

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

AB-7785

File: 20-363526 Reg: 00049840

CHEVRON STATIONS, INC. dba Chevron #91408
8888 North Magnolia Avenue, Santee, CA 92071,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: February 7, 2002
Los Angeles, CA

ISSUED MAY 14, 2002

Chevron Stations, Inc., doing business as Chevron #91408 (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 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 B. Saltsman, Stephen W. Solomon, and Matthew Gorman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

¹The decision of the Department, dated March 8, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on April 17, 2000.

Thereafter, the Department instituted an accusation against appellant charging that, on July 21, 2000, appellant's clerk sold a six-pack of Budweiser beer to 17-year-old Czara Apgar. At the time of the sale, Apgar was acting as a minor decoy for the San Diego Sheriff's Department.

An administrative hearing was held on January 19, 2001, at which time documentary evidence was received and testimony was presented concerning the transaction by Apgar ("the decoy"), by Deputy Sheriff James Seal, and by appellant's manager, Oscar Tiscareno.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as charged in the accusation and no defense had been established.

Appellant thereafter filed a timely notice of appeal in which it raises the following issues: (1) the Administrative Law Judge (ALJ) erred in not granting appellant's request for a continuance, and (2) the ALJ failed to make proper findings regarding the credibility of witnesses.

DISCUSSION

I

Appellant contends the ALJ improperly denied its request for a continuance, prejudicing appellant's right to cross-examine the witnesses. The request for continuance was based on what appellant's counsel alleged to be a discrepancy between the testimony of the decoy and Deputy Seal as to the number of locations at

which she attempted, and was able, to purchase alcoholic beverages and those numbers as shown on two "decoy fact sheets" appellant had obtained through discovery.

On direct examination, Deputy Seal originally estimated that the decoy went to 25 to 30 premises on the evening of July 21, 2000, and that she was able to purchase alcoholic beverages at approximately six or seven locations [RT 19]. After having his recollection refreshed by reviewing a decoy fact sheet, a copy of which appellant's counsel had, Seal testified that the decoy visited 30 locations and two sold to her [RT 20-21]. During cross-examination, Seal recalled that there were two decoys working that night, but testified that he was unable to remember whether the 30 locations represented those visited by just one or both of the decoys [RT 24-25]. He later testified he was unable to remember how many locations were visited by decoy Apgar [RT 27].

On redirect, the decoy estimated she had attempted to purchase alcohol at 30 locations on that night and that two sold to her [RT 47-48]. On re-cross, the decoy confirmed that there were three decoys working that night, but that not all three went to those 30 locations. Appellant's counsel then said, "So your testimony is you went to 30 locations and – Well, on the basis of that, Your Honor, I would like to make a motion regarding discovery because we were provided a minor decoy sheet – . . . ¶ Motion for continuance so we can get other documents, because there are more purchases than two according to the minor decoy sheet" [RT 48]. Upon the ALJ asking for more explanation, counsel stated that he had two decoy sheets, one showing 31 locations and five purchases, and the other listing 19 locations and no purchases. Counsel then

argued, ". . . – and I'm getting little bit different facts here, and I think then we have the right to find out how many – find out how many other decoy – at how many locations other decoys purchased, how many locations other decoys went to. Otherwise, we really can't meaningfully cross-examine. It's just the math doesn't add up"

The court responded that further discovery should have been requested before the hearing if documents were missing, and that counsel had not shown good cause for a continuance. [RT 49.] When counsel stated that, based on the decoy's testimony, the numbers "just [didn't] add up," the ALJ observed that the decoy was simply estimating the number of locations based on her recollection, not testifying as to a specific number. The ALJ concluded, ". . . if you're making a request for a continuance based on the fact that the testimony of this witness doesn't seem to coincide with whatever documents you were given by the Department, that request is denied" [RT 50].

Pursuant to Government Code §11524, the ALJ has the right to grant or deny a request for a continuance for good cause. Under subdivision (b) of that section, a party is ordinarily required to apply for the continuance within 10 working days after discovering the good cause for the continuance, unless that party did not cause and sought to prevent the condition or event establishing the good cause. An appellant has no absolute right to a continuance; one is granted or denied at the discretion of the ALJ and a refusal to grant a continuance will not be disturbed on appeal unless it is shown to be an abuse of discretion. (Givens v. Department of Alcoholic Beverage Control (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446].)

Appellant contends that "good cause" was shown for granting a continuance because it was sought to allow appellant to obtain "evidence . . . directly related to a

complete defense to the Department's Accusation," that is, "complete and correct documents regarding the . . . decoy operation" (App. Br. at 7.) The "complete defense" to which appellant contends the evidence it wished to obtain was related, is Rule 141. Appellant argues that it was vital to appellant to have a "full and complete opportunity to cross-examine the Department's witnesses on the issue of Rule 141 compliance", that the "universal confusion over the facts surrounding the minor decoy operations on the night of the incident" made it clear to appellant's counsel that the Department had not provided adequate discovery responses, and that "[a]ppellant's opportunity to cross-examine the Department's witnesses was immediately adversely affected." (Id. at p. 6.)

The ALJ did not abuse his discretion in refusing to grant appellant's request for a continuance. Seal testified that he believed 25 to 30 locations were visited that night; after refreshing his memory from the decoy fact sheet that had been provided appellant in discovery, he testified that 30 locations were visited and purchases were made at two. The decoy gave a "ballpark figure" of 30 locations visited and two purchases made. There was no discrepancy in the witnesses' testimony.

The discrepancy alleged by appellant between the testimony and the documents he had obtained through discovery is speculative. A decoy fact sheet was shown to Seal by counsel for both appellant and the Department, and it apparently showed this decoy visited 30 locations and purchased at two. Appellant's counsel said that he had two decoy sheets, one showing 31 locations and five purchases, and the other listing 19 locations and no purchases. However, the decoy fact sheets were not entered into evidence, or even offered to the ALJ to verify the alleged discrepancy. It was

appellant's burden to show that these documents were incorrect or incomplete. Even if appellant's counsel had shown that a variance actually existed between the testimony and the figures on the documents, this would not show that the documents were incorrect or incomplete.

In addition, appellant failed to show, or even allege, that a continuance would allow it to obtain additional or different information. Even if appellant were to show that such information existed, it did not show that, if obtained, the information would provide it with evidence that would materially aid its case. Appellant's vague generalization about evidence "related to a complete defense" lacks the specificity that would assure that this request is for a legitimate, necessary purpose as distinguished from a simple delaying tactic or "fishing expedition."

II

Appellant contends the ALJ failed to justify his credibility determinations as required by the case of Holohan v. Massanari (2001) 246 F.3d 1195 (9th Cir.).

The Board considered and rejected this contention in 7-Eleven, Inc. and Huh (2001) AB-7680, saying:

"We have reviewed the decision in [Holohan], and the court decisions cited in support of that portion of the court's holding, and are satisfied that the view expressed by the court is peculiarly related to federal Social Security disability claims, and does not reflect the law of the State of California. While it may be true that a statement of the factors behind a credibility determination may be of considerable assistance to a reviewing court, and is welcomed by this Board, we are not prepared to say that a decision which does not set forth such considerations is fatally flawed."

There is no reason for us to decide the issue any differently in the context of the present appeal.

ORDER

The decision of the Department is affirmed.²

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

²This 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.