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

AB-8165
File: 20-341208 Reg: 03054380

CHEVRON STATIONS, INC., dba Chevron Station
2358 Sunrise Boulevard, Rancho Cordova, CA 95670,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: March 11, 2004
San Francisco, CA
ISSUED MAY 12, 2004

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 appellant's clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Chevron Stations, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas Allen.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on June 8, 1998. On January 30, 2003, the Department filed an accusation against appellant charging that, on October 2, 2002, appellant's clerk, Tyler Blair (the clerk), sold an alcoholic beverage

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[1]The decision of the Department, dated July 10, 2003, is set forth in the appendix.

to 19-year-old Christopher Phoenix. Although not noted in the accusation, Phoenix was working as a minor decoy for the Sacramento County Sheriff's Department at the time of the sale.

At the administrative hearing held on May 15, 2003, documentary evidence was received, and testimony concerning the sale was presented by Phoenix (the decoy), by Sacramento County Sheriff's deputies Ray Roberts and Jason Manning, and by one of appellant's clerks, Barbara Jennings. Elia Abonassor also testified about appellant's training and policies.

Subsequently, the Department issued its decision that determined the violation charged had been proven, and no defense had been established. Appellant has filed an appeal contending that rules 141(a)[2] and 141(b)(2) were violated.

DISCUSSION

Rule 141(a) requires that law enforcement agencies conduct minor decoy operations "in a fashion that promotes fairness." Rule 141(b)(2) requires that a minor decoy "display 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 at the time of the alleged offense." Violation of any of the provisions of rule 141 provides a licensee with a defense to the charge of an unlawful sale to a minor decoy. (4 Cal. Code Regs., §141, subd. (c).)

Appellant contends that the minor decoy's appearance violated both rule 141(a) and rule 141(b)(2) because the decoy was "of large physical stature, wearing jewelry, spiked hair, and sideburns." These aspects of the decoy's appearance, appellant

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[2]References to Rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

argues, would "tend to confuse the seller" and caused the decoy to not have the appearance that could generally be expected of a person under the age of 21 years.

Finding of Fact V addresses the decoy's appearance:

> On October 2, 2002, Tyler Blair was 6 feet tall and weighed about 180 pounds. He wore blue jeans and a green shirt with rolled up sleeves. He did not wear any jewelry other than a necklace and a bracelet.
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> At the hearing, the decoy testified he still weighed about the same, but was now 6 feet 1 inch tall. At the hearing his hair was similar in appearance to the photograph (Exhibit 2) taken after the transaction, except that then it was longer on top of his head. He testified and responded to questions in a polite manner.
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> The decoy visited seven licensed premises on October 2, 2002, as part of the decoy operation. He purchased alcoholic beverages at three of these locations and at least once without producing identification. He had not worked as a decoy before, and has worked on one such operation since.
>
> After observing the decoy's overall appearance, including his demeanor and taking into consideration all of the evidence surrounding his appearance on October 2, 2002, it is found that the minor decoy displayed the appearance of a person who could generally be expected to be under the age of 21 years when the sale of beer was made to him by Respondent's clerk on October 2, 2002. The minor's appearance at the hearing was substantially the same as his appearance presented to Respondent's clerk on October 2, 2002.

Appellant is arguing, essentially, that substantial evidence does not support the finding that the decoy complied with rule 141(b)(2). "Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Board* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

When an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably

support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (positions of both the Department and the license-applicant supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

The administrative law judge (ALJ) considered not only the decoy's physical appearance, including his size, hair, and jewelry, but also his demeanor, and found that none of his attributes of appearance, either singly or in combination, caused him to appear older than his actual age at the time he purchased the beer. We have said many times that we will not substitute our judgment for that of the ALJ regarding the decoy's apparent age, absent very unusual circumstances, none of which are present here. Nothing has been presented that indicates the ALJ's determination in this regard was inadequate.

Appellant states, without foundation, that the decoy, who was 6 feet tall and weighed 180 pounds, was the size of a man, not a "typical male youth." The ALJ did not find that to be the case, and our everyday experience tells us that his conclusion is

not unreasonable. This decoy's size was well within the bounds of what could generally be expected in a young man under the age of 21.

Appellant asserts that a recent Court of Appeal case "reiterated [that] 'a female decoy should not use make-up or wear jewelry'." However, the court simply noted that such a provision was included in the Department's nonbinding guidelines that preceded the promulgation of rule 141 and that a similar provision was proposed, but not adopted, in the legislation that eventually became subdivision (f) of section 25658. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (7-Eleven, Inc./Keller*) (2003) 109 Cal.App.4th 1687, 1692, 1697 [1 Cal.Rptr.3d 339].)

Continuing with its erroneous premise, appellant reasons that if female decoys should not wear jewelry, neither should male decoys. We question the validity of this reasoning. While it might be possible that certain jewelry could make a young woman appear older, it is more difficult to imagine jewelry making a young man appear older. In any case, the necklace and bracelet that are visible in the photograph of this decoy appear to be of the casual type most often seen on young people. We do not see how this jewelry could possibly make the decoy appear older, and appellant has not shown us otherwise.

It is not clear that the decoy's hair was "spiked" when he was in appellant's premises.[3] Even if it were, appellant does not explain how that hairstyle, typically worn by young people, made the decoy appear to be at least 21 years old.

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[3]Showing the decoy the photograph of himself taken after the sale, appellant's counsel asked, "Would it be fair to say [your hair] was like somewhat kind of spiked on top, perhaps?" The decoy responded, "From the picture it looks like to be." [RT 16-17.] This is something less than a clear affirmation that the decoy's hair really was spiked; it could simply be that the photo makes it look as if his hair were spiked when it was not. Looking at the photograph, we cannot tell if the decoy's hair was spiked.

Appellant asserts that the decoy's sideburns "put this case squarely over the line of fairness" because, in the photograph, the sideburns appear to be darker and longer than they were at the hearing. The sideburns, appellant contends, are comparable to a goatee, mustache, or "five-o'clock shadow" which this Board has looked on with disfavor. (See *The Southland Corporation/Samra* (2000) AB-7320.)

Appellant did not make an issue of the sideburns in its closing argument, and the ALJ apparently did not find them to have any particular effect on the decoy's apparent age. We do not believe that sideburns ordinarily will have an effect on the apparent age of a decoy comparable to that of a mustache or goatee. We cannot say that the sideburns caused this decoy to appear to be over the age of 21 or that they made this decoy operation unfair.

We find no reason to question the ALJ's finding that the decoy complied with rule 141(b)(2), or to say that the decoy operation was unfair because of the decoy's appearance.

ORDER

The decision of the Department is affirmed.[4]

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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