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

AB-9483
File: 21-479514 Reg: 14080700

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #9481
12444 Beach Boulevard, Stanton, CA 90680-3930,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: June 4, 2015
Los Angeles, CA

ISSUED JUNE 19, 2015

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #9481 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for ten 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 California, LLC, through their counsel, Ralph Barat Saltsman and Margaret Warner Rose of the law firm of Solomon Saltsman and Jamieson, and the Department of Alcoholic Beverage Control, through its counsel, Jennifer M. Casey.

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[1]The decision of the Department, dated December 4, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 9, 2009. On June 19, 2014, the Department filed an accusation against appellants charging that, on February 7, 2014, appellants' clerk, Luis Miramontes (the clerk), sold an alcoholic beverage to nineteen-year-old Michael Tompkins. Although not noted in the accusation, Tompkins was working as a minor decoy for the Orange County Sheriff's Department at the time.

At the administrative hearing held on October 7, 2014, documentary evidence was received and testimony concerning the sale was presented by Tompkins (the decoy), and by Diamond Tann, a deputy for the Orange County Sheriff's Department. Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy and Deputy Tann entered the licensed premises. The decoy went to the coolers and selected a six-pack of Bud Light beer, which he took to the cash register. The decoy waited in line and, when it was his turn to be served, he set the beer on the sales counter. The clerk asked to see the decoy's identification, and the decoy handed his California driver's license to the clerk. The clerk looked at the license before handing it back to the decoy. The decoy paid for the beer, received change from the clerk, and exited the premises.

The Department's decision determined that the violation charged was proved and no defense was established. The administrative law judge (ALJ) recommended, and the Department imposed, a penalty of ten days' suspension.

Appellants then filed a timely appeal contending the minor decoy operation

violated rules 141(b)(2)[2] and 141(a).

DISCUSSION

I

Appellants contend that the decoy operation violated rules 141(b)(2) and 141(a). Specifically, appellants argue that a number of factors concerning the decoy's overall appearance suggest that the decoy operation was not conducted in a fashion that promotes fairness. Those factors include: that the decoy was able to purchase alcohol at seven of the fourteen licensed premises he visited that evening; that he stood six feet tall and weighed 165 pounds; that his ID was printed in the horizontal rather than vertical format; and that he had four and a half years of experience as a police Explorer and had assumed a leadership position in the organization. (App.Br. at pp. 6-7.)

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.

Meanwhile, rule 141(b)(2) provides, in pertinent part: "[t]he 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 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*

[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.

Restaurants, Inc. v. Alcoholic Bev. Control Appeals Bd. (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126].) However, non-compliance with rule 141 is an affirmative defense, and the burden of proof is on the party alleging it. (*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 if 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 1429, 1437 [13 Cal.Rptr.3d 826].)

It is therefore the task of 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].)

This Board has stated many times that, in the absence of compelling reasons, it will ordinarily defer to the ALJ's findings on the issue of whether there was compliance with rule 141(b)(2). In this case, the ALJ made the following findings of fact concerning the decoy's overall appearance, including his law enforcement experience and demeanor:

> 5. Tompkins appeared and testified at the hearing. On February 7, 2014, he was 6 feet tall and weighed 165 pounds. He was wearing a white shirt, green jacket, blue jeans, and black tennis shoes. His hair was cut short. (Exhibits 2 & 6.) His appearance at the hearing was the same.
>
> [¶ . . . ¶]
>
> 8. On February 7, 2014, Tompkins was a lieutenant with the Explorer program. He had been an Explorer for approximately 4½ years at the time. when he was 15 years old. [*sic*] As a lieutenant with the Explorers, he not only received training, but provided training to others. He went to 14 locations on February 7, 2014, of which seven sold alcoholic beverages to him.
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> 9. Tompkins appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of [the clerk] at the Licensed Premises on February 7, 2014, Tompkins displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to [the clerk].

(Findings of Fact, ¶¶ 5, 8-9.)

The ALJ considered appellants' rule 141(a) and 141(b)(2) arguments and rejected them:

> 5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rules 141(a) and 141(b)(2)[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that Tompkins' height, weight, and build, coupled with his extensive experience as an Explorer, made him appear to be unusually mature. This argument is rejected. Although Tompkins had more experience as an Explorer than most, there was nothing about this experience which made him appear to be older. Indeed, his appearance at the hearing, including his demeanor on the stand, was consistent with his actual age. (Finding of Fact ¶ 9.)

(Conclusions of Law, ¶ 5.)

Here on appeal, appellants first take issue with the decoy's experience as an Explorer, and the fact that the decoy had moved up the rankings in the Explorer program, and even twice assumed the supervisory rank of lieutenant. (App.Br. at pp.

6-7.) Appellants further claim that the ALJ improperly downplayed this experience in the proposed decision. (*Id*. at p. 6.)

This Board has time and again rejected the "experienced decoy" argument proffered by appellants in this case. As we stated in *Azzam* (2001) AB-7631:

> A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. . . . There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.

(*Id.* at p. 5, emphasis in original.) Appellants have presented no *evidence* that the decoy's experience *actually resulted* in him displaying an appearance of a person 21 years old or older on the date of the operation in this case. Rather, they simply rely on a difference of opinion — theirs versus that of the ALJ — as to what conclusion the evidence in the record supports. Absent an evidentiary showing, appellants' argument on this point must fail.

