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

AB-9430
File: 21-479373; Reg: 13079562

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #9579
4570 Atlantic Avenue, Long Beach, CA 90807-1513,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 4, 2014
Los Angeles, CA

ISSUED JANUARY 9, 2015

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #9579 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 15 days because their clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances include appellants Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, through their counsel, Ralph Barat Saltsman and Jennifer L. Carr of the law firm Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, through its counsel, Kimberly J. Belvedere.

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[1]The decision of the Department, dated April 10, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 2, 2009. On November 26, 2013, the Department filed an accusation against appellants charging that, on September 16, 2013, appellants' clerk, Nancy Melendez (the clerk), sold an alcoholic beverage to 18-year-old Corey Gilley. Although not noted in the accusation, Gilley was working as a minor decoy for the Long Beach Police Department (LBPD) at the time.

At the administrative hearing held on February 12, 2014, documentary evidence was received and testimony concerning the sale was presented by Gilley (the decoy) and by Eduardo De La Torre, a Long Beach Police officer. Appellants presented no witnesses.

Testimony established that on September 16, 2013, Detective Gomez from the LBPD entered the licensed premises. Later, the decoy entered and went to the beer cooler where he selected a six-pack of Bud Light beer in bottles. He took the beer to the register and placed it on the counter. The clerk rang up the beer and completed the transaction without asking for identification and without asking any age-related questions. The decoy then exited the premises and met up with the LBPD officers.

The decoy and several officers reentered the premises a short time later and one of the officers asked the decoy who had sold him the beer. The decoy pointed to the female clerk behind the counter and indicated that she was the one. Officer De La Torre identified himself to the clerk and informed her that she had sold alcohol to a minor. He asked her to call a supervisor to take over the register and for her to come out from behind the counter. Officer De La Torre asked the decoy to identify the person who had sold him the beer. The decoy pointed at the clerk and said “I’m 18 years old

and she sold me the beer." The two of them were facing each other at the time and standing approximately five feet apart. A photograph was taken of the decoy with the clerk (Exhibit 2-A) and the clerk was later issued a citation.

The Department's decision determined that the violation charged had been proven and that no defense had been established. The Department imposed a penalty of 15 days' suspension.

Appellants then filed a timely appeal contending: (1) the decision is not supported by substantial evidence because the ALJ failed to explain how continuation of the license would be contrary to public welfare and morals; (2) rules 141(a)[2] and 141(b)(2) were violated because the decoy appeared to be over the age of 21; (3) the face-to-face identification did not comply with rule 141(b)(5); and (4) evidence of mitigation was not considered.

DISCUSSION

I

Appellants contend that the decision is not supported by substantial evidence because the ALJ failed to explain how continuation of the license would be contrary to public welfare and morals.

When an appellant contends that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Bus. & Prof. Code § 23084; *Boreta Enterprises,*

[2]References 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.

Inc. v. Dept. of Alcoholic Bev. Control (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].)

Appellants do not allege that the decision is not supported by the findings. Instead, appellants assert that since Business and Professions Code section 24200, subdivision (a) provides authority to discipline a licensee for actions that are contrary to public welfare and morals, the Department is therefore required to explain how the sale to a minor runs contrary to public welfare and morals. (App.Br. at p. 9.) No such requirement exists, however.

The authority of the Department derives from the California Constitution, which states in pertinent part: “The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude.” (Cal. Const, art. XX, § 22.) This authority is codified in Business and Professions Code section 24200, which lays out in subdivisions (a) through (f) some of the various grounds that constitute a basis for the suspension or revocation of licenses — additional bases are laid out in sections 24200.1, 24200.5, and 24200.6. Activity which is contrary to public welfare or morals is merely one of these grounds, and does not constitute an element which must be proved in each and every case.

Appellants assert that the ALJ did not comply with the California Supreme Court's holding in *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836] (*Topanga*), that the agency's decision must set forth findings to "bridge the analytic gap between the raw evidence and ultimate decision or order." They allege that the ALJ’s conclusion must be

explained:

> Cause for suspension of the Respondents' license was established. Continuation of the license would be contrary to public welfare or morals pursuant to Article XX, Section 22, of the Constitution of the State of California, and Business and Professions Code Section 24200(a) and (b) in conjunction with Section 25658(a) of said Code.

(Determination of Issues IV). However, as the Board has said many times, there is no requirement that the ALJ explain his reasoning. Simply because the ALJ does not explain his analytical process does not invalidate his determination, or constitute an abuse of discretion.

A violation of section 25658(a) is a violation of law. And violations of the law are contrary to public welfare and morals. (See *7-Eleven, Inc. / Lucky* (2014) AB-9431 at pp. 8-11.) No further explanation is required.

