

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

AB-9436

File: 21-477763; Reg: 13079253

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store 9554
77 Bovet Road, San Mateo, CA 94402,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: January 8, 2015
Sacramento, CA

ISSUED JANUARY 29, 2015

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store 9554 (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, 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 Ryan Kroll of the law firm Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, through its counsel, Heather Cline Hoganson.

¹The 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 September 23, 2013, the Department filed an accusation against appellants charging that, on December 6, 2012, appellants' clerk, Christian Tapia (the clerk), sold an alcoholic beverage to 19-year-old Daniel Cano. Although not noted in the accusation, Cano was working as a minor decoy for the San Mateo Police Department at the time.

At the administrative hearing held on February 20, 2014, documentary evidence was received and testimony concerning the sale was presented by Cano (the decoy) and by Joseph Hickman and Steven Pettit, Jr., officers with the San Mateo Police Department.

Testimony established that on the day of the operation, the decoy entered the licensed premises followed by Officer Hickman — who stayed approximately 15 yards away during the decoy operation and observed the transaction from inside the store. The decoy went to the coolers and selected a 24-ounce can of Budweiser beer. He took the beer to the cash register. The clerk scanned the beer, then asked for the decoy's identification. The decoy handed the clerk his identification, which had a vertical orientation and a red stripe indicating: "AGE 21 IN 2014," which, as mentioned, was two years later than the attempted purchase. The clerk nodded, then completed the sale.

The decoy exited the licensed premises with the beer in a bag, and confirmed to Officer Pettit that the clerk had sold him alcohol. About ten seconds later, the decoy reentered the premises with the police officers. He pointed to the clerk and said "This is the man who sold me alcohol." (RT at p. 50.) Officer Pettit then informed the clerk that he had sold alcohol to a minor, and the clerk said "Ah, shit, I did." (RT at p. 22.) A

photograph was taken of the decoy and clerk together, but at the request of appellants this exhibit was withdrawn and is not in evidence. The clerk was then issued a citation.

The Department's decision determined that the violation charged had been proven and that no defense had been established.

Appellants then filed an appeal contending: (1) The ALJ's findings are inadequate to show compliance with rule 141(b)(5),² and (2) the record lacks substantial evidence for the Department to cure the deficiencies in the proposed decision or to support a finding that a face-to-face identification took place. These issues will be discussed together.

DISCUSSION

Appellants contend that the ALJ's findings are inadequate to show compliance with rule 141(b)(5). They also contend that the record lacks substantial evidence to support a finding that a face-to-face identification took place.

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.

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.

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani) (2004) 118 Cal.App.4th 1439, 1437 [13 Cal.Rptr.3d 826].) When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department. (See 6 Witkin, Cal. Procedure (2d ed. 1971) *Appeal*, § 245, pp. 4236-4238.) (*Kirby v. Alcoholic Bev. Control Appeals Bd. (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815].*)

The issue of substantial evidence, when raised by an appellant, leads to an examination by the Appeals Board to determine, 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, Inc. v. Dept. of Alcoholic Bev. Control (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].*)

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.

The ALJ made the following findings on the issue of the face-to-face identification:

IV

After purchasing the beer, the decoy exited the store with it. Approximately ten seconds later, he returned to the store, accompanied by police officers from the San Mateo Police Department.

V

While standing approximately ten feet from the clerk, the decoy identified him as the seller of the beer. The identification was made to Officer Pettit of the San Mateo Police Department. During the identification, the decoy was looking at the clerk. The clerk was not helping customers at that time. After the identification took place, one of the police officers took a photograph of the decoy and the clerk standing next to each other.

(Findings of Fact ¶¶ IV-V.) Appellants contend the evidence only supports a conclusion that “the decoy pointed the clerk out from somewhere within the premises.” (App.Br. at p. 1.) They further allege that “the evidence does not indicate that the clerk was reasonably aware he had been identified as having sold alcohol to that particular decoy.” (App.Br. at p.2.)

