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

AB-8546
File: 20-286537 Reg: 05060254

CHEVRON STATIONS, INC., dba Chevron
3900 Pelandale Avenue, Modesto, CA 95356,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: January 11, 2007
Sacramento, CA
Redeliberation: February 1, 2007

ISSUED APRIL 5, 2007

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 10 days, all of which were stayed for a probationary period of one year, 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 Michael Akopyan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

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[1]The decision of the Department, dated March 21, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on August 3, 1993. On July 20, 2005, the Department filed an accusation against appellant charging that, on May 14, 2005, appellant's clerk, Susan Carvalho (the clerk), sold an alcoholic beverage to 17-year-old Karianne Hogrefe. Although not noted in the accusation, Hogrefe was working as a minor decoy for the Modesto Police Department at the time.

At the administrative hearing held on December 29, 2005, documentary evidence was received and testimony concerning the sale was presented by Hogrefe (the decoy) and by Michael Hicks, a Modesto police officer. Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no affirmative defense was established.

Appellant has filed an appeal contending: (1) The Department failed to prove that a violation occurred at appellant's location; (2) the decoy's appearance violated Department rules 141(a)[2] and 141(b)(2); (3) the decoy operation was not conducted fairly, violating rule 141(a); and (4) the Department violated its own policy guidelines in imposing the penalty.

DISCUSSION

I

During his testimony, officer Hicks stated that he believed the address of the Chevron licensed premises in Modesto visited during the decoy operation was 3900 Sisk Road, rather than 3900 Pelandale Avenue. [RT 7.] He said that the Chevron station was at the corner of Pelandale and Sisk Road. [RT 8.] Department counsel subsequently moved to "amend according to proof," and the administrative law judge

[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.

(ALJ) responded that the "[a]ccusation is amended to reflect 3900 Sisk Road." [RT 22.] However, the accusation (part of Exhibit 1) was never amended by interlineation to reflect that change.

The proposed decision by the ALJ lists the licensee's address as 3900 Sisk Road. The order issued by the Department, adopting the proposed decision except as to the penalty, lists the address as 3900 Pelandale Avenue, as does every other document in the record, with the exception of the proposed decision and the first page of the police report (Exhibit 2).[3]

Appellant's alcoholic beverage license number, 20-286537, appears on all the jurisdictional documents in Exhibit 1 as well as on the copies of the photographs of the decoy included in the police report (Ex. 2, p. 4) and on the copy of the notification sent to the licensee following the decoy operation (Ex. 2, p. 6).

Appellant made no comment regarding the address during either the testimony, the motion to amend, or closing argument.

On appeal, appellant contends that because its licensed premises is located at 3900 Pelandale Road, amending the accusation by changing the address constitutes a dismissal of the accusation against it. Even if it was not dismissed, appellant argues, all the evidence presented at the hearing was not about appellant's premises, but in support of the new charge against the premises at 3900 Sisk Road. This location, according to appellant, is an Applebee's restaurant, under a different license, about a mile from appellant's premises.

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[3]The police report lists the address of the premises as 3900 Pelandale Avenue in the narrative on the second page, twice on the copy of the citation issued to the clerk (Ex. 2, p. 5), and on the copy of the notification sent to the licensee following the decoy operation (Ex. 2, p. 6).

Appellant cites no authority for its contention that changing the address constitutes dismissal of the accusation against it. This contention is based purely on wishful thinking.

An administrative accusation is required to apprise a licensee sufficiently of the charges so that it is able to prepare its defense. (Gov. Code, § 11503.) Ascribing the wrong address to the licensed premises would have made no difference even had it been that way on the original accusation, as long as the licensee was not misled and was able to prepare a defense. Appellant has not shown, nor even alleged, that it suffered any prejudice from the error.

Appellant did not object to or even comment on the erroneous address testified to by the officer. Appellant presented no documentary or testimonial evidence, but its closing argument clearly addressed the accusation against it, rather than arguing that it did not need to do so because the accusation now concerned some other licensee.

It is quite obvious that no other licensee was intended to be charged with this violation. Appellant is not justified in arguing that it somehow ceased to be the licensee charged, when the name and license number remained the same. No other Chevron or any other licensee has the license number used on all the documents in this case.

Appellant did not make this argument at the administrative hearing, and it is not entitled to do so now. It proceeded with the hearing as the respondent, and cannot now say that it was not.

II

Department rules 141(a) and 141(b)(2) require that law enforcement agencies conduct decoy operations "in a fashion that promotes fairness" and that decoys display an appearance that could generally be expected of a person under the age of 21,

respectively. Appellant contends that these rules were violated in this case by the use of this decoy. It argues that the decoy's large stature and prior experience as a decoy gave her poise and confidence "atypical" of a person under the age of 21 years old.

