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

AB-7731
File: 20-344101 Reg: 99047257

CHEVRON STATIONS, INC. dba Chevron Station #98958
1650 41st Avenue, Capitola, CA 95010,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja

Appeals Board Hearing: October 11, 2001
San Francisco, CA

ISSUED DECEMBER 11, 2001

Chevron Stations, Inc., doing business as Chevron Station #98958 (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 person under the age of 21, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Chevron Stations, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

---

[1]The decision of the Department, dated October 26, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on July 28, 1998. Thereafter, the Department instituted an accusation against appellant charging that, on June 4, 1999, appellant's clerk, Joshua Blum ("the clerk"), sold an alcoholic beverage to 18-year-old Melissa Clemens.

An administrative hearing was held on January 26, June 7, and August 29, 2000, at which time documentary evidence was received and testimony was presented on behalf of the Department by former Department investigator Alfred Fuerte, Department district supervisor Christopher O'Hanlon, Melissa Clemens, and Department investigator Mamie Gon, and on behalf of appellant by Bobby Pinkerton.

Fuerte and Gon testified that on June 4, 1999, they saw Clemens remove two bottles of Corona beer from the cooler in the premises, and saw Pinkerton remove a can of Fosters beer and hand it to Clemens. Clemens took the beer to the counter, where the clerk rang up the beer and Clemens paid for it. The investigators stopped Clemens and Pinkerton, who was carrying the beer in a bag, a few minutes later outside the premises and checked their identification, which showed that Pinkerton was 21 and Clemens was 18. Investigator Gon informed Clemens and Pinkerton that she had observed Clemens purchase the beer.

Clemens and Pinkerton testified that, although Clemens paid for the beer, it was with money that she had received earlier from Pinkerton. Both testified that they told Gon that Pinkerton purchased the beer. Clemens and Pinkerton were boyfriend and girlfriend, living together at the time of the incident and at the time of the hearing. Both were also employed at the premises.

Subsequent to the hearing, the Department issued its decision which determined that the violation had been established as charged in the accusation.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the testimony of the investigators is contradictory and inconsistent; (2) the Department failed to explain why it choose to believe the testimony of the investigators rather than that of Clemens and Pinkerton; (3) the clerk did not sell beer to Clemens; and (4) there was no "adoptive admission" by either Clemens or Pinkerton. The first two issues are related and will be discussed together.

DISCUSSION

I

Appellant contends there were numerous inconsistencies between the testimony of investigator Gon and that of investigator Fuerte, the Department's decision erred in stating that the investigators were in a position to observe the entire incident, and investigator Gon did not have an independent recollection of events and had a motive to lie. In any event, appellant argues, the decision must be reversed because the ALJ failed to follow the directive of Holohan v. Massanari (2001) 246 F.3d 1195 (9th Cir.) by failing to explain his reasons for accepting the investigators' testimony rather than that of Clemens and Pinkerton.

Appellant takes issue with the ALJ's statements about the investigators' testimony. The ALJ discussed the conflicts in the testimony in Finding III-4 [the specific part objected to by appellant is underlined]:

> "There is a conflict in the testimony. Although there are minor inconsistencies in the testimonies of the witnesses, the testimony of Investigators Fuerte and Gon is found to be more credible.

> "A. Ms. Clemens and Mr. Pinkerton were employed at these premises; following the incident they had discussed the matter with their manager, Bob McGee; subsequently, Mr. McGee had advised them to prepare a report of the incident; they had prepared the report a few days or a week later; they did not rely upon any notes prepared immediately after the incident; they prepared the statements while they were at home seated near each other. They had a strong motive to fabricate because at the time of the incident, and at the time they prepared their statements, they were employed at the premises by [appellant]; their livelihood could have been affected had they admitted violating the law. In addition, they had an opportunity to fabricate because of their relationship to each other, and their conversation with Mr. McGee right after the incident. In contrast, the testimony of Officers Fuerte and Gon was consistent with each other. They were in a position to observe the entire incident, and they had no motive to lie. Investigator Gon had prepared a report following the incident. They appeared to respond to the questions by recalling the incident, supplemented with the report prepared by Ms. Gon. Therefore, the contentions of Ms. Clemens and Mr. Pinkerton are rejected; it is found that Ms. Clemens purchased the beer, and paid for it herself, and the clerk, Mr. Blum, sold the beer to Ms. Clemens."

With regard to the inconsistencies between Gon and Fuerte, appellant points out two, one having to do with whether the investigators first saw Clemens and Pinkerton inside the store or outside, the other whether Clemens took the bagged beer over to Pinkerton or Pinkerton picked up the beer from the counter. Two inconsistencies, however, do not make testimony "rife with inconsistencies" as asserted by appellant. Overall, the testimony of the investigators was consistent; the discrepancies that exist are not such that would affect the credibility of their testimony.

