter was not required for the hearing on the discovery motion. We have not been persuaded to change our mind.

ORDER

The decision of the Department is reversed and the case is remanded to the Department for reconsideration in light of the comments herein with respect to Rule 141(b)(2), for compliance with appellant's discovery request as limited by this opinion, and for such other and further proceedings as are appropriate and necessary.[2]

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[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

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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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.