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

AB-9434
File: 21-477914 Reg: 13079382

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store 9174
11411 Deerfield Drive, Truckee, CA 96161-0506,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: January 8, 2015
Sacramento, CA

ISSUED JANUARY 30, 2015

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store 9174 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for fifteen days for their clerk selling an alcoholic beverage to a 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 Margaret Warner Rose of the law firm of Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, through its counsel, Kelly Vent.

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[1]The decision of the Department, dated April 23, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On October 21, 2013, the Department filed an accusation against appellants charging that, on June 3, 2013, appellants' clerk, Candice Lenihan (the clerk), sold an alcoholic beverage to eighteen-year-old Joseph Childers. Although not noted in the accusation, Childers was working as a minor decoy for the Department at the time.

At the administrative hearing held on February 6, 2014, documentary evidence was received and testimony concerning the sale was presented by Childers (the decoy). Appellants did not present any witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises and proceeded immediately to the alcoholic beverage section. He selected a 24-ounce can of Corona beer and took it to the register where the clerk was working. The clerk scanned the beer and asked the decoy for identification. The decoy presented his California driver's license, and the clerk took possession of it. The clerk looked at the identification, tried to scan it, and then looked at it again. The clerk said something to the effect of, "I would never have guessed it. You must get asked a lot." The decoy said nothing in response. The clerk completed the sale and the decoy left the premises with the beer.

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

Appellants then filed an appeal contending rule 141(b)(4)[2] was violated. Also, on the date of the hearing for this appeal, appellants submitted to the Board a motion to

[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.

continue oral argument until such time as all three Board members could be present to hear it.

DISCUSSION

I

Appellants contend the decoy operation was not conducted in a fashion that promotes fairness, in violation of rule 141(a), because the decoy failed to speak up when the clerk said, "I would never have guessed it. You must get asked a lot." Appellants maintain this failure to speak violated rule 141(b)(4)[3] and that both the administrative law judge (ALJ) and the Department misapplied the standards set forth by previous decisions of this Board as to what constitutes compliance, or lack thereof, with the rule.

Rule 141(a) requires "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*.

(Emphasis added.) 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 for the licensees, the public, and the decoys themselves." (*Acapulco Restaurants, Inc. v. Alcoholic Bev. Control Appeals Bd.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126].)

In the Proposed Decision, the ALJ made the following observations about appellants' rule 141(b)(4) argument:

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[3]Rule 141(b)(4) provides: "A decoy shall answer truthfully any questions about his or her age."

> The Appeals Board has ruled where there is a verbalization by the clerk expressing the mistaken notion that the decoy is 21 years or older, then a decoy has a duty to rectify the error in the interest of fairness. (Garfield Beach CVS, LLC and Longs Drug Stores California, LLC [(2013)] AB-9271.) Underpinning this holding, the Appeals Board noted that while Rule 141(b) (4) expressly requires a decoy to answer truthfully any *questions* about his or her age, there is no requirement for the decoy to volunteer his or her true age or "to clear up what may be a misconception about age where a seller is silent and simply goes ahead with the sale either without having requested proof of age or, upon request, having been provided identification." (Id.) The Appeals Board concluded by recognizing that since decoys are engaged in a law enforcement process designed to test the extent to which sellers are complying with laws pertaining to alcoholic beverage sales to minors, it would be "*unreasonable to expect that process to function if the decoy was obligated to clear up what might be a mistake or misconception on the part of the seller.*" [Citation.]
>
> The Court is reluctant to draw a distinction between verbal and non-verbal mistakes made by sellers about a decoy's age. One form of misconception about a buyer's age (verbal) should not invoke Rule 141(a) while another (non-verbal) does not. It is unreasonable to relieve a seller of alcoholic beverages from liability, who has been presented with unambiguous proof (Childers' CDL - State's Exhibit 3) of an underage buyer's age, because they verbalize their mistake or misconception while penalizing those purveyors that remain silent after receiving and reviewing bona fide evidence of a buyer's underage status.
>
> There was nothing inherently unfair about the fashion in which this decoy operation was conducted. The Respondent failed to establish an affirmative defense.

(Determination of Issues, emphasis in original.)

The Board is puzzled by some aspects of the ALJ's reasoning. For instance, the ALJ's analysis mentions the difference between verbal and non-verbal mistakes and the Board's supposed reluctance to afford much weight to it. But *Garfield Beach*, s*upra*, the opinion of this Board relied upon by the ALJ, makes clear that the distinction

between verbal and non-verbal mistakes is critical in cases such as this.[4]

The Southland Corp./Dandona (1999) AB-7099 reversed a decision of the Department where the decoy did not respond to the clerk's remark, "1978. You're 21." The decoy testified she understood the clerk's remark to be a statement rather than a question, but also testified that she had been instructed by the police that if she presented her driver's license, she did not have to answer a question about her age. (*Id*. at pp. 4-6.) The Board observed:

> It is clear from the testimony of the decoy that it would have meant little to her whether [the clerk's] remark was a question or a statement . . . . Consequently, to accept her after-the-fact characterization of the clerk's remark as a mere statement is too charitable. There can be a very fine line between a remark that is a mere statement and a remark that is really a question. Delegating that determination to one who believed she should not have answered in either case tacitly ignores the requirement of fairness.

