

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

AB-8223

File: 20-368274 Reg: 03054892

CHEVRON STATIONS, INC. dba Chevron Station
879 Hopper Avenue, Santa Rosa, CA 95403,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: January 6, 2005
San Francisco, CA

REISSUED AS CORRECTED

ISSUED FEBRUARY 17, 2005

Chevron Stations, Inc., doing business as Chevron Station (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days for its clerks, Debra S. Jennings and Pamela B. Sisombath, having sold a 40-ounce bottle of Budweiser beer to Jason Jucutan, a 19-year-old 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 Julie Doi, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

¹The decision of the Department, dated December 24, 2003, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 7, 2000. Thereafter, the Department instituted an accusation against appellant charging the unlawful sale of an alcoholic beverage (beer) to a minor on February 13, 2003.

An administrative hearing was held on September 18, 2003, at which time oral and documentary evidence was received. Testimony was presented by Jason Jucutan ("the decoy"), Santa Rosa police officer David MacDonald, and Chevron territory manager Diane Provinte. Following the conclusion of the hearing, Administrative Law Judge (ALJ) Michael B. Dorais issued a proposed decision, finding that the charge of the accusation had been established, and that appellant had not established any affirmative defense under Rule 141.² The Department adopted the proposed decision, and this timely appeal followed.

Appellant raises the following issues: (1) the Department failed to comply with Rule 141(b)(3); (2) the Department failed to comply with Rule 141(b)(4); (3) the ALJ improperly concluded that there had been compliance with Rule 141(b)(5) by failing to explain why he accepted the testimony of Officer MacDonald over that of the decoy; and (4) the Department failed to comply with Rule 141(b)(2).

Issues (1) and (2) are related, and will be discussed together.

DISCUSSION

I

Rule 141(b)(3) requires a decoy to carry his or her own identification showing a correct date of birth, or carry no identification; a decoy who carries identification shall

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.

present it upon request to any seller of alcoholic beverages. Rule 141(b)(4) requires a decoy to answer truthfully any questions about his or her age.

Appellant devotes a substantial portion of its brief to an argument that Rule 141(b)(3) was violated because the decoy did not display his identification to Sisombath, the clerk who actually rang up the sale, and that Rule 141(b)(4) was violated when the decoy said “Yes, she checked my ID” when asked by Sisombath whether his ID had been checked by Jennings, but did not volunteer his age.

Appellant’s attorney did not raise either of these issues at the hearing. His failure to do so precludes them from being raised on appeal. (See Witkin, Cal. Procedure (4th ed. 1997) Appeal, §394, p.444; and see *7-Eleven/Twomey* (2003) AB-8030, and cases cited therein.) It is unfair to the ALJ to charge him with committing error with respect to issues that were not addressed timely, when he would have had an opportunity to consider them. Thus, we do not reach the question of whether the ALJ would have been justified in rejecting them.

II

Appellant points to several inconsistencies in the testimony of Officer MacDonald and that of the decoy, and argues that the ALJ failed to explain why he resolved credibility concerns as he did. Appellant cites *Holohan v. Massaneri* (9th Cir., 2001) 246 F.2d 1195, and argues that this case governs the ALJ’s approach to the problem.

The ALJ made the following findings on this issue (Finding of Fact IV-A):

After exiting Respondent’s licensed premises, decoy Jucutan met with two law enforcement officers and then reentered the store with them.

Santa Rosa Police Officer David MacDonald asked him which of the clerks sold him the beer and from a distance of about two or three feet from the check-out counter the decoy pointed to the clerk who took his payment, and told MacDonald that the other clerk had checked his identification and told the clerk

who took his payment that it was okay to sell to him.

Officer MacDonald then spoke to Debra Jennings and she told him that she thought Jucutan was old enough to purchase alcoholic beverages because he was born in 1983. Jennings then accompanied MacDonald and Jucutan to a storage room in the store where Jucutan while standing in front of Jennings pointed at her and verbally identified her as the person who had checked his identification and had then told the other clerk it was okay to sell the beer to him.

MacDonald and the decoy returned to the check-out counter and Jucutan next identified Sisombath by pointing to her and stating that she was the person who received payment from him and rang-up the sale. This identification was made across the counter in a face to face confrontation from a distance of about four feet. Sisombath told MacDonald that before she made the sale to Jucutan she asked Jennings if Jennings had checked Jucutan's identification and Jennings told her to make the sale to Jucutan.