The decision addresses the decoy's appearance in Finding of Fact II.C.:

> C. The overall appearance of the decoy including her demeanor, her poise, her size, her mannerisms and her physical appearance were consistent with that of a person under the age of twenty-one. The decoy's appearance at the time of the hearing was similar to her appearance on the date of the decoy operation except that at the hearing she was dressed in an Air Force Academy uniform rather than casual clothes.
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> 1. The decoy has a young looking face marked on the lower portion extensively by acne, which accentuates her youthful appearance. On the day of the sale, the decoy was five feet eight inches in height, weighed 160 pounds and was almost the same size at the hearing, with the only difference being she now weighed five pounds less.
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> 2. The decoy testified that she had participated in six decoy operations prior to May 14, 2005, and that also prior to that date she was a police Explorer for approximately a year and had done ride alongs and clerical work for the Modesto Police Department.
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> 3. The decoy was born on October 28, 1987. She testified that she was not nervous at Respondent's premises "then or now". The decoy answered questions politely and acknowledged without equivocation her error in mistakenly recalling whether she wore jewelry during the decoy operation.
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> Although she wore an Air Force Academy uniform at the hearing and felt she was not nervous, the decoy appeared to the Administrative Law Judge to more resemble a high school student than a college freshman, and to be somewhat nervous.
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> 4. On May 14, 2005, the decoy visited twenty-six licensed premises and purchased alcoholic beverages at four, including Respondent's.
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> 5. The photograph on page four of Exhibit 2 was taken at the premises and it depicts what the decoy was wearing and how she appeared at the premises. After considering the photograph depicted in Exhibit 2, the overall appearance of the decoy when she testified and the way she conducted herself at the hearing, a finding is made that the decoy displayed an overall appearance that could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

The ALJ made an express finding that the decoy displayed the appearance of a person under 21 years of age. He made this finding after having observed the decoy as she testified and taking into consideration the factors relied upon by appellant. The fact that appellant's assessment of the decoy's appearance differs from the ALJ's is neither surprising nor a sufficient basis for overturning the ALJ's finding.

Appellant is asking this Board to evaluate the decoy's appearance. Absent a clear error or abuse of discretion on the part of the ALJ or the Department, this Board will ordinarily defer to the ALJ's assessment of the decoy. Appellant's self-interested descriptions of the decoy do not cause us to believe there was gross error or an abuse of discretion in the ALJ's assessment of the decoy's appearance.

The ALJ, who saw and heard the decoy in person at the hearing, and whose responsibility it was to assess the decoy's appearance and apparent age, determined that the decoy's appearance complied with rule 141(b)(2). This Board is in no position to second-guess the ALJ's evaluation.

III

Appellant contends that the decoy operation violated the fairness requirement of rule 141(a) because the decoy "took deliberate acts to prompt a violation." This occurred, according to appellant, when the decoy, after putting the beer on the counter, took out a $20 bill and handed to the clerk without being told how much she owed.

In Determination of Issues II, this argument is addressed:

> Respondent contends that because the decoy wore tight clothing and handed the clerk a $20 dollar bill without asking the price of the beer, she appeared as if she was older than her actual age. These arguments are rejected. The decoy appeared underage and paid for the beer with a $20 dollar bill provided her by police. Handing a clerk a bill larger than the amount likely to be the sales price is commonly done by customers at checkout counters.

Although there was no conversation between the decoy and the clerk, the clerk had already rung up the sale when the decoy handed her the $20 bill. In a sense, the decoy had been told how much she owed before she proffered the money.

In any case, we agree with the ALJ that it is not unusual for a customer to hand a clerk money sufficient to cover the likely cost before knowing what the actual cost of an item is. We cannot conclude that this common action could have made the decoy operation unfair.

IV

Appellant contends that the Department failed to follow its own penalty guidelines regarding mitigating factors "in order to dismiss the Department's recommended mitigated penalty." (App. Br. at p. 11.) Appellant refers to Determination of Issues IV, entitled "Penalty Consideration," in which the ALJ concluded that the failure to ask for the decoy's ID "offset" the mitigation of appellant's long licensure without a violation, and noted that appellant had not offered any evidence of training either before or after the violation.

The hearing transcript reveals that Department counsel recommended a 10-day suspension, all stayed. The ALJ, however, stated in his proposed decision that the Department had recommended a *15*-day suspension with all days stayed. He ended up proposing a straight 10-day suspension. This is a lesser penalty than what the ALJ said the Department recommended, but a greater penalty than what the Department actually recommended. It appears that appellant's objection is to this straight 10-day penalty.

What appellant apparently overlooks is the modified penalty ordered by the Department when it adopted the proposed decision. The penalty ultimately imposed by

the Department was a 10-day suspension with all days stayed for a probationary period of one year – the exact penalty recommended by the Department at the hearing. Since this is "the Department's recommended mitigated penalty," we can only assume that appellant's argument is moot.

If this is not the case, the argument should still be rejected. The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. *(Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].) The penalty imposed is clearly within the Department's discretion.

ORDER

The decision of the Department is affirmed.[4]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4]This 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.