

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

AB-8078

File: 20-366020 Reg: 02053492

CHEVRON STATIONS, INC., dba Chevron # 20-9217
8501 Bond Road, Elk Grove, CA 95624,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: September 4, 2003
San Francisco, CA

ISSUED DECEMBER 15, 2003

Chevron Stations, Inc., doing business as Chevron # 20-9217 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days, with five days thereof stayed for a one-year probationary period, 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, Ralph B. Saltsman, Stephen W. Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on January 11, 2001. Thereafter, the Department instituted an accusation against appellant charging that, on

¹The decision of the Department, dated December 26, 2002, is set forth in the appendix.

June 3, 2002, appellant's clerk, Kurtis Jackson (the clerk), sold an alcoholic beverage to 17-year-old Chad Bowman. Although not noted in the accusation, Bowman was working as a minor decoy for the Elk Grove Police Department at the time.

At the administrative hearing held on November 20, 2002, documentary evidence was received, and testimony concerning the sale was presented by Bowman (the decoy), by Department investigator Kathleen Lenihan, and by David Hutchinson, a Sacramento County deputy sheriff acting under contract as an Elk Grove police officer.

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 thereafter filed a timely appeal in which it contends that Rule 141(b)(2)² was violated.

DISCUSSION

Rule 141(b)(2) requires that a 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." Appellant contends that Bowman, the decoy, did not comply with the rule because he had a receding hairline, a characteristic which, appellant asserts, this Board held to be "highly questionable" and "unacceptable" in *Southland/Te & Yuong* (2001) AB-7430.³

²References 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.

³In addition, appellant argues that another administrative law judge, in a hearing held the day after this hearing, found the same decoy to violate rule 141(b)(2), and the Department adopted that decision without change. Appellant does not ask this Board to take official notice of this decision, nor does it allege that this is newly discovered evidence; it merely attaches a copy of the decision, uncertified, to its brief. Under the

(continued...)

The Department's decision addresses the decoy's appearance in Determination of Issues II as follows:

The evidence shows that the decoy's height and weight at the time of the transaction were 5'11" and 150 lbs., respectively. He was dressed casually. His hair was trimmed short, though it was a bit longer than at the hearing. He did have a premature receding hairline. He wore no cap or jewelry. His sunglasses were setting on his forehead. His appearance at the hearing was quite the same as that in the photograph taken after his confrontation with the clerk (Department's Exhibit No. 2). His overall appearance at the hearing, considering his physical appearance and his demeanor, poise, presence and level of maturity, was that which generally could be expected of a person under the age of 21 years.

There is no reason to expect that his overall appearance at the hearing was any different during the transaction. He was at the counter only a few minutes. No direct evidence was offered as to the clerk's impression of the decoy's age.

Respondent suggests that Bowman's past history as a decoy and Explorer caused him to disguise his emotions and nervousness sufficiently to make the seller believe that he appeared older than 21 years. Again, there was no testimony or other evidence indicating the clerk's view of the decoy. Nor does the fact that the decoy appeared at 22 licensed premises that evening and succeeded in purchasing an alcoholic beverage at six constitute sufficient evidence showing he appeared 21 years or older. Nor does the fact that of the six sites, only one asked for identification. Respondent's arguments are based solely upon speculation.

The ALJ goes on to address, and reject, appellant's contention that the decoy's receding hairline violated the fairness requirement of rule 141(a):

Respondent urges that this decoy operation was not conducted in a fashion that promotes fairness (Rule 141(a)) because the decoy had a

³(...continued)
 circumstances, the Board is not obligated to consider the decision. In any case, the determination regarding the decoy's appearance is not controlling in this case, nor do we find it persuasive: The question before the other ALJ was the decoy's appearance during a transaction on a different date and under different circumstances; he observed the decoy under circumstances different from those at the hearing in the present matter; and he based his determination on an analysis of *Southland/Te and Yuong* that we reject. (See discussion, *infra*.)

premature receding hairline, citing the ABC Appeals Board case of *The Southland Corporation, Khim Te, and Kevin Yuong* (2001) AB-7430.

In *Southland*, the Board reversed a decision of the Department that found cause for disciplinary action involving a decoy operation because, *inter alia*, it determined that the administrative law judge considered "only the decoy's physical appearance in determining there was compliance with Rule 141(b)(2)." In its decision, the Board stated that " the use of a decoy with a prematurely receding hairline is unacceptable and should not have condoned, much less justified, by the ALJ," as a matter of fairness.