Officer MacDonald prepared a written report (Exhibit 2) one day after the incident, and a supplemental report (Exhibit 3) approximately two weeks later. He testified, consistently with those reports, that the identification of Jennings took place in a back room, and that of Sisombath took place at the counter following the decoy's identification of Jennings. The decoy, on the other hand, recalled that he identified both clerks while at the counter.

Both Officer MacDonald and the decoy agreed that, when the two first entered the store, the decoy identified Jennings as the clerk who checked his identification and Sisombath as the clerk who rang up the sale. MacDonald appears not to have considered this to be the face to face identification required by the rule, hence the later identifications, one in the back room (where the photograph of the decoy and Jennings was apparently taken), and one at the counter.

Although it is readily apparent that the ALJ placed greater weight on the testimony of Officer MacDonald regarding the circumstances surrounding the face to

face identifications by the decoy, than on that of the decoy, it cannot fairly be said that he made a determination that the decoy's testimony was not credible. There were, not surprisingly, inconsistencies in their respective recollections, but not to the degree that either was testifying falsely.

Holohan v. Massaneri, supra, is a federal case stating a rule to be applied in administrative proceedings involving Social Security disability claims. The case holds that a claimant's testimony cannot be rejected without giving "clear and convincing reasons." It has no bearing on the issues in this case.

III

Appellant argues that the ALJ erred by failing to consider the decoy's "considerable law enforcement experience" he gained as a police cadet for the Santa Rosa Junior College Police Department, emphasizing the confidence he would have acquired. Appellant claims that the ALJ focused solely on the decoy's physical appearance even though his law enforcement experience would have affected his demeanor.

The ALJ found as follows with respect to the decoy's appearance (Finding of Fact III):

There was nothing remarkable about the decoy's nonphysical appearance at the hearing. He provided straightforward answers during his testimony. At the time of Respondent's illegal sale of alcoholic beverages Jucutan was 5' 8" tall and weighed 145 pounds. His height and weight were unchanged at the hearing seven months later. He wore blue jeans, a grey sweatshirt and a black baseball style cap with a bill when he visited Respondent's premises on February 13, 2003. He was dressed in a similar casual manner during the hearing although minus a cap. On neither occasion was he wearing jewelry.

Prior to this decoy operation, Jucutan had worked as a police cadet with his

college police. His duties included foot patrol on campus. He testified he was not nervous during the decoy operation and he did not appear nervous while testifying.

Decoy Jucutan visited twelve licensed premises during the February 13, 2003, decoy operation. One other of the licensed premises also sold an alcoholic beverage to him.

On the day of the decoy operation, decoy Jucutan shaved about five hours before entering Respondent's premises. He had shaved about three hours before testifying at this hearing. During the hearing in response to Respondent's attorney's statement that the decoy had shadows of a mustache and chin-line beard, the decoy initially agreed that he normally had such appearance but later stated he did not know if he had any facial shadows caused by the growth of facial hair on either occasion. He testified credibly that it was hard for him to grow facial hair.

No shadow of a mustache or other facial hair was visible during the hearing even when the Administrative Law Judge held a legal sized writing tablet above Jucutan's head so that his face was in shadow in a manner similar to the effect caused by a cap's bill.

Exhibit 7, is a photograph taken soon after the sale showing decoy Jucutan and Assistant Manager Jennings. After considering the photograph depicted in Exhibit 7, the overall appearance of the decoy when he testified and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance that could generally be expected of a person under twenty-one years of age under the actual circumstances presented at the time of the alleged offense.

While it is true that the ALJ paid considerable attention to the decoy's physical description, it cannot be said that he confined himself to that. He acknowledged the decoy's police cadet experience, his calmness at the hearing, and said the decoy's non-physical appearance was unremarkable. He considered the decoy's overall appearance in concluding that Rule 141(b)(2) was satisfied, and we cannot ask for more.

We did not have the opportunity the ALJ enjoyed of observing the decoy as he

testified. We can only read the decoy's testimony, and examine his face and manner of dress as depicted in the photograph (Exhibit 7). Nothing there leads us to believe we could better assess the decoy's appearance than did the ALJ.

ORDER

The decision of the Department is affirmed.³

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

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.