

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

AB-9368

File: 21-477537 Reg: 13078141

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store 9538
1792-96 Garnet Avenue, San Diego CA 92109-3350,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 1, 2014
Los Angeles, CA

ISSUED JUNE 11, 2014

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store 9538 (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 Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, David Sakamoto.

¹The decision of the Department, dated July 31, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On March 14, 2013, the Department filed an accusation against appellants charging that, on November 13, 2012, appellants' clerk, Jacob Keef (the clerk), sold an alcoholic beverage to 18-year-old Jonathon Young. Although not noted in the accusation, Young was working as a minor decoy for the San Diego Police Department at the time.

At the administrative hearing held on June 12, 2013, documentary evidence was received and testimony concerning the sale was presented by Young (the decoy); by Judson Campbell, a San Diego Police Officer; and by Alberto Beltran, appellants' Assistant Manager.

Testimony established that on the date of the operation, the decoy entered the premises, walked to the beer coolers, and selected a six-pack of Bud Light beer in bottles. He took the beer to the sales counter, where he waited in line. When it was his turn to be served, the decoy placed the beer on the counter. The clerk rang up the beer and stated the price. The decoy paid with a twenty-dollar bill. The clerk returned some change and bagged the beer. The clerk did not ask the decoy for identification, nor did he ask any age-related questions.

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

Appellants then filed this appeal contending the ALJ abused his discretion and failed to proceed in the manner required by law when he (1) ignored evidence that the premises were busy at the time of the operation, in violation of the fairness requirements of rule 141(a); (2) summarily dismissed evidence that the decoy's appearance did not comply with rule 141(b)(2); and (3) ignored mitigating evidence.

DISCUSSION

I

Appellants contend the ALJ ignored evidence showing that the operation violated the general fairness provisions of rule 141, subdivision (a). Specifically, appellants contend that the store was busy, as there were approximately five or six customers in the location and the clerk had to call another employee to open more registers. (App.Br. at p. 4.)

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. (Cal. Const., art. XX, § 22; Bus. & Prof. Code §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].)

Rule 141(a) calls for fairness in the use of minor decoys:

A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors . . . and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

As appellants note, the requirements of rule 141 must be strictly obeyed: "The Department's increasing reliance on decoys demands strict adherence to the rules

adopted for the protection of the licensees, the public, and the decoys themselves."
(Acapulco Restaurants, Inc. v. Alcoholic Bev. Control Appeals Bd. (1998) 67
Cal.App.4th 575, 580 [79 Cal.Rptr.2d 126, 129] [addressing face-to-face identification].)

It is settled law, however, that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. *(Hooks v. Cal. Personnel Bd. (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 653]; Reimel v. House (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; Harris v. Alcoholic Bev. Control Appeals Bd. (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].)*

Appellants contend that "based on the busy activity in the store at the time of the minor decoy operation, there was an unusual level of patron activity that interjected itself into the store, as testified to by the minor decoy and the assistant store manager." (App.Br. at p. 5.) The Department counters that the issue was not raised at the administrative hearing.

On the one hand, there is nothing in the closing arguments to indicate that appellants raised the issue. There is only the most oblique reference to the opening of a second register, and nothing to indicate that appellants intended to make a fairness argument based on it. [RT at pp. 84-86.] On the other hand, counsel for appellants did question the decoy regarding the level of activity in the store. [RT pp. 29-30.]

We can take guidance from this Board's decision in *Tang*, cited by appellants in their brief:

It is conceivable that in a situation which involved an unusual level of patron activity that truly interjected itself into a decoy operation *to such an extent that a seller was legitimately distracted or confused, and the law*

enforcement officials sought to take advantage of such distraction or confusion, relief would be appropriate.

(*Tang* (2000) AB-7454, at p. 5, emphasis added; see also *Equilon Enterprises* (2001) AB-7765, at p. 4.) At no point in the administrative hearing did appellants argue that the level of activity caused legitimate distraction or confusion, or that officers acted improperly or took advantage of the situation. It is unreasonable to expect an ALJ to infer a legal argument from passing factual references alone. The issue is therefore waived.

II

Appellants contend that the decoy's appearance violated rule 141(b)(2) because he had a receding hairline at the time of the operation, which he covered up at the hearing; because he had a "great deal" of experience as a decoy as well as law enforcement training, and had achieved the rank of cadet sergeant with the San Diego Police Department; and because he successfully purchased alcohol at five out of nine locations on the day of the operation.

