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

AB-7735

File: 20-342354 Reg: 00048927

CHEVRON STATIONS, INC. dba Chevron Stations
5600 Sepulveda Blvd., Van Nuys, CA 91411,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: November 1, 2001
Los Angeles, CA

ISSUED DECEMBER 28, 2001

Chevron Stations, Inc., doing business as Chevron Stations (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerk, Makena Mekonnen, having sold an alcoholic beverage (a 40-ounce bottle of Budweiser beer) to Cortney Taggart, a nineteen-year old police decoy, 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, Matthew G. Ainley.

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[1]The decision of the Department, dated November 2, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on September 23, 1998. An accusation was filed against appellant on May 24, 2000, charging a violation of Business and Professions Code §25658, subdivision (a) (the sale of an alcoholic beverage to a minor), on February 4, 2000. An administrative hearing was conducted on September 19, 2000, following which the Department entered the decision from which this timely appeal has been taken.

Appellant contends: (1) the Administrative Law Judge erred in failing to consider a guideline violation as a manifestation of unfairness under Rule 141; (2) Rule 141(b)(5) was violated; and (3) Rule 141(b)(2) was violated.

DISCUSSION

I

Appellant contends that the ALJ committed error by concluding that he could not consider the Department's guidelines.

We confess to some difficulty in understanding appellant's contention. Perhaps this is because appellant (at page 7 of its brief) has referred to a finding (Finding II G) that is not to be found in the decision from which this appeal has been taken, and asserts, also contrary to the decision, that the ALJ concluded that the Department guidelines (with respect to the conduct of decoy operations during "rush hour") could not be considered at all.

The ALJ did not go so far in his ruling. Instead, he wrote (Finding of Fact 9):

> "... [A]lthough Rule 141 requires that a decoy operation be conducted in a manner that promotes fairness, there is nothing in the rule which would bar prosecution for alleged violations of guidelines raised by the Respondent. As set forth in Provigo v. Alcoholic Beverage Control, ... Department Guidelines merely set forth suggested procedures for police agencies to follow and do not afford

> the licensee a defense to a violation of liquor laws except perhaps for 'outrageous' conduct constituting a violation of due process. There is no evidence of any unfairness or outrageous conduct such as entrapment, and the contentions are rejected."

We think the ALJ's summary of the Provigo holding was correct. The Supreme Court said, in that case: "... [T]he mere use of underage decoys to enforce the liquor laws does not constitute outrageous conduct. The additional fact that the law enforcement officers failed to follow the Department's suggested decoy program 'guidelines' ... does not change our analysis." (Provigo Corp. v. Alcoholic Beverage Control Appeals Board) (1994) 7 Cal.4th 561, 570 [28 Cal.Rptr. 638].

Nor do we think it can fairly be said that the ALJ did not consider the guidelines "at all" in reaching his conclusion that there had been a violation. To the contrary, we think he adequately addressed the "rush hour' issue in Finding of Fact 9, where he stated:

> "It is further urged on the part of the licensee that Department Guidelines were violated in the conduct of the decoy operation in that the Police Department did not avoid calling on the premises during rush hours. The evidence in this case is that the licensed location is nearby the entrance to a major freeway and it is evident that the premises is busy regardless of the day of the week or the time of day. It was also busy on February 4, 2000, at the time the decoy operation was scheduled, with patrons coming, going, and being served.
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> "As pointed out by the Complainant, if the licensee's contention is taken to its logical conclusion, it would become impossible to ever conduct undercover operations at the premises. Such a result would be absurd."

Finding of Fact 9 fairly and adequately considers whether the alleged "rush hour" guideline violation amounted to unfairness in the context of Rule 141. In Finding 9, the ALJ specifically found that there had been no unfairness. Therefore, we reject appellant's suggestion (at page 10 of its brief) that the decision erects a new standard that, unless there is outrageous conduct, a decoy operation is automatically fair.

