

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

AB-9281

File: 21-479659 Reg: 11075299

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy # 9187
683 Lomas Santa Fe Drive, Solana Beach, CA 92075,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: August 1, 2013

Los Angeles, CA

Telephonic Deliberation: August 12, 2013

ISSUED AUGUST 29, 2013

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy # 9187 (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 Saltzman and D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

¹The decision of the Department, dated July 3, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 10, 2009. On June 23, 2011, the Department filed an accusation against appellants charging that, on March 11, 2011, appellants' clerk, Leticia Rangel (the clerk), sold an alcoholic beverage to 19-year-old Valentine Pfaffmann. Although not noted in the accusation, Pfaffmann was working as a minor decoy for the San Diego County Sheriff's Department at the time.

At the administrative hearing held on March 22, 2012, documentary evidence was received and testimony concerning the sale was presented by Pfaffmann (the decoy); and by Carla Taft and Michael Benavides, San Diego County Sheriff's deputies.

Testimony established that on March 11, 2011, the decoy entered the licensed premises, followed shortly thereafter by two sheriff's deputies. The decoy selected a six-pack of Coors Light beer from the coolers, and took it to the sales counter where the clerk asked him for his identification. The decoy handed the clerk his California driver's license which contained a red stripe indicating "AGE 21 IN 2013." The clerk looked at the license, entered something into the cash register, and completed the sale without asking the decoy any questions. One of the officers observed the sale of the beer to the decoy. Subsequently, the decoy exited the licensed premises and returned with several deputies to make a face-to-face identification of the clerk.

The Department's decision determined that the violation charged was proved and no defense to the charge was established.

Appellants then filed a timely appeal contending that there is insufficient evidence to support the ALJ's finding that the decoy had the appearance which could generally be expected of a person under the age of 21.

DISCUSSION

Appellants contend that the ALJ failed to make findings to support his decision that the decoy's appearance complied with rule 141(b)(2).² In particular, appellants maintain that the ALJ failed to explain how the decoy's physical and non-physical appearance supported the finding that the decoy appeared to be under the age of 21, in violation of *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836] (*Topanga*). (App.Br. at pp. 4-5.)

This Board is bound by the factual findings in the Department's decision as long as they are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends, [Inc. v. Alcoholic Bev. Control Appeals Bd. (2002)]* 100 Cal.App.4th [1250,]1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779];) We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor an appellate court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*

(*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

²References 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.

Rule 141(b)(2) provides: "The decoy shall 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."

The ALJ made the following findings regarding the decoy's appearance (Findings of Fact ¶¶ 8 and 10):

¶ 8. The decoy's overall appearance including his demeanor, his poise, his mannerisms, his maturity, his size and his physical appearance were consistent with that of a person under the age of twenty-one and his appearance at the time of the hearing was similar to his appearance on the day of the decoy operation except that he was about ten pounds heavier on the day of the hearing. The decoy is a youthful looking young man who was five feet eleven inches in height and who weighed one hundred thirty pounds on the day of the sale. On that day, the decoy was clean shaven, he wore no jewelry and his clothing consisted of a blue striped, long sleeve pullover shirt, blue jeans and Nike basketball shoes. Exhibits 2 and 3 are photographs that were taken on the day of the sale before going out on the decoy operation and Exhibit 5 is a photograph that was taken at the premises. All three of these photographs show how the decoy looked and what he was wearing on the day of the sale.

¶ 10. There was nothing remarkable about the decoy's nonphysical appearance and there was nothing about his speech, his mannerisms or his demeanor that made him look older than his actual age. After considering the photographs depicted in Exhibits 2, 3 and 5, the decoy's overall appearance when he testified and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

Appellants contend that the ALJ's findings of fact do not support compliance with rule 141(b)(2), and they cite *Topanga, supra*, as support for their assertion that "[a]n agency's decision must include findings 'to bridge the analytic gap between the raw evidence and the ultimate decision or order.'" (App.Br. at p. 4.)

Appellants misapprehend *Topanga*. It does not hold that findings must be explained, only that findings must be made. This Board has rejected countless attempts to stretch *Topanga* beyond its limited usefulness. *Topanga* addressed the total absence of findings; it is of no relevance to a case such as this, where the ALJ set forth extensive findings regarding the decoy's appearance at the time of the sale as well

as at the hearing. (Findings of Fact ¶¶ 8 and 10, *supra*.)

Ultimately, appellants are asking this Board to consider the same set of facts and reach a different conclusion from that of the trier of fact; this we cannot do.

ORDER

The decision of the Department is affirmed.³

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

³This 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.