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

AB-8246
File: 20-367561 Reg: 03055575

CHEVRON STATIONS, INC. dba Chevron
4295 Clayton Road, Concord, CA 94521,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: January 6, 2005
San Francisco, CA

ISSUED FEBRUARY 11, 2005

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, Jennifer Rubin, having sold a 40-ounce bottle of Budweiser beer to Anthony Garcia, a 16-year-old 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 and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on January 16, 2002. The

[1]The decision of the Department, dated February 5, 2004, is set forth in the appendix.

Department instituted an accusation against appellant on July 31, 2003, charging that, on January 23, 2003, its clerk sold an alcoholic beverage to a minor.

An administrative hearing was held on November 25, 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, and appellant had failed to establish any affirmative defense to the charge.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the Department's practice in employing retired annuitants as administrative law judges (ALJ's) violates due process; (2) Rule 141(b)(2) was violated; and (3) Rule 141(b)(5) was violated.[2]

DISCUSSION

I

Appellant's challenge to the Department's practice of employing retired annuitants as ALJ's is premised on three contentions: the Department's practice violates due process because it creates a financial interest in the outcome of the proceeding arising from the ALJ's prospects of future employment; its practice of hiring retired annuitants on an hourly basis violated due process; and its policy concerning appointment of retired annuitants is an underground regulation.

Each of these contentions was addressed at length by the Board in *Albertson's, Inc*. (2004) AB-8146 and *Circle K Stores, Inc.* (2004) AB-8169. We see nothing in appellant's brief that persuades us to change the views expressed in those cases.

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[2] References 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.

II

Rule 141(b)(2) requires that a decoy display the appearance which could reasonably 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 disputes the ALJ's factual finding that the decoy met this standard, stressing his size, the difference between his actual weight (between 230 and 240 pounds) and the weight shown on his identification card (165 pounds), as well as his lack of resemblance to the photograph on his identification card.

The ALJ addressed each of these concerns in the course of his findings concerning the decoy's experience, training, and appearance (Findings of Fact V through VIII):

> Garcia had been an Explorer for about five months prior to this incident. He had received training in several basic police procedures including firearms, taking control of emergency situations, traffic control and decoy operations. He has also attended various city events operating D.A.R.E. booths at festivals.[1] With regard to decoy operations, he was instructed to be honest when asked his age, to show his identification if requested and to buy only "common" alcoholic beverages. Prior to January 23, 2003, Garcia participated in several shoulder-tap operations.[2] The January 23rd incident was his first in-store decoy operation. Respondent's premises was one of numerous he had entered as a decoy that date.
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> [1] Drug Abuse Resistance Education
>
> [2] Waiting outside a licensed premises and asking adults to buy him alcoholic beverages.
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> On January 23, 2003, Garcia weighed 230 lbs. At this hearing he weighed 240 pounds. He had no facial hair and was not wearing glasses on both dates. He was dressed similarly on both dates.
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> Rubin testified that she thought Garcia appeared over 30 years old because he was dressed all in black, had dark hair and was wearing a flashy watch and a gold belt. Two photographs taken of Garcia on the 23rd confirm his manner of dress. The watch was not received into evidence nor displayed at the

hearing. It is also true that he did not closely resemble the photograph on his identification card. It is clear, however, from the testimony of Rubin that she did not ask to see his identification because of the discrepancy of his weight and his facial appearance in his photographs. She stated she asked for his identification because she had not seen him before and he was just standing at the counter and not moving. For these reasons, she decided to "card him."

At the hearing, Garcia appeared similar to the photographs taken of him on the 23rd. At the hearing, he displayed the appearance, both physically and by way of his demeanor, poise, presence and level of maturity, that could generally be expected of a person under 21 years of age. There is no reason to believe that he did not display the same appearance under the actual circumstances presented to the clerk at the time of the transaction found above, and it is so found.

The ALJ encapsulated his findings in Determination of Issues 2(2):

The evidence shows that the decoy did not appear his true age. He was substantially heavier than the weight indicated on his identification card, and there was a difference in his facial appearance when compared to the photos on his identification card. However, when considering his age, demeanor, poise, presence and level of maturity at the hearing, the fact that he was similarly attired then as during the transaction, the limited time he was facing the seller during the transaction and the extremely limited conversation between the two, it is also clear that the decoy has the appearance that could generally be expected of a person under 21 years of age under the actual circumstances presented to the seller.

