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

AB-7865
File: 20-296284 Reg: 01050302

CHEVRON STATIONS, INC., dba Chevron
1715 Santa Rosa Avenue, Santa Rosa, CA 95404,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Arnold Greenberg

Appeals Board Hearing: July 11, 2002
San Francisco, CA

ISSUED OCTOBER 3, 2002

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 20 days for appellant's clerk selling an alcoholic beverage to a minor decoy, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, section 22, arising from 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, Dean R. Lueders.

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[1]The decision of the Department, dated July 19, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on August 22, 1994. Thereafter, the Department instituted an accusation against appellant charging that, on November 29, 2000, appellant's clerk, Ismael Bompart ("the clerk"), sold an alcoholic beverage (a 32-ounce bottle of Miller beer) to 19-year-old Marina Price. Price was working with the Santa Rosa Police Department as a minor decoy at the time of the sale.

An administrative hearing was held on June 1, 2001, at which time documentary evidence was received and testimony concerning the transaction was presented by Price ("the decoy"), by Santa Rosa police officer David MacDonald, and by the clerk.

Subsequent to the hearing, the Department issued its decision which determined that the violation occurred as charged in the accusation and no defense was established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the Administrative Law Judge (ALJ) erred in not allowing the decoy's testimony to be videotaped; (2) the Department failed to produce all documents in its "possession, custody or control"; and (3) the ALJ did not discuss the clerk's perception of the decoy's apparent age. Appellant does not argue in support of, or otherwise elaborate on, the third issue raised and, therefore, we do not address that issue.

DISCUSSION

I

Appellant contends the ALJ should have granted counsel's request to videotape the decoy's testimony because the ALJ relied on the decoy's appearance at the hearing

in making his finding regarding the decoy's apparent age at the time of the sale and the videotape would assist the Appeals Board in reviewing the ALJ's finding.

This Board has acknowledged previously the necessity for an ALJ to use the decoy's appearance at the hearing to aid in determining whether the decoy displayed the appearance of a person under the age of 21 at the time of the violation. The Board said, in Circle K Stores, Inc. (2000) AB-7265:

> "We are well aware that the rule requires the ALJ to undertake the difficult task of assessing [the] appearance [of a decoy] many months after the fact. However, in the absence of evidence of any discernible change in the appearance or conduct of the minor decoy between the time of the transaction and the time of the hearing, it would be reasonable to conclude that the ALJ's impression of the apparent age of the minor at the time of the hearing would also have been the case had he viewed the minor at the earlier date."

The Board has repeated many times that it is not in a position to second-guess the finding of the ALJ, who has the opportunity, which this Board does not, of observing the decoy in person, and we have deferred to the judgment and discretion of the ALJ's in most instances. Occasionally there have been cases where circumstances compel us to re-examine the ALJ's finding. Those instances, however, have not been the result of the Board's disagreement based upon looking at a photograph of the decoy, but upon some indication that the ALJ has taken into consideration (or omitted from consideration) some factor that may have unfairly or improperly affected the ALJ's determination of the decoy's apparent age.

There is nothing in this decision or record that causes this Board to question the fairness or propriety of the ALJ's finding as to the apparent age of the decoy, and a videotape of the decoy's testimony is neither necessary nor desirable for our limited review.

There is no provision for videotaped testimony in the Administrative Procedure

Act or in any other statutes or rules that govern the Department's disciplinary proceedings or our review of the Department decisions. Although a videotape might be useful in certain instances, we have no authority to direct the Department as to the conduct of its disciplinary proceedings.

The ALJ has great discretion in the conduct of the hearing, and it would have been no abuse of discretion for the ALJ in this instance to deny the videotaping on simply practical grounds, such as the time it would take. The ALJ considered the legal and practical arguments made by both attorneys and then denied the request to videotape. We cannot say that in doing so he abused his discretion.

II

Appellant contends the Department had a duty to provide certain materials it refused to provide when appellant requested their production in discovery. Specifically, the items in question were a copy of a surveillance audiotape and legible photocopies of photographs and the decoy's driver's license. The Department refused to provide them because the items were in the possession of the Santa Rosa Police Department (SRPD), not the Department. Before the administrative hearing, appellant filed a Motion to Compel with regard to these items, which the ALJ denied.

Appellant argues by analogy to cases holding that a criminal prosecutor has a broad duty to provide exculpatory evidence. Appellant contends that the Department "sanctioned" and "collaborated in" the SRPD's decoy operation, and, therefore, the Department should be considered to have "reasonable access" to the material sought and a duty to provide it to appellant.

Appellant's argument is premised on the hypothetical conjecture that "if disciplinary administrative proceedings are conducted similar [sic] to criminal law

evidentiary principles (as they should be), the meaning of 'custody, possession and control' in the Administrative Procedure Act" would be interpreted as broadly as similar terms are in the criminal law context. Whether or not administrative disciplinary actions *should* be conducted in the same manner as criminal prosecutions, the fact is that they are not. Appellant's attempted analogy is defective and provides no basis for requiring the Department to provide the requested material that is in the possession of the SRPD.

Section 11507.6 of the Administrative Procedure Act "provide[s] the exclusive right to and method of discovery as to any [formal administrative adjudicatory] proceeding . . ." (Gov. Code, §11507.5.) Pursuant to that section, a party is entitled to inspect and make copies of certain materials "in the possession or custody or under the control of the other party." Although appellant appears to admit that the material was not in the Department's possession or control, it contends the Department must provide the material, because it is "reasonably accessible" to the Department. Even if we were to accept this argument, which we do not, appellant has made no showing that the material is, in fact, reasonably accessible to the Department.

Appellant did not have to do without the material it desired, even though the Department was not obligated to provide it. Appellant could have served the SRPD with a subpoena duces tecum to obtain the items it desired. The Department did not compromise appellant's due process rights by refusing to gather evidence for appellant; appellant always had a simple, effective way to get what it needed directly from the SRPD.

ORDER

The decision of the Department is affirmed.[2]

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

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[2]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.