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

AB-9239
File: 21-479307 Reg: 10073420

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy 5945
915 East Arrow Highway, Azusa, CA 91702-5800,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: February 7, 2013
Los Angeles, CA

ISSUED MARCH 11, 2013

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy 5945 (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 police 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, Ralph Barat Saltsman and D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

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[1]The decision of the Department, dated January 13, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 1, 2009. On August 10, 2010, the Department filed an accusation against appellants charging that, on January 29, 2010, appellants' clerk, Guadalupe Quintana (the clerk), sold an alcoholic beverage to 18-year-old Jorge Arias, III. Although not noted in the accusation, Arias was working as a minor decoy for the Azusa Police Department at the time.

At the administrative hearings held on September 22, 2011, and October 21, 2011, documentary evidence was received and testimony concerning the sale was presented by Arias (the decoy); by Victoria Torrez, a Department Investigator; and by John Madaloni, an Azusa Police officer.

Testimony established that on January 29, 2010, the decoy entered the licensed premises, selected a six-pack of Corona beer in bottles from the cooler, and took it to the counter. The clerk asked for identification, and the decoy handed her his California driver's license which she viewed for about five seconds before pressing something on the register and completing the sale.

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

Appellants then filed a timely appeal contending that the ALJ's factual findings do not support his rule 141(b)(2)[2] conclusions.

[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.

DISCUSSION

Appellants contend that the ALJ abused his discretion and failed to proceed in the manner required by law because his factual findings do not support his conclusion that the decoy's appearance complied with rule 141(b)(2).

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. (*CMPB Friends,* [*Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002)] 100 Cal.App.4th [1250,]1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; ....) 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. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) 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 Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

Appellants contend that the ALJ's findings of fact do not support compliance with rule 141(b)(2). Appellants rely on the California Supreme Court's opinion in *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836] as support for their assertion that "[a]n agency's decision must include findings 'to bridge the analytic gap between the raw evidence and the ultimate decision or order.'" (App.Br. at p. 4, citing *Topanga*, *supra*, at p. 515.)

Appellants misapprehend *Topanga*. It does not hold that findings must be

explained, only that findings must be made. This is made clear when one reads the entire sentence that includes the phrase on which appellant relies: "We further conclude that implicit in section 1094.5 is a requirement that the agency which renders the challenged decision *must set forth findings* to bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga*, 11 Cal.3d at 515, emphasis added.)

In *No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 258-259 [242 Cal.Rptr. 760], the court quoted with approval, and added italics to, the comment regarding *Topanga* made in *Jacobson v. County of Los Angeles* (1977) 69 Cal.App.3d 374, 389 [137 Cal.Rptr. 909]: "'The holding in *Topanga* was, thus, that *in the total absence of findings justifying a variance*, the granting of such variance could not be sustained.'"

This Board has rejected countless attempts to stretch *Topanga* beyond its limited usefulness. *Topanga* addressed the total absence of findings. It is of no relevance to a case such as this, where the ALJ set forth findings regarding the decoy's appearance at the time of the sale as well as at the hearing. (Finding of Fact ¶10.) We must express, once again, our displeasure with counsel's persistent attempts to stretch *Topanga* beyond its reasonable reach.

Appellants refer us to *Garfield Beach CVS, LLC* (2012) AB-9178, in which this Board reversed for insufficient findings. The opinion in that case, however, hinged largely on the absence of necessary findings:

> No specific finding was made that the decoy displayed 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.

(*Id.* at p. 5.) The Board, in that case, did not reinterpret the ALJ's findings. Instead, essential findings were missing entirely. That is not the case here; the ALJ specifically rejected the argument that the decoy appeared over 21, and stated unambiguously that the decoy "had the appearance generally expected of a person under the age of 21." (Finding of Fact ¶10 and Conclusions of Law ¶5.) There is simply no deficiency of the sort shown in *Garfield Beach*.

Ultimately, appellants are asking this Board consider the same set of facts and reach a different conclusion from that of the trier of fact; this we cannot do.

ORDER

The decision of the Department is affirmed.[3]

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

[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.