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

AB-8516
File: 20-371215 Reg: 05060384

CHEVRON STATIONS, INC., dba Chevron
145 Hartz Avenue, Danville, CA 94526,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: January 11, 2007
Sacramento, CA
Redeliberation: February 1, 2007

ISSUED APRIL 5, 2007

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 appellant's clerk selling an alcoholic beverage to a Department 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, Ryan M. Kroll, and Kevin R. Snyder, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

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[1]The decision of the Department, dated January 26, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on January 18, 2002. On August 9, 2005, the Department filed an accusation against appellant charging that, on June 30, 2005, appellant's clerk sold an alcoholic beverage to 18-year-old David Sanchez. Although not noted in the accusation, Sanchez was working as a minor decoy for the Department at the time.

At the administrative hearing held on December 6, 2005, documentary evidence was received and testimony concerning the sale was presented by Sanchez (the decoy) and by Department investigator Jaime Villones.

The Department's decision determined that the violation charged was proved and no affirmative defense was established. Appellant then filed an appeal contending that rules 141(b)(2)[2] and 141(b)(5) were violated.

DISCUSSION

I

Rule 141(b)(2) requires that a decoy display the appearance that could generally be expected of a person under the age of 21. Appellant contends that "the overwhelming weight of the evidence" indicates that the decoy appeared at least 21 years old at the time of the sale. Sanchez, appellant asserts, was an experienced "professional" decoy who displayed no nervousness and must, therefore, have appeared to be at least 21 years old.

The rule, through its use of the phrase “could generally be expected” implicitly recognizes that not every person will think that a particular decoy is under the age of 21. Thus, the fact that a particular clerk mistakenly believes the decoy to be older than

[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.

he or she actually is, is not a defense if in fact, the decoy's appearance is one which could generally be expected of a person under 21 years of age. In this case, of course, we do not know whether the clerk thought that the decoy was at least 21, because the clerk did not testify.

The decoy's lack of nervousness is only one consideration, to be balanced against such other considerations as overall appearance, demeanor, manner of dress, manner of speaking, physical movements, and the like. The Board has addressed, and rejected, many times before the argument made here, that the decoy's experience must necessarily have made him appear to be at least 21. In *Azzam* (2001) AB-7631, for example, the Board said:

> Nothing in Rule 141(b)(2) prohibits using an experienced decoy. A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. While extensive experience as a decoy or working in some other capacity for law enforcement (or any other employer, for that matter) may sometimes make a young person appear older because of his or her demeanor or mannerisms or poise, that is not always the case, and even where there is an observable effect, it will not manifest itself the same way in each instance. There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.

The ALJ noted and considered the same physical and non-physical features of the decoy that appellant urges require a finding that the decoy's appearance violated rule 141(b)(2), yet the ALJ found that the rule was not violated. As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he or she testifies. We are not in a position to second-guess the trier of fact, especially where the only basis for doing so is a partisan appeal that the decoy lacked the appearance required by the rule. That being

the case, and there being no indication that the ALJ used an improper standard in applying the rule, appellant's contention is rejected.

II

Rule 141(b)(5) requires, after a sale to a minor decoy, "but no later than the time a citation, if any, is issued," that a reasonable attempt be made to "have the minor decoy . . . make a face to face identification of the alleged seller of the alcoholic beverages." Appellant contends that this decoy operation did not strictly comply with rule 141(b)(5) as required by *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd*. (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126], because the clerk could not reasonably have been aware that he was being identified as the seller. Appellant also contends that the ALJ's finding of compliance with the rule is not supported by substantial evidence, but rather upon assumptions.

The decision discusses the decoy's identification of the seller in Finding of Fact V and appellant's rule 141(b)(5) defense in Finding of Fact VII, paragraph 5:

> V. Outside, Sanchez walked to the investigators' car and showed them the beer. They then returned inside the premises. Investigator Villones went to the counter with Sanchez and asked him to identify the seller. The two clerks[3] were behind the counter. Sanchez pointed to the male clerk and stated he was the seller. The male clerk had eye contact with Investigator Villones at this time. He was about three feet from the two when he was identified. He was cited.
> [¶] . . . [¶]
> VII. 5. Respondent postures that the Department did not make a reasonable attempt to have the decoy enter the premises after the transaction and make a face-to-face identification of the seller.
> Respondent failed to establish this affirmative defense. The evidence wholly contradicts this interpretation of the events. The decoy returned to the premises with investigators of the Department, approached the seller and, in response to a question from Investigator Villones, pointed to the seller and identified him as the clerk involved in

[3]The decision states, in Finding of Fact IV, that "Behind the counter were two employees- a male and a female."

> the transaction. The clerk appeared to be looking at the two when this occurred.
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> Respondent [failed] to establish a defense under Rule 141, subsection (b)(5).

It is important to remember that when an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision 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, 94 [84 Cal.Rptr. 113].) "Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (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].)

In its review, 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. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [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, 826-827 [40 Cal.Rptr. 666].)

Appellant states that the decoy and the clerk were not looking at each other when the decoy identified the clerk as the seller; that the decoy did not verbally identify

the seller; that, because the two clerks were standing close to each other, it was not clear to whom the decoy was pointing; and, therefore, "it is not reasonable to say that on an individual basis [the two clerks] ought to have known who specifically was being identified." (App. Br. at p. 7.) Appellant's argument is based on misstatement of the facts and on the very type of unacceptable assumptions it accuses the ALJ of making.

While there are some minor inconsistencies in the testimony, it was the job of the ALJ, not this Board, to resolve those conflicts. Substantial evidence clearly exists in the record to support the findings of the Department's decision that the clerk was looking at both the decoy and the officer, that the decoy verbally identified the seller, and that the decoy clearly identified the male clerk. From these facts, the ALJ made the eminently reasonable inference[4] that the male clerk reasonably should have known that he was being identified as the seller.

ORDER

The decision of the Department is affirmed.[5]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4]Appellant has confused or misused the terms *assumption* and *inference*. The American Heritage Dictionary (4th ed. 2000) defines "assumption" as "something taken for granted or accepted as true *without proof*." *Inference*, however, is defined in that dictionary as "the act of reasoning from factual knowledge or evidence." A decision may be supported by reasonable inferences, as is the decision here.

[5]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.