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

AB-9507
File: 21-479486 Reg: 14081462

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy 9674
1050 West Sunset Boulevard, Los Angeles, CA 90012,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: November 3, 2015
San Diego, CA

ISSUED DECEMBER 7, 2015

Appearances: *Appellants*: Melissa Gelbart, of Solomon Saltsman & Jamieson, for Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy 9674.
Respondent: Kerry Winters, for the Department of Alcoholic Beverage Control.

OPINION

This appeal is from a decision of the Department of Alcoholic Beverage Control[1] suspending appellants' license for 10 days because their clerk sold an alcoholic beverage to a minor decoy in violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on November 25, 2009. On

[1]The decision of the Department, dated April 1, 2015, is set forth in the appendix.

October 24, 2014, the Department filed an accusation against appellants charging that, on August 14, 2014, appellants' clerk, Jacqueline Coria (the clerk), sold an alcoholic beverage to eighteen-year-old Alexis Hernandez. Although not noted in the accusation, Hernandez was working as a minor decoy for the Department at the time.

At the administrative hearing held on February 11, 2015, documentary evidence was received and testimony concerning the sale was presented by Hernandez (the decoy), and by Kimberly Johnson, an agent for the Department. Appellants presented no witnesses.

Testimony established that on the date of the operation, Agent Johnson entered the licensed premises. The decoy followed shortly thereafter and proceeded to the alcoholic beverage coolers. The decoy selected a 3-pack of Bud Light beer and took it to the register area where he stood in line. When it was his turn to be served, the decoy set the beer down on the counter. The clerk asked to see the decoy's identification, and the decoy handed the clerk his California identification card. The clerk looked at the ID for a few seconds and then handed it back to the decoy. The clerk told the decoy the price of the beer, and the decoy paid the clerk by handing some money to her. The clerk gave the decoy some change and then bagged the beer. The decoy picked up the beer and then exited the premises. Agent Johnson purchased some candy and then also exited.

The Department's decision determined that the violation charged was proved and no defense was established. Counsel for the Department recommended a penalty of 15 days' suspension, but the administrative law judge (ALJ) recommended a penalty of 10 days' suspension in light of appellants' history of discipline-free operation.

Appellants then filed an appeal contending that the Department failed to proceed

in the manner required by law in omitting reference to and failing to analyze the decoy's nonphysical characteristics, which, they claim, support appellants' rule 141(b)(2) defense.

DISCUSSION

Appellants contend that the Department failed to proceed in the manner required by law because the ALJ omitted from his proposed decision analysis of the decoy's nonphysical characteristics that supported their rule 141(b)(2)[2] defense. To wit, appellants claim the ALJ failed to analyze the decoy's comfort level over the course of this and prior decoy operations, the fact that the decoy was not nervous during the operation, and the volume of locations the decoy had visited prior to the instant operation. (App.Br. at pp. 7-9.) Appellants further claim that these factors, if properly considered, suggest that the decoy operation was conducted in an unfair manner in violation of rule 141(a). (See *id*. at p. 9.)

Rule 141(a) requires "fairness" in the use of minor decoys:

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

To that end, 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." Rule 141 provides an affirmative defense, and the burden of proof lies with the party asserting it — here, appellants. (*Chevron Stations, Inc.* (2015) AB-9445;

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[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.

7-Eleven, Inc./Lo (2006) AB-8384.)

This Board is bound by the factual findings in the Department's decision so 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.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.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

In this case, the ALJ made the following factual findings concerning the decoy's overall appearance:

> 5. Hernandez appeared and testified at the hearing. On August 14, 2014, he was 5'8" tall and weighed 152 pounds. He wore a red-checked button-down shirt with a red shirt underneath it, blue jeans, and Adio canvas shoes (a type of skateboarding shoes). His hair was short on top with a medium fade on the sides. He was clean shaven and did not wear any jewelry. He had a watch on his left wrist. (Exhibits 2 & 5.)[fn.] His appearance at the hearing was the same, except that he was 10 pounds heavier and had braces on his teeth.
>
> [¶ . . . ¶]
>
> 10. August 14, 2014 was Hernandez's second or third time working as a decoy. Hernandez learned of the decoy program through his participation in the Explorer program with the South Gate Police Department. Hernandez had been an Explorer for approximately 1½ years before this

> operation. As an Explorer, Hernandez went on ride-alongs, helped with paperwork, trained for competitions, and helped out a [*sic*] various events (e.g., fairs). Hernandez also was employed as a public safety officer, responsible for traffic control and issuing parking tickets. Hernandez visited a total of ten locations on August 14, 2014, of which two sold alcoholic beverages to him.
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> 11. Hernandez appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of Coria at the Licensed Premises on August 14, 2014, Hernandez displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Coria.

(Findings of Fact, ¶¶ 5, 10-11.) These findings prompted the ALJ to reach the following conclusion regarding appellants' rule 141 defenses:

> 5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rules 141(a) and 141(b)(2)[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that Hernandez's training and experience as an Explorer and a public safety officer gave him the appearance of a person over the age of 21. In particular, the Respondents pointed to Hernandez's confidence on the stand and the fact that he appears to have a 5 o'clock shadow in the photos. As noted in footnote 2, *infra*, the photos in this case are of poor quality. Hernandez credibly testified that he shaved every day, including earlier in the day on August 14, 2014. The Respondents' argument is rejected. Taking into account Hernandez's appearance at the hearing, the two photos, and his experience, Hernandez had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 11.)

(Conclusions of Law, ¶ 5.)