Next, appellant complains that the investigators were not in a position to observe the entire incident as stated in the Department's decision. Fuerte, appellant asserts, did not observe money actually being transferred from Clemens's hands to the clerk's hands, and he was not present the entire time that Gon was talking to Clemens and Pinkerton outside the premises. Therefore, Fuerte could not corroborate all of the facts testified to by Gon.

Gon, appellant argues, was not in a position to observe the entire incident because she could not possibly have simultaneously observed both Clemens at the counter and Pinkerton at the microwave. In order to observe one, she would have to turn her back on the other. As far as we can tell, however, only appellant has used the word "simultaneous" to describe Gon's observations of Clemens and Pinkerton during the actual transaction. Appellant is right; it is simply impossible for absolute simultaneous observation of the two given their relative positions and that of Gon. Gon, however, testified that she either "glanced toward [Pinkerton's] direction" or saw him in her peripheral vision while she was focused primarily on the interaction between the clerk and Clemens. It is easy to visualize Gon's observation of what both Clemens and Pinkerton were doing at that time, unless we assume, as appellant would apparently have us do, that Gon was rooted to the spot between Clemens and Pinkerton, unable to even turn her head or her eyes away from Clemens. Such an assumption would clearly be unjustified.

Appellant argues that the ALJ's statement, "They [i.e., Gon and Fuerte] were in a position to observe the entire incident," is false, but the ALJ used it to help give credence to the investigators' testimony. In fact, while perhaps neither Gon nor Fuerte saw every moment of the incident, between the two of them, the entire incident was able to be fully described and, therefore, the ALJ's statement was accurate. The fact that one could not corroborate the other on some detail does not make the testimony of either less credible.

Investigator Gon's motive to lie, appellant asserts, was that she "derives her livelihood from her Department salary." This contention does not merit discussion.

This Board has previously considered, and rejected, appellant's argument that Holohan v. Massanari, supra, requires an explanation of the ALJ's rejection of certain testimony and acceptance of other testimony. In 7-Eleven, Inc. and Huh (8/16/01) AB-7680, we said:

> "We have reviewed the decision in [Holohan], and the court decisions cited in support of that portion of the court's holding, and are satisfied that the view expressed by the court is peculiarly related to federal Social Security disability claims, and does not reflect the law of the State of California. While it may be true that a statement of the factors behind a credibility determination may be of considerable assistance to a reviewing court, and is welcomed by this Board, we are not prepared to say that a decision which does not set forth such considerations is fatally flawed."

We continue to reject this argument here.

II

Appellant contends that the clerk did not sell the beer to Clemens, but to Pinkerton. According to appellant, even though Clemens handed the money to the clerk, she did not intend to buy the beer, and thus no "sale" could have been made to her. Rather, appellant argues, Pinkerton intended to buy the beer and Clemens was merely a conduit for the payment of Pinkerton's money to the clerk for the beer.

This argument is based almost entirely on the testimony of Clemens and Pinkerton, testimony that was rejected by the ALJ as not credible. The ALJ found that Clemens took the beer to the counter, took money out of her purse, and paid for the beer. This establishes a sale to Clemens and the ALJ found that there was no credible testimony refuting this. The fact that Pinkerton happened to be carrying the bag containing the beer when he and Clemens left the premises is not sufficient to indicate that the beer was sold to him.

It is the responsibility of the trier of fact, not this Board, to determine credibility and to resolve conflicts in testimony. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812]; Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].) The ALJ carried out his responsibilities in these areas, and appellant has presented no reason for this Board to attempt to go behind the ALJ's determinations.

III

Appellant contends that, as a matter of law, neither Clemens nor Pinkerton made an "adoptive admission" by their failure to deny, when Gon confronted them, that Clemens purchased the beer. For silence to constitute an adoptive admission, appellant argues, Gon must have said something more to Clemens than that she had seen Clemens "buy the beer"; she must have "asserted that title and ownership in the beer passed to Clemens, and not that Clemens simply handed money to [the clerk]."

Appellant's argument relies on its contention that there was no "sale" to Clemens. As discussed above, that contention was rejected by the ALJ and also rejected by this Board. A normal person, told that he or she had been seen "buying a beer," where, as here, to do so was a violation of law, would be expected to deny the purchase. If Clemens thought that she had simply given the clerk Pinkerton's money to buy Pinkerton's beer and thus did not "buy the beer," it is only logical to assume she would have said so. Her silence in this case may reasonably be seen as an adoptive admission.

Even if this Board were to find that there was no adoptive admission, it would not affect our resolution of this appeal. The evidence is undisputed that Clemens took the

beer to the counter and gave money to Blum to pay for the beer. This, by itself, constitutes substantial evidence to support the findings and determination of the Department's decision.

ORDER

The decision of the Department is affirmed.[2]

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

---

[2]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.