II

Appellants contend that rules 141(a) and 141(b)(2) were violated because the decoy appeared to be over the age of 21, thereby making the decoy operation unfair. They also allege that the ALJ failed to consider arguments and evidence presented to support their 141(b)(2) defense. In particular, appellants direct the Board to the fact that the decoy was one week shy of his nineteenth birthday, that he had eighteen months of experience with Long Beach Search and Rescue, that he had a muscular body type, and that he was not nervous at the time he participated in the decoy operation. (App.Br. at p. 11.)

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 rule provides an affirmative defense, and the burden of proof lies with the

appellants.

This Board is bound by the factual findings in the Department's decision so long as those findings 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* (*Lacabanne*) (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734].) 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].)

The ALJ made the following findings of fact regarding the decoy's physical appearance and demeanor:

> B. The decoy's overall appearance including his demeanor, his poise, his mannerisms, his speech, 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 approximately one inch longer on the day of the hearing.
>
> 1. On the day of the sale, the decoy was five feet ten inches in height, he weighed one hundred fifty pounds, he was clean-shaven and his hair was short. He was wearing a white and black T-shirt, black shorts, black shoes and a watch. The photograph depicted in Exhibit 2-A was taken at the premises and it depicts what the decoy looked like and what he was wearing when he was at the premises. The photographs depicted in Exhibits 3-A and 3-B were taken on the day of the sale before going out

on the decoy operation. These two photographs also depict what the decoy looked like and what he was wearing when he was at the premises except that he did not have his dark glasses on top of his head when he was at the premises.

2. The decoy had not participated as an Explorer and he had not participated in any prior decoy operations. However, he had participated as a volunteer in a search and rescue program for about eighteen months prior to September 16, 2013. This program is designed to allow young adults to learn about the fire and police departments. The decoy had also gone on one police ride-along as an observer. The decoy testified that he was not nervous at the premises or while testifying.

3. The decoy is a very youthful looking teenager who was soft-spoken while testifying. There was nothing about his speech, his mannerisms or his demeanor that made him appear older than his actual age.

4. The decoy visited thirteen locations on September 16, 2013 and he was able to purchase an alcoholic beverage at six locations.

5. After considering the photographs (Exhibits 2-A, 3-A and 3-B), 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 ¶¶ II.B.1 through 5.)

Contrary to appellants' assertions, the ALJ considered all aspects of the decoy's appearance — including his size, physique, experience, and demeanor — and found appellants' arguments unpersuasive.

Appellants have provided no valid basis for the Board to question the ALJ's determination that the decoy's appearance complied with rule 141. This Board has on countless occasions rejected invitations to substitute its judgment for that of the ALJ on a question of fact, and we must do so here as well.

III

Appellants contend that the face-to-face identification did not comply with rule

141(b)(5) because "the minor only identified the clerk after the clerk had been quarantined and secluded for the minor decoy to make such identification. The minor decoy had no other choice but to identify the clerk whom the officers had initiated contact with and identified as the person who had sold an alcoholic beverage to a minor and thus, the identification was unduly suggestive." (App.Br. at p. 14.)

Rule 141(b)(5) provides:

> Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

The rule provides an affirmative defense. The burden is therefore on the appellants to show non-compliance. As appellants correctly point out, the rule requires "strict adherence." (See *Acapulco Restaurants, Inc.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126] [finding that no attempt, reasonable or otherwise, was made to identify the clerk].)

In *Chun* (1999) AB-7287, this Board observed:

> The phrase "face to face" means that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

(*Id.* at p. 5.) In *7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983, we clarified application of the rule in cases where, as here, an officer initiates contact with the clerk following the sale:

> As long as the decoy makes a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error, we do not believe that the officer's contact with the clerk before the identification takes place causes the rule to be violated.

(*Id.* at pp. 7-8; see also *7-Eleven, Inc./Paintal Corp.* (2013) AB-9310; *7-Eleven, Inc./Dars Corp.* (2007) AB-8590; *West Coasts Products LLC* (2005) AB-8270; *Chevron Stations, Inc.* (2004) AB-8187.)

The court of appeals has found compliance with rule 141(b)(5) even where police escorted a clerk outside the premises in order to complete the identification. (See *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Keller*) (2003) 109 Cal.App.4th 1687 [3 Cal.Rptr.3d 339].) As the court noted:

> [S]ingle person show-ups are not inherently unfair. (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 386 [269 Cal.Rptr. 447].) While an unduly suggestive one-person show-up is impermissible (*ibid.*), in the context of a decoy buy operations [*sic*], there is no greater danger of such suggestion in conducting the show-up off, rather than on, the premises where the sale occurred.

The court concluded that "[t]he literal terms of [rule 141(b)(5)] leave the location of the identification to the discretion of the peace officer." (*Id.* at p. 1697.)

