

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

AB-9381a

File: 21-477888 Reg: 13078461

GARFIELD BEACH CVS, LLC, and LONGS DRUG STORES CA, LLC,
dba CVS Pharmacy Store 9681
1105 Myrtle Avenue, Eureka, CA 95501-1222,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: April 2, 2015
Sacramento, CA

ISSUED APRIL 22, 2015

Garfield Beach CVS, LLC, and Longs Drug Stores CA, LLC, doing business as CVS Pharmacy Store 9681 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 15 days because their clerk sold an alcoholic beverage to a police minor decoy in violation of Business and Professions Code section 25658, subdivision (a).

Appearances include appellants Garfield Beach CVS, LLC, and Longs Drug Stores CA, LLC, through their counsel, Ralph Barat Saltsman and Margaret Warner Rose of the law firm Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, through its counsel, Dean Lueders.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On May 6, 2013, the Department filed an accusation against appellants charging that, on January

¹The decision of the Department, dated December 5, 2014, is set forth in the appendix.

17, 2013, appellants' clerk, (the clerk), sold an alcoholic beverage to 17-year-old Adam N. Although not noted in the accusation, Adam was working as a minor decoy for the Eureka Police Department at the time.

At the administrative hearing held on August 28, 2013, documentary evidence was received and testimony concerning the sale was presented by Adam N. (the decoy); by Officer Joshua Siipola of the Eureka Police Department; and by Nanci Hankerd, appellants' store manager.

Testimony established that on the date of the operation, the decoy entered the premises alone, walked to the beer coolers, selected a tall can of Budweiser beer, then proceeded to the sales counter.

The clerk asked the decoy for his identification. The decoy presented his California driver's license, which bore his correct date of birth as well as a blue stripe stating "PROVISIONAL UNTIL AGE 18 IN 2013" and a red stripe indicating "AGE 21 in 2016." The clerk looked at the identification briefly, then rang up the beer. After paying for the beer, the decoy exited the premises and met up with the officers.

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

Appellants filed an appeal contending that rule 141(b)(3) was violated. (See *Garfield Beach CVS, LLC/Longs Drug Stores Cal., LLC* (2014) AB-9381.) Appellants argued that the ALJ failed to make any factual or legal determinations regarding their rule 141(b)(3) defense. (*Id.* at pp. 2-3.)

This Board held that the factual findings were sufficient, but that the Department's decision indeed failed to articulate a conclusion of law on appellants' rule 141(b)(3) defense. Accordingly, we remanded the case for a clear ruling on the rule

141(b)(3) issue, and for any additional fact-finding necessary to reach such a conclusion. (*Id.* at p. 6.)

Appellants then filed this appeal insisting that rule 141(b)(3) was violated. Specifically, appellants argue (1) that the evidence contradicts the ALJ's factual finding that the surveillance video is inconclusive as to whether the decoy removed his identification from its wallet sleeve; and (2) the ALJ failed to reach any legal conclusion as to whether rule 141(b)(3) is violated when a decoy fails to present freestanding identification. These issues are raised together in appellants' brief, but will be addressed separately here.

DISCUSSION

I

Appellants challenge the factual finding, contained in the decision below, that the surveillance video was inconclusive as to whether the decoy removed his identification from his wallet. Appellants insist that "when this Board views Exhibit 3 (the video of the sale) the Board will observe the obvious, that the video definitively shows that the ALJ's finding is unequivocally wrong." (App.Br. at p. 1.)

Rule 141, subdivision (b)(3), states, "A decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages." The rule provides an affirmative defense, and the burden of proof lies with appellants. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

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 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. [Citation.] 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 1429, 1437 [13 Cal.Rptr.3d 826].)

Appellants' argument turns on the contents of Exhibit 3, a surveillance video taken within the premises during the transaction in question. Although the surveillance video was displayed at the first administrative hearing (RT at pp. 11-12), the Department's first decision did not address the video's contents.² (See Findings of Fact, Department Decision, *Garfield Beach CVS, LLC/Longs Drug Stores Cal., LLC*, *supra.*) In the second decision after the remanded hearing, however, the ALJ found:

C. In the surveillance video, the decoy's back is facing the camera and the sales transaction moved very rapidly. As a result of this, it is impossible to state definitively whether or not the decoy's identification was removed from the wallet. However, it does appear that the clerk did not take physical possession of the identification. Nevertheless, as stated above, it is undisputed that the decoy did present his ID to the clerk when requested.