The Department and appellant are in agreement that the Appeals Board has shown little affection for the "rush hour" defense. (See Circle K Stores, Inc. (April 11, 2001) AB-7476). The reason is obvious. When commerce reaches the point where the desire not to inconvenience customers overrides the importance of refusing sales of alcoholic beverages to minors, the public safety and morals of the people of the State of California will be irreparably injured. Such an unacceptable result will not occur on this Board's watch. Unless there is persuasive evidence of something associated with the timing of the decoy operation that truly prevents a seller from acting with circumspection when faced with the possibility that a prospective purchaser of alcoholic beverages is a minor, it is unlikely that a "rush hour" defense will prevail.

II

Appellant contends that there was a disagreement between one of the police officers and the decoy as to what the clerk was doing when the face-to-face identification took place, and the failure of the ALJ to explain why he chose to rely on the police officer's testimony, rather than that of the decoy, was a credibility determination made without the explanation required by the ruling in Massaneri v. Holohan (9th Cir. 2001) 246 F.3d 1195.[2]

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, 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]; Kruse v. Bank of America (1988)

[2] Appellant has, in its citation to this case, referred to the court which decided it as "9th Circuit Cal." This form of citation is appropriate when the issue is one of California law. We do not read the court's decision on the credibility issue as involving California law.

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]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Here, the conflicts in the testimony are relatively minor, and the resolution of them was the ALJ's responsibility. We cannot say that he committed error in doing so.

Three (not merely two) witnesses testified that a face-to-face identification was conducted. According to the three (the decoy and police officers Hammer and Moore), the clerk had either finished with customers or was in the midst of a customer transaction. In either case, given the physical proximity of at least two police officers and the decoy to the clerk when the identification was made, it is highly unlikely that the clerk would have been unaware that she was being singled out as the person who made an illegal sale to a minor. Since the clerk did not testify, we do not know what she would have claimed.

It is an exaggeration to say that the ALJ diminished the decoy's credibility by finding the face-to-face identification to have been adequate. The ALJ did no more than reconcile minor variations in the recollections of three witnesses, each of whom saw the same event and formed slightly different perceptions of what was occurring.

III

Appellant contends that the decoy did not display an appearance which could generally be expected of a person under the age of 21. It bases its argument on the decoy's experience as an Explorer Scout and the responsibilities assigned to her in that capacity.

The ALJ considered the decoy's Explorer Scout experience, but found it outweighed by other considerations (Finding of Fact 8):

> "At the time of the transaction, minor Taggart had an overall youthful appearance, including 'a small baby face,' wore no makeup except a light foundation, and wore no jewelry except possibly a necklace. She was then 5'2" tall, and weighed 120 pounds, and was slight of build. She wore her hair pulled back by a clip, with it free falling down her back below her shoulders. She wore blue jeans, and a sweat shirt over a t-shirt and tennis shoes.
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> "There was little in the minor's appearance at the hearing slightly more than seven months after the February 4, 2000, incident, that is her physical appearance, clothing, poise, demeanor, maturity and mannerisms, to indicate an age beyond her 19 years. It is found that she displayed the appearance which could generally be expected of a person under 21 years of age at the time of the sale, despite the fact that Taggart was an experienced decoy and a highly regarded explorer. In this regard, there was no showing of unfairness under Department Rule 141(a)."

As this Board has observed on other occasions, a decoy's involvement in explorer scout activities, as well as his or her prior experience as a police decoy, are merely factors to be considered by an ALJ in making a Rule 141(b)(2) assessment. They are not controlling. (See, e.g., Prestige Stations, Inc. (2001) AB-7630; 7-Eleven, Inc./Huh (2001) AB-7680.)

This is simply another case where an appellant is asking the Board, which has not seen the decoy, to substitute its judgment of the decoy's appearance for that of the ALJ.

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.

It is clear from his findings that the Administrative Law Judge was aware of what

was expected of him by Rule 141(b)(2). Only if we were to infer that the findings are a mere recitation intended to satisfy this Board, and not one reflective of the sincere judgment of the Administrative Law Judge could we agree with appellants' contention. We decline to do so.[3]

ORDER

The decision of the Department is affirmed.[4]

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

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[3] It is worth noting that appellant's assistant manager testified that she formed an opinion that the decoy was between 18 and 23 years of age.

[4] 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.