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

AB-9382
File: 21-477764 Reg: 13078254

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store 9811
1871 El Camino Real, Burlingame, CA 94010-3220,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: July 10, 2014
San Francisco, CA

ISSUED AUGUST 5, 2014

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store 9811 (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 Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kelly Vent.

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[1]The decision of the Department, dated October 3, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On February 29, 2013, the Department filed an accusation against appellants charging that, on December 15, 2012, appellants' clerk, Timothy Luu (the clerk), sold an alcoholic beverage to 17-year-old Albert G. Although not noted in the accusation, Albert G. was working as a minor decoy for the Burlingame Police Department at the time.

At the administrative hearing held on August 22, 2013, documentary evidence was received and testimony concerning the sale was presented by Albert G. (the decoy) and by Robert Cissna, a Burlingame Police officer.

Testimony established that on December 15, 2012, the decoy entered the licensed premises alone and went to the beer cooler where he selected a six-pack of Budweiser beer. He placed the beer on the counter at the checkout area, and the clerk asked him for his identification. The decoy handed the clerk his California driver's license. The clerk viewed it for an unknown amount of time, then completed the sale. The decoy exited the premises, then re-entered with officers from the Burlingame Police Department.

Officer Cissna asked the decoy who sold him the beer. The decoy pointed to the clerk. He and the officers were several feet[2] from the clerk when he did so, and the clerk was waiting on another customer, but (according to Officer Cissna) the clerk looked up and took note when he was identified as the seller of the beer. (RT at p. 39.)

The officers asked the clerk to retrieve the $10 bill used by the decoy to pay for

[2]Testimony of the decoy (RT at pp. 21-22) states "three to four feet." Officer Cissna's testimony states "10 to 12 feet." (RT at p. 38.) The ALJ also describes the decoy and clerk as being ten to twelve feet apart. (Findings of Fact II-C.)

the beer, but the clerk said he gave it to another customer. They all moved to another section of the store for privacy and the clerk was advised of the violation. The clerk was issued a citation and a photograph was taken of the decoy and clerk. (Exhibit 2.) The clerk did not deny selling beer to the minor decoy.

The Department's decision determined that the violation charged had been proven and that no defense had been established.

Appellants then filed an appeal contending: (1) rule 141(b)(2)[3] was violated; (2) rule 141(b)(5) was violated; and (3) the decision is not supported by substantial evidence.

DISCUSSION

I

Appellants contend that the decoy did not display the appearance required by rule 141(b)(2).

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 maintain that the decoy appeared older than 21 because of his physical appearance — the decoy was over 6 feet tall, weighed 225 pounds, and, they allege, had a receding hairline — as well as his training and experience as a decoy and police Explorer.

The Appeals Board has rejected the "experienced decoy" argument many times before. As the Board said in *Azzam* (2001) AB-7631:

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[3]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.

> A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. . . .There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.

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 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.4th [1250,] 1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.4th 364, 367 [3 Cal.Rptr.2d 770; . . . 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. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 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 Bev. Control v. Alcoholic Bev. Control Appeals Bd*. (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826] (*Masani*).)

The ALJ's Findings of Fact II, paragraphs E 1-4, concerning the decoy's appearance and compliance with rule 141(b)(2), were as follows:

> ¶ E. The decoy's overall appearance including his demeanor, his poise, his mannerisms, and his physical appearance were consistent with that of a person under the age of twenty one years, and his appearance at the time of the hearing, with slight variations, was substantially the same as his appearance on the day of the decoy operation.
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> ¶ 1. On the day of the sale, the decoy weighed approximately 225 pounds, and was 6 feet, 1 inch tall. On the date of the hearing, Albert was 6 feet 1 ¼ inches tall and appeared to weigh a little less than 225 pounds. Albert is a large-framed young man, but his physique is a bit flabby rather than chiseled. His body weight is more attributable to "baby fat" rather than musculature. His face is pudgy and this lends to his youthful

appearance. Albert's hair is dark and he wears it close-cropped to his head. (State's Exhibit 2) On the day of the hearing, his hair was shorter than it appears in the photograph. (*Id*.) His hair does recede slightly along the forehead, but this does not make him look any older than his current age; 18 years-old.

