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

AB-9139
File: 21-479481 Reg: 10073002

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #9608
2505 Santa Monica Boulevard, Santa Monica, CA 90404,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 1, 2011
Los Angeles, CA

ISSUED OCTOBER 17, 2011

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #9608 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk selling an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, appearing through their counsel, Autumn Renshaw and Jessica Cohen, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated October 25, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 3, 2009. On April 30, 2010, the Department filed an accusation against appellants charging that, on March 4, 2010, appellants' clerk, Candelaria Yoshimi (the clerk), sold an alcoholic beverage to 18-year-old Dyllan Hebert. Although not noted in the accusation, Hebert was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on September 14, 2010, documentary evidence was received and testimony concerning the sale was presented by Hebert (the decoy) and by two Department Investigators: Andrea Florentinus and William Johnson.

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

Appellants then filed an appeal contending: (1) Rule 141(a)[2] was violated, and (2) rule 141(b)(2) was violated. These issues will be discussed together.

DISCUSSION

Appellants contend that the decoy operation did not comply with the fairness standards set forth in rule 141(a) because the decoy did not display the appearance required by rule 141(b)(2).

Rule 141(a) provides:

> 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

[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.

> beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

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.

Appellants argue: ". . . the evidence at the hearing clearly established that the decoy had large markings in his ears when making the purchase of alcohol that could have easily been interpreted as earrings. . . . This attribute gave him the appearance which could generally be expected of someone age 21 or older. . . ." (App. Br. at p.5.) Appellants contend that it is unfair to have allowed the use of a decoy with visible earring marks.

The Administrative Law Judge (ALJ) heard and rejected the same argument that appellants are now making. He observed the decoy as he testified, and concluded that the decoy displayed the appearance required by Rule 141(b)(2):

> 4. After considering the photographs depicted in Exhibits 3, 4 and 5, 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. (FF II-B-4.)

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he testifies, and making the determination whether the decoy's appearance met the requirement of Rule 141(b)(2), that he possessed 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 are not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy lacked the appearance required by the rule, and an equally partisan response that he did not.

The fact that this decoy may have had visible earring holes does not convince us that *this* decoy's appearance failed to comport with the requirements of rule 141. The rule, through its use of the phrase "could generally be expected" implicitly recognizes that not every person will think that a particular decoy is under the age of 21. Thus, the fact that a particular clerk mistakenly believes the decoy to be older than he or she actually is, is not a defense if in fact, the decoy's appearance is one which *could* generally be expected of that of a person under 21 years of age.

The factual determination of the ALJ, that this decoy operation was conducted in compliance with rule 141(b)(2), is determinative in this case. The fact that appellants disagree with that determination does not make it unfair.

At oral argument, counsel for appellants also maintained that the ALJ failed to explain his findings, although this point was not raised in their brief. This Board has addressed, and rejected, this same contention numerous times before. For example, in *7-Eleven, Inc./Cheema* (2004) AB-8181, the Board said: "Appellants misapprehend *Topanga*.[3] It does not hold that findings must be explained, only that findings must be made." (Accord, *No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 258-259 [242 Cal.Rptr. 760]; *Jacobson v. County of Los Angeles* (1977) 69 Cal.App.3d 374, 389 [137 Cal.Rptr. 909].) Appellant is not entitled to any additional analysis.

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[3] *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836, 522 P.2d 12].

ORDER

The decision of the Department is affirmed.[4]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[4]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.