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

CHEVRON STATIONS, INC.,
dba Chevron #1492
40635 Winchester Road
Temecula, CA 92390
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

AB-7552
File: 20-281787 Reg: 99047004

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: October 5, 2000
Los Angeles, CA

ISSUED APRIL 11, 2001

Chevron Stations, Inc. doing business as Chevron #1492 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 25 days for appellant's clerk selling an alcoholic beverage to a person under the age of 21, being 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 Chevron Stations, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

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[1]The decision of the Department, dated December 9, 1999, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on March 16, 1993. Thereafter, the Department instituted an accusation against appellant charging that, on April 29, 1999, appellant's employee, Nathan Courts ("the clerk"), sold an alcoholic beverage to Rhiannon Fernandez ("the minor"), who was under 21 years of age. The minor was acting as a decoy for the Riverside County Sheriff's Department at the time.

An administrative hearing was held on November 3, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the sale.

Subsequent to the hearing, the Department issued its decision which found that the charge of the accusation had been proved.

Appellant filed a timely appeal, contending that 1) Rule 141(b)(5) [face-to-face identification of the seller] was violated; 2) the penalty enhancement based upon a prior violation lacks an evidentiary basis; and 3) the Department violated appellant's rights to full and fair discovery.

DISCUSSION

I

Appellant asserts that Rule 141(b)(5) was violated. This subdivision of the rule requires that the minor decoy make a "face-to-face identification" of the person who sold an alcoholic beverage to him or her. Appellant contends that a face-to-face identification was attempted, but the photograph taken shows that the clerk and the minor were not face to face, but shoulder to shoulder, next to each other, with both facing the camera. Appellant points out that the minor testified she was across the

store and at an angle from the clerk when she made the identification. Neither the situation in the photograph nor the one described by the minor qualify as a face-to-face identification, appellant argues.

When asked what the physical distance was between her and the clerk when she pointed to him and said "He sold it to me," the minor testified that "He was across the store at like an angle, so I walked into the door and he was to the left-hand angle of me." She did not know how far away the clerk was from her at the time. [RT 20-21.]

Deputy McElvain testified that, after identifying himself to the clerk, he took the clerk off to the side, away from the register. Another deputy entered the store with the minor, and McElvain asked the minor to identify the person who sold the beer to her, which she did by pointing and saying that he was the one who sold to her. [RT 62.] Asked where the minor was when she pointed to the clerk, McElvain said "[s]he was shoulder to shoulder to him" [RT 63].

On cross-examination, McElvain was asked if the minor and the clerk were standing next to each other, shoulder to shoulder, as in the photograph, when the minor identified the clerk. McElvain said yes. Then he was asked if, in the photograph, the minor was looking at the clerk, and McElvain replied, "In the photo she is not." [RT 89.] McElvain also agreed that his report (which is not part of the record) does not state how far from the clerk the minor was when she identified him, where either of them were standing, that she was looking at the clerk, or that she made a face-to-face identification of the clerk. [RT 90-91.]

The ALJ discussed the minor's identification of the clerk in Finding II.C.:

"The evidence established that a face to face identification of the seller of the

beer did in fact take place even though the evidence did not establish that the minor and the clerk were facing each other at the time of the identification. After exiting the premises, the decoy was met by Deputy Mike, and the decoy subsequently reentered the premises accompanied by Deputy Mike. Deputy McElvain then asked the decoy to identify the person who had sold her the beer. While the decoy was standing 'shoulder to shoulder' with the clerk, the decoy pointed to [the clerk] and stated, 'He did'. A photograph (Exhibit 2) was taken and it depicts the decoy holding the six-pack of Bud Light Beer and pointing to the clerk. The decoy and the clerk are standing in very close proximity to each other and are standing 'shoulder to shoulder' in this photograph. After the decoy had identified the clerk and after the photograph in Exhibit 2 had been taken, a citation was issued to the clerk."

Appellant asserts that this situation is remarkably like that in Chun (1999) AB-7287, in which the Board said:

> "The findings do not suggest a face to face identification, but only allude to a pointing out of the seller from somewhere within the premises.
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> "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."

The court in Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126] has stated that Rule 141 must be adhered to strictly. Appellant contends there was not strict adherence here as defined by Acapulco, supra, and by this Board in Chun, supra. We disagree.

Taken by itself, the minor's testimony does not seem to establish that all the requirements of a face to face identification were met. However, this Board must review the entire record and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); Kruse v. Bank of

America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].) Looking at the testimony of the minor in conjunction with that of McElvain, we believe that the ALJ's conclusion regarding the identification was reasonable and supported by substantial evidence.

Appellant does not articulate precisely what it is about this identification that makes it less than "strict adherence." It appears that appellant may construe the minor's testimony that she was standing across the store from the clerk (whatever distance that might be) when she pointed to him, to preclude the "reasonable proximity" requirement in Chun. However, the minor's testimony, while not establishing the relative positions of the clerk and the minor when she identified him, does not preclude a conclusion based on other evidence that the identification was face to face as defined in Chun.

It also appears that appellant believes the photograph in which the minor and the clerk are "shoulder to shoulder" means that the identification, if it occurred at that point, was by definition not "face to face," even though there was reasonable proximity at that time. Appellant's counsel, in cross-examining McElvain, appeared to be attempting to establish that the minor and the clerk were not literally face to face when the identification was made. That dialogue, however, established only the obvious: that the minor and the clerk were not looking at each other when the photograph was taken. McElvain testified that they were standing shoulder to shoulder as in the photograph when the identification was made. However, he was not asked if they were looking at

each other when the identification was made; he merely agreed with counsel that "*in the photo*" they were not.