The record here reflects that the ALJ expressly considered a great many aspects of the decoy's physical and nonphysical appearance — including his experience as an Explorer, prior experience as a minor decoy, and his dress, poise, demeanor, maturity, and mannerisms — but nevertheless found that the decoy displayed the appearance which could generally be expected of a person under the age of 21.

Appellants extrapolate and heavily rely upon language from a previous and oft-

misinterpreted decision of this Board to support their contention that "[t]his Board recognizes that '[a]chievements and responsibility' will 'certainly have a bearing on apparent age.'" (App.Br. at p. 8, citing *Azzam* (2001) AB-7631, at p. 5.)

As has been the case the previous umpteen times appellants' counsel has raised this argument in other cases, it appears untethered to the reasoning and facts underlying *Azzam* decision. The language quoted from *Azzam* is drawn from a separate case, and reads in its entirety:

> While the trier of fact must consider the entire person, physical and demeanor attributes, in determining the apparent age of a decoy, work or education experience and levels of responsibility attained do not, *ipso facto*, aid in that determination or otherwise produce a given result. A person, all things considered, appears to be a certain age. Achievements and responsibility, while they certainly have a bearing on the apparent age, are just an inherent part of the appearance the decoy projects. They do not, independently, become elements which permit a magic addition of a year or two or three to a person's physical appearance.

(*Azzam*, *supra*, at p. 5, quoting *Prestige Stations, Inc.* (2001) AB-7265, at p. 3.)

The crux of the *Azzam* opinion as it relates to this case was the Board's discussion concerning the so-called "experienced decoy" argument. Much to appellants' dismay — and to the dismay of the countless other appellants who have raised this or similar arguments before this Board since the decision in *Azzam* was issued — the Board explained:

> Nothing in Rule 141(b)(2) prohibits using an experienced decoy. 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. While extensive experience as a decoy or working in some other capacity for law enforcement (or any other employer, for that matter) may sometimes make a young person appear older because of his or her demeanor or mannerisms or poise, that is not always the case, and even where there is an observable effect, it will not manifest itself the same way in each instance. *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.*

(*Azzam*, *supra*, at p. 5, emphasis added.)

In this case, appellants have directed us to no *evidence* that the decoy's experience *actually resulted* in him displaying the appearance of a person 21 years old or older. Indeed, evidence of how the decoy appeared from the clerk's perspective would be nearly impossible to ascertain since the clerk did not testify at the administrative hearing. In the end, all the Board is left with is a difference of opinion — appellants' versus that of the ALJ — as to the conclusion that the evidence supports. Without more, this is simply an insufficient basis upon which to overturn the determination by the ALJ. As we have stated many times, the ALJ is the trier of fact, and has the opportunity to observe the decoy as he testifies, and make the determination whether the decoy's appearance met the requirement of rule 141 that he possess 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.

Moreover, the fact that the ALJ did not expressly consider each and every facet of the decoy's appearance that could potentially play into an assessment of his apparent age does not render the ALJ's determination an abuse of discretion. An ALJ is not required to provide a "laundry list" of factors he deems inconsequential. (See, e.g., *Lee* (2014) AB-9359, at p. 8; *7-Eleven/Patel* (2013) AB-9237, at p. 9; accord *Circle K Stores* (1999) AB-7080.) Indeed, "[i]t is not the Appeals Board's expectation that the Department, and the ALJ's [*sic*], be required to recite in their written decisions an exhaustive list of the indicia of appearance that have been considered." (*Circle K Stores*, *supra*, at p. 4.) An ALJ's failure to explain *all* of his reasons for a decision does

not invalidate his determination or constitute an abuse of discretion. (See *Garfield Beach* (2014) AB-9430.)

As we explained in a very recent opinion addressing the same attack on an ALJ's findings that appellants make here:

> [T]his Board is entitled to review whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. (Cal. Const. art. XX, § 22; Bus. & Prof. Code. § 23084, subd. (c) and (d).) If this Board observes that the evidence appears to contradict the findings of fact, it will review the ALJ's analysis — assuming some reasoning is provided — to determine whether the ALJ's findings were nevertheless proper. Should this Board be faced with evidence clearly at odds with the findings and no explanation from the ALJ as to how he or she reached those findings, this Board will not hesitate to reverse. This should not be read to require an explanation or analysis to bridge any sort of "gap"; typically, the evidence an appellant insists is essential and dispositive is either irrelevant or has no bearing whatsoever on the findings of fact. While an ALJ may better shield himself against reversal by thoroughly explaining his reasoning, he is not required to do so. The omission of analysis alone is not grounds for reversal, provided findings have been made.

(*Garfield Beach CVS, LLC/Longs Drug Stores, LLC* (2015) AB-9501, at pp. 5-6.) Nothing in this case suggests that these principles were violated here.

On a final note, during oral argument, appellants insisted that their argument merited specific analysis by the ALJ under rule 141(a) and rule 141(b)(2). As noted by the Department during oral argument, this Board has addressed — and expressly rejected — similar contentions by licensees in the past:

> Appellants appear to be trying to get around this Board's consistent rejection of the argument that the decoy did not have the appearance of a person under the age of 21 (rule 141(b)(2)) by making essentially the same argument and saying that it was the fairness requirement of rule 141(a) that was violated. Regardless of the rule relied on, this argument must be rejected. . . . In essence, . . . appellants are making a rule 141(b)(2) argument here, thinly disguised as a rule 141(a) argument.

(*7-Eleven, Inc./Dhillon and Gonzalez* (*Dhillon*) (2008) AB-8659, at pp. 3-4.) As was the

case in *Dhillon*, *supra*, regardless of whether appellants rely on rule 141(a) or rule 141(b)(2) in this case, their argument is rejected.

ORDER

The decision of the Department is affirmed.[3]

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