

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

AB-8131

File: 20-386412 Reg: 02053926

BP WEST COAST PRODUCTS, LLC dba Arco AM/PM #6322
101 East Glenwood Avenue, Turlock, CA 95380,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John D. Wagner

Appeals Board Hearing: January 8, 2004
San Francisco, CA

ISSUED APRIL 15, 2004

BP West Coast Products, LLC, doing business as Arco AM/PM #6322 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 20 days for its clerk having sold an alcoholic beverage to a 17-year-old 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 Barat Saltsman, Stephen Warren Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on June 26, 2002. Thereafter, on October 29, 2002, the Department instituted an accusation against

¹The decision of the Department, dated April 3, 2003, is set forth in the appendix.

appellant charging that its agent and/or employee, Michael Albert Smith, sold an alcoholic beverage (beer) to Joshua Donn Snodgrass, a person then approximately 17 years of age. Although not noted in the accusation, Snodgrass was acting as a police decoy for the Turlock Police Department.

An administrative hearing was held on January 29, 2003, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Snodgrass and by Joseph Esquivel, a Turlock police officer who witnessed the transaction and supervised the face-to-face identification by the decoy after the decoy had returned to the store. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established and appellant had not established any affirmative defense under Rule 141.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the Department violated Business and Professions Code section 25666; and (2) Rule 141(b)(2) was violated.

DISCUSSION

I

Business and Professions Code section 25666 provides:

In any hearing on an accusation charging a licensee with a violation of Sections 25658, 25663, and 25665, the department shall produce the alleged minor for examination at the hearing unless he or she is unavailable as a witness because he or she is dead or unable to attend the hearing because of a then-existing physical or mental illness or infirmity, or unless the licensee has waived, in writing, the appearance of the minor.

Appellant contends that there was no compliance with section 25666 because the Department did not offer the testimony of a second decoy, Vanessa Gomez (Gomez), who had accompanied Snodgrass into the store and who, although it was not alleged in

the accusation, had also made a purchase of an alcoholic beverage.

Gomez was present at the hearing. She and other witnesses were excluded from the hearing on appellant's motion. The Department did not call her as a witness, and appellant's counsel expressly declined an opportunity to do so, stating: "[The Department] chose not to call her. I'm not going to call her, and I don't believe it's my obligation to do so."

We think counsel was mistaken.

Section 25666 requires only that the "alleged minor" be produced for examination. The "alleged minor" in this case was Snodgrass. Snodgrass testified and was cross-examined. We do not read section 25666 as requiring the Department to produce anyone other than the minor who is the subject of the claimed violation of section 25658, subdivision (a). Indeed, section 25666 does not itself even require the Department to conduct an examination of the "alleged minor," only that he or she be "produced for examination." Theoretically, the Department could prove the age of the minor in some manner other than through the testimony of the minor, leaving it to the licensee whether to elicit testimony from the minor.

The accusation did not include a charge concerning the sale to Gomez. Consequently, she is not an "alleged minor" within the meaning of section 25666.²

In any event, Gomez was "produced for examination." She was present at the hearing, and could have been examined by appellant's counsel. He expressly waived

² Appellant asserts (App.Br., p.5) that prior decisions of the Appeals Board have held that section 25666 requires the production of the second decoy where he or she has actively participated in the transaction. Appellant has not cited any Appeals Board decision so holding, and we are not aware of any such case. The Board has held that a second decoy's active involvement in a transaction could have Rule 141(b)(2) implications. (See *7-Eleven, Inc./Smith* (2001) AB-7740.)

the opportunity to do so.

II

Appellant contends that the decision must be reversed because the administrative law judge (ALJ) did not explain his conclusion that both decoys appeared to be under the age of 21 years when they made their purchases of beer.

It is true, as appellants points out in its brief, that the Appeals Board has consistently reversed decisions of the Department in cases where the ALJ limited his or her consideration under Rule 141(b)(2) to physical aspects of the decoy's appearance, and gave insufficient consideration to other facets of appearance, such as poise, maturity, demeanor, and mannerisms. (See, e.g., *Circle K Stores* (1999) AB-7122.)

The clerk did not testify. Both the police officer and the decoy testified that both minors were asked for identification, and each produced a driver's license showing the owner's true age as 17. After examining the licenses, the clerk told the two decoys they were too young to be drinking, that he did not drink when he was their age. Nonetheless, he went forward with the sale.

Given these facts - the clerk has examined documents showing the decoys' true age, tells them they are too young to drink, and tells them he did not drink when he was their age, but then sells them the beer - does the failure of the ALJ to expand on his conclusion regarding the appearance of the decoys compel reversal?

Under the strict rule laid down in *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board* (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126], we think it does.

The Department argues that, once identification has been displayed showing that the decoy is under the age of 21, the issue of the decoy's appearance is no longer

relevant. We have disagreed with the Department on this question in other cases, because we read the court of appeal decision in *Acapulco Restaurants, Inc., supra*, to hold that there must be compliance with the provisions of the rule even though there is other evidence that would suggest that compliance with the rule is unnecessary. In *Acapulco Restaurants, Inc.*, there was no compliance with Rule 141(b)(5), because the decoy failed to identify the seller of the alcoholic beverage. The court reversed the Appeals Board and the Department even though a police officer had witnessed the entire transaction and was able to identify the person who made the sale. In the present case, there was no compliance with Rule 141(b)(2).

Were we writing on a clean slate, we would affirm the Department. We are not, and we do not.

ORDER

The decision of the Department is reversed.³

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³ 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.