

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

AB-9304

File: 20-286536 Reg: 11075889

CHEVRON STATIONS, INC.,
dba Chevron Station
1960 West 11th Street, Tracy, CA 95376,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: July 11, 2013
Sacramento, CA

ISSUED JULY 30, 2013

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 15 days, with 10 days stayed, 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 D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kelly Vent.

¹The decision of the Department, dated August 23, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on November 30, 1993. On October 17, 2011, the Department filed an accusation charging that appellant's clerk, Alicia Granados (the clerk), sold an alcoholic beverage to 19-year-old Kayla Cole on July 29, 2011. Although not noted in the accusation, Cole was working as a minor decoy for the Tracy Police Department at the time.

At the administrative hearing held on April 4 and June 6, 2012, documentary evidence was received, and testimony concerning the sale was presented by Cole (the decoy). Appellant presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the premises alone and selected a six-pack of Bud Light beer. She took the beer to the cash register, where the clerk asked for her identification. The decoy took her California driver's license from her pocket and handed it to the clerk. The decoy's driver's license bore the portrait orientation indicating that she was under 21, as well as a red bar with the words "AGE 21 IN 2012." The clerk examined the decoy's identification for about 3 to 5 seconds, then proceeded with the sale. The clerk did not ask the decoy any age-related questions. Following the sale, the decoy exited the premises.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and that the appellant had failed to establish a defense under rule 141(b)(2).

Appellant filed an appeal contending that the decoy did not display the appearance required by rule 141(b)(2).

DISCUSSION

Appellant contends that the ALJ failed to proceed in the manner required by law and abused his discretion when he disregarded appellant's 141(b)(2) argument and the evidence supporting it.

Rule 141(b)(2) requires that the decoy "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." Proof that the law enforcement agency involved failed to comply with any of the provisions of rule 141 provides a defense to a sale-to-minor charge arising from a decoy operation.

As this Board has observed many times, the ALJ has the opportunity to observe the decoy while she testifies, and this Board does not. The ALJ's determination is one of fact, and in the absence of any evidence that the ALJ utilized an improper standard, this Board must affirm.

The appellant specifically takes issue with the ALJ's refusal to characterize its assertions as evidence. The ALJ addressed these arguments in his Determination of Issues, paragraph II:

Respondent's counsel contends the decoy's "mature appearance" consisting of a "voluptuous" figure, coupled with her prior decoy experience (i.e. a "super decoy") violate the appearance standard set out in Rule 141(b)(2). These arguments are merely conjecture since the selling clerk did not testify and no other evidence was presented by the Respondent on the issue.

The appellant counters that there is "ample evidence" to support its position, "including the decoy herself, the decoy's experience, and surveillance photographs of the decoy at the point of sale." (App.Br. at p. 2.)

We agree with the ALJ that appellant's "evidence" is mere conjecture. Appellant offers subjective, illusory descriptions of the decoy, such as "voluptuous" and "mature." Appellant did not support these descriptions with any testimony or other evidence; indeed, they appear to be little more than serviceably evocative terms selected by appellant's counsel. The appellant did present surveillance photos; these photos are, as the ALJ noted, an accurate depiction of the decoy's appearance during the actual purchase. (See Findings of Fact ¶ II.C.2.). However, these are merely photographs of the decoy, and do nothing to support appellant's contention that her appearance violated rule 141(b)(2). We agree that appellant failed to present evidence that the decoy appeared either "voluptuous" or "mature," or that either of these vague, subjective labels necessarily indicates a violation of rule 141(b)(2).

Additionally, appellant asserts that the decoy's experience lent her an air of confidence. (App.Br. at pp. 4-5.) The ALJ did observe that her testimony was "direct and concise," and that she "did not appear nervous" and "showed little emotion." (Findings of Fact ¶ II.D.1.). However, he ultimately concluded that "[t]here was no evidence presented that [her] prior experience as a decoy caused or contributed to the clerk selling an alcoholic beverage to him [sic]. The selling clerk did not testify at the hearing." (Findings of Fact ¶ II.D.2.) We agree; this Board cannot accept mere speculation, and appellant offers no support for its conclusion that an air of confidence necessarily makes an individual appear over 21 years of age.

Finally, there is evidence indicating that the clerk proceeded with the sale despite indisputable evidence that the decoy was a minor. The clerk requested and was given the decoy's valid identification, examined it, and nevertheless proceeded with the sale. (See Findings of Fact ¶ II.B.) Moreover, the decoy's driver's license bears the rotated

portrait orientation indicating that the holder is under 21, along with a red stripe bearing the words "AGE 21 IN 2012." [Exhibit 3.] A mere glance at the decoy's identification should have immediately alerted the clerk that the decoy was underage.

Appellant's clerk did not testify. Instead, appellant feeds this Board unsupported, subjective, and ultimately meaningless descriptions regarding the decoy's relative voluptuousness and confidence, and would have us hold that this "evidence" trumps the uncontradicted fact that the clerk examined and ignored indisputable evidence of the decoy's actual age. This Board cannot reconsider the decision below on such feeble grounds.

ORDER

The decision of the Department is affirmed.²

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This 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.