Officer Hickman testified as follows about the face-to-face identification:

[Ms. Hoganson]

Q. Did you watch the minor leave the store?

A. Yes, I did.

Q. And did you subsequently leave the store or did you remain inside?

A. I remained inside.

Q. Did the minor subsequently re-enter the store?

A. Yes.

Q. And was that with another officer?

A. Yes.

Q. So what happened - - what did you observe when the minor re-entered the store?

- A. He was brought to the counter - - to the same counter by Officer Pettit and was present when I believe it was Mr. Tapia was informed that the subject was in fact a minor decoy representing the police department.
- Q. Okay. And were you still fifteen or twenty yards back at that point or did you walk over?
- A. No. When the minor decoy was brought back inside with Officer Pettit, I approached at that time and assisted Officer Pettit with evidence collection and completing the citation, things of that nature.
- Q. Okay. Were you then within hearing range of Officer Pettit approaching the clerk?
- A. Yes.
- Q. Okay. And how was the clerk informed that he had sold alcohol to a minor?
- A. Verbally by Officer Pettit.
- Q. What did the clerk say or did the clerk say anything?
- A. He did say something in response, but I - - I don't recall what he said.
- Q. Did it appear to you the clerk understood what was being said?
- A. Yes. He didn't seem to have any difficulty comprehending what Officer Pettit said.

(RT at pp. 12-13.)

Officer Pettit testified on this issue as follows:

[Ms. Hoganson]

- Q. For the period of the operation, were you inside or outside?
- A. I believe I was outside in the vehicle that was parked along with Officer Von Glahn.
- Q. How did you become aware that the minor decoy had purchased alcohol?

- A. When he came outside and Officer Hickman who I believe was standing somewhere near one of the openings of the business, Daniel contacted Officer Hickman and Officer Hickman then got my attention and I came over.
- Q. Once you had ascertained with the minor decoy that the sale had taken place, what exactly did you do?
- A. Oh, we went inside and contacted the suspect who had sold the alcohol - - who Daniel identified had sold the alcohol to him.
- Q. Did Daniel identify the clerk first?
- A. Yes.
- Q. And then you approached him?
- A. Yes.
- Q. Did you speak to the clerk?
- A. I did briefly as is stated in my report, yes.
- Q. What was the clerk's response to you?
- A. As far as when I told him that he had sold alcohol to an underaged person?
- Q. Right.
- A. He - - as I was referring to my report earlier, all I can really remember is that he said, "Ah, shit, I did."
- Q. So did it appear to you that he knew what was going on?
- A. He appeared to me to be slightly surprised, but not overly surprised. So I don't know what to take away from that. Whether he knew what he was doing or not, I don't know.
- Q. What I mean is: Did it appear to you that he understood that you were informing him that he had sold alcohol to a minor?
- A. Yes.

(RT at pp. 21-22.)

On direct examination, the decoy testified as follows about these events:

[Ms. Hoganson]

Q. Okay. What happened after you left the store with the beer?

A. After I left the store with the beer, I - - I confirmed with the officer that were [sic] there with me yes, this store clerk sold me some alcohol, and that was their time to just come in and ask him questions and all that.

Q. Okay. So before you go back in the store, you were speaking with Officer Pettit; is that correct?

A. Yes.

Q. And then when - - did you return to the store with Officer Pettit?

A. Yes.

Q. And in the next couple of seconds, what did you do when you walked back to the store?

A. All I can remember is when I went back into the store, I pointed at him in confirmation saying that yes, he sold me the alcohol, and then we got together to take a photo, just me and him.

Q. So if I understand your testimony, it was you and the store clerk?
...

A. Yes.

Q. And then you approached the clerk; is that correct?

A. Yes.

Q. Did you hear the officers tell the clerk anything?

A. No.

Q. Did - - how did the clerk know that he had sold you alcohol?

Mr. Kroll: Objection. Lack of foundation; calls for speculation

Judge Low [sic]: Overruled. Do you know if the clerk knew that he had sold you alcohol?

The Witness: Yes.

Judge Low [sic]: And how do you know that he knew?

The Witness: I know that he knew that he sold me alcohol was when he - - I gave him the money.

Judge Low [sic]: No, no. This is after you came back.

The Witness: How do I know it was him?

Judge Low [sic]: How do you know that he recognized you in effect?

The Witness: This was like a short time after. I basically left the store and then about like ten seconds later, I entered and there he was.

Judge Low [sic]: All right. Next question, please.

Ms. Hoganson: Q. Okay. Did I understand correctly that you approached the clerk with Officer Pettit?

A. After he sold me the alcohol, yes.

Q. Yes. When you re-entered the store.

A. Yes.

Q. And you walked back up to the counter?

A. Yes.

Q. And was there some verbal indication to the clerk that "hey, we need to talk to you"?

A. No.

Q. The clerk looked at you?

A. Yeah, yes.

Q. And specifically what happened?

A. As soon as I came back into the store, me and the store clerk - - I looked at him, I identified him as the person who sold me the beer.

