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

AB-7725
File: 20-339497 Reg: 99047642

CHEVRON STATIONS, INC. dba Chevron Station
6151 Greenback Lane, Citrus Heights, CA 95621,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja

Appeals Board Hearing: October 11, 2001
San Francisco, CA

ISSUED NOVEMBER 29, 2001

Chevron Stations, Inc., doing business as Chevron Station (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerk having sold an alcoholic beverage to a minor decoy, 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 Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

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[1]The decision of the Department, dated October 12, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on March 28, 1998. Thereafter, the Department instituted an accusation against appellant charging that, on July 30, 1999, appellant's agent or employee, Laura C. Sargent, sold an alcoholic beverage (beer) to Richard B. Nielsen, who was then approximately eighteen years of age. Although not disclosed in the accusation, Nielsen was acting as a police decoy for the Citrus Heights Police Department.

An administrative hearing was held on August 24, 2000, at which time oral and documentary evidence was received. At that hearing, the Department presented the testimony of Nielsen and of Richard Rider, a Citrus Heights police detective. Appellant presented no witnesses.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation was established and that appellant's license should be suspended for 15 days.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the proposed decision contains findings which are in conflict with uncontroverted testimony elicited at the hearing; (2) the Department failed to make proper findings regarding the credibility of witnesses and reasons for rejecting contradictory testimony; (3) the Department violated Rule 141(b)(2); and (4) the Department violated Rule 141(b)(5).

DISCUSSION

I

Appellant contends that the finding in the proposed decision that the decoy was not wearing any jewelry - "no ring, necklace, earrings or watch" - is in conflict with the

decoy's testimony that he was wearing a gold-colored watch during the decoy operation at appellant's store. Appellant further argues that Exhibit 2, a photo taken of the decoy on the day of the decoy operation further supports its claim that the decoy was wearing the watch at the time of the sale.

The Department's brief suggests that "appellant's blatant misstatement of the underlying facts" should warrant a dismissal of appellant's appeal, referring specifically to appellant's position regarding the watch the decoy supposedly wore during the decoy operation. Although this Board lacks the power to take such drastic action, it is compelled to agree with the Department that appellant's brief has been less than forthright in its arguments to this Board.

Appellant's brief makes much of that portion of the decoy's testimony (at RT 23) where the decoy said he was wearing the watch during the decoy operation. However, without any explanation, the brief ignores the decoy's testimony on the next two pages of the transcript where the decoy spontaneously corrects his earlier testimony and disclaims having worn the watch - "Actually, can I say something? It was to a question that was asked earlier. ... Now that I think about it, I was not wearing a watch. I was made – everything is supposed to be taken off."

Later in the brief, in connection with the credibility issue, appellant's brief asserts that "it strains reason as to how the Department could treat as credible the vast majority of Detective Rider's testimony, which is clearly ***not*** based on independent recollection, but based simply on a police report he wrote 13 to 14 months prior to the hearing." The brief ignores Detective Rider's testimony, recorded in the very pages cited in the brief, that it was not necessarily important for him to look at the police report, because "I already had a pretty clear recollection. I just wanted to insure that I was getting all the

detail that I could in my mind out of the report."

We agree with the Department that appellant's counsel owes a greater duty of candor than is displayed in the brief it has filed with this Board. It is one thing to exaggerate the importance of certain testimony beyond a degree of entitlement, but something else entirely to intentionally misstate the record in an appellate brief.

In any event, appellant has picked a particularly weak point on which to base its claim that the ALJ erred. We are entirely unpersuaded that the fact that a decoy might be wearing a "gold-colored" watch adds an element of maturity to his or her appearance.

II

Appellant criticizes the decision for failing to explain why it was decided that the testimony of Detective Rider and the decoy was credible even though there were inconsistencies and discrepancies between the two. Appellant complains that the ALJ should not have believed the decoy's testimony that he was not wearing the glasses shown in the police photo taken before the decoy operation began. It also complains about Detective Rider's alleged reliance upon his 13- to 14-month-old report, an issue discussed above.

This Board has previously stated that it does not regard the decision in Holohan v. Massaneri (2001) 246 F.3d 1195 (9th Cir.) as altering the law in California. In California, the credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].) The Holohan decision deals with federal claims under the Social Security Act,

where an administrative law judge has rejected the testimony of a claimant on credibility grounds. It has no applicability here.

III

In still another example of the hyperbole extant in appellant's brief, it claims that "the overwhelming weight of the evidence indicates that, both physically and through demeanor, the decoy ... displayed the appearance of a person over the age of 21 at the time of the sale." (App.Br., at page 9.) The evidence, according to appellant, is that the decoy wore an adult-appearing gold watch - not true, according to the decoy - may have been wearing glasses - again, not true, according to the decoy - had been a police decoy on other occasions, and was five feet, eleven inches tall.