¶ 2. The decoy testified at hearing. Albert spoke rather softly during his testimony. However, he did not appear overly nervous or apprehensive. His testimony was credible concerning the salient events surrounding the purchase of an alcoholic beverage in Respondent's premises.

¶ 3. Albert is an Explorer with the Pacifica Police Department. As an Explorer, Albert wears a police-type uniform, and assists with city events and goes on ride-alongs with the police. He has received training on felony car stops and domestic violence calls for service. Albert attends Explorer meetings two times a month. The meetings are an hour long.

Albert began operating as a decoy in December, 2012. Albert estimates he participated in ten prior decoy operations. During each operation he would visit approximately 5 licensed premises attempting to purchase alcoholic beverages. He initially felt nervous acting as a minor decoy. Albert has become a little more comfortable in his role, but he still feels nervous during the operations. There was no credible evidence presented that Albert's prior experience as a police explorer caused or contributed to the clerk selling an alcoholic beverage to him. The selling clerk did not testify at the hearing.

¶ 4. After considering 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 the age of twenty-one years under the actual circumstances presented to the seller at the time of the sale.

Appellants maintain the ALJ failed to consider factors which made the decoy appear older, but the above description goes into extensive detail about why the decoy did *not* appear to be over the age of 21 at the time of the sale. Appellants have provided no valid basis for the Board to question the ALJ's determination that the decoy complied with rule 141. This Board has repeatedly declined to substitute its judgment for that of the ALJ on questions of fact. Minors come in all shapes and sizes, and we are reluctant to suggest, without more, that minor decoys of large stature automatically

violate the rule, or that size necessarily makes one appear older.

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 requirements of rule 141. We must decline appellants' invitation to re-weigh the evidence — particularly when, as here, the ALJ has made extensive findings on both the physical and non-physical characteristics of the decoy.

II

Appellants contend that the face-to-face identification of the clerk failed to comply with rule 141(b)(5) because the clerk was not aware he was being identified by the decoy.

Rule 141(b)(5) provides:

> Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

The rule provides an affirmative defense. The burden of proof is therefore on the appellants to show non-compliance.

Appellants allege that the identification failed to strictly comply with this Board's decision in *Chun* (1999) AB-7287, which defined face-to-face identification as:

> . . . the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

A more recent opinion from this Board, *Fortune Commercial Corporation* (2005) AB-8418, clarified the *Chun* holding:

> Rule 141(b)(5) is concerned with both identifying the seller and providing an opportunity for the seller to look at the decoy again, soon after the sale. [Citation.] It does not require a direct "face-off" to accomplish these purposes. Regardless of whether the clerk heard what the decoy said to the officer, she had the opportunity to look at the seller again. The opportunity is all that needs to be provided; if the opportunity is provided, but the clerk does not take advantage of the opportunity, the rule is not violated.

(*Id.* at pp. 5-6.) Subsequent Appeals Board decisions have reflected this interpretation. (See, e.g., *G4 Consortium, LLC* (2010) AB-9061, at pp. 3-4; *7-Eleven, Inc./Kim* (2004) AB-8198, at pp. 4-5; *7-Eleven, Inc./Berg* (2004) AB-8051, at pp. 5-6; see also *Greer* (2000) AB-7403, at p. 4 ["The minor decoy must identify the seller; there is no requirement that the seller identify the minor, nor is it necessary for the clerk to be actually aware that the identification is taking place."].)

The ALJ made the following findings on this issue:

> ¶ C. Once outside, Albert flagged down the Burlingame police officers. The decoy re-entered the premises with three Burlingame police officers to conduct a face-to-face identification of the seller. As the decoy and the officers entered the premises through the front door, one of the officers asked Albert who sold him the beer. The decoy pointed to Timothy Luu. At this time, the decoy and the officers were approximately ten to twelve feet away from the clerk. The clerk was waiting on a customer, but he looked at the decoy and the officers when Albert identified him as the seller.