(Findings of Fact ¶ I.C.)

We have reviewed Exhibit 3, which was properly included in the record, and find no error in the ALJ's interpretation of the video. The video itself has a low resolution,

²The absence of findings regarding the contents of the surveillance video is *not* what prompted this Board to remand. The remand resulted solely from the absence of legal conclusions on the rule 141(b)(3) issue.

resulting in a blurred image largely obscured by video compression artifacts. It also has a low frame rate, limiting the number of separate images available for scrutiny, and is filmed from a distance *behind* the decoy. While it is clear that the decoy shows *something* by holding it outward at the right side of his body, the object is cupped in his palm. Because his palm is facing away from the camera, it is impossible to tell what the object is he is showing to the clerk.

Appellants acknowledge that “[w]hile the decoy’s back is to the camera, the decoy’s position does not preclude the viewer in any way from seeing the identification throughout the entire sale.” (App.Br. at p. 8.) By “viewer” we presume appellants are referring to the clerk, not those viewing the video that was filmed from a position behind the minor decoy. After all, it is the clerk to whom the minor decoy is showing his identification, and the minor decoy’s undisputed testimony supplementing the video (Exhibit 3) confirms that his identification was in his hand and visible to the clerk. Simply put, the evidence supports the challenged finding of fact.

II

Appellants contend that the ALJ’s allegedly erroneous findings of fact, discussed in Part I, *supra*, prevented him from reaching a conclusion of law on their rule 141(b)(3) defense. They contend their defense was, and is, that the decoy’s failure to present “free-standing identification” — that is, to remove the identification from his wallet — violated the rule.

As noted, we find no error in the ALJ’s finding of fact regarding the contents of the surveillance video. Because he found the video unhelpful, the ALJ relied on other evidence to determine the sequence of events:

D. The . . . clerk who sold beer to the decoy did not testify at the hearing

and [appellants] did not call any other percipient witness to the sales transaction. Therefore, the decoy's credible testimony is the only direct evidence regarding the sales transaction. Even if the decoy was mistaken in recalling that he actually handed his ID to the clerk, the preponderance of the evidence established that the decoy did indeed present his ID to the clerk when requested. By doing so, the requirements of Rule 141(b)(3) were met. Rule 141(b)(3) does not require that the decoy actually hand his ID to the clerk. The decoy only has to present his ID when requested as was done in the case at issue.

E. Furthermore, [appellants] did not argue or present any evidence to establish that the decoy's ID was in any way obscured or unreadable or purposely concealed.

(Findings of Fact ¶¶ I.D through E.)

Appellants bear the burden of proving their rule 141 defense. Their offer of proof depends entirely on their interpretation of the events in the surveillance video, which the ALJ properly rejected. (See Part 1, *supra*.) The clerk did not testify, and appellants offered no other evidence to show that the decoy's identification remained in his wallet. Moreover, the decoy's testimony was the opposite of what appellants claim — that he *did* remove the identification from his wallet. (RT at p. 18.) His testimony was disputed only by argument, not facts. In the absence of factual support, the ALJ was not required to address the narrow legal question of whether a decoy's identification must be freestanding.

The only relevant question, then, is whether the decoy presented his identification upon request, as required by the rule. Appellants do not dispute that the decoy presented the identification at the clerk's request. (Findings of Fact ¶ I.D.) Indeed, counsel for appellants conceded at the administrative hearing that "the ID was presented upon request to the seller." (RT at p. 41.) Moreover, appellants do not claim the minor decoy's identification was in any way obscured, unreadable, or intentionally concealed. (Findings of Fact ¶ I.E.) Accordingly, they have failed to establish a

violation of rule 141(b)(3), and the ALJ was justified in concluding that “[t]here was compliance with Rule 141(b)(3).” (Determination of Issues II.)

We originally remanded this decision because it lacked a clear conclusion of law on appellants’ rule 141(b)(3) defense. As we noted, we were uncertain “whether the ALJ ignored appellants’ rule 141(b)(3) defense, or simply overlooked it in drafting the decision.” (*Garfield Beach CVS, LLC/Longs Drug Stores Cal., LLC, supra*, at p. 6.)

That shortcoming has been remedied by the remanded hearing. (See Legal Basis for Decision II; Determination of Issues II.)

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.