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

AB-7895
File: 20-339497 Reg: 01050722

CHEVRON STATIONS, INC. dba Chevron
6151 Greenback Lane, Citrus Heights, CA 95621,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: July 11, 2002
San Francisco, CA

ISSUED SEPTEMBER 12, 2002

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 its clerk having sold an alcoholic beverage (a 40-ounce bottle of Budweiser beer) to a 16-year old decoy, 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 Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

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[1]The decision of the Department, dated September 27, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on May 28, 1998. Thereafter, on April 30, 2001, the Department instituted an accusation against it charging that, on August 23, 2000, its clerk, Wade Hart ("the clerk"), sold an alcoholic beverage (beer) to Scott Lera, who was then sixteen years of age. Although not stated in the accusation, Lera was acting as a decoy for the Citrus Heights Police Department.

An administrative hearing was held on August 7, 2001, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Lera ("the decoy") and by Dan Donelli, an investigator for the Citrus Heights Police Department. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established and that appellant had failed to establish any defense to the charge.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends that Lera did not display the appearance required by Department Rule 141(b)(2) (4 Cal. Code Regs. §141(b)(2)).[2] Appellant does not contest the fact that Lera purchased an alcoholic beverage.

DISCUSSION

Appellant contends that the Administrative Law Judge (ALJ) erred in relying on Lera's testimony to find that he was 6 feet 2 inches in height and weighed 160 pounds at the time of the transaction, in the face of other evidence and testimony that Lera

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[2] Rule 141(b)(2) requires that a 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." Failure to comply with the rule is a defense to any action brought under Business and Professions Code §25658.

might have been as tall as 6 feet 3 or 4 inches in height and weighed as much as 180 pounds. Consequently, asserts appellant, there is not substantial evidence in the record to support the finding.

Appellant points to the decoy's California driver's license (Exhibit E) which shows him to have been 6 feet 3 inches tall and weighing 187 pounds one year before the decoy operation, and decoy information sheets (Exhibits D and E) describing him as 6 feet 4 inches tall and weighing 180 pounds.

Using the discrepancies between the ALJ's finding and the height and weight statistics on the exhibits, appellant posits this argument:

> "If this administrative law judge predicated his review of the apparent age of the minor decoy and the assessment of compliance or non-compliance with Rule 141(b)(2) upon the finding that the decoy stood 6 foot 2 inches and was 160 lbs at the time of the decoy operation when he was more probably 6 foot 4 inches and 180 lbs then the assessment is based upon inaccurate information."

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corporation* v. *National Labor Relations Board* (1951) 340 US 474, 477 [71 S.Ct. 456]; *Toyota Motor Sales USA, Inc.* v. *Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (*Bowers* v. *Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences

which support the Department's findings. (*Kirby* v. *Alcoholic Beverage Control Appeals Board* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857]; *Kruse* v. *Bank of America* (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; *Lacabanne Properties, Inc.* v. *Department of Alcoholic Beverage Control* (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and *Gore* v. *Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

The ALJ's findings with respect to the decoy's appearance, at the time of the transaction and at the time of the hearing, are contained in Findings of Fact VI and VII, and are set out here in full:

VI

"A. On the date of the decoy operation, the decoy was about 6 feet 2 inches tall and weighed about 160 pounds. He was wearing blue jeans, a blue shirt and a plaid over-shirt. In addition, he was wearing hiking/walking boots with 1/4 to ½-inch soles. His hair was short; there is no evidence he had any facial hair. The decoy was not wearing any jewelry. State's Exhibit No. 3 depicts the decoy as he appeared on the date of the sale of beer to him. It is found that the decoy displayed the physical appearance which could generally be expected of a person under 21 years old.

"B. On the date of the hearing, the decoy had to be cautioned to let the question be completed before he answered. He testified that on the date of the decoy operation, he was very nervous and sick to his stomach from his nervousness. He did not say 'Hi' when he walked up to the clerk.

"C. Having observed the decoy's overall appearance, and keeping in mind his physical appearance, as well as his demeanor, his mannerisms, and his poise, it is found that the decoy displayed the appearance generally expected of a person under 21 years old. There is no evidence that the decoy presented a substantially or significantly different appearance in front of Mr. Hart, Respondent's clerk, on August 23, 2000.

VII

Respondent argued that the decoy's height caused the decoy to appear older than twenty-one years. Although the decoy was 6 feet 2 inches or maybe even a little taller, he was not large, but was rather skinny. Thus, this physical appearance, including his short hair, and his demeanor and mannerisms made him appear his age of seventeen years. There is no evidence that he presented an appearance at the time of the sale of beer to him which caused him to appear

older than his age. Accordingly, this argument is rejected."

Appellant places too much weight on what was only one consideration taken into account by the ALJ - the approximations of the decoy's height and weight. It is clear from the decoy's testimony that he was not stating his height and weight as if he had just weighed and measured himself. As would anyone who is approximating his height and weight, there is some margin of error. Here, we do not find the discrepancies between the decoy's estimates, the data on the decoy work sheet and the data on the decoy's driver's license, and the ALJ's finding, to be such as to outweigh the other matters considered by the ALJ.

We must not forget that, in his Rule 141(b)(2) assessment, the ALJ is required to make a considered evaluation of what appearance a decoy would have presented to a seller anywhere from six to 12 months earlier, based almost entirely on what he sees before him at the hearing, when the decoy testifies. The Board has routinely acknowledged that the ALJ is in the best position to make that determination, and has been reluctant to interfere with the ALJ's call. Here, the ALJ had the benefit of a photo of the decoy made at the time of the decoy operation, and was in a position to compare the appearance presented in that photo with the appearance presented by the decoy when he testified.

In any event, we think the evidence of the decoy's height and weight at various times is both indefinite and conflicting, and we are inclined to accept the ALJ's resolution of the problems posed by the evidence, and his conclusion that appellant failed to prove a violation of Rule 141(b)(2).[3]

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[3] It is clear the ALJ relied on more than mere numbers: "Although the decoy was 6 feet 2 inches or maybe even a little taller, he was not large, but was rather skinny."

ORDER

The decision of the Department is affirmed.[4]

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

[4] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.