

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

AB-9287

File: 21-479726 Reg: 11075571

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy 9749
2138 North Tustin Street, Orange, CA 92865-3712,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: August 1, 2013
Los Angeles, CA
Telephonic Deliberation: August 12, 2013

ISSUED AUGUST 29, 2013

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy 9749 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ 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, Ralph Barat Saltzman and D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing

¹The decision of the Department, dated July 17, 2012, is set forth in the appendix.

through its counsel, Kimberly J. Belvedere.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 10, 2009. On August 5, 2011, the Department filed an accusation against appellants charging that, on May 14, 2011, appellants' clerk, Warren Tsai (the clerk), sold an alcoholic beverage to 18-year-old Sabrina Ayoub. Although not noted in the accusation, Ayoub was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on May 9, 2012, documentary evidence was received and testimony concerning the sale was presented by Ayoub (the decoy) and by Jennifer Gardea, a Department agent. Appellants presented no witnesses.

Testimony established that on May 14, 2011, the decoy entered the licensed premises and selected a six-pack of Bud Light beer in bottles which she took to the checkout counter. The clerk asked the decoy for her identification, and she handed him her California driver's license which indicated that she was 18 years old, and which bore a red stripe stating "AGE 21 IN 2012." The clerk did not ask any age-related questions, and, after examining the identification, completed the sale. The decoy exited the premises and then returned with Agent Gardea and other Department agents to make a face-to-face identification of the clerk.

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

Appellants then filed a timely appeal contending the decision is not supported by the findings, because of errors in those findings.

DISCUSSION

This Board is bound by the factual findings in the Department's decision, as 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. (*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].)

If one finding, sustained by sufficient evidence, will support the trial court's judgment, an appellate court will presume that the judgment was predicated on such finding, and questions relative to other findings become immaterial upon appeal and may be disregarded. . . . Or, in other words, however unsupported, however lame, however inconclusive, any number of the findings may be, if in any case there be one clear, sustained and sufficient finding upon which the judgment may rest, every presumption being in favor of the judgment, it will be here concluded that the court did rest its judgment upon that finding, or those findings, and the others may and will be disregarded. [Citations.]

(*Balding v. Atchison, Topeka & Santa Fe Railway Co.* (1964) 225 Cal.App.2d 254 [37 Cal.Rptr. 215].)

California Code of Civil Procedure section 1094.5, subdivision (b) provides:

"Abuse of discretion is established if . . . the order or decision is not supported by the

findings" Appellants maintain that there has been an abuse of discretion in this matter, and that there are "several abnormalities that impugn the meaningfulness of the factual findings and conclusions contained in the proposed decision." (App.Br. at p. 2.)

Appellants cite *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836] (*Topanga*) as support for their assertion that "effective mandamus review is possible only when the administrative decisionmaker (here, the administrative law judge) makes findings that enable a reviewing court (this Appeals Board) to follow the decisionmaker's path of reasoning by comparing the raw evidence and the ultimate decision to the findings." (App.Br. at pp. 1-2, citing *Topanga, supra*, at p. 515.)

In particular, appellants refer to four errors when they speak of "abnormalities." Two of these appear in the middle of Findings of Fact ¶ 8, in which the administrative law judge (ALJ) writes: "Clerk Tsai was aware that she [*sic*] was being identified as the person who sold the beer to Kozich [*sic*]." As appellants correctly note, there is no individual involved in this matter named Kozich, and the clerk is male, not female. A third error appears at the end of the proposed decision which is dated February 14, 2012 – three months before the hearing which took place on May 9, 2012. And finally, appellants point out Conclusions of Law ¶ 6 in which the ALJ states: "Ayoub appeared and acted her true age, 18." This, appellants say, contradicts the fact that the decoy was almost 20 years of age on the date of the hearing.

We agree with appellants' speculation that the "errors . . . most likely resulted from using a standardized computer-generated template or a previous decision . . ." (App.Br. at p. 6.) However, we do not believe one can say the decision is not supported by the findings as a result of such errors.

In the instant case, the errors pointed out by appellants do not change the fact that substantial evidence still exists, in spite of these errors, to establish that the clerk in this matter sold a six-pack of beer to a minor decoy.

Findings of Fact ¶¶ 6-8 outline the substantial evidence in support of the accusation in this matter:

¶ 6. Ayoub entered the Licensed Premises and went to a cooler. She selected a six pack of Bud Light beer. (See Exhibit 2.) Beer is an alcoholic beverage. Ayoub took the six pack of beer to the sales counter for purchase. There were two customers in line in front of her.

¶ 7. Another register opened up. The clerk, Warren Tsai, called Ayoub to his register. Ayoub placed the beer on the counter. Clerk Tsai scanned the beer and then asked Ayoub for identification. Ayoub handed Tsai her California driver license. (See Exhibit 4.) Clerk Tsai took possession of the driver license, appeared to look at it for a second or two, and then handed it back to Ayoub. Clerk Tsai did not ask any age related question nor did he ask Ayoub any questions regarding the information on the license. Clerk Tsai then entered something on the register's keyboard. Ayoub paid for the beer, received her change, and exited the store with the six pack of Bud Light beer. Investigator Jennifer Gardea was inside the store posing as a customer during this entire time and witnessed these events.

¶ 8. After making the purchase and leaving the store, Ayoub met outside the store with the investigators. Decoy Ayoub was taken back into Respondents' store. Ayoub was asked who sold her the beer. Ayoub pointed her finger at Clerk Tsai and said "He did". They were standing 3 feet apart at the time of this identification. Clerk Tsai was aware that she [sic] was being identified as the person who sold the beer to Kozich [sic]. Investigator Gardea asked clerk Tsai if he understood that he was being identified as the person who sold Ayoub the beer. Clerk Tsai said that he understood. A photo of clerk Tsai and Ayoub holding the beer she purchased was taken after the face to face identification. (See Exhibit 2.)

To cause reversal, an error must be prejudicial and it must appear that a different result would have been probable if such error did not exist. (Code Civ. Proc., § 475; see *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 104 [87 Cal.Rptr.2d 754].) There is no presumption of injury from an error, but the burden is on the

appellant to show that the error was sufficiently prejudicial to justify reversal. (*Kyne v Eustice* (1963) 215 Cal.App.2d 627, 635-636 [30 Cal.Rptr 391].)

Notwithstanding the sloppiness in the Department's decision, we do not believe reversible error exists in this matter. Even if the complained-of paragraph (Finding of Fact ¶ 8) is disregarded, the decision is still supported by substantial evidence. That being said, however, the Board would like to caution the Department to take better care when issuing their Decisions to insure that careless "cut and paste" errors of this nature do not occur. The Board came close to remanding this matter for correction of the findings, and may be forced to do so in the future if similar instances are presented to us.

ORDER

The decision of the Department is affirmed.²

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

²This 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.