

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

AB-7714

File: 20-346656 Reg: 00048923

CHEVRON STATIONS, INC. dba Chevron Station
1140 East Ontario Avenue, Corona, CA 91719,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: August 16, 2001
Los Angeles, CA

ISSUED OCTOBER 16, 2001

Chevron Stations, Inc., doing business as Chevron Station (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for appellant's clerk selling an alcoholic beverage to a person under the age of 21, a minor decoy for the Corona Police Department, in 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.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 10, 1998. Thereafter, the Department filed an accusation against appellant charging that, on February 10, 2000, appellant's clerk sold beer to a minor, Robert Newman.

¹The decision of the Department, dated September 28, 2000, is set forth in the appendix.

An administrative hearing was held on August 15, 2000, at which time documentary evidence was received and testimony was presented by Corona police officer Kevin Shearer and by the minor decoy, Newman ("the decoy"). Appellant presented no witnesses. Subsequent to the hearing, the Department issued its decision which determined that the sale had occurred as charged and that no defense had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the findings do not show compliance with Rule 141(b)(5), and (2) the Administrative Law Judge (ALJ) erred in finding that the appearance of the decoy complied with Rule 141(b)(2).

DISCUSSION

I

Appellant contends the findings do not establish compliance with Rule 141(b)(5) because there is no finding as to the distance between the decoy and the clerk during the investigation or whether the clerk was aware, or reasonably should have been aware, that he was being identified.

Rule 141(b)(5) (4 Cal. Code Regs. §141, subd. (b)(5)) provides that, after a sale of an alcoholic beverage to a minor decoy has taken place, the decoy should make a face-to-face identification of the seller. In the appeal of Chun (1999) AB-7287, this Board stated that "face to face" means that

"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."

In this case, the testimony of the decoy made it clear that he was "in some reasonable proximity to" the clerk and that the clerk was aware, or reasonably should have been aware, that he was being identified. In response to Department counsel's question about how the identification was accomplished, the decoy testified, "We walked in and *kind of drew his attention over*. And I said, 'This is the guy who sold me the alcohol'" [RT 16] . (Emphasis added.)

The ALJ made a general finding that the identification had taken place and described the actions of the officer and the decoy when they returned to the store to make the identification. Although the ALJ did not make a specific finding as to the distance between them or the clerk's awareness of the identification, the record contains the information upon which he based his conclusion that the identification was properly made. Appellant has presented nothing in contravention of that conclusion, and we conclude that there is no basis for holding the Rule 141(b)(5) finding deficient.

II

Appellant contends the ALJ failed to properly consider all indicia of the minor decoy's age, ignoring that which would lead to the conclusion that the minor appeared to be over 21 years of age. In this, appellant charges, the ALJ "showed considerable bias and rush to judgment," and "clearly demonstrated that he was not interested in any evidence that would lead to a conclusion that the decoy looked over 21."

Appellant's specific criticisms are that the ALJ ignored both the large size of the decoy relative to the clerk, as shown in the picture of the two of them taken after the

sale, and the picture on the decoy's driver's license, which shows him with a goatee.² Appellant argues that these are both indicia that would lead one to conclude that the decoy presented the appearance of a person over the age of 21.

It is true that in the photograph taken of the decoy and clerk after the sale, the decoy is about a head taller than the clerk. This is irrelevant; the rule requires an evaluation of the decoy's appearance relative to the appearance that could generally be expected of a person under the age of 21. The relative sizes of clerk and decoy do not determine whether the decoy appears to be over 21 or not. Even if the clerk held the belief that people taller than he is must be over 21 (which we do not know, since the clerk did not testify), that mistaken belief would not be binding on the ALJ in his evaluation of the decoy's apparent age.

Appellant's contention that the picture on the driver's license was "yet another indicia of age" verges on the absurd. If the picture on the license is an indicia of age, so is the red stripe that says "Age 21 in 2001." We cannot imagine that appellant's counsel is serious in asking this Board to approve use of the decoy's driver's license as an indicia of the decoy's age.

This decoy was about 6 feet tall and weighed about 180 pounds, neither measurement extraordinary for a young man of 18 or 19. The ALJ made a specific finding that the decoy's appearance complied with Rule 141(b)(2), detailing the indicia upon which he based his finding. This Board is not in a position to second-guess the finding made by the ALJ, who had the opportunity, which this Board has not, of observing the decoy in person at the hearing.

²The decoy shaved the goatee off at the police station before the decoy operation began [RT 26-27].

ORDER

The decision of the Department is affirmed.³

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

³This 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.