(*Id*. at pp. 7-8.)

In *Lucky Stores, Inc*. (1999) AB-7227, cited extensively by appellants, the Board reversed a decision of the Department where the decoy made no response when the clerk said, "1978. You are just 21" (per the decoy) or "1978. You are 21" (per the clerk). The clerk testified he intended what he said to be a question, and got only a grin in response, while the decoy testified he understood it to be a statement, to which no reply was necessary. (*Id*. at p. 4.) The Board stated:

> Our concern is that it is asking too much of a decoy to leave it to him or to her to make that critical judgment whether a remark about age is intended to elicit from them either a confirmation or a correction, or is

[4]There, the Board observed that while there is nothing in rule 141(b)(4) that requires a decoy to clear up what may be a misconception about his or her age when a clerk simply remains silent and completes the sale, "where there has been a verbalization of the seller's thought processes . . . a decoy may be expected to respond." (*Garfield Beach*, *supra*, at pp. 4-5.)

> simply conversation. If fairness of the decoy operation is an important goal, as the Rule proclaims, then, in its implementation, it ought to be the case that where the clerk's remark about age is such that an honest clarification from the decoy may prevent the sale from occurring, the decoy has the obligation to offer such clarification by saying "No, I am not 21," or words to that effect.

(*Id*. at p. 6.)

Next, in *Equilon Enterprises, LLC* (2002) AB-7845, the Board reversed a decision of the Department where the decoy remained silent after the clerk examined the decoy's driver's license, which showed he would be 21 in 2003, and said, "Born in 1981. You check out okay." The Board explained why it thought the decision merited reversal:

> Rule 141 requires that a decoy shall answer truthfully questions about his or her age. There is nothing in the rule that requires a decoy to volunteer information about his or her age, or to clear up what may be a misconception about age when a seller is silent and simply goes ahead with the sale either without having requested proof of age or, upon request, having been provided identification. Since a decoy is engaged in a law enforcement process to determine the extent to which sellers are complying with the law regarding sales of alcoholic beverages to minors, it would seem unreasonable to expect that process to function if the decoy was obligated to clear up what might be a mistake or misconception on the part of the seller.
>
> For example, many transactions involve a seller who requested identification, was furnished identification which showed the decoy to be a minor, yet proceeded with the sale. It could reasonably be assumed the seller was careless, or unable to interpret the information provided. It might also be assumed the seller did not really care, although this is undoubtedly much less frequent.
>
> However, where there has been a verbalization of the seller's thought processes such as that in this case a decoy may be expected to respond. Rule 141 says that a decoy is required to respond to a question. As this Board has said in an earlier case, there may be a thin line between what is a statement and what is a question. And when that line blurs, and the verbalization borders on the ambiguous, it may well be that a response is required.

(*Id*. at p. 5.)

As mentioned, *Garfield Beach*, *supra*, a case similar to *Lucky Stores*, found that where there is a verbalization by a clerk or employee expressing the mistaken notion that the decoy is over 21, the decoy has a duty to respond in the interest of fairness. In that case, the clerk said "I know you are over 21 and this is only for the cameras," and the decoy said nothing in response. (*Id*. at p. 2.) In both *Lucky Stores* and *Garfield Beach*, the clerk uttered words which clearly expressed that a mistaken calculation had been made. Even though both cases involved statements and not questions, the Board found that a response by the decoy was required in the interest of fairness.

Within the past year this Board considered a case in which the clerk stated "Oh, you are so young" and received only a nod and a slight light laugh from the decoy in response. (*7-Eleven, Inc./Johal Stores, Inc.* (2014) AB-9403.) Although we determined that rule 141(b)(4) had not been violated, we surveyed the above line of cases and determined "[i]t is apparent from the Board's prior cases involving this rule, that it considers an appropriate response — whether to a statement or a question by a clerk — to be one which is free of ambiguity, unlikely to cause confusion or distraction, and which *errs on the side of responding if the clerk has made a mistaken calculation as to age*." (*Id*. at pp. 11-12, emphasis added.)

Viewing the instant case through the lens established by this Board's precedent, we find this is an instance where the clerk's mistaken thought process has been verbalized, thereby requiring a response from the decoy. Here, the clerk said: "I would never have guessed it. You must get asked a lot." (RT at p. 18.) Obviously, this case is

markedly different from cases such as *Lucky Stores*[5] and *Garfield Beach*,[6] *supra*, where the mistake concerning the decoy's age was explicit in the clerks' respective comments. However, while this clerk's comments did not *explicitly* reveal her mistake, *implicit* in them was the notion that she had made such a mistake.

