

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

AB-9131

File: 20-481969 Reg: 10072721

CHEVRON STATIONS, INC., dba Chevron Stations, Inc.
3085 East Central Avenue, Fresno, CA 93725,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: July 14, 2011
San Francisco, CA

ISSUED AUGUST 10, 2011

Chevron Stations, Inc., doing business as Chevron Stations, Inc. (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its off-sale beer and wine 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, Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kelly Vent.

¹The decision of the Department, dated September 2, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on September 20, 2009. On March 17, 2010, the Department filed an accusation against appellant charging that, on October 28, 2009, appellant's clerk sold an alcoholic beverage to Zachary Buie, a person under the age of 21. Although not noted in the accusation, Buie was working as a minor decoy for the Fresno County Sheriff's Department at the time.

At the administrative hearing held on July 13, 2010, documentary evidence was received, and testimony concerning the sale was presented by Buie. Appellant presented no witnesses.

Subsequent to 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 making the following contentions: (1) There was no compliance with Rule 141(b)(2); and (2) there was no compliance with Rule 141(b)(5).

DISCUSSION

I

The administrative law judge (ALJ) addressed the decoy's appearance in Findings of Fact 5, 7 and 8:

FF 5: Buie appeared and testified at the hearing. When he visited the Licensed Premises he was 6 feet, 2 inches tall and weighed 175 pounds. His height and weight on the day of the hearing were the same. Buie has dark hair and green eyes. When Buie entered the Licensed Premises he was wearing a gray t-shirt that bore a "Highland Riders" and an orange wing insignia, blue jeans, and black tennis shoes. (State's Exhibit 2.) Buie was clean shaven, having shaved the day of the decoy operation. Buie normally shaves only once every two weeks. His complexion is smooth and there are no wrinkles around his eyes. During the decoy operation and at hearing, Buie did not wear any jewelry, earrings, or watch. He did wear glasses at the hearing, but did not have them on during the decoy operation. Decoy Buie appeared substantially the same at the hearing as he did at Respondent's Licensed Premises on October 28, 2009.

FF 7: Buie has participated in at least three decoy operations. He was given the following instructions; enter the store(s) and select a 20 ounce Bud Light beer, show his identification if asked by the clerk, and to divulge his true age if asked. During each decoy operation he visited approximately 15 licensed premises attempting to purchase alcoholic beverages. He claimed not to be nervous during any of the operations.

FF 8: Buie is a tall, gangly young man, whose appearance is consistent with a 17-year-old teenager. At hearing, Buie's conduct was somewhat immature; oftentimes breaking out in inappropriate bursts of laughter prior to responding to simple questions. Based on his overall appearance, *i.e.*, his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance in front of Respondent's sales clerk at the Licensed Premises on October 28, 2009, Buie displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to the clerk. A reasonable seller of alcoholic beverages would have and should have asked for Buie's identification.

Appellant disagrees with these findings, and contends that the decoy did not display the appearance required by Rule 141(b)(2), *i.e.*, that "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." It melds a series of non-sequiturs, irrelevancies, and distortions of the record to support its contention that this 17-year-old decoy somehow must have appeared to the clerk to be over 21 years of age.

First of all, appellant suggests (App. Br., pp. 1, 5) that because Buie "towered" over the clerk, it was a violation of the rule to use him as a decoy. Of course, neither Buie nor the Fresno Sheriff's Department had any idea he would encounter a clerk of unusually diminutive stature. (See Exhibit 2.) Appellant argues as if a 6'2" teenager simply by being tall appears to be over 21. A visit to just about any high school would dispel that notion.

We also think appellant seriously distorts the record in its accusation that the decoy possessed a “cavalier attitude” by smiling during the operation.² Buie acknowledged that he may have smiled “a little bit” when the photograph showing him and the clerk together was taken, but one could hardly describe that as a smile during the operation.

Admittedly, Buie was not nervous when he purchased the beer. We do not think that alone is enough to age the decoy another four or more years in the appearance he presented to the clerk.

Nothing appellant says in its brief persuades us that the ALJ’s findings are flawed or should be disregarded. We see in this appeal nothing more than an inability or unwillingness to accept an unpleasant outcome.

II

Appellant contends secondly that there is no properly admissible evidence in support of the finding that there was compliance with Rule 141(b)(5), which states:

Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

This contention is without merit.

² We think it useful to set out in full appellant’s remarks concerning the decoy’s conduct during the operation, to illustrate the lengths to which it will go to present an ill-conceived defense:

He [the decoy] testified that he was not nervous the first time he was a decoy and that he was not nervous during the decoy operation in question. His cavalier attitude is further evidenced by his testimony regarding his smile during the operation. This confidence and even happiness is certainly not what would generally be expected of a person under the age of 21 who is conducting a decoy operation with law enforcement.

(App. Br., p. 5).

The ALJ stated, in Determination of Issues 5:

The Respondent further argued that the Department violated rule 141(b)(5), claiming it is the Department's legal responsibility to prove compliance with the aforementioned rule. This argument is also rejected since rule 141(b)(5) is an affirmative defense. The Respondent bears the burden of proving the Department failed to comply with rule 141(b)(5). The Respondent failed to prove any affirmative defense vis-à-vis rule 141(b)(5), or any other section of rule 141.

The ALJ's reasoning is consistent with the position the Appeals Board has taken in a number of cases. For example, in *7-Eleven/Dhami* (2009) AB-8871, the Board stated:

In this case, there was evidence that the decoy reentered the premises after having made the purchase. However, the decoy was not asked whether a face to face identification was made. With the burden of proof on appellants, and no evidence on the issue, it necessarily follows that appellants failed to establish the affirmative defense.

We reach the same conclusion here.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This 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.