The ALJ observed the decoy when he testified, and was clearly satisfied that the decoy presented the requisite appearance under Rule 141(b)(2) (Finding of Fact III, part VI):

> "A. On July 30, 1999, the date of the sale of the beer to him, [the decoy] was 5'11" tall and weighted 157 pounds. On July 30, 1999, [the decoy's] hair was fairly short, 1/4" on the sides and a half inch on the top. He was not wearing any jewelry - no ring, necklace, earrings or watch. He was wearing a short sleeve, cotton shirt and jeans. His physical appearance was as depicted in State's Exhibit No. 2 (which was admitted into evidence), except that he was not wearing the eyeglasses and the wrist watch at the time he purchased the beer from [appellant's] clerk.
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> "B. On the date of the hearing, the decoy was the same height and weight - 5' 11" tall and 157 pounds - his hair was somewhat longer than the hair depicted in the State's Exhibit No. 2. Although his hair looked different, the decoy looked substantially similar on the date of the decoy operation as he did when he testified. On the date of the decoy operation, as well as on the date of the hearing, the decoy displayed the physical appearance which could generally be expected of a person under 21 years of age.
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> "C. Prior to July 30, 1999, [the decoy] had participated in two decoy operations. He testified that, nevertheless, when he went into the above-captioned premises on July 30, 1999, he was pretty nervous; he was not smiling or frowning, and as he approached the clerk, he made eye contact with the clerk. While testifying, the decoy was tapping his fingers and rocking back and forth in his chair, and

appeared to be fairly nervous.

> "D. This Administrative Law Judge has observed the decoy's overall appearance, including his physical appearance, his clothing, poise and demeanor, maturity and mannerisms at the hearing. It is concluded that nothing apparent at the hearing indicates that [the decoy] in any way exhibited an age beyond his actual age of nineteen at the hearing. He displayed the appearance generally expected of a person under 21 years of age. There is no evidence that [the decoy] presented a substantially or significantly different appearance in front of [appellant's] clerk, Laura Sargent, on July 30, 1999."

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he testifies, and making the determination whether the decoy's appearance met the requirement of Rule 141, that he possessed the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages.

We are not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy lacked the appearance required by the rule.

The rule, through its use of the phrase "could generally be expected" implicitly recognizes that not every person will think that a particular decoy is under the age of 21. Thus, the fact that a particular clerk mistakenly believes the decoy to be older than he or she actually is, is not a defense if in fact, the decoy's appearance is one which could generally be expected of that of a person under 21 years of age. We have no doubt that it is the recognition of this possibility that impels many if not most sellers of alcoholic beverages to pursue a policy of demanding identification from any prospective buyer who appears to be under 30 years of age, or even older.

We think it worth noting that we hear many appeals where, despite the

supposed existence of such a policy, the evidence reveals that the seller made the sale in the supposed belief that the minor was in his or her early or mid-20's, and for that reason did not ask for identification and proof of age. It is in such cases, and in those where there is a completed sale even though the buyer - not always a decoy - displayed identification which clearly showed that he or she was younger than 21 years of age, that engenders the belief on the part of the members of this Board that many sellers, or their employees, do not take sufficiently seriously their obligations and responsibilities under the Alcoholic Beverage Control Act.

By the same token, we appreciate the fact that, on occasion, police have used decoys whose appearance, because of large physical stature, facial hair, or other feature of appearance, is such that a conscientious seller may be unfairly induced to sell an alcoholic beverage to that person. Within the limits that apply to this Board as a reviewing tribunal, we have attempted to deter such practices, either by outright reversal, or by stressing the importance of compliance with Rule 141. If licensees feel more is necessary, their resort must be to another body.

IV

Finally, appellant suggests that the evidence shows that there was neither a direction to the decoy to identify the person who sold him the beer, nor an identification of the seller by the decoy. It asserts that it is not clear that Detective Rider asked the decoy to identify the sales clerk, because Rider said he was only administratively in charge of the operation, and deferred to Department investigator Tanaka, who was also present. Appellant also contends that the decoy's testimony that he was directed by both Rider and Tanaka to make the identification also raises questions, because Rider testified that he had no recollection of Tanaka asking the decoy to make the

identification.

Appellant is asking the Board to make its own findings with respect to what occurred with respect to the identification of the seller in place of those made by the ALJ. It would be inappropriate for the Board to do so. The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[2]

Our reading of the records leads us to conclude that there was substantial evidence in the record to support the ALJ's findings. Detective Rider testified that after reentering the store with the decoy, he first identified himself to the clerk as a police officer, and then asked the decoy to make his identification "of the employee." In response, according to Rider, the decoy "pointed out the employee and indicated that she was the one who in fact had sold him the alcohol" [RT 58]. Read as a whole, Detective Rider's testimony leaves little doubt that the identification process was as he described it, and that, in his capacity as team leader, he had the necessary authority to

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[2] California Constitution, article XX, § 22; Business and Professions Code §§23084 and 23085; Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

direct the decoy.

Appellant's reliance upon the supposed disagreement between Detective Rider and the decoy with respect to whether both Rider and Tanaka, or only Rider, asked the decoy to identify the sales clerk gains it little. The impression we get from the decoy's testimony is that, based upon instructions given to him while outside the store he was of the view that both Rider and Tanaka were taking him back into the store to identify the clerk. That Detective Rider could not recall whether Tanaka had also indicated to the decoy that he was to make an identification is of little import. The fact that both he and the decoy agreed there had been an identification is sufficient to sustain the ALJ.

ORDER

The decision of the Department is affirmed.[3]

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

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[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.