

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

AB-9340

File: 20-414237 Reg: 12077148

CHEVRON STATIONS, INC., dba Chevron #90499
404 Soquel Avenue, Santa Cruz, CA 95062,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: October 3, 2013
Sacramento, CA

ISSUED NOVEMBER 21, 2013

Chevron Stations, Inc., doing business as Chevron #90499 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days, with 10 days stayed provided appellant completes one year of discipline-free operation, for its 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 Barat Saltsman and Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kelly Vent.

¹The decision of the Department, dated January 22, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on August 27, 2004. On June 28, 2012, the Department filed an accusation charging that appellant's clerk, Roberto Miranda (the clerk), sold an alcoholic beverage to 19-year-old Saul Valadez-Martin on March 27, 2012. Although not noted in the accusation, Valadez-Martin was working as a minor decoy for the Santa Cruz Police Department and the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on October 30, 2012, documentary evidence was received, and testimony concerning the sale was presented by Valadez-Martin (the decoy). Appellant presented no witnesses.

Testimony established that on March 27, 2012, the decoy entered the licensed premises and selected a six-pack of Corona beer from the cooler which he took to the register. The clerk scanned the beer and asked for the decoy's identification. The decoy handed the clerk his California driver's license which contained his true date of birth as well as a red stripe stating "AGE 21 IN 2013." The clerk looked at the license for about 5 seconds and then completed the sale. Following the sale the decoy exited the premises and then reentered with a police officer and a Department agent to conduct a face-to-face identification of the seller. The officer asked the decoy who sold him the beer and the decoy said that it was the clerk behind the counter. The decoy and clerk were three to five feet apart when the identification was made, and the clerk was not waiting on any customers. The officer identified himself to the clerk and asked him to come around to the front of the sales counter where his photograph was taken with the decoy. (Exhibit 2-B.)

Subsequent to the hearing, the Department issued its decision which determined

that the violation charged had been proven and that no defense had been established.

Appellant filed an appeal contending: (1) The administrative law judge (ALJ) abused his discretion when he disregarded appellant's rule 141(a)² and 141(b)(2) arguments, and (2) the face-to-face identification of the clerk failed to comply with rule 141(b)(5).

DISCUSSION

I

Appellant maintains that the ALJ failed to proceed in the manner required by law and abused his discretion when he disregarded appellant's rule 141(a) and 141(b)(2) arguments.

Rule 141(a) provides:

A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

Rule 141(b)(2) provides:

The 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.

Appellant maintains that the decoy did not display the appearance which could generally be expected of a person under the age of 21, and therefore the decoy operation was unfair. Appellant contends "[t]he ALJ fails to consider the evidence that establishes not only was the decoy two days shy of his twentieth birthday but, he had

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.

been a Police Explorer [sic] for nearly two years, he had served as a minor decoy on three prior occasions, and he was less nervous from his experience on the date of this operation.” (App.Br. at p. 6.)

This Board is bound by the factual findings in the Department’s decision as long as they are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our judgment on the evidence, and we must accept as conclusive the Department’s findings of fact. *CMPB Friends, [Inc. v. Alcoholic Bev. Control Appeals Bd. (2002) 100 Cal.4th [1250,] 1254 [122Cal.Rptr.2d 914]; Laube v. Stroh (1992) 2 Cal.4th 364, 367 [3 Cal.Rptr.2d 770; . . . We must indulge in all legitimate inferences in support of the Department’s determination. Neither the Board nor an appellate court may reweigh the evidence or exercise independent judgment to overturn the Department’s factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (Lacabanne)*. The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.*

(*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826] (Masani)*.)

The ALJ made the following findings about the decoy’s appearance (Findings of Fact II):

FF II-F. The decoy’s overall appearance including his demeanor, his poise, his mannerisms, his size and his physical appearance were consistent with that of a person under the age of twenty one years and his appearance at the time of the hearing was substantially the same as his appearance on the day of the decoy operation.

[¶ . . . ¶]

FF II-F-3. . . . There was no credible evidence presented that Valadez-Martin’s prior experience as a police Explorer or alcoholic beverage decoy caused or contributed to the clerk selling an alcoholic beverage to him. The selling clerk did not testify at the hearing.

The ALJ was aware of the factors that appellant asserts to show that the decoy's appearance violated the rules, and yet his conclusions are diametrically opposed to that of appellant (Determination of Issues II and III):

DI II. Respondent's counsel contends the Department violated the *fairness* provision of Rule 141(a) because Valadez-Martin was two days shy of his twentieth birthday when he served as a minor decoy. According to counsel, this "totes the line" too close to Rule 141(b)(1)'s requirement that a decoy shall be less than 20 years of age at the time of the operation. The Department clearly complied with Rule 141(b)(1) because Valdez-Martin [*sic*] was 19 years old on the date of the operation. The use of a decoy that is almost 20 years old does not violate the *fairness* requirement of Rule 141(a), absent additional evidence that would substantiate such a claim. No such evidence was presented. The Department did not violate the *fairness* provision of Rule 141(a).