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. [Citations.] 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. [Citations.] 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 Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004))

118 Cal.App.4th 1439, 1437 [13 Cal.Rptr.3d 826].)

Rule 141, subdivision (b)(2), restricts the use of decoys based on appearance:

"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." Once again, the burden of proof lies with appellants.

Appellants contend that the ALJ "failed to properly consider" their evidence and arguments that the decoy's appearance did not comply with the rule. (App.Br. at p. 5.)

In reality, the ALJ made extensive factual findings regarding the decoy's age and appearance:

2. Jonathon Young . . . was working as a minor decoy with officers from the San Diego Police Department when he visited the premises The decoy was born on July 15, 1994 and he was eighteen years old when he visited the premises.

¶ . . . ¶

7. Exhibit 3 is a photograph that was taken at the premises and it depicts the decoy holding the Bud Light beer that he purchased at the premises and he is standing next to Keef, the clerk who sold him the beer.

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 his hair was longer and styled differently on the day of the hearing.

9. On the day of the sale, the decoy was clean shaven and his hair was very short. His clothing consisted of a red and blue striped T-shirt, blue jeans and blue tennis shoes. Exhibit 3 is a photograph that was taken at the premises and Exhibits 4 and 5 are photographs that were taken on the day of the sale before going out on the decoy operation. All three of these photographs show how the decoy looked and what he was wearing on the day of the sale. Although the decoy has a slightly receding hairline which is visible in Exhibits 3, 4 and 5, the decoy is an extremely youthful looking young man who is short in stature and thin in build. He is five feet four

inches in height and he weighs only one hundred fifteen pounds.

10. The decoy had participated in three to five prior decoy operations, and he had served as a cadet with the San Diego Police Department for approximately 18 months at the time of the decoy operation. The decoy had received some training as a cadet and he had achieved the rank of cadet sergeant. On the day in question, he visited about nine locations and about five of the locations sold him an alcoholic beverage. The decoy indicated that he was nervous when he was at the premises and while he was testifying.

11. 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 3, 4 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.

(Findings of Fact ¶¶ 2, 7-11.) Based on these findings, the ALJ rejected appellants' arguments. (Determination of Issues ¶ 2.)

The ALJ did not "summarily dismiss" the 141(b)(2) issue, as appellants claim. (See App.Br. at p. 6.) In fact, the decision below provides an unusually detailed set of findings. The ALJ directly addressed all the factors appellants now claim he ignored, and found that the decoy did in fact bear the appearance of someone under the age of 21. When appellants assert that the ALJ "failed to properly consider" the evidence, they are, in essence, asking this Board to consider the same set of facts and reach the opposite conclusion — something this Board cannot do.

III

Appellants contend that the ALJ completely disregarded their evidence and arguments in support of a mitigated penalty. In particular, appellants point to the absence of findings on this issue.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant. (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183].) However, the Board will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Unless some statute requires it, an administrative agency's decision need not include findings with regard to mitigation. (*Vienna v. Cal. Horse Racing Bd.* (1982) 133 Cal.App.3d 387, 400 [184 Cal.Rptr. 64]; *Otash v. Bureau of Private Investigators* (1964) 230 Cal.App.2d 568, 574-575 [41 Cal.Rptr. 263].) Appellants provide no statutory authority for such a requirement. Findings regarding the penalty imposed are not necessary as long as specific findings are made that support the decision to impose disciplinary action. (*Williamson v. Bd. of Med. Quality Assurance* (1990) 217 Cal.App.3d 1343, 1346-1347 [266 Cal.Rptr. 520].)

Appellants challenge the ALJ's failure to make any findings regarding evidence they offered in support of mitigation, including the termination of the clerk and appellants' employee training scheme. [See RT pp. 85-86.]

Whether appellants' evidence serves to mitigate the standard penalty is a discretionary determination left in the hands of the ALJ. The absence of findings is not

fatal, because the law is clear: the ALJ is not required to make findings regarding the penalty imposed. This Board may only inquire whether the penalty imposed is reasonable. We find that it is.

ORDER

The decision of the Department is affirmed.²

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

²This 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.