

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

AB-9211

File: 21-477766 Reg: 11074917

GARFIELD BEACH CVS LLC and LONGS DRUG STORES CALIFORNIA LLC,
dba CVS Pharmacy Store 9940
872 N. Delaware Street, San Mateo, CA 94401-1504,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: November 1, 2012
Los Angeles, CA

ISSUED DECEMBER 4, 2012

Garfield Beach CVS LLC and Longs Drug Stores California LLC, doing business as CVS Pharmacy Store 9940 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their 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 appellants Garfield Beach CVS LLC and Longs Drug Stores California LLC, appearing through their counsel, Ralph Barat Saltsman and D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kelly Vent.

¹ The decision of the Department, dated November 4, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On April 15, 2011, the Department instituted an accusation against appellants charging that, on October 28, 2010, appellants' clerk sold an alcoholic beverage to 19-year-old Kevin Gates. Although not noted in the accusation, Gates was working as a minor decoy for the San Mateo Police Department at the time.

An administrative hearing was held on August 18, 2011, at which time documentary evidence was received, and testimony concerning the sale was presented by Gates (the decoy) and by Shandon Murphy, a San Mateo police officer. Appellants presented no witnesses.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellants filed an appeal making the following contentions: (1) There is not substantial evidence in support of the ALJ's findings regarding the face-to-face identification; and (2) the ALJ failed to support his conclusions with sufficient factual findings.

DISCUSSION

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law,

proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.²

Our review “is limited to a determination of whether the Department has proceeded without or in excess of its jurisdiction; whether the Department has proceeded in the manner required by law; whether the Department’s decision is supported by its findings; whether those findings are supported by substantial evidence; or whether there is relevant evidence which, in the exercise of reasonable diligence could not have been produced or was improperly excluded at the hearing before the Department.” [Citations.]

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

I

Appellants contend that there is not substantial evidence to support the ALJ’s findings regarding the face-to-face identification required by rule 141(b)(5).³ They assert that “the failing testimony of Officer Murphy, and the sound testimony of the decoy, were selectively discounted to make a narrative that favors the Department.” (App. Br., p. 5.)

The decoy was not asked about face-to-face identification on direct examination.

²The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

³Rule 141(b)(5) provides:

Following any completed sale, but not later than the time a citation, if any, is issued, the police 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 alcoholic beverages.

Rule 141(b)(5), as with the other subdivisions of the rule, creates an affirmative defense; Rule 141(c) provides that the failure to comply with the rule shall be a defense to any action brought pursuant to Business and Professions Code section 25658.

On cross-examination, he testified that, when he returned to the store after he had made the purchase in question, he “went straight to the clerk” and told him, “You sold me an alcoholic beverages (*sic*), or beer, and I was only 19.” The decoy further testified he was “about” ten feet away, the clerk was not looking at him when he pointed at him, and was still ringing people through. The officers then identified themselves to the clerk, pulled him away from the register and photographed him with the decoy while the decoy was holding the beer he had purchased. [RT 22-25.]

San Mateo police officer Shandon Murphy described the face-to-face identification slightly differently; he said he and the decoy were across the counter from the clerk, three or four feet away, when the decoy identified him as the seller. Officer Murphy remembered that the clerk was surprised and obviously frustrated, because with the police there, he had obviously done something wrong. Officer Murphy further testified the clerk had just finished waiting on customers when he conducted the face-to-face identification.

Admittedly, there are variations and/or conflicts between the testimony of the two Department witnesses. Officer Murphy’s testimony that the decoy and the clerk “had eye contact” could only be referring to the two looking at each other, and the decoy’s testimony that the clerk was not looking at him when he pointed to the clerk, are the kind of conflicts the ALJ must resolve. Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] [in which the positions of both the Department and the license-applicant were supported by substantial evidence]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248

Cal.Rptr. 271]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821, 826-827 [40 Cal.Rptr. 666].)