We have set forth these findings and determination of issues to illustrate the ALJ's careful and thoughtful consideration of appellant's Rule 141(b)(2) contentions. We have said many times that the Board will not, in the absence of extraordinary circumstances, second guess the ALJ on the issue of a decoy's appearance under Rule 141(b)(2). While it is true that the Board has on past occasions expressed its concern over the use of decoys who display a very large physical appearance, its concerns in this case are allayed by the ALJ's careful attention to detail and the fact that the decoy in question was only 16 years old at the time of the transaction.

It does not escape us that the clerk requested and was shown Garcia's identification, placing her on notice of his age. Her sale to Garcia was negligent at best.

III

Rule 141(b)(5) requires the peace officer directing the decoy to make a reasonable attempt to reenter the premises and have the decoy make a face to face identification of the seller of the alcoholic beverages.

Appellant implies in its brief (App. Br., at page 17) that the ALJ's treatment of the face to face identification issue under Rule 141(b)(5) was nothing more than a "glancing blow," and that the decision "does not arise to the dignity of an explanation as to how the Administrative Law Judge arrived at a conclusion that there was compliance with the Rule." Citing *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836], appellant asserts that "absent such a road map," the Appeals Board is left without the opportunity to determine whether the evidence supports the findings and the findings support the determination ultimately reached.

Appellant's argument is little more than hyperbole. The ALJ described the face to face identification in Finding of Fact IV:

> Rubin looked at the identification card about 30-45 seconds, returned it to Garcia and rang up the sale. Garcia paid him with money issued to him by the police. Rubin bagged the bottle, and Garcia left the premises with his purchase. Outside, Garcia went to the car where the officers were parked. He gave Officer Cruz the beer and described what had occurred. Cruz took the beer and entered the premises. After a short while, Garcia also entered and was asked to identify who sold him the beer. Garcia estimates he was about 10 feet from Rubin when he stated she had sold him the alcohol. The clerk was behind the counter. When asked by Cruz why she sold him the beer, Rubin stated she was otherwise occupied with preparing for a change of cashiers.

Appellant does not explain why it thinks Finding of Fact IV (and, by implication Determination of Issue 2(5))[3] is deficient, and we do not think it is.

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[3] Addressing the contention that the officer failed to make a reasonable attempt (continued...)

The citation of *Topanga* does not advance appellant's case. The Board addressed a similar argument from appellant's counsel in *7-Eleven, Inc./Cheema* (2004) AB-8181, stating:

> Appellants misapprehend *Topanga*. It does not hold that findings must be explained, only that findings must be made. This is made clear when one reads the entire sentence that includes the phrase on which appellants rely: "We further conclude that implicit in section 1094.5 is a requirement that the agency which renders the challenged decision *must set forth findings* to bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga*, *supra*, 11 Cal.3d 506, 515, italics added.)
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> In No Slo Transit, Inc. v. City of Long Beach (1987) 197 Cal.App.3d 241, 258-259 [242 Cal.Rptr. 760], the court quoted with approval, and added italics to, the comment regarding *Topanga* made in Jacobson v. County of Los Angeles (1977) 69 Cal.App.3d 374, 389 [137 Cal.Rptr. 909]: " 'The holding in Topanga was, thus, that *in the total absence of findings in any form on the issues supporting the existence of conditions justifying a variance*, the granting of such variance could not be sustained.' " In the present appeal, there was no "total absence of findings" that would invoke the holding in *Topanga*.
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> Appellants' demand that the ALJ "explain how [the conflict in testimony] was resolved" (App. Br. at p. 2) is little more than a demand for the reasoning process of the ALJ. The California Supreme Court made clear in *Fairfield v. Superior Court of Solano County* (1975) 14 Cal.3d 768, 778-779 [122 Cal.Rptr. 543], that, as long as findings are made, a party is not entitled to attempt to delve into the reasoning process of the administrative adjudicator:
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> > As we stated in *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836, 522 P.2d 12]: "implicit in [Code of Civil Procedure] section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order."[Fn.]
> >
> > In short, in a quasi-judicial proceeding in California, the administrative board should state findings. If it does, the rule of *United States v. Morgan* [(1941)] 313 U.S. 409, 422 [85 L.Ed. 1429, 1435 [61 S.Ct. 999]] precludes inquiry outside the administrative record to determine what evidence was considered, and reasoning employed, by the administrators.

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[3](...continued)
to enter the premises and have the decoy make a face to face identification, the ALJ stated tersely, "The evidence is quite to the contrary."

We are satisfied that there was compliance with Rule 141(b)(5).

ORDER

The decision of the Department is affirmed.[4]

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

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[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.