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

AB-8170
File: 20-371248 Reg: 03054279

CHEVRON STATIONS, INC. dba Chevron
10967 Alondra Boulevard, Norwalk, CA 90650,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: June 10, 2004
Los Angeles, CA

ISSUED JULY 29, 2004

Chevron Stations, Inc., doing business as Chevron (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 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 Labin, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on November 30, 2001. Thereafter, the Department instituted an accusation against appellant charging that its

[1]The decision of the Department, dated July 17, 2003, is set forth in the appendix.

employee, Georgina Carrillo (the clerk), sold beer to Michannan Taflinger, a 17-year-old minor. Although not noted in the accusation, Taflinger (the decoy) was acting as a decoy for the Los Angeles Sheriff's Department

An administrative hearing was held on June 17, 2003, at which time oral and documentary evidence was received. At that hearing, testimony concerning the sale transaction was presented by the decoy and by Los Angeles Deputy Sheriff Jerry Saba.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged. Appellant thereafter filed a timely notice of appeal, raising a single issue.

DISCUSSION

In its appeal, appellant contends that the decision's failure to address an irreconcilable conflict between the testimony of the decoy and that of one of the police officers involved in the decoy operation violates the requirement of *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836], that the agency set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. As a consequence, appellant asserts, the face-to-face identification which was conducted did not comply with Rule 141(b)(5). Appellant cites the Board's decision in *Chun* (1999) AB-7287, and asserts that there was no mutual acknowledgment between the seller and the decoy.

Appellant's attack is directed at Finding of Fact IV:

> After paying for the beer, the decoy exited the Respondent's store with it. She then returned to the store with Los Angeles Deputy Sheriff Saba, who had been waiting outside. While inside the store, Deputy Saba asked the decoy who sold the beer to her. The decoy identified Carillo as the seller. During the identification, Carillo was standing two to five feet from the decoy and was facing the decoy and Deputy Saba. The identification was in compliance with the Department's Rule 141(b)(5). A citation was issued to Carillo after the

identification took place.

The decoy testified that when she identified the clerk, the clerk was talking to the deputies, but her eyes were directed toward the decoy - "she was looking in my eyes." [RT 24]. She described the clerk as being in the middle of a triangle, the deputies on the left, the decoy on the right, and "not a foot away from each other when I identified her." [RT 25]. A photograph (Exhibit 2), taken immediately after the identification, shows the clerk and the decoy standing next to each other. The decoy is holding the beer she purchased.

Appellant argues that Deputy Saba's testimony, that the clerk's attention was directed at the deputies when the identification took place, is in such conflict with the decoy's testimony, that Finding 4 is flawed.

The thrust of appellant's argument is that the clerk could not have been looking into the decoy's eyes while at the same time having her attention directed toward the deputies, hence, there was no mutual acknowledgment.

This argument ignores several things. First, the decoy described where she and the deputies were standing in relation to the clerk. It strikes us as unrealistic that the clerk could not have been aware of what was occurring, given the close proximity of the two, and especially after being photographed with the decoy to whom she was accused of selling. Since the clerk did not testify, it is wholly conjectural that she would not have been aware that she had just been identified as the seller.

Appellant has read too much into *Chun*, *supra*, a decision that has been refined by more recent decisions of the Board. For example, in *Greer* (2000) AB-7403, the Board agreed it was not necessary that the clerk be actually aware that the identification was taking place. And, in *7-Eleven, Inc./Chawla* (2003) AB-8107, the

Board stated:

> It is clear that the Board believes that the focus must be on the decoy's identification of the seller. That approach reduces to an absolute minimum the possibility that an innocent clerk, one who had no involvement in the transaction, will be falsely accused. And, since the practical requirement of the identification process is to return the decoy to the store shortly after his or her purchase, the likelihood that his or her renewed presence, accompanied by police officers, will go unnoticed by the selling clerk is virtually non-existent.

In *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board/Keller* (2003) 109 Cal.App.4th 1687, 1698 [1 Cal.Rptr.3d 339], the court observed that Rule 141(b)(5) was "primarily designed" to insure that the seller will be given the opportunity, soon after the sale, "to come face to face" with the decoy. While the Board in past decisions may not have acknowledged such a "primary" design, it has always recognized that the seller is entitled to a reasonable opportunity to view the decoy in the course of the identification process. (See, e.g., *7-Eleven, Inc./Chawla, supra*; and see *Chun, supra*: "'[F]ace to face' means that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller *is*, *or reasonably ought to be*, knowledgeable that he or she is being accused and pointed out as the seller" (emphasis supplied).)

In any event, we think any conflict in testimony has been exaggerated. The so-called conflict is simply one in which two witnesses observed the same event and described it in slightly different ways. The fact that the ALJ did not bother to address such conflict as there might have been does not strike us as error. One of his functions as trier of fact is to resolve conflicts in testimony[2], and we find no fault in the way he did

[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

so in this case.

ORDER

The decision of the Department is affirmed.[3]

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

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inferences which support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857].)

[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.