

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

AB-9302

File: 21-479660 Reg: 12076514

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy 9751
5623 Kanan Road, Agoura Hills, CA 91301-3358,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: August 1, 2013
Los Angeles, CA

Telephonic Deliberation: August 12, 2013

ISSUED AUGUST 30, 2013

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy 9751 (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 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, D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry Winters.

¹The decision of the Department, dated August 23, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on November 25, 2009. On February 16, 2012, the Department filed an accusation against appellants charging that, on October 26, 2011, appellants' clerk, Brittany Orr (the clerk), sold an alcoholic beverage to 18-year-old Kabrina Borbon. Although not noted in the accusation, Borbon was working as a minor decoy for the Los Angeles County Sheriff's Department at the time.

At the administrative hearing held on June 5, 2012, documentary evidence was received and testimony concerning the sale was presented by Borbon (the decoy) and by Cheryl Hartman, a Los Angeles County Sheriff's Department deputy. Appellants presented no witnesses.

Testimony established that on October 26, 2011, Deputy Hartman and her partner entered the licensed premises, followed shortly thereafter by the decoy. The decoy proceeded to the coolers, where she selected a can of Bud Light Beer. The decoy took the beer to the counter and handed it to the clerk. The clerk, who was talking with another customer, rang up the beer. The decoy paid, received some change, and left the premises.

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

Appellants then filed this timely appeal contending the ALJ abused his discretion and failed to proceed in the manner required by law by refusing to consider appellants' evidence, including the 21-year-old clerk's appearance (offered as a point of comparison in assessing the decoy's apparent age) and hearsay evidence indicating that the clerk believed the decoy was 28 years old.

DISCUSSION

Appellants contend that the ALJ abused his discretion and failed to proceed in the manner required by law by refusing to consider appellant's evidence that the decoy appeared over the age of 21. Specifically, the ALJ failed to consider the appearance of the 21-year-old clerk, as pictured in a photograph alongside the decoy, as a point of comparison by which to evaluate the decoy's apparent age, and ignored hearsay evidence indicating that the clerk believed the decoy was 28 years old.

The scope of this Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decisions, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing. (California Constitution, article XX, section 22; Business & Professions Code §§ 23084, 23085; *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].)

Only relevant evidence is admissible. (Cal. Evid. Code § 350.) "Relevant evidence means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Cal. Evid. Code § 310.)

Hearsay evidence, generally, is inadmissible in civil proceedings. (Cal. Evid. Code § 1200.) Section 11513(c) of the Government Code, however, allows the

admission of hearsay evidence in administrative proceedings “for the purpose of supplementing or explaining other evidence.” (See also Cal. Code Regs., tit. 2, § 7429, subd. (f)(4).) Where an objection is made, hearsay evidence alone cannot be used as proof: “[i]f an appropriate objection is made at hearing, hearsay evidence shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil cases.” (§ 7429, subd. (f)(4).)

Appellants first argue that the ALJ ought to have considered a photograph of the 21-year-old clerk, standing beside the decoy, as a “measuring tape” by which to assess the decoy’s apparent age. (App.Br. at p. 2; see also Exhibit 4.)

At the hearing, counsel for the Department objected to this evidence, arguing irrelevance; the ALJ agreed and gave a reasoned explanation. [RT at pp. 35-37.] He did not address the matter in the decision.

Appellants cite to a court of appeals case in support of their assertion that the photograph of the clerk was nevertheless relevant and ought to have been considered. However, their reliance is misplaced. The cited sentence reads:

Among other things, we have reviewed the *photograph of the decoy* taken immediately after the sale, which is arguably the most important piece of evidence in considering whether the decoy displayed the physical appearance of someone under 21 years of age.

(Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652], emphasis added.)

The court went on to hold that the ALJ’s assessment of the decoy’s appearance in these photographs was reasonable. (*Ibid.*)

Nowhere does the cited case indicate that a photograph of the *clerk*, with or without the decoy, is in any way relevant when assessing a *decoy’s* apparent age. In

fact, a photograph of the clerk, offered as a point of comparison, is no more relevant to the facts of this case than a photograph of any other individual 21-year-old. The question of whether the *decoy's* appearance complied with rule 141(b)(2) in no way implicates the appearance of the clerk, who may or may not appear her actual age. The clerk's appearance in no way influenced the appearance of the decoy at the time of the sale.

Moreover, the clerk did not testify, so it would be mere speculation to suggest that her understanding of her own appearance influenced her decision to sell alcohol to the decoy. The appearance of the clerk was wholly irrelevant, and the ALJ properly ignored it.

Second, appellants assert that the ALJ ignored the fact that the clerk thought the decoy was 28 years old. The clerk did not testify. On appellants' cross-examination of Deputy Hartman, the following exchange took place:

Q. And when you identified yourself to Ms. Orr, did she state that she thought [the decoy] looked 28?

A. Yes.

MS. WINTERS: Objection. Hearsay.

THE COURT: I'll let it in as administrative hearsay.

[RT at pp. 38-39.] In his decision, however, the ALJ did not consider the statement.

Administrative hearsay, when admitted over an objection, may only be used to supplement other evidence – it cannot be offered as proof. (§ 7429, subd. (f)(4).) Because appellants offered no other admissible evidence, there is nothing for the statement to support. The ALJ was therefore entitled to ignore it.

Appellants take issue with the ALJ's failure to make findings on these points.

The ALJ, however, is not required to make findings on evidence that is irrelevant and inadmissible. We find no error in the decision below.

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.