Q. Did [he] hear you identify?

Mr. Kroll: Objection. Lack of foundation; calms [sic] for speculation.

Judge Low [sic]: Do you know if he heard you?

The Witness: No. I don't know if he heard me.

(RT at pp. 37-40.)

And on cross examination, the decoy testified as follows:

[Mr. Kroll]

Q. Now, when you re-entered the CVS - - and I'll just explain this to make sure we're clear. You went into CVS, you encountered the clerk and then you re-entered.

You re-entered with an Officer Pettit; is that correct?

A. Yes.

Q. And you identified the clerk as soon as you entered the CVS; is that correct?

A. Yes.

Q. And how far away was the clerk to you when you made that identification to the officer?

A. From here to that plant right there, twenty feet.

Q. And at that time was the clerk interacting with any other customer?

A. No.

Q. When you made the identification, were you looking at the clerk or were you looking at the officer?

A. I was looking at the clerk.

Q. And at that time do you know where Officer Hickman was?

A. Yes. He was standing in the store in the same area I was.

Q. Was - - how close was Officer Hickman to you at that time?

A. About eight feet.

Q. At the time that you re-entered, did you see anyone else in the store besides you, Officer Hickman, Officer Pettit and the clerk?

A. No.

Q. And approximately how long were you outside before you re-entered?

A. About ten seconds.

[¶ . . . ¶]

Judge Low [*sic*]: Mr. Cano, how did you know to identify the clerk?

The Witness: Because I recognized him.

Judge Low [*sic*]: No. I mean, what prompted you to do it?

The Witness: I pointed at him, said, “this is the man who sold me alcohol[.]”

(RT at pp. 48-50.)

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, the Board clarified application of the rule in cases where 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; *BP West Coast Products LLC* (2005) AB-8270; *Chevron Stations, Inc.* (2004) AB-8187.)

In the instant case, appellants argue that the identification was made from too

great a distance to constitute a valid face-to-face identification. (App.Br. at pp. 5-6.) While we note the decoy's approximation of having been 20 feet away (RT at p. 49), both the ALJ (Finding of Fact ¶ 5) and appellants themselves during their closing argument (RT at p. 52) state that the identification took place at a distance of ten feet. We believe the risk of misidentification at this distance, particularly when no other customers are present, is slim to non-existent.

Finally, appellants contend that the clerk was not aware that he was being identified as the seller of the alcohol to the decoy. (App.Br. at p. 6.) This contention is not supported by the evidence. The clerk did not testify, so there was no direct testimony to establish whether the clerk knew or should have known he was being identified. However, the testimony of Officer Pettit makes it very clear that the clerk knew he had been identified as having sold alcohol to a minor when he said "Ah, shit, I did." We do not have to guess whether he knew or not — his response confirms that he did.

The core objective of rule 141 is fairness to licensees when decoys are used to test their compliance with the law. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (2003) 109 Cal.App.4th 1687, 1698 [1 Cal.Rptr.3d 339].) Rule 141(b)(5) is concerned with both identifying the seller and providing an opportunity for the seller to look at the decoy again, soon after the sale. (*Ibid.*) It does not require a direct "face off" to accomplish these purposes. Regardless of whether the clerk heard what the decoy said to the officer, he had the opportunity to look at the decoy again, and his response shows that he knew that he had been identified as having sold alcohol to a minor.

We believe the record contains sufficient evidence to support a finding that a

proper face-to-face identification took place, in compliance with rule 141(b)(5). We note, however, that the proposed decision is decidedly lacking in findings on other necessary elements of rule 141 compliance raised by appellants. This is most unhelpful and comes close to being an abuse of discretion. The Board cannot fulfill its mandate — to determine whether the decision below is supported by substantial evidence — without such findings. The ALJ is the fact finder the Board depends upon in making our determinations and when he refuses to make essential findings he makes everyone's job more difficult. We remind the Department that "properly constituted findings enable the parties to the agency proceeding to determine whether and on what basis they should seek review. . . . They also serve a public relations function by helping to persuade the parties that administrative decision-making is careful, reasoned, and equitable." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 517 [113 Cal.Rptr. 836].) We urge the Department to refrain from such cursory observations in the future.

ORDER

The decision of the Department is affirmed.³

BAXTER RICE, CHAIRMAN
FRED HIESTAND, 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.