DI III. Respondent's counsel also argues that the [*sic*] Rule 141, subsection (b) (2) was violated because the decoy appeared to be over 21 years of age. Respondent's counsel contends the decoy's police explorer experience, coupled with his decreasing lack of nervousness as he participated in operations, violated the appearance standard set out in Rule 141(b)(2).

These arguments are rejected. First, the Court had the opportunity to observe the decoy at hearing, along with the photograph presented in State's Exhibit 2-B, and concluded Valadez-Martin displayed an overall appearance which could generally be expected of a person under the age of twenty-one years under the actual circumstances presented to the seller at the time of the sale. [See Findings of Fact II.]

Second, Respondent's arguments are merely conjecture since the selling clerk did not testify and no other evidence was presented by the Respondent on the issue. The lack of evidence to support the Respondent's contentions is a material failure of proof and no affirmative defense was established. [Citation omitted.]

We are not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy lacked the appearance required by the rule, and an equally partisan response that he did not. Appellant has given us no reason to depart from our general rule of deference to the ALJ's factual determination regarding the decoy's appearance. As this Board has said on many occasions, the

ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he testifies, and making the determination whether the decoy's appearance met the requirements of rule 141.

II

Appellant contends that the face-to-face identification of the clerk failed to comply with rule 141(b)(5) because there was no evidence that the clerk knew or should have known he was being identified as the seller of the alcohol.

Rule 141(b)(5) provides:

Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

Appellant maintains that the evidence in this matter does not support the Department's finding that there was compliance with rule 141(b)(5), or that the clerk knew or should have known he was being identified as the seller of the alcohol.

In *Greer* (2000) AB-7403, the Board said it is not necessary that the clerk *actually* be aware that the identification is taking place. The only "acknowledgment" required is achieved by "the seller's presence such that the seller is, *or reasonably ought to be*, knowledgeable that he or she is being accused and pointed out as the seller." [Emphasis added.]

The court in *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126], said that there must be "strict adherence" to the provisions of rule 141. Appellant relies on this language for its contention that there must be a finding that the decoy and the clerk were directly facing each other, looking at each other, and that the evidence must support this for the

identification to be valid.

The administrative law judge (ALJ) found that a face-to-face identification took place in Findings of Fact II-D:

FF II-D. The decoy re-entered the premises to conduct a face-to-face identification of the seller after meeting law enforcement officers outside the Chevron Station. Valadez-Martin was accompanied into the store by Police Officer Terry and Department Agent "Chris". As they entered the premise, Officer Terry asked the decoy to identify the seller. Valadez-Martin indicated the clerk behind the counter was the seller, although he does not recall exactly what he said to Officer Terry. Valadez-Martin was three to five feet away from the clerk when he identified him as the seller. The decoy was looking right at the clerk. Valadez-Martin does not know if the clerk was looking in his direction or what he was doing at the time. However, the decoy recalls the clerk was not waiting on any customers.

The officers and the decoy moved closer to the sales counter and Officer Terry identified himself to the sales clerk. The decoy was approximately two feet away from the clerk at this point. Officer Terry had the sales clerk move from behind the sales counter and come around to the front side of the counter where he and the decoy were standing. A photograph was taken of the sales clerk and the decoy at this time. (State's Exhibit 2-B) The clerk never denied selling beer to Valadez-Martin.

The ALJ was not required to find that the decoy and the clerk were directly facing each other or that they were looking at each other, because neither of these situations is required to comply with the rule.

The Appeals Board provided the following definition of "face to face" in the context of rule 141(b)(5) in *Chun* (1999) AB-7287:

. . . the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

Not only is this definition in accord with ordinary dictionary definitions of the meaning of "face-to-face," it takes into consideration the context of a decoy operation, where the safety of the decoy is a concern, and the face-to-face identification is merely one part of

the overall situation, not some theatrical confrontation.

The core objective of rule 141 is fairness to licensees when decoys are used to test their compliance with the law. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1687, 1698 [1 Cal.Rptr.3d 339].) Rule 141(b)(5) is concerned with both identifying the seller and providing an opportunity for the seller to look at the decoy again, soon after the sale. (*Ibid.*) It does not require a direct "face off" or any overt "acknowledgment" to accomplish these purposes. There was no evidence of misidentification in this case, and the clerk had the opportunity to look at the decoy again — both when he was being identified, and when he was photographed with the decoy. The opportunity is all that needs to be provided; if the opportunity is provided, but the clerk does not take advantage of the opportunity, the rule is not violated.

Substantial evidence supports a finding that there was compliance with rule 141(b)(5) in this case.

ORDER

The decision of the Department is affirmed.³

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This 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.