

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

AB-8205

File: 20-363420 Reg: 03055095

ANGELO CARDARELLI and CARLA CARDARELLI dba Mendocino College Chevron
701 Mendocino Avenue, Santa Rosa, CA 95401,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: October 7, 2004
San Francisco, CA

ISSUED JANUARY 10, 2005

Angelo Cardarelli and Carla Cardarelli, doing business as Mendocino College Chevron (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 25 days for their clerk, Shawn Gonzalez, having sold a six-pack of Smirnoff Ice malt beverage to Jennifer Dressel, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Angelo Cardarelli and Carla Cardarelli, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

¹The decision of the Department, dated October 30, 2003, is set forth in the appendix.

PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 3, 2000.

Thereafter, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor.

An administrative hearing was held on September 18, 2003, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged in the accusation, and there had been compliance with Rules 141(b)(2) and 141(b)(5).

Appellants thereafter filed a timely appeal in which they raise the following issues: appellants had a right to counsel, and even though Angelo Cardarelli represented himself, Carla Cardarelli was totally unrepresented; the administrative law judge (ALJ) abused his discretion in denying the requested continuance. These issues are interrelated, and will be discussed together.

DISCUSSION

At the outset of the hearing, appellant Angelo Cardarelli stated:

Sir, I'd like to ask if it is possible for a continuance on this matter. ... I just became aware today of a law firm that specializes in these cases which I was not aware of. I am a Chevron dealer. That means I am independent of the corporation, and I was never aware from Chevron that they have a firm that they have worked with in the past. In my first violation I obtained an attorney from here in Santa Rosa, and I didn't –like I said, it wasn't very satisfactory because it seemed like the steps were preset and the knowledge that I've become aware of this morning tells me that there are other rights in this proceeding that I wasn't aware of before.

The Department opposed the request, asserting that appellant was notified in writing that he had the right to counsel, that he knew this from the fact that he had employed an attorney previously, and that his request was untimely. Appellant Cardarelli responded that the process in connection with the first violation was very informal, while

he learned this morning that the hearing would be formal, with a court reporter.

Judge Dorais, after noting that Angelo Cardarelli had a conversation with an attorney who was there to represent Chevron, suggested to Cardarelli that he employ that attorney, and, if he decided to do so, he, Judge Dorais, would give him “a few minutes” to discuss the case with the attorney, but added:

I know you’ve had an opportunity to discuss with him initially the situation. If you want to step up to the plate and retain an attorney at this point, fine and dandy, but it is, I think, tardy to ask that a hearing be delayed simply because you’ve run into an attorney exiting one hearing as you’re entering another hearing.

Cardarelli replied:

Well, actually the firm contacted me this morning. I was not aware of the firm, and I discussed a few matters with the folks at the office and I – unfortunately Chevron Corporation doesn’t really communicate with its dealers, independent dealers, as to all the resources available. And my experience the first time was that this was pretty much a lockstep process, and the attorney that I hired at the first incident was really of no use. He was paid for really not achieving anything. So as I proceeded into this violation, I just naturally assumed that it was going to be similar as to the first time.

After indicating his agreement with the Department’s opposition to the continuance, Judge Dorais asked: “Do you want to proceed at this time or do you want to retain Mr. Jamieson?”.² Judge Dorais then ordered a brief recess so that Cardarelli could consult with attorney Jamieson. When the hearing resumed, Cardarelli appeared without counsel.

The Department presented two witnesses: Jennifer Dressel, the minor decoy, and Santa Rosa police officer David McDonald. Dressel testified that she was 19 years of age at the time of the purchase, that she selected Smirnoff Ice because it was a malt beverage, paid for it with a \$20 bill, and was not asked her age or for identification. She

² Mr. Jamieson is a member of the firm which represents appellants in this appeal.

left the store with her purchase, returned two minutes later, and, while standing three feet from the clerk, identified him as the seller. The clerk nodded, acknowledging that he had sold her the alcoholic beverage. Officer McDonald confirmed Dressel's testimony regarding the face to face identification, and also testified that the clerk told him he thought Dressel was 24.

Appellant Angelo Cardarelli also testified that he thought the decoy older than 21, based on her appearance and on the fact that she selected a product promoted to females of drinking age.

