

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

AB-9217

File: 21-479576 Reg: 10073318

GARFIELD BEACH CVS LLC and LONGS DRUG STORES CALIFORNIA LLC,
dba CVS Pharmacy 9799
6215 Riverside Avenue, Suite B, Riverside, CA 92506-2179,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: September 6, 2012
Los Angeles, CA

ISSUED OCTOBER 19, 2012

Garfield Beach CVS LLC and Longs Drug Stores California LLC, doing business as CVS Pharmacy 9799 (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 Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kimberly J. Belvedere.

¹The decision of the Department, dated November 16, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 9, 2009. On July 22, 2010, the Department instituted an accusation against appellants charging that, on April 8, 2010, appellants' clerk, Lessie Davis (the clerk), sold an alcoholic beverage to 17-year-old Justin A.² Although not noted in the accusation, Justin A. was working as a minor decoy for the Riverside Police Department at the time.

An administrative hearing was held on October 6, 2011, at which time documentary evidence was received, and testimony concerning the sale was presented by Justin A. (the decoy) and by Chad Collopy, a Riverside police officer.

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 a timely appeal, and make the following contentions: (1) the decoy did not display the appearance required by rule 141(b)(2), and the ALJ did not establish an analytical bridge between the evidence and his conclusion that the decoy appeared to be under the age of 21; and (2) the decision failed to comply with clear precedent requiring the Department to explain its basis for making findings of credibility.

DISCUSSION

I

Appellants contend that the decoy lacked the appearance required by rule 141(b)(2), i.e., that he “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.” They point to his experience as

² Because decoy Justin A. is a juvenile, we have not included his surname.

a police Explorer and as a decoy, and tell us he was self-assured, had been trained in police tactics, and had a mature physical appearance which was inconsistent with an appearance generally expected of a person under 21 years of age. Thus, appellants argue, the ALJ lacked sufficient evidence to support his findings.

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.³

Substantial evidence is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

When findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197

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

Cal.Rptr. 925].) Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

The ALJ observed the decoy as he testified, made findings regarding the decoy's appearance, and explicitly referred to those elements of appearance that appellants say caused this 17-year-old decoy to have the appearance of an adult 21 years of age or more (Findings of Fact 5 and 9, and Conclusion of Law 6):

FF 5: Decoy [Justin A.] appeared and testified at the hearing. He stood about 5 feet, 6 inches tall and weighed approximately 145 pounds. His hair was cut short. When he visited Respondents' store on April 8, 2010, he wore khaki shorts, a white t-shirt and flip-flops. (See Exhibits 2 and 3). He was not wearing any jewelry. [Justin A.] has gained about 15 pounds since the date of the operation. At Respondents' Licensed Premises on the date of the decoy operation, [Justin A. looked substantially the same as he did at the hearing.

FF 9: Decoy [Justin A.] appears his age, 17 years of age at the time of the decoy operation. Based on his overall appearance, *i.e.*, his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance/conduct in front of Clerk Davis at the Licensed Premises on April 8, 2010, [Justin A.] displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to Davis. [Justin A.] appeared his true age.

CL 6: Respondents also argue that Rule 141(b)(2) was violated because the decoy appeared to be over 21 years of age because of his hair line and being a police explorer, This argument is also rejected. Decoy [Justin A.] appeared his true age, 17 at the time of the operation. (Findings of Fact, ¶¶ 5 through 11.)

This Board's jurisdiction is limited, as we pointed out above. We are not permitted to address factual issues *de novo*. The ALJ is the fact finder. The ALJ was in a position to view the decoy, hear the decoy testify, observe the behavioral elements that go into a person's poise, maturity, mannerisms, and demeanor, and conclude, as

he did, that the decoy's appearance complied with the rule's requirements. We have not found, and appellants have not shown us, any legal error that would justify our intervention.

II

Appellants contend that the decision should be reversed because the ALJ failed to explain his findings on issues of credibility. They argue that he was obligated to explain why, confronted with two inconsistent accounts, he chose to believe one witness and disbelieve the other:

The ALJ in the case at bar, was faced with a decision; he had to decide which of the two inconsistent accounts to believe. However, the ALJ simply dismissed the [*sic*] some of the witness's testimony as incredible yet failed to provide an adequate legal basis for his decision as required.

(App. Br., p.7.)

This is the first time, to our knowledge, that an appellant has raised a credibility issue with respect to whether a decoy displayed the appearance required by rule 141(b)(2). Appellants do this without even telling us what is inconsistent about the testimony of the witnesses who testified in support of the Department's case.

At the Department hearing, appellants argued that there was inconsistent testimony from the police officer and the decoy as to where one or the other was standing when the decoy made his purchase. How this could bear on the ALJ's

reasoning with respect to the decoy's 141(b)(2) criteria simply baffles us, and appellants have not told us how.

ORDER

The decision of the Department is affirmed.⁴

FRED ARMENDARIZ, CHAIRMAN
BAXTER RICE, 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.