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

AB-9215
File: 20-377010 Reg: 11074765

CHEVRON STATIONS, INC., dba Chevron Stations
3921 Irvine Boulevard, Irvine, CA 92602,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 6, 2012
Los Angeles, CA

ISSUED OCTOBER 17, 2012

Chevron Stations, Inc., doing business as Chevron Stations (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days, with all 10 days stayed for a period of one year, provided no cause for disciplinary action occurs within the one-year period, for its 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 Barat Saltsman and Autumn M. Renshaw, and the

[1]The decision of the Department, dated November 4, 2011, is set forth in the appendix.

Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on August 8, 2001. On April 5, 2011, the Department filed an accusation charging that on October 29, 2010, appellant's clerk, Rai Biswas (the clerk), sold an alcoholic beverage to 18-year-old Cody Skelly. Although not noted in the accusation, Skelly was working as a minor decoy for the Irvine Police Department at the time.

At the administrative hearing held on August 18, 2011, documentary evidence was received, and testimony concerning the sale was presented by Skelly (the decoy) and by Kayla Wiebe, an Irvine Police officer.

Testimony established that on October 29, 2012, the decoy entered the premises, selected a six-pack of Bud Light beer in cans, and took it to the sales counter. There, the clerk scanned the beer and asked the decoy for identification. The decoy handed the clerk his California driver's license which contained a blue stripe indicating "Provisional Until Age 18 in 2010" and a red stripe indicating "Age 21 in 2013." The clerk looked at the license and completed the sale without asking any age-related questions of the decoy. The decoy exited the premises with the beer, and subsequently re-entered to identify the clerk. As the decoy approached the counter, the clerk was engaged in conversation with police officers. One of the officers asked the decoy who sold him the beer, and the decoy identified the clerk. The clerk was then issued a citation.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven and no defense to the charge had been

established.

Appellant filed a timely appeal contending: (1) Rule 141(b)(5)[2] was violated and (2) rule 141(b)(2) was violated.

DISCUSSION

I

Appellant contends that the face-to-face identification of the clerk was overly suggestive, and not in compliance with rule 141(b)(5), because police officers were conversing with the clerk when the decoy re-entered the premises to make a face-to-face identification.

Rule 141(b)(5) provides:

> 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.

If any of the requirements of rule 141 are violated, subdivision (c) of the rule provides that the licensee has a complete defense to a sale-to-minor charge.

Appellant alleges the identification was overly suggestive because at the time it occurred, police officers had "surrounded the clerk." (App.Br. at p. 5.) Appellant asserts that the clerk was distracted by the officers and therefore could not have known he was being identified by the decoy. (*Ibid.*) Finally, appellant argues that "the purpose of the face-to-face identification is to promote fairness in minor decoy operations and provide necessary protection to ABC licensees," and that the violation of this requirement by the Department constitutes reversible error. (App.Br. at pp. 5-6.)

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[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.

Appellant's last argument misstates the rule. It is not that the Department must demonstrate compliance with the rule; rather, it is appellant's burden to establish the affirmative defense of rule 141 by showing that the rule was not complied with. (*7-Eleven, Inc./Hipolito* (2006) AB-8444.) "The burden of proving an affirmative defense falls on the party asserting it." (*Ibid*.)

The Board has long since repudiated the idea that the Department bears the burden of making a prima facie showing of compliance with the rule and that without that showing, the licensee is entitled to the complete defense provided by subdivision (c) of rule 141. In *7-Eleven, Inc./Lo* (2006) AB-8384, the Board specifically overruled its decision in *The Southland Corporation & R.A.N., Inc*. (1998) AB-6967, the appeal in which that erroneous notion was first propounded.

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 said 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." And in *Chun* (1999) AB-7287, the Board stated:

> The phrase "face 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.

The evidence supports a finding that a face-to-face identification took place. The only question is whether the identification was in some way overly suggestive, or if the clerk was so distracted that he did not know he was being identified.

The administrative law judge (ALJ) made the following finding about the face-to-

face identification in Findings of Fact (FF) II-C:

> C. The preponderance of the evidence established that a face to face identification of the seller of the beer did in fact take place and that the identification of the clerk complied with the Department's Rule 141.

The ALJ goes on to say:

> After the sale of the beer had taken place, the decoy returned to the premises and saw one of the officers standing by the clerk who had sold him the beer. When Officer Russell asked the decoy who had sold him the beer, the decoy pointed to the clerk and stated that he had sold him the beer. When this identification took place, the decoy and the clerk were standing about five feet apart. . . . (FF II-C-1.)

This version of the events belies appellant's description of the clerk as having been "surrounded" by officers.

Appellant contends that the identification of the seller by the decoy was overly suggestive because it took place after police officers had initiated a conversation with the clerk. Appellant calls this "overly suggestive in the same way that an unconstitutional one-man line up is overly suggestive." (App.Br. at p.5.) The ALJ, presented with the same argument, concluded that the face-to-face identification was not unduly suggestive, and that the identification "complied with the Department's Rule 141." (FF II-C, *supra*.)