(Findings of Fact II-C.)

In this case, there is undisputed evidence that the clerk either knew, or reasonably ought to have known, that he was being pointed out as the seller. The Department submitted a photograph of the decoy holding the beer while standing beside the clerk. (Exhibit 2.) And ultimately, the ALJ concluded that there was ample opportunity for the clerk to realize he was being identified:

> Respondent also contends that rule 141, subsection (b) (5) was violated because the clerk was helping a customer and therefore could not know

> he was being identified by the decoy. This argument ignores the facts. The clerk looked up at the officers and the decoy when Albert identified him as the seller. The decoy was also with the officers when Luu was taken to a different section of the store to discuss the transaction, and ultimately issue him a citation for the violation. The clerk, Timothy Luu, had sufficient opportunity to come "face-to-face" with the decoy. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control App. Bd.* (2003) 109 Cal. App. 4th 1687.)
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> The Department complied with Rule 141, subsection (b) (5), of Division 1, California Code of Regulations as set forth in Findings of Fact II. The Respondent failed to establish an affirmative defense.

(Determination of Issues III.)

The clerk did not testify, and appellants present no other evidence to undermine the conclusion that the clerk ought to have known that he had been identified as the seller. Appellants have failed to carry their burden of proof on this affirmative defense.

III

Appellants contend that the ALJ's decision and determination of issues are not supported by substantial evidence because of two clerical errors.

Specifically, appellants maintain that because the ALJ incorrectly referred to the decoy as Albert J. instead of Albert G., and incorrectly stated the sale took place on December 15, 2011 instead of December 15, 2012 (in Determination of Issues I) that the Department's decision is not supported by substantial evidence.

When an appellant contends that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) In

making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734].) "Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

The paragraph at issue is the following:

> The Respondent violated the provisions of Business and Professions Code Section 25658(a) in that on December 15, 2011, the Respondent did, through its employee (Timothy Luu), sell an alcoholic beverage (beer) to a minor (Albert J.) as set forth in Findings of Fact II.

(Determination of Issues I.) Appellants allege that no evidence exists that any sale took place on December 15, 2011 to an Albert J. Therefore, they maintain, the entire decision is fatally flawed and must be reversed.

The California Constitution directs:

> No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after *an examination of the entire cause, including the evidence*, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

(Cal. Const., Art. VI, § 13, emphasis added.)

Similarly, California Code of Civil Procedure states in part:

> . . . No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. . . .

(Cal. Code Civ. Proc., § 475.)

"[A]n appellate court must make every intendment in favor of the judgment and erroneous conclusions of law and unsupported or erroneous findings of fact will be disregarded as being harmless error if the judgment as rendered can be sustained on the supported and proper findings made by the trial court. [Citations.]" (*Hay v. Allen* (1952) 112 Cal.App.2d 676 [247 P.2d 94].)

Appellants conveniently ignore the fact that the accusation correctly identifies the sale as occurring in 2012 to an Albert G. They ignore 25 pages of testimony by Albert G., during which he confirmed his identity, his participation in the decoy operation which resulted in the sale, and the date — December 15, 2012. Appellants also ignore the entirety of Findings of Fact II, running more than two pages, in which the sale is described at length as having been made in 2012 to an Albert G. In fact, the majority of the references to the decoy in the decision omit *any* last initial and simply refer to him as "the decoy" or "Albert." Examining the matter in light of the whole record, substantial evidence exists to support the Department's decision in spite of the contradiction in Determination of Issues I.

We fail to see how appellants were prejudiced in any way by the ALJ's use of the wrong last initial and the wrong year in a single paragraph when it is obvious from the decision taken as a whole what the ALJ intended — no other person and no other date could rationally be inferred. It appears that these mistakes were simply inadvertent

typographical errors and, as such, constitute harmless error.

ORDER

The decision of the Department is affirmed.[4]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, 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.