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

AB-9513
File: 21-477732 Reg: 14080809

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store #9923
1005 East Bidwell Street, Folsom, CA 95630,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: January 7, 2016
Sacramento, CA

ISSUED MARCH 1, 2016

Appearances: *Appellants:* Michelangelo Tatone, of Solomon Saltsman & Jamieson, as counsel for appellants Garfield Beach CVS, LLC and Longs Drug Stores California, Inc., doing business as CVS Pharmacy Store #9923.
Respondent: Jonathan Nguyen as counsel for the Department of Alcoholic Beverage Control.

OPINION

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store #9923 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 15 days, with five days conditionally stayed subject to one year of discipline-free licensure, because their clerk sold an alcoholic beverage to a police minor decoy in violation of Business and Professions Code section 25658, subdivision (a).

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[1]The decision of the Department, dated April 15, 2015, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On July 16, 2014, the Department filed an accusation against appellants charging that, on May 7, 2014, appellants' clerk sold an alcoholic beverage to 18-year-old Kathryn Cook. Although not noted in the accusation, Cook was working as a minor decoy for the Department of Alcoholic Beverage Control and the Folsom Police Department at the time.

At the administrative hearing held on March 5, 2015, documentary evidence was received and testimony concerning the sale was presented by Cook (the decoy). Appellants presented no witnesses.

The decoy's testimony established that on the date of the operation, appellants' clerk sold her a twelve-pack of Bud Light beer. The clerk did not ask the decoy her age and did not ask to see any identification. After the sale took place, one of the police officers took a photograph of the decoy and the clerk standing next to each other.

The Department's decision determined that the violation charged was proved and no defense was established. In light of appellants' five-year history of discipline-free licensure, their request for mitigation was granted, and they were assigned a penalty of fifteen days' suspension with five days conditionally stayed.

Appellants then filed an appeal contending: (1) The ALJ failed to consider evidence relevant to appellants' rule 141(b)(2)[2] defense; (2) the clerk was unaware he was being pointed out as the seller of alcoholic beverages, in violation of rule 141(b)(5) and (3) the Department failed to prove that the sale took place at appellants' store. At

[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.

oral argument, appellants expressly waived the third issue. Accordingly, it will not be addressed in this decision.

DISCUSSION

I

Appellants contend that the ALJ improperly discounted evidence of the decoy's so-called "success rate" — that is, the fact that on the date of the operation, four out of seven stores visited sold her an alcoholic beverage. According to appellants, "[t]his particular evidence establishes that 3 other sales clerks, in addition to Appellants' clerk, who worked similar positions in similar circumstances, were all inclined to sell alcohol to the decoy, *and did so because of her appearance*." (App.Br. at p. 6.)

The clerk did not testify.

Rule 141, subdivision (b)(2), states:

> 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 party asserting 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 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. [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].)

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 persuasiveness can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; see also 9 Witkin, Cal. Procedure (5th ed. 2008) *Appeal*, § 365 [observing that "[t]his fundamental doctrine is stated and applied in hundreds of cases"].)

Appellants cannot and do not allege that the ALJ overlooked or ignored the decoy's "success rate." The ALJ expressly considered the relative import of this bit of evidence, and wrote:

> Respondents noted that four of the approximately seven licensed premises which the decoy visited on May 7 sold an alcoholic beverage to her, suggesting that the decoy appeared at least twenty-one years old to the clerks who made those sales. The suggestion is rejected, as it is not supported by any evidence. It is just as possible that those clerks made the sales due to carelessness or indifference about the law. Moreover, it is not relevant that some of the clerks who saw the decoy might have thought that she appeared at least twenty-one years old, just as it is not relevant that other clerks might have thought that she did not. The issue in this case is whether the decoy displayed the appearance which could generally be expected of a person under twenty-one years old when she bought the beer from Respondents' clerk. As stated in Paragraph VII of the Findings of Fact, she did.

(Determination of Issues III.)

Appellants respond by asserting that this conclusion is "completely absurd" and instead advocating their preferred inference, that the sales necessarily occurred because of the clerks' internal subjective misinterpretation of the decoy's physical appearance. (App.Br. at p. 6.) They write: "To dismiss such evidence, and conclude that the sales occurred due to the 'possibility that those clerks made the sales due to carelessness or indifference about the law," . . . is, in and of itself, carelessness on the ALJ's part, and an indifference to the evidence presented and the law." (*Ibid.*)

Additionally, at oral argument, appellants objected to the wording of the ALJ's conclusion, interpreting it to mean that the ALJ found a decoy's success rate was *never* relevant evidence — a conclusion that would run counter to previous decisions from this Board.

This Board recently observed, however, that "[w]hile [it] has reversed a handful of cases in which the decoy's success rate was notably high, in all of those cases the success rate merely supplemented other indicia of error." (*7-Eleven, Inc./NRG Convenience Stores, Inc.* (2015) AB-9477, at p. 6.) There is no other indicia of error in this case. A decoy's success rate is best characterized as supplementary evidence of a rule 141(b)(2) violation. Without other, more tangible evidence that the decoy appeared over 21, there is nothing to prompt either an ALJ or this Board to favor the inference that the success rate was somehow connected to the decoy's apparent age — let alone substitute such an unsupported inference for a firsthand assessment of the physical appearance of the decoy. Without additional direct evidence that a decoy's appearance violated the rule, her success rate is indeed irrelevant.

Here, appellants failed to carry the burden of proving their rule 141(b)(2)

affirmative defense. Appellants' inference — that four of seven clerks legitimately mistook the decoy for someone over the age of 21 — is wholly unsupported by any evidence, testimonial or otherwise.

Finally, we disagree that the ALJ was "careless" or "indifferent." (See *ibid.*) The conclusion he reached — that appellants' inference is unjustified in light of equally viable alternative explanations — is the only reasonable conclusion in the face of such sparse evidence.

II

Appellants contend that the clerk was not aware he was being identified as the seller of alcoholic beverages. According to appellants, the decoy stood a full five feet from the clerk, did not point at him when she stated "yes, that's him," and did not communicate with him during or after the photograph.

This issue was not raised at the administrative hearing.

It is settled law that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*Hooks v. Cal. Personnel Bd.* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Bd. of Med. Examiners* (1978) 81 Cal.App.3d 564, 576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control* (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; *Harris v. Alcoholic Bev. Control Appeals Bd.* (1961) 197 Cal.App.2d 1182, 1187 [17 Cal.Rptr. 167].)

A review of the transcript reveals that appellants never raised a defense under rule 141(b)(5). The ALJ noted the omission, noting that "Respondents did not allege a violation of the Department's Rule 141(b)(5)." (Determination of Issues IV.) The

defense is therefore waived.

ORDER

The decision of the Department is affirmed.[3]

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

PETER J. RODDY, MEMBER, listened to oral argument of this case by telephone, but did not participate in this decision, because the Board did not provide sufficient advance notice to all parties of this fact pursuant to Government Code section 11123, subdivision (b)(1)(C).

[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.