The most reasonable interpretation of the phrase "I would never have guessed it," as used in this context,[7] is that the clerk was telling the decoy, because he looked so young, she was surprised that he was of the appropriate age to purchase alcoholic beverages. Her subsequent comment "You must get asked a lot" is indicative that she believed her mistake — that the decoy was at least 21 years old but looked younger — must have been a common one. This commonsense interpretation of the clerk's comments is buttressed by the decoy's testimony concerning his own interpretation:

> MS. CARR (counsel for appellant): Of course. What -- after the clerk made that statement to you, what did you take that statement to mean?
>
> A. Casual conversation.
>
> Q. And that casual conversation did you see it related in any way to your age?
>
> A. Yes and no.
>
> Q. When you say "Yes and no," what do you mean?
>
> A. Yes, that maybe *I looked younger*. No, because *she thought I was older* or thought that I do it a lot, you know.

(RT at p. 19, emphasis added.)

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[5]"1978. You are just 21" or "1978. You are 21." (*Lucky Stores*, *supra*, at p. 4.)

[6]"I know you are over 21 and this is only for the cameras." (*Garfield Beach*, *supra*, at p. 2.)

[7]This context being that the seller of alcoholic beverages has requested proof of majority from the buyer, has both received and reviewed identification provided by the buyer in response, and has then completed the sale.

When the decoy believes, as here, that a clerk's remarks are ambiguous as to his or her age, the decoy has an obligation to respond verbally and truthfully. That is the plain meaning of rule 141(a)'s language instructing that minor decoy operations must be conducted in a "*fashion that promotes fairness*." Implicit in the clerk's remarks here is the mistaken notion that the decoy was old enough to purchase alcoholic beverages. This is therefore a case where the seller's remark was such that an honest clarification from the decoy may have prevented the sale from occurring, and thus, in the interest of fairness, the decoy had an obligation to offer such clarification. (See *Lucky Stores*, *supra*, at p. 6; *Garfield Beach*, *supra*, at pp. 4-5.) We accordingly reverse the decision of the Department.

On a final note, we observe that this case lies remarkably close to the line where a decoy's duty to clarify a clerk's mistake concerning his or her age arises. We do not intend to impose on minor decoys the obligation to make a split-second, critical judgment whether a remark about age is intended to elicit from them either a confirmation or a correction, or is simply conversation. That said, we firmly believe that the Department itself is in the best position to eradicate the need for such an obligation via proper training of its minor decoys. Where, as here, the decoy him or herself interprets a seller's comments to *in any way* pertain to the decoy's age, the Department should insist that the decoy err on the side of responding with clarification. (See *Johal*, *supra*, at pp. 4-5.) Such a protocol would promote fairness in the spirit of rule 141(a) because an otherwise diligent seller would no doubt refuse to complete the transaction upon realizing the decoy's true age, whereas it can reasonably be inferred that a seller who proceeds with the sale after receiving such clarification has done so intentionally,

and is therefore properly subject to discipline. As such, we encourage the Department to train its decoys accordingly respecting the meaning and application of rule 141a).

II

In their motion for a continuance, appellants contend that, because Article XX of the California Constitution states that the Alcoholic Beverage Control Appeals Board shall consist of three members, oral argument on this matter should be continued until such time as all three Board members would be present. The Board explained to appellant's counsel that it would proceed to hear the matter as the presence of two members constituted a quorum, but if in the deliberations there was a difference of opinion between the members present as to the proper disposition of the case, we would reset it for reconsideration and hearing (unless waived) when all members could be present. Accordingly, we denied the motion, but, to avoid a party making future motions on this same reasoning, further clarify our reasons and authority for denying it.

There is nothing in the language of the California Constitution creating the Appeals Board or in the legislation implementing its provisions that addresses the question of whether the Board may hear and decide an appeal when it does not have a full complement of members. Similarly, there is no general statutory provision applicable to the Board or other administrative agencies, and our research has not disclosed any California case law addressing the subject. While some California administrative agencies are governed by statute as to what constitutes a quorum for conducting business, (see, e.g., Bus. & Prof. Code § 5524 [California Architects Board]; Bus. & Prof. Code § 8524 [Structural Pest Control Board]), the Appeals Board is not one of them.

However, authorities from courts of other jurisdictions, relying on common law,

support the Board's long-standing practice of deciding cases when a simple majority of the three-member Board is present for oral argument. (See, e.g., *Fed. Trade Comm. v. Flotill Prods., Inc.* (1967) 389 U.S. 179, 183-184 [88 S.Ct. 401] ("[I]n the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body. Where the enabling statute is silent on the question, the body is justified in adhering to that common-law rule."). See also *Ho Chong Tsao v. Immigration & Naturalization Service* (5th Cir. 1976) 538 F.2d 667, 669. Until such time as an appellant provides us with persuasive law to the contrary, or a reviewing court or the California Legislature holds otherwise, our position stands.

ORDER

The decision of the Department is reversed.[8]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[8]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 is 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.