Pursuant to Government Code section 11524, the ALJ has the right to grant or deny a request for a continuance for good cause. Under subdivision (b) of that section, a party is ordinarily required to apply for the continuance within 10 working days after discovering the good cause for the continuance, unless that party did not cause and sought to prevent the condition or event establishing the good cause. An appellant has no absolute right to a continuance; they are granted or denied at the discretion of the ALJ and a refusal to grant a continuance will not be disturbed on appeal unless it is shown to be an abuse of discretion. (*Givens v. Department of Alcoholic Beverage Control* (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446].)

Appellants suggest that Angelo Cardarelli, because of his earlier experience in resolving a violation by way of a stipulation and waiver and payment of an offer in compromise, was misled by the notice of hearing into the belief that this proceeding would be no different. Appellant argues that, even though the notice of hearing provided the statutory language of Business and Professions Code section 11509 concerning his right to be represented by counsel, at his expense, it did not "reference" that skilled counsel would appear on behalf of the Department, that the hearing would

be formal, and that it would be conducted by an administrative law judge.

Dressel, as a student at Santa Rosa Junior College, McDonald, a Santa Rosa police officer, and the court reporter, possibly would have been minimally inconvenienced by a continuance. On the other hand, Department Counsel, and ALJ Dorais, who traveled to Santa Rosa from Sacramento, would have been considerably more inconvenienced by a continuance, both because of lost time and duplication of travel, but also the problem of adjusting their personal and work schedules for a continued hearing.

Angelo Cardarelli, on the other hand, had an opportunity to consult with and retain experienced counsel before the hearing, was able to cross-examine with some degree of ability, and was given considerable leeway in the admission of evidence and testimony.³ He knew from the notice of hearing that the hearing would be evidentiary in nature, and even had the foresight to obtain an affidavit from the clerk who made the sale.

The record does not indicate why Cardarelli did not retain the attorney who contacted him at the hearing, and with whom he consulted prior to the commencement of the hearing. We do know, from Cardarelli's statements to the ALJ, that he knew he was entitled to counsel, but intended to represent himself because he had not been impressed with the performance of his attorney in connection with the earlier violation.

Finally, we note that appellants' brief does not suggest any defense they might have asserted had they been represented by counsel. Nor does it point to any

³ Cardarelli was permitted to testify about his clerk's claim that the decoy appeared to him to be 24 years of age, and was allowed to introduce as administrative hearsay, an affidavit of the clerk to the same effect.

procedural error, other than the claimed abuse of discretion in the denial of the continuance. On the other hand, given the testimony of the decoy and the police officer, the only viable defense under Rule 141 appellants could have asserted was, in fact, asserted - that the decoy lacked the appearance of a person under the age of 21. As to that issue, we are not in a position nor are we willing to disagree with the ALJ's comprehensive findings, which we quote, that the decoy presented the appearance of a person under the age of 21.⁴

We think the factors supporting a continuance are not such as to persuade us that the ALJ abused his discretion in going forward with the hearing. Nor do we think there was error in proceeding without the presence of Carla Cardarelli, Angelo Cardarelli's spouse, business partner and co-licensee. Carla Cardarelli received notice of the hearing and elected not to attend, thus waiving any defense she may have had.

ORDER

⁴ The ALJ found (Finding of Fact V):

At the time of the transaction, Dressel was 19 years old. She weighed 118 pounds and was 5' 3" tall. She wore no makeup and was dressed in a dark brown long sleeve shirt, blue jeans and white tennis shoes. A photograph (Exhibit 4) taken of Dressel and the clerk shortly after the transaction shows her hair shorter and blonder.

This was not the first occasion Dressel served as a decoy. She had worked as a decoy for about a year on an occasional basis. Dressel visited sixteen (16) licensed off-sale premises on October 29, 2002. On that date, four (4) licensed premises sold alcoholic beverages to her, and twelve (12) refused her attempted purchase of alcoholic beverages. Considering her demeanor, her poise, her overall presence and the level of maturity she displayed at the hearing and comparing her physical presence with that in Exhibit 4, the photograph taken on the day in question, Dressel displayed the appearance which could generally be expected of a person under 21 years of age. There is no reason to believe that she did not display the same appearance under the actual circumstances presented to Respondent's clerk when he sold her the alcoholic beverage on October 29, 2002.

The decision of the Department is affirmed.⁵

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁵ 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.