In *Carlos M.*, *supra*, the court said:

> The burden is on the defendant to demonstrate unfairness in the manner the show-up was conducted, i.e., to demonstrate that the circumstances were unduly suggestive. (*People v. Hunt* (1977) 19 Cal.3d 888, 893-894 [140 Cal.Rptr. 651, 568 P.2d 376].) Appellant must show unfairness as a demonstrable reality, not just speculation. (*People v. Perkins* (1986) 184 Cal.App.3d 583, 589 [229 Cal.Rptr. 219].)

(*In re Carlos M.*, *supra*, at p. 386.)

In this case, appellants do not contend that the clerk was in fact misidentified. They simply contend that officers "quarantined and secluded" the clerk in the back room, leaving the decoy no other choice but to identify the isolated clerk as the seller.

First, there is no evidence that officers either "quarantined" or "secluded" the clerk, or even that they escorted her into a back room. In fact, the record shows that

the clerk was merely asked to step in front of the counter. Second, appellants overlook the fact that even if the clerk had been fully isolated, there was nothing to prevent the decoy from simply pointing out to officers that they'd initiated contact with the wrong clerk.

The ALJ made the following findings about the identification:

> C. The evidence established that a face to face identification of the seller of the beer did in fact take place and that the identification complied with the Department's Rule 141.
>
> 1. Shortly after the sale had taken place, the decoy returned to the premises with several officers. When one of the officers asked the decoy to inform him who had sold the beer to him, the decoy pointed to the female clerk who was standing behind the counter and indicated that she had sold him the beer. Officer De La Torre then approached the clerk, identified himself as a police officer, informed her that she had sold an alcoholic beverage to a minor and instructed the clerk to call a supervisor to take over the cash register. The clerk then came out from behind the counter to the front of the counter.
>
> 2. When Officer De La Torre subsequently asked the decoy to identify the person who had sold beer to him, the decoy pointed to the clerk and stated that she had sold him the beer. At the time of this identification, the clerk and the decoy were facing each other and standing approximately five feet from each other. Exhibit 2-A is a photograph that was taken after the face to face identification and it shows the decoy holding the six-pack of beer he purchased at the premises and he is standing next to Melendez, the clerk who sold him the beer.

(Findings of Fact ¶¶ II.C.1 through 2.)

Nothing in the record suggests that the identification was erroneous, or that the decoy was in any way pressured to misidentify the seller. The face-to-face identification fully complies with rule 141(b)(5).

IV

Appellants contend that evidence of mitigation — to wit, that appellants have been licensed at this location for four years with no record of disciplinary action — was

not considered and that the ALJ erred in stating “no evidence of mitigation was presented at the hearing.” (App.Br. at p. 15, quoting Finding of Fact ¶ II.D.)

The 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]) but 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 its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Rule 144 sets forth the Department's penalty guidelines and provides that higher or lower penalties from the schedule may be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances. (Cal. Code Regs., tit. 4, § 144.)

Rule 144 itself addresses the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

> **Penalty Policy Guidelines:**
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> The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or

> complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

An administrative agency's decision need not include findings regarding mitigation absent a statute to the contrary. (*Vienna v. Cal. Horse Racing Bd.* (1982) 133 Cal.App.3d 387, 400 [184 Cal.Rptr. 64].) Appellants have not identified any statute with such requirements. 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, 1346-47 [266 Cal.Rptr. 520].)

"Trial courts need not state reasons for rejecting or minimizing a mitigating factor, particularly where no objection is raised. [Citations.] Further, unless the record affirmatively indicates otherwise, the trial court is deemed to have considered all relevant criteria, including any mitigating factors. [Citation.]" (*People v. King* (2010) 183 Cal.App.4th 1281, 1322, [108 Cal.Rptr.3d 333], internal quotations omitted.)

In closing argument, appellants stated, "[l]astly, as noted on the Accusation, the CVS has been licensed since 2009, which has been four years without discipline at this location, and for that Respondent would request mitigation and a 12-day if the Accusation were sustained." (RT at pp. 50-51.) While four years of discipline-free licensure is evidence which the ALJ could have considered as mitigating evidence, he was not required to do so. Rule 144 explicitly states that higher or lower penalties may be imposed by the Department than those recommended in rule 144.

In short, without more, appellants' discontent with the ALJ's proposed penalty and the extent to which it has or has not been mitigated does not render that penalty an

abuse of discretion — especially when the penalty imposed is the standard penalty imposed for the first instance of such a violation. Whether appellants' evidence serves to mitigate the standard penalty is a discretionary determination left in the hands of the ALJ. Depending on the facts of the individual case, four years without a violation may indeed constitute mitigating evidence. In other cases, such as appellants', the ALJ may determine that the same time period does *not* mitigate the penalty. Either way, the law is clear: the ALJ is not required to make findings regarding the penalty imposed.

A 15-day suspension is reasonable and we find no abuse of discretion.

ORDER

The decision of the Department is affirmed.[3]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, 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.