Taking the testimony of the minor and McElvain together, it becomes obvious that when the minor re-entered the store, she saw the clerk and McElvain across the store and approached them. She did not specify where she was when she was asked to make, and made, the identification. McElvain, however, testified that she was standing *right next to* the clerk when she pointed to him. It would have been impossible for the clerk and the minor not to have seen each other clearly as the minor approached to identify the clerk. Even if the minor was not looking directly at the clerk when she pointed at him and said he was the one who sold to her, the requirements this Board set out in Chun were clearly satisfied: the minor and the seller, were not just in "some reasonable proximity to each other," but in extremely close proximity to each other, and they "acknowledge[d] each other's presence, by the decoy's identification, and the seller's presence such that the seller [was], or reasonably ought to [have been], knowledgeable that he . . . [was] being accused and pointed out as the seller." The ALJ was correct in concluding that the requirement of Rule 141(b)(5) was satisfied.

II

Appellant contends that "it is impossible to ascertain the factual basis and legal foundation for an enhanced penalty given the decision's muddled Findings of Fact in that regard" and, therefore, the penalty imposed was an abuse of discretion.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where

the issue of an excessive penalty is raised, we will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

The relevant Findings in the Department's decision are I. and II.I.:

> "I. [T]he [appellant] has the following record of disciplinary action:
> "On August 1, 1996, an Accusation was filed against the [appellant] and the [appellant] was subsequently found to have violated Section 25658(a) of the Business and Professions Code and paid a fine in lieu of a ten day suspension.
> "On January 27, 1999, an Accusation was filed against the [appellant] and the [appellant] was subsequently found to have violated Section 25648(a) of the Business and Professions Code and received a twenty-five day suspension."
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> "II. . . .I. The fact that this is the second violation of Business and Professions Code Section 25658(a) within thirty-six months of the present violation was taken into consideration in the imposition of a penalty herein."

Exhibit 5 consists of certified copies of an Accusation and a Department decision relating to appellant, with a registration number of 96036999. This exhibit is really irrelevant to this issue since the Department conceded at hearing that the violation in this instance was more than 36 months prior to the present violation.

Exhibit 6 consists of certified copies of an Accusation and a Department decision relating to appellant, with a registration number of 99045508. The date of the violation is listed in the Accusation as October 31, 1998. The present violation occurred April 29, 1999, which is within 36 months of the violation in registration number 99045508. This brings the matter within the scope of the penalty provisions of Business and Professions Code §25658.1, subdivision (a), which provides:

> "Notwithstanding any other provision of this division, no licensee may petition the department for an offer in compromise pursuant to Section 23095 for a second or any subsequent violation of Section 25658 that occurs within 36 months of the initial violation."

Appellant appears to be arguing that the Department's decision is fatally flawed because it does not "adequately and accurately state a basis for an enhanced penalty founded upon prior violations within the definitions stated by Business and Professions Code section 25658.1," since the date of the violation in registration number 99045508 (the "prior" used by the ALJ to "enhance" the penalty in the present matter) is not stated in the decision issued under that registration number.[2]

Appellant's argument is rejected. While the date of the violation in 99045508 is not stated in the Department's decision for 99045508, the accusation in 99045508 does state the date of the violation. This accusation was filed on January 27, 1999, as stated in the decision in the present matter and as acknowledged by appellant. (App. Opening Br. at 9.) Therefore, the date of the violation in the prior matter is established by the certified copy of the accusation, which is linked to the decision in the present matter by its filing date, and to the prior decision by its registration number.

This case is totally unlike Kim (1999) AB-7103, cited by appellant. In Kim, the Appeals Board reversed the penalty because the documents put into evidence were not properly authenticated, and, therefore, could not be used to show that the violation in question occurred during the critical 36-month period. In the present matter, the documents were properly authenticated, the date of the prior accusation was properly proved to be within 36 months of the present violation, and the "prior" was properly used to "enhance" the penalty under §25658.1, subdivision (a).

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[2] Appellant's statement of this contention is somewhat ambiguous, and it could be that appellant is really arguing that the flaw is the failure of the Department's decision *in the present matter* to state the violation date for registration number 99045508. Whichever contention is intended by appellant, the same response applies.

III

Appellant claims it was denied discovery rights under Government Code §11507.6 when the Department refused its request for the names and addresses of licensees whose clerks, during the 30 days preceding and following, had sold to the decoy who purchased an alcoholic beverage at appellant's premises. Appellant also claims error in the Department's unwillingness to provide a court reporter for the hearing on its motion to compel discovery, which was denied in relevant part following the Department's refusal to produce the requested information. 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 the evidentiary hearing, and not to a hearing on a motion where no evidence is taken.

The Board has issued a number of decisions directly addressing this issue. (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 appellants were limited to the discovery provided in Government Code §11507.6, 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."

The issue concerning the court reporter has also been decided in the cases mentioned above. The Board held that a court reporter was not required for the hearing on the discovery motion.

We continue to adhere to our conclusions expressed in the cases noted above.

ORDER

The decision of the Department is affirmed with respect to the issues of Rule 141(b)(5), the prior violation, and the court reporter, and remanded to the Department for such further proceedings as are necessary and appropriate with respect to discovery in accordance with our previous decisions noted herein.[3]

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

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[3]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.