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

AB-9211a
File: 21-477766 Reg: 11074917

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store 9940
872 North 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: July 10, 2014
San Francisco, CA

ISSUED AUGUST 4, 2014

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 Control[1] 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 Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kelly Vent.

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[1]The decision of the Department, dated November 1, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

This is the second appeal in this matter. 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 a 19-year-old police decoy. Following an administrative hearing on August 18, 2011, the Department issued a decision which determined that the violation charged had been proven, and that no defense had been established.

In the first appeal, the Board reversed the decision of the Department on the ground it was not supported by the findings; specifically, that no factual findings were set forth to support a determination that the minor decoy appeared to be under the age of 21 as required by law. (See AB-9211, issued December 4, 2012.) The Board's reversal was not accompanied by any express instructions to the Department, thereby leaving it with three responses: (1) accept the Board's decision and dismiss its complaint against the licensee; (2) seek judicial review of the Board's order by writ of mandamus; or (3) remand the matter to an administrative law judge (ALJ) for essential factual findings on the decoy's general appearance as to age.

The Department remanded the matter to the same ALJ who rendered the initial decision, and a second hearing was held on September 3, 2013. The ALJ came to an identical conclusion without taking additional evidence. Thereafter, the Department entered the decision which is the subject of appellants' present appeal.

In the instant case, appellants contend: (1) the Department did not have the authority to remand the matter to an ALJ, and (2) the ALJ failed to comply with the Board's remand order.

DISCUSSION

I

Appellants allege the Department lacks the authority and jurisdiction to remand the matter to an administrative law judge following a reversal by the Appeals Board. (App.Br. at pp. 5-9.)

Appellants contend that the Department was without jurisdiction to enter its Decision Following Appeals Board Decision, having failed to seek review of the Appeals Board's decision by way of petition for writ of review to a Court of Appeal or to the Supreme Court. Appellants assert that, since the Appeals Board did not order the case remanded to the Department, which was within its power, the Department's sole recourse from the Appeals Board's order of reversal is as provided for in Business and Professions Code §§ 23089 and 23090, i.e., by petition for writ of review to a Court of Appeal or to the Supreme Court. Since the Department did not seek review as provided for in those sections of the Code, appellants contend, the Appeals Board decision is final, and the Department's order is beyond its jurisdiction.

The Board addressed this issue previously at considerable length in *Circle K Stores, Inc.* (1999) AB-7080a, and concluded that the Department possessed the requisite jurisdiction to enter the order it did. That decision discussed the pertinent case law considering the effect of an unqualified order of reversal, and concluded that it was the equivalent of an automatic remand for further proceedings not inconsistent with the Board's decision. The same is true in this case, and remand was appropriate to provide the ALJ an opportunity to remedy his deficient findings.

II

Appellants contend that even if the remand order was proper, that the ALJ's

decision is devoid of the necessary factual findings to support a determination that the decoy appeared under the age of 21. We agree.

This appeal brings to mind the lyrical refrain from a once popular song: "Here we come [or go], right back where we started from" (Al Jolson, et. al, *California*, track No. 5 on the album, *The Guest*.) Where we "started from" was *Garfield Beach/Longs* (2012) AB-9278, a case nearly identical to this one. The Board in that case, as in this one, initially reversed the Department's decision due to the ALJ's failure to make a necessary finding that the minor decoy displayed the appearance of one under the age of 21.[2] The Department chose to remand that case, but on remand presented no new evidence and did not ask the ALJ (the same one that heard the case the first time) to make what we obviously felt and expressed was a necessary finding about the minor decoy's age appearance. The ALJ there, the same one as in this case, again reached the same conclusion he did in his first decision, absent the essential finding. Following a second appeal (*Garfield Beach/Longs* (2014) AB-9178a), we reversed for lack of the requisite finding and the Department decided to dismiss the accusation. (See Decision Following Appeals Board Decision, June 13, 2014.) The same result, in spades, is warranted here.

The ALJ made the following observation pertaining to the appearance of the decoy:

> Respondent argued that there was a violation of the Department's Rule 141(b)(2) because the decoy was tall. The argument is rejected. No

[2]Counsel for the Department argues "the affirmative defense afforded by Rule 141(b)(2) should not be available if the clerk does not testify regarding the appearance of the decoy." (Reply Br. at p. 6.) No authority for this position is offered, and a search of the Board's opinions involving rule 141(b)(2) reveals none. Neither this Board nor any court has ever held that the clerk must testify for the defense to be available.