Appellants further contend that the decoy's size — 6 feet tall and 165 pounds — and success rate — i.e., ability to purchase alcoholic beverages at seven of fourteen locations on February 7, 2014 — also suggest that his appearance did not comply with rule 141(b)(2). These contentions are likewise without merit.

First, with regard to the decoy's size, the Board has repeatedly declined to substitute its judgment for that of the ALJ on this particular question of fact. Minors come in all shapes and sizes, and we are reluctant to suggest, without more, that minor decoys of large stature automatically violate the rule. (See, e.g., *7-Eleven Inc./Lobana* (2012) AB-9164, at pp. 3-4.) We have also noted that:

> [a]n ALJ's task to evaluate the appearance of decoys is not an easy one, nor is it precise. To a large extent, application of such standards as the

> rule provides is, of necessity, subjective; all that can be required is reasonableness in the application. As long as the determinations of the ALJ's are reasonable and not arbitrary or capricious, we will uphold them.

(*O'Brien* (2001) AB-7751, at pp. 6-7.)

Moreover, as to the decoy's 50% success rate on the evening in question, while an unusually high success rate *may* trigger suspicion that the decoy's appearance does not comply with rule 141(b)(2), a per se standard where a high success rate inevitably leads to a finding of non-compliance with the rule would be inappropriate because the sales could be attributable to a number of reasons other than a belief that the decoy appeared to be over the age of 21. (*7-Eleven, Inc./Aziz* (2010) AB-8980, at p. 3, quoting *7-Eleven, Inc./Jain* (2004) AB-8082.) Appellants have offered no evidence that the success rate in this case was specifically attributable to the decoy's appearance.

Next, the Board is not moved by appellants' point that the horizontal orientation of the decoy's driver's license somehow tricked the clerk into thinking the decoy was over 21. The horizontally oriented license does nothing to negate the following facts: the license showed the decoy's correct date of birth; the license contained a red stripe indicating "AGE 21 IN 2015" (Exhibit 5); before completing the transaction the clerk had to click through a register prompt asking if he had checked the decoy's ID (RT at p 20; Exhibit 3); and the clerk had to enter the decoy's date of birth into the register before completing the sale.[3] (RT at pp. 20-21; Exhibit 4.)

Finally, any effect appellants claim the aforementioned characteristics had on the decoy's overall appearance, as seen by the clerk, is mere speculation — the clerk did

[3]We also note that, according to Deputy Tann's testimony, the clerk entered a conveniently incorrect birth date of 8/25/90 — which would have made the decoy 23 years old on February 7, 2014 — when the decoy's true date of birth is 8/25/93. (See RT at p. 21.)

not testify at the hearing. The Board has reviewed the entire record and agrees with the ALJ's determination that there was compliance with rule 141(b)(2). As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity to observe the decoy as he testifies and to make the determination whether the decoy's appearance met the requirement of rule 141 that he possess 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.

We see no flaw in the ALJ's findings or determinations. Ultimately, appellants are asking this Board to consider the same set of facts and reach a different conclusion, despite substantial evidence to support those findings. This we cannot do.

II

On a final note, the Board is concerned with what we perceive to be a growing tendency of parties opting to forego oral argument before the Board and simply submitting the case on the briefs alone. As a former California appellate court attorney — and now superior court judge — has observed:

> [W]hy wouldn't you want to argue your case? Courts are famous for allowing "one bite at the apple." The court already gave you a chance to state your position in the briefs. Now it's giving you a second chance. And this time, you get to speak directly to the justices deciding your case, explain to them why you should win, and clear up any concerns they may have. You can hammer home a win, or even turn a loser into a winner by resolving any lingering doubts. On the other hand, there is little chance of turning a winner into a loser at oral argument. If your position was strong enough to merit an appellate brief, it's strong enough to merit oral argument. This is a rare but sweet second bite at the apple, with almost no downside. Take it!

(Nathan R. Scott, *Oral Argument at the California Court of Appeal* (2007) 49 Orange County Lawyer 10.) The Board echoes Judge Scott's sentiments, and we strongly encourage all appellants to argue their respective positions before us.

In this case, for instance, appellants filed no reply brief. Hence there was no response to the Department's contention that appellants failed to raise issues at the administrative hearing that they were raising for the first time in their opening brief. (Dept.Br. at p. 7.) The Board may well have benefitted from a colloquy with counsel for the parties on this point, but waiver of oral argument deprived us of that opportunity. As another authority remarked about the importance of oral argument (and implicitly why good appellate advocates will not, except in the rarest of cases, waive it):

> Oral argument . . . provides information that the brief can't contain. Most obviously, it gives the appellee [i.e., respondent] an opportunity to reply to responses and new points contained in the appellant's reply brief [or, since no reply brief was filed here, it gives appellant an opportunity to reply to new points raised in respondent's brief]. At least as important, it provides both sides the opportunity to answer questions that have arisen in the judges' minds. . . And the judges are bound to have in mind questions unanticipated by the briefs – either because the answer is too obvious or because the question is too subtle. Oral argument is the time to lay these judicial doubts to rest. And finally, the quality of oral argument can convey to the court that the brief already submitted is the product of a highly capable and trustworthy attorney, intimately familiar with the facts and the law of the case.

(Scalia & Garner, *Making Your Case: The Art of Persuading Judges* (2008), at p. 140.) The Board agrees with these aforementioned authorities and the reasons they provide for not waiving oral argument and submitting to us cases on the briefs.

ORDER

The decision of the Department is affirmed.[4]

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

[4]This final decision 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 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.