

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

AB-9758

File: 20-482041 Reg: 18086772

CHEVRON STATIONS, INC.,
dba Chevron Stations, Inc.
1315 Magnolia Avenue,
Corona, CA 92879,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: June 6, 2019

Ontario, CA

ISSUED JUNE 21, 2019

Appearances: *Appellant:* Donna J. Hooper, of Solomon, Saltsman & Jamieson, as
counsel for Chevron Stations, Inc.,

Respondent: John Newton, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

Chevron Stations, Inc., doing business as Chevron Stations, Inc. (appellant),
appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending
its license for 15 days because its clerk sold an alcoholic beverage to a police minor
decoy, in violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on September 28, 2009.

There is no record of prior departmental discipline against the license.

¹The decision of the Department, dated October 10, 2018, is set forth in the
appendix.

On April 9, 2018, the Department filed an accusation charging that appellant's clerk, Marissa Marie Drinkard (the clerk), sold an alcoholic beverage to 18-year-old Roberto Estrada Jr. (the decoy) on October 6, 2017. Although not noted in the accusation, the decoy was working for the Corona Police Department (CPD) and Alcoholic Beverage Control (ABC) at the time.

At the administrative hearing held on July 24, 2018, documentary evidence was received, and testimony concerning the sale was presented by the decoy, CPD officer Robert Slane, and ABC Agent Sarah Hutson. Appellant's station manager, Chantal Rebecca Clarke testified for appellant.

Testimony established that the decoy entered the licensed premises on October 6, 2017 and selected a three-pack of 24 ounce Coors Light beer in cans. The decoy brought the beer to the front of the store and placed it on the counter. The clerk scanned the beer and asked the decoy for identification. The decoy handed the clerk his valid California Driver's License, which the clerk looked at for two seconds. The decoy's driver's license had a vertical orientation,² showed his correct date of birth, and included a red stripe which read, "AGE 21 IN 2019." The clerk handed the decoy's driver's license back to him, and proceeded with the sale.

For alcoholic beverage sales, the cash register utilized by the clerk requested the clerk to enter the customer's date of birth, or press one of three available button options which read, "Continue," "Cancel," or "Under Age." The clerk selected the "Continue" option. After selecting "Continue," another screen appeared which read, "Age Verification Override - Customer is over LEGAL purchase age?" This screen had two

²California Driver's Licenses for individuals 21 years of age or older are displayed in a horizontal format.

options, to "Continue," or "Cancel." Once again the clerk selected to "Continue."

The clerk told the decoy the price of the beer, accepted his money, and returned his change. The decoy took the beer and the change and exited the store. There is no evidence that the clerk asked the decoy any age-related questions or questions about his driver's license.

The decoy then re-entered the licensed premises with Officer Slane, Agent Hutson, and two other CPD officers. They walked to the side of the front sales counter. Agent Hutson asked the decoy to identify the person who sold him the beer. The decoy pointed at the clerk and said, "She did." At the time of the identification, the decoy and the clerk were about five feet apart and facing each other.

The clerk confirmed that she sold the beer to the decoy and explained that she looked too quickly at the decoy's driver's license. The clerk was apologetic and stated that she had only worked at the licensed premises for two or three days. The clerk was also willing to show Agent Hutson how the cash register at the licensed premises functioned for alcoholic beverage sales.

Appellant's manager testified at the hearing that the clerk was hired on October 4, 2017 and received on-site training regarding alcohol sales. The training is conducted by either the manager or her assistant and is about an hour and a half long. New hires are trained to know the age a person must be in order to legally purchase alcohol products. New hires are also shown how to complete an alcohol sale on the registers. The manager explained that the "Continue" button should only be used when the customer appears over 30 years old. Finally, new hires are trained on checking identification and are informed of the consequences of selling alcohol to minors.

Appellant's manager testified that, subsequent to the violation, she now reminds her employees on a daily basis that they must check everyone's identification for alcohol sales. Also, appellant's registers now allow its clerks to scan customer identification. However, the register system still allows employees to override/bypass the age verification prompts in the register by hitting the "Continue" button.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established. The Department suspended appellant's license for 15 days.

Appellant filed an appeal contending that the Department abused its discretion by ignoring mitigation evidence before imposing a 15-day suspension under rule 144.³

DISCUSSION

Appellant contends that the Department abused its discretion by ignoring evidence of mitigation before imposing a 15-day license suspension. (AOB, pp. 6-7.)

The Board will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) "Abuse of discretion" in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.] (*Brown v. Gordon*, 240 Cal.App.2d 659, 666-667 (1966) [49 Cal.Rptr. 901].)

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.'

³References 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.

(*Harris v. Alcoholic Beverage Control Appeals Board* (1965) 62 Cal. 2d 589, 594 [400 P.2d 745].)

Rule 144 provides:

In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act (Bus. and Prof. Code Sections 23000, et seq.), and the Administrative Procedures Act (Govt. Code Sections 11400, et seq.), the Department shall consider the disciplinary guidelines entitled "Penalty Guidelines" (dated 12/17/2003) which are hereby incorporated by reference. **Deviation from these guidelines is appropriate where the Department in its sole discretion determines that the facts of the particular case warrant such a deviation** - such as where facts in aggravation or mitigation exist.

(Cal. Code Regs., tit. 4, § 144, emphasis added.)

Among the mitigating factors provided by the rule are the length of licensure without prior discipline, positive actions taken by the licensee to correct the problem, cooperation by the licensee in the investigation, and documented training of the licensee and employees. Aggravating factors include, *inter alia*, prior disciplinary history, licensee involvement, lack of cooperation by the licensee in the investigation, and a continuing course or pattern of conduct. (*Ibid.*)

The Penalty Policy Guidelines further address the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

Penalty Policy Guidelines:

The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken

against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

(Ibid.)

Appellant argues that it was error for the Director to ignore: 1) the lack of prior discipline; 2) positive action taken by the licensee following the violation; 3) subsequent corrective training, and; 4) cooperation by the clerk in demonstrating operation of the cash register system. The above evidence was offered by appellant as evidence of mitigation at the hearing.

A review of the Decision shows that appellant's mitigation evidence was not ignored, but rather, was "offset by the minor changes it has made since the date of the violation and failure to address the underlying problem." (The Decision, p. 7.) The Department found that none of appellant's changes "address[ed] the underlying problem at issue – which is that its clerks, despite asking for a customer's ID, can easily override the cash register system by twice pressing "Continue" to permit the sale of age-restrictive products to minors." (*Id.* at p. 8.) The Department found this to be a "grave concern since that is exactly what clerk Drinkard did, despite receiving the one hour to 90 minute on-site training" (*Ibid.*)

As the Board has said many times over the years, the extent to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion — pursuant to rule 144 — and the Board may not interfere with that discretion absent a clear showing of abuse. Appellant has not demonstrated an abuse of discretion in this case. The Board sees no error.

ORDER

The decision of the Department is affirmed.⁴

MEGAN McGUINNESS, ACTING CHAIR
SUSAN A. BONILLA, 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.*