> evidence was presented regarding the decoy's height, although the Administrative law Judge could see that he was at least 6 feet tall. Respondent has not shown how the decoy's height resulted in a violation of Rule 141(b)(2).

(Determination of Issues ¶ II.) At no time does the ALJ make a finding that the decoy displayed the appearance of someone under the age of 21.

Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836] (*Topanga)*, holds that "implicit in [the law] . . . is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order." The court explained that

> among other functions, a findings requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions. [Citations.] In addition, findings enable the reviewing court to trace and examine the agency's mode of analysis. [Citations.] [¶ . . . .¶] Absent such road signs, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency. Moreover, properly constituted findings enable the parties to the agency proceeding to determine whether and on what basis they should seek review. [Citations.] They also serve a public relations function by helping to persuade the parties that administrative decision-making is careful, reasoned, and equitable."

(*Id.* at pp. 516-517, fns. omitted.)

We do not know, except by assumption, whether the ALJ actually observed the decoy — since this fact is omitted from both of his decisions, and no specific finding is made in either decision that the decoy displayed 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 — as required by Business and

Professions Code § 25658(f) and rule 141(b)(2). In fact, the ALJ's proposed decision lends equal support to the inference that the decoy did *not* meet the standard required by the rule, since even though the ALJ observed the decoy when he testified, the findings do not address any aspect of his appearance except height, nor do they refer to the photo of the decoy (Exhibit 3), all of which makes us wonder what the ALJ *did* consider in coming to a conclusion that there was compliance with rule 141(b)(2).

The Board consistently recognizes that we must defer to the factual determinations of the ALJ *as long as they are reasonable*. Indeed, the Board has recited countless times:

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

However, the Board cannot accord deference when, as here, a factual determination essential to a legal conclusion is *absent*. It cannot be denied that in minor decoy prosecutions a "finding" that the decoy has the general appearance of a person under 21 years of age is necessary to the Department's imposition of discipline. That is the clear lesson of, *inter alia*, *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2002) 103 Cal. App.4th 1084 [123 Cal.Rptr.2d 652], an opinion that arose from a remand to this same ALJ, due to similarly insufficient findings he made the first time respecting the minor decoy's appearance as to age. In that case, however, in contrast to this one, the ALJ made the requisite new findings about the decoy's appearance based on evidence previously presented. Here, the ALJ refused to make such a finding because he mistakenly believed rule 141 "does not

require the ALJ to make findings to prove compliance with the rule." (Proposed Decision at p. 5.)

The ALJ's refusal to make findings does not wash. In the first place, it improperly relieves the Department from any obligation to satisfy the requirement that the minor decoy's general appearance be of a person under 21 years of age, contrary to the plain language of the statute and rule, as well as decisions of appellate courts and this Board. Second, it puts this Board in the difficult (if not impossible) position of trying to determine from the dry printed record and a photograph of the minor decoy what his general appearance was (in regards to his age) at the time of sale and at the hearing.

Unlike the ALJ, the Board did not and could not observe important factors about the decoy, including his demeanor, gestures, nervousness, and so forth that are relevant to his general age appearance. The ALJ is the fact finder the Board depends upon in making such determinations and when, as here, he refuses to make essential findings because he claims there is insufficient evidence to support doing so, we must take him at his word and decide this dispute in accordance with applicable law. Finally, the ALJ's conclusion that there was compliance with 141(b)(2) is precisely the leap from "evidence to conclusion" that *Topanga* countenances against.

By refusing to make the findings the law requires, the ALJ's decision constitutes an "abuse of discretion." "'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* (1966) 240 Cal.App.2d 659, 666-667 [49 Cal.Rptr. 901].) Accordingly, the Board concludes the decision in this matter is not supported by the findings and, as such, constitutes an

abuse of discretion.

ORDER

The decision of the Department is reversed.[3] We believe no remand is warranted as we are ruling as a matter of law that the Department's decision was incorrect. Too much taxpayer money has already been wasted on the previous remand that unfortunately brought us, once again, "right back where we started from." The accusation should be dismissed.

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

[3]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.