The ALJ's findings on this issue are set forth in Finding of Fact III:

While standing three to four feet from the clerk, the decoy said to him, "You sold me an alcoholic beverage, a beer, and I'm only 19," or words to that effect. The identification of the clerk was made to Officer Murphy. During the identification, the clerk and the decoy made eye contact with each other.

(Considering the words said by the decoy, it is obvious he was addressing them to the clerk. Under this circumstance, and considering Officer Murphy's testimony that the clerk and the decoy made eye contact, the decoy's testimony that the clerk was not looking at him during the identification is given little weight.)

The burden of proof to establish a defense under rule 141(c) is on appellants, and in this case, appellants fall far short of proving that the face-to-face identification described by the decoy and the police officer was deficient. That the decoy may have thought the clerk was not looking at him, or that he thought he was "maybe" or "approximately" 10 feet from the clerk [RT 23], while the officer estimated the difference as "three or four feet," do not detract from the overall picture of an identification consisting of the decoy proceeding straight to the clerk [RT 20, 22] when he reentered the store, his statement regarding the sale directed to the clerk [RT 22, 25], the clerk's expression of frustration [RT 31], the almost immediate photographing of the decoy and the clerk together [RT 25], and the officer's account of the event [RT 30-32].

Appellants' characterizations of Officer Murphy's testimony - "Officer Murphy remembered nothing of this operation," "Officer Murphy apologized for his failing memory," or his "failing testimony" (App. Br., p. 5) are gross exaggerations. Our review of the record found only two instances where Officer Murphy was unable to remember

details of the event - one relating to whether another officer accompanied him into the store and the other concerning whether other employees were near the cash register when he approached the clerk. Neither of these instances detracts in any measurable extent from Officer Murphy's otherwise detailed testimony, or from his memory.

The clerk did not testify, so, without his testimony, appellants have no proof the face-to-face identification failed to accomplish its purpose.

In *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1687, 1698 [1 Cal.Rptr.3d 339] (*Keller*), the court upheld a 141(b)(5) identification conducted outside the licensed premises. After reviewing the historical background of the rule, the court concluded:

[W]hile identification of the seller is of obvious importance, Regulations section 141(b)(5) was primarily designed to deal with a different issue. The core rationale for the creation of binding sections concerning the conduct of buy operations was to allow such buys in a manner fair to sellers. ... Regulations section 141(b)(5) ensures – admittedly not as artfully as it might– that the seller will be given the opportunity, soon after the sale, to come “face-to-face” with the decoy.

There is no question in the case before this Board that the seller was given the opportunity to come face-to-face with the decoy, either in the circumstances described by the decoy and Officer Murphy or moments later when the decoy and the seller were brought together for the photograph that became Exhibit 3.

II

Appellants argued at the administrative hearing that there was a violation of rule 141(b)(2), which requires that a decoy display the appearance which could generally be expected of a person under 21 years of age. The ALJ made no findings regarding the decoy's appearance, other than to note appellants' argument that he was “tall,” stating, “No evidence was presented regarding the decoy's height, although the Administrative

Law Judge could see that he was at least six feet tall. Respondent has not shown how the decoy's height resulted in a violation of Rule 141(b)(2).” [Determination of Issues II].

The Appeals Board considers the issue whether the appearance displayed by a decoy complies with rule 141(b)(2) one of fact. (See, e.g., *Garfield Beach CVS LLC/Longs Drug Stores California LLC (2011) AB-9138.*) The decision in question does not treat the issue as one of fact, and the factual findings make no reference to the rule. Even though the ALJ observed the decoy when he testified, the findings do not address any aspect of his appearance, nor do they even refer to the photo of the decoy (Exhibit 3), all of which makes us wonder what the ALJ did consider, other than height. Height, by itself, is not a reliable measure of apparent age, yet it appears to be all the ALJ considered. Without even the most basic of findings, the decision must be reversed.

ORDER

The decision of the Department is reversed.⁴

BAXTER RICE, CHAIRMAN
 FRED ARMENDARIZ, MEMBER
 FRED HIESTAND, MEMBER
 ALCOHOLIC BEVERAGE CONTROL
 APPEALS BOARD

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.