The Board has consistently held that limiting the analysis to the decoy's physical appearance "fails to indicate [consideration] of other important indicia of age such as demeanor, poise, presence, or level of maturity, to name some" (*Southland*, pg. 3-4). The Board's remarks concerning the use of a decoy with a receding hairline can be considered as dicta since the issue confronting the Board was the proper standard to be used when determining if the appearance of the decoy complied with the requirements of Rule 141(b)(2).

Respondent, in the case at bar, argues that, regardless of the youthful appearance of the decoy, it is unacceptable for the Department to use him if he has a prematurely receding hairline because it is unfair to do so in violation of Rule 141(a). This despite the fact that the overall appearance of the decoy complies with the requirements of Rule 141.

"Fairness" is defined as the "quality or state of being fair, i.e. fair or impartial treatment." "Fair" is defined as "characterized by honesty and justice; free from fraud, injustice prejudice or favoritism." "Fair" is considered the most general of the terms "just," "equitable," and "unbiased." It "implies a disposition in a person or group to achieve a fitting or right balance of claims or considerations that are free from undue favoritism or implies a quality or result in an action befitting such a disposition." Certainly a determination of whether or not a particular decoy operation was carried out in a fashion that promotes fairness depends upon the particular facts of each case.

Bowman, despite his prematurely receding hairline, displayed the appearance that could generally be expected of a person under 21 years old. In short, his receding hairline does not contribute to making his appearance 21 years or older. Thus, his receding hairline did not constitute unfairness as to his general appearance.

There is absolutely no evidence showing that Bowman's receding hairline contributed in any way toward the sale of an alcoholic beverage to this decoy. There is absolutely no evidence showing that the clerk was in any way influenced by the receding hairline. There is no evidence to

show that the operation was tainted by fraud, injustice, prejudice or favoritism. Base upon the evidence adduced at this hearing, there was no showing that this decoy operation was conducted in a manner that did not promote fairness.

Respondent did not establish a defense under Rule 141.

The ALJ found explicitly that, in spite of a "prematurely receding hairline," Bowman "displayed the appearance that could generally be expected of a person under 21 years old." Although appellant asserts that rule 141(b)(2) was violated, it does not appear to argue that the decoy, in fact, appeared to be at least 21, but that the decoy's receding hairline per se means the rule was violated.

As it did at the hearing, appellant relies for this assertion on this Board's decision in *Southland/Te and Yuong* (2001) AB-7430, which also involved a decoy with a receding hairline. In that case, the Board said that using a decoy with a receding hairline was "unacceptable and should not have been condoned, much less justified, by the ALJ." As pointed out by the ALJ in the present case, however, this language in *Southland/Te and Yuong* was only dicta, reversal in that case being based on the apparent failure of the ALJ to consider factors other than physical appearance when determining that the decoy's appearance met the requirement of rule 141(b)(2). In this context, the Board disapproved the analysis of the ALJ that the rule was not violated by using such a decoy because the decoy was not intentionally disguised to appear older, and his receding hairline was "genetic rather than a process of his maturation."

We do not consider *Southland/Te and Yuong* to stand for the proposition attributed to it by appellant, that a decoy with a receding hairline cannot, per se, display the appearance which could generally be expected of a person under the age of 21. In hindsight, we believe the language used was too strong, and to the extent that the

language implies a per se rule that decoys with receding hairlines violate rule 141(b)(2), we disavow it. Nor do we believe that a receding hairline on a decoy is a per se violation of the rule 141(a) requirement that the decoy operation be conducted in a fashion that promotes fairness.

The ALJ found that the decoy's appearance complied with the requirement of rule 141(b)(2) and did not violate the fairness requirement of rule 141(a). The ALJ, who saw the decoy in person at the hearing, was in a far better position than is this Board to evaluate whether or not the decoy's appearance violated either rule 141(a) or 141(b)(2). The determination of the trier of fact as to the decoy's appearance will not be disturbed in the absence of a clear abuse of discretion.

Appellant states in its brief that "This is not a question over which reasonable minds could differ. This is a case where there is only one possible perception of the evidence: the decoy violated the Rule." Appellant is obviously wrong, since ALJ Judson, in this case, found that the decoy did not violate the rule, and appellant has not shown that his determination was unreasonable or an abuse of discretion.

ORDER

The decision of the Department is affirmed.⁴

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

⁴This 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.