The court in *Keller*, *supra*, at 109 Cal.App.4th 1687, 1698*,* noted that it is not "inherently unfair" to conduct an identification where there is only one person presented to identify, citing *In re Carlos M.*,[3] in which an alleged assailant was transported to a hospital to be identified by the victim. The court in *Carlos M*. rejected the contention that the identification was unduly suggestive, stating:

> A single-person show-up is not inherently unfair. (*People v. Floyd* (1970)

[3] *In re Carlos M*. (1990) 220 Cal.App.3d 372, 386 [269 Cal.Rptr. 447].

> 1 Cal.3d 694, 714 [83 Cal.Rptr. 608, 464 P.2d 64].) The burden is on the defendant to demonstrate unfairness in the manner the show-up was conducted, i.e., to demonstrate that the circumstances were unduly suggestive. (*People v. Hunt* (1977) 19 Cal.3d 888, 893-894 [140 Cal.Rptr. 651, 568 P.2d 376].) Appellant must show unfairness as a demonstrable reality, not just speculation. (*People v. Perkins* (1986) 184 Cal.App.3d 583, 589 [229 Cal.Rptr. 219].)

(Id., at p. 386.)

The person shown to the victim in *Carlos M*. was wearing handcuffs, but the court held that even that circumstance did not make the identification process unduly suggestive:

> While appellant claims the handcuffs influenced the victim to believe appellant was involved, the mere presence of handcuffs on a detained suspect is not so unduly suggestive as to taint the identification. (See *In re Richard W*. (1979) 91 Cal.App.3d 960, 969-971 [155 Cal.Rptr. 11].)

(*Carlos M*., *supra*.) The instant case involves conduct far less suggestive than that in *Carlos M*., and appellant has not met its burden of showing that this identification was unduly suggestive simply because police officers were speaking to the clerk prior to the actual identification.

Finally, we address the contention that the clerk did not know he was being identified because police officers were speaking to him. This contention is not supported by the evidence. Officer Wiebe testified that an officer spoke to the clerk and explained what was occurring, but that during the actual identification, the officer stopped speaking. [RT 41.]

We believe there was compliance with rule 141(b)(5) in this case.

II

Appellant contends secondly that the decoy did not display the appearance required by rule 141(b)(2) and that there was insufficient evidence to support a finding

that the decoy's appearance complied with the rule.

Rule 141(b)(2), dictates: "[t]he decoy shall display the appearance 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." Appellant maintains that the decoy displayed a 5 o'clock shadow at the time of the decoy operation, giving him the appearance of a mature male over the age of 21.

The ALJ made extensive findings on the decoy's appearance in FF II-D:

> D. The overall appearance of the decoy including his demeanor, his poise, his mannerisms, his size and his physical appearance were consistent with that of a person under the age of twenty-one and his appearance at the time of the hearing was similar to his appearance on the day of the decoy operation.
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> 1. The decoy is a youthful looking young man who is five feet seven inches in height and who weighs one hundred fifty pounds. On the day of the sale, his clothing consisted of gray jeans, a tan sweat-shirt, a green jacket and black sneakers. The decoy testified that he shaved on the morning of the day of the sale and that he probably had a slight 5' oclock [*sic*] shadow when he visited the premises. The photographs depicted in Exhibits 2 and 3 were taken on the day of the sale before going out on the decoy operation and the photograph depicted in Exhibit 5 was taken at the premises. All three of these photographs show how the decoy looked and what he was wearing on the day of the sale.
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> 2. . . . The decoy also testified that he was nervous when he visited the premises, that he had not participated in any prior decoy operations, that he has not served as a police Explorer or cadet and that he was not paid to be a decoy.
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> 3. There was nothing remarkable about the decoy's nonphysical appearance and there was nothing about his speech, his mannerisms or his demeanor that made him appear older than his actual age.
>
> [¶]
>
> 5. After considering the photographs depicted in Exhibits 2, 3 and 5, 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 to the seller at the time of the alleged offense.

The Board is bound by the factual findings in the Department's decision as long as they are supported by substantial evidence. The standard of review is as follows:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends,* [*Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002)] 100 Cal.App.4th [1250,]1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; ....) We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor an appellate court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

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 testifies, and making the determination whether the decoy's appearance met the requirement of rule 141 that he possessed the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages. We are not in a position to second-guess the trier of fact, or to re-weigh the evidence, especially where all we have to go on is a partisan appeal that the decoy lacked the appearance required by the rule, and an equally partisan response that he did not.

ORDER

The decision of the Department is affirmed.[4]

FRED ARMENDARIZ, CHAIRMAN
BAXTER RICE, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[4]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.