

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

AB-8166

File: 20-372476 Reg: 03054291

CHEVRON STATIONS, INC., dba Chevron
1890 Prairie City Road, Folsom, CA 95630,
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 25, 2004

Chevron Stations, Inc., doing business as Chevron (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 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 Gary D. Labin, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on February 6, 2001. On January 14, 2003, the Department filed an accusation against appellant charging that,

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

on October 11, 2002, appellant's clerk, Daniel Strother (the clerk), sold an alcoholic beverage to 19-year-old Kyle Jensen. Although not noted in the accusation, Jensen was working as a minor decoy for the Folsom Police Department at the time.

At the administrative hearing held on June 4, 2003, documentary evidence was received and testimony concerning the sale was presented by Jensen (the decoy); by Carl Siegler, a Folsom Police officer; and by John Moreno, appellant's territory manager.

Following the hearing, the Department issued its decision which determined that 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)(5) were violated.

DISCUSSION

I

Rule 141(a) requires that law enforcement agencies conduct minor decoy operations "in a fashion that promotes fairness." Rule 141(b)(5) requires that, after a sale is made and before a citation is issued, the officer directing the decoy shall attempt to enter the premises and have the minor decoy make a face-to-face identification of the seller of the alcoholic beverage. 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, rather than having the decoy identify the seller, the officer identified the clerk for the decoy and the decoy merely agreed with the officer's identification. This, appellant argues, was unduly suggestive and unfair, violating both rule 141(a) and 141(b)(5).

²References 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.

The identification of the seller was described in the second paragraph of Finding of Fact III:

After exiting Respondent's store, the decoy met with a police officer and then reentered the premises. The decoy was asked by a police officer who had observed the transaction from within the store if the clerk behind the counter was the person who sold him the beer. The decoy verbally identified the clerk as the person who sold him the beer. The face to face identification was made from a distance of three to four feet. The clerk did not protest being identified as the seller. The clerk was identified by the police as Daniel Strother and was issued a citation.

In Determination of Issues II-B, the ALJ discussed and rejected the argument appellant makes here:

Respondent contended that the manner in which the decoy identified the clerk who sold the alcoholic beverages was neither fair or objective because a police officer asked the decoy if the sales clerk was the person who sold who sold him the alcoholic beverages. Respondent's counsel contends this procedure violates the fairness requirement of Rule 141 and the procedure required in Rule 141(b)(5) ¶¶ . . . ¶¶ Respondent's counsel contends the identification process was biased or tainted in this case because a police officer did not ask, "who sold you the beer?", but instead asked, "is this the clerk who sold you the beer?", which Respondents's counsel contended was identifying the clerk for the decoy rather than having the decoy identify the seller for the police officers. From this, it is argued that the identification process was not operated in a fashion that promotes fairness and therefore was conducted in violation of Rule 141(a) and Rule 141(b)(5). The contention is rejected. The decoy made the identification at the sales counter moments after the sale. Nothing about the identification procedure in this case was unfair or not in compliance with the procedure described in the Rule.

In *The Vons Companies, Inc.* (2004) AB-8058, the Board rejected the same argument:

The Board has addressed this issue before, rejecting the same argument appellant makes here. In *7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983, the Board said:

The fact that the officer first contacts the clerk and informs him or her of the sale to a minor has been used to show that the clerk was aware of being identified by the decoy. (See, e.g., *Southland & Anthony* (2000) AB-7292; *Southland & Meng* (2000) AB-7158a.) ¶ . . . ¶ As long as the decoy makes a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in

error, we do not believe that the officer's contact with the clerk before the identification takes place causes the rule to be violated.

Appellant cites to *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. & 7-Eleven/Keller* (2003)109 Cal.App.4th 1687 [1 Cal.Rptr.3d 339] (*Keller*), asserting that the Court of Appeal held "that type of suggestive line-up with only one person is impermissible under Rule 141(b)(5)." In *Keller*, the appellate court annulled the decision of the Appeals Board³ that found a violation of rule 141(b)(5) where the decoy remained outside, the officer brought the clerk outside, and the decoy then identified the clerk as the seller. The court said, at page 1698:

We note that single person show-ups are not inherently unfair. (*In re Carlos M.* (1990) 220 Cal. App. 3d 372, 386 [269 Cal. Rptr. 447].) While an unduly suggestive one person show-up is impermissible (*ibid.*) in the context of a decoy buy operations [sic], there is no greater danger of such suggestion in conducting the show-up off, rather than on, the premises where the sale occurred.

This does not support appellant's contention. While an "unduly suggestive" identification might be impermissible, appellant presented no evidence that the identification was unduly suggestive.

(See also *7-Eleven, Inc./Vameghi* (2004) AB-8065.)

This language adequately explains why we affirm the decision in the present case.

ORDER

The decision of the Department is affirmed.⁴

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

³ *7-Eleven/Keller* (2002) AB-7848.

⁴This 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.