ISSUED JULY 14, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

PRESTIGE STATIONS, INC. dba AM/PM Station 9628 11454 Balboa Boulevard Granada Hills, CA 91344, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	))))))))))))	AB-7427 File: 20-330750 Reg: 98045185 Administrative Law Judge at the Dept. Hearing: Arnold Greenberg Date and Place of the Appeals Board Hearing: June 6, 2000 Los Angeles, CA

Prestige Stations, Inc., doing business as AM/PM Station 9628 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its off-sale beer and wine license for 15 days, with 10 days thereof stayed, conditioned upon two years of discipline-free operation, for its clerk, Iraj Yousef, having sold an alcoholic beverage (a six-pack of Budweiser beer) to Mauricio Valdovinos, a minor, then 19 years of age, participating in a decoy operation conducted by the Los Angeles Police Department, such sale being

[1]The decision of the Department, dated June 3, 1999, is set forth in the appendix.

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 Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on June 20, 1997. Thereafter, the Department instituted an accusation against appellant charging the transaction which was the subject of the hearing.

An administrative hearing was held on March 18, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Los Angeles police officer John Delvecchio and Valdovinos on behalf of the Department, and Nellie Martinez, the store manager.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation and ordered the suspension described above.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) Rule 141(b)(2) was violated; (2) appellant was misled by the Department's training program; (3) Rule 141(b)(5) was violated; (4) appellant was denied its discovery rights and its right to a transcript of the hearing

on its motion to compel discovery.

DISCUSSION

I

Appellant contends Rule 141(b)(2) was violated. That rule requires that a minor used as a decoy must present the appearance which could reasonably be expected of a person under 21 years of age. Appellant contends that the Administrative Law Judge (ALJ) limited his analysis of the decoy's appearance to his physical appearance, rather than conducting the full and fair analysis contemplated by the rule and as the rule has been applied by the Appeals Board. Appellant also contends the decoy sported a mustache, which should have barred his use as a decoy.

Appellant is incorrect in its contention that the decision limited its analysis of the decoy's appearance to physical characteristics. In addition to his height and weight, the decoy's composure, state of nervousness, style of dress, facial appearance ("clean shaven except for having failed to shave his mustache for a few days" prior to the sale), rank and responsibilities as an Explorer Scout captain, all were considered, as was the level of maturity he displayed.

We are not prepared to say that this is a restricted analysis, in violation of the rule, as appellant asserts.

II

Appellant argues that the clerk was misled as to the decoy's appearance by the list of possible clues to a minor's appearance set forth in a 1996 L.E.A.D. program publication issued by the Department. Although the clerk did not testify, and no evidence was presented that he had ever attended a L.E.A.D. program, his manager, Nellie Martinez, testified that she had attended such a program, had been given the publication, and used it to train the clerk. Appellant cites the Board's decision in The Southland Corporation/R.A.N., Inc. (1998) AB-6967, in which the Board criticized the Department for having created a document which "appears to 'divert' the mind of licensees and their employees, away from the more numerous real-life characteristics of non-neophyte underage purchasers."

Despite the Board's criticism of the L.E.A.D. document in The Southland Corporation/R.A.N., Inc., in its review of cases where this contention has been raised, the Board has seldom, if at all, reversed a Department decision, especially where the clerk in question has not testified.

When such a defense is presented on behalf of the absent offender, any judgment as to whether the training memorandum was a factor is little more than speculation, usually dependent, in turn, upon hearsay and conjecture.

That is the case here. While there is the testimony of the manager that she trained the clerk, the Board cannot know how well the clerk responded to the training, whether he had the capability of applying the "clues" provided by the Department, and, most of all, whether he was misled.

Since the violation of Rule 141 is an affirmative defense, it seems more than

reasonable to require more from a licensee in the way of proof than mere speculation, especially where any such speculation must overcome the reality of the ALJ's findings regarding the appearance of the decoy.

III

Appellant contends that the requirement of Rule 141(b)(5) was not met because, at the moment the decoy identified the clerk as the seller, the clerk was engaged in a conversation with the police officer concerning the law violation, and would have been unaware he was being identified. Appellant claims the circumstances of the identification did not meet the standard applied in Chun (1999) AB-7287, where the Board said:

> "The phrase 'face-to-face' means that the two, 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 concedes that the decoy identified the clerk as the seller. It is appellant's contention that the clerk did not know he was being identified, and, by inference, would not have been aware of who it was who identified him.

We do not think this characterization of the record does justice to the facts.

First, the fact that the clerk did not testify leaves only speculation as to what he might or might not have been aware of. But, even assuming he was engaged in conversation with the police officer about having sold to a minor, the likelihood that he would not have noticed the advance of the minor from the doorway, 30 feet away, to a point only 10 feet away, is remote. Nor would it escape his attention

that the person approaching him, to whom he had just sold an alcoholic beverage, was undoubtedly the person the police officer would have been referring to as being an underage purchaser.

More importantly, the testimony of the police officer and the minor effectively destroys any basis for such speculation.

The police officer testified that he and the minor were standing on one side of the counter and the clerk on the other when the decoy pointed across the counter and identified the clerk as the seller, and that this occurred after the officer had explained to the clerk why he was there [RT 13].

`The minor testified initially that he was approximately 30 feet away when asked to identify the clerk as the seller, and about 10 feet from the counter when he made the identification [RT 30]. He was then asked by one of the officers for his I.D., which was then displayed to the clerk [RT 31]. He was later photographed with the clerk [RT 32; Exhibit 3].

We think that the rule was clearly satisfied.

IV

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. It also claims error in the Department's failure to provide a court reporter for the hearing on their

motion to compel discovery. Appellant cites 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 an evidentiary hearing and not to a hearing on a motion where no evidence is taken, and that appellant was not entitled to the discovery it sought.

The Board has issued a number of decisions directly addressing these issues. (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 has 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," as used in subdivision (a) of that section was not restricted to percipient witnesses, and concluded:

> "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."

The Board also held in the cases mentioned above that a court reporter was not required for the hearing on the discovery motion. We continue to adhere to that position.

ORDER

The decision of the Department is affirmed as to all issues other than discovery, and the case is remanded to the Department for such further proceedings as may be necessary and/or appropriate in light of our comments herein.[2]

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

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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 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.