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

AB-9571
File: 21-479481; Reg: 15082906

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store #9608
2502 Santa Monica Boulevard,
Santa Monica, CA 90404-2011,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: November 3, 2016
San Diego, CA

ISSUED DECEMBER 16, 2016

Appearances: *Appellants:* Saranya Kalai, of Solomon, Saltsman & Jamieson, as counsel for appellants Garfield Beach CVS, LLC and Longs Drug Stores California, LLC.
Respondent: Jonathan Nguyen, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store #9608, appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 15 days because their clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

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[1]The decision of the Department, dated February 16, 2016, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 3, 2009. On August 14, 2015, the Department filed an accusation against appellants charging that, on May 9, 2015, appellants' clerk, Pavlina Ganasheva (the clerk), sold an alcoholic beverage to 18-year-old Anthony Solano. Although not noted in the accusation, Solano was working as a minor decoy for the Santa Monica Police Department at the time.

At the administrative hearing held on December 2, 2015, documentary evidence was received and testimony concerning the sale was presented by Solano (the decoy) and by Lt. Saul Rodriguez, a Santa Monica Police officer. Appellants presented no witnesses.

Testimony established that on May 9, 2015, the decoy entered the licensed premises by himself, followed a short time later by Lt. Rodriguez. The decoy went to the coolers and selected a 12-pack of Budweiser beer in cans which he took to the register. The clerk scanned the beer and asked to see his identification. The decoy handed her his California driver's license, which contained his correct date of birth and a red stripe indicated "AGE 21 IN 2017." (Exh. 3.) The clerk looked at the license, entered something into the cash register, then handed it back to the decoy. The sale was completed and the decoy exited the premises with the beer, followed by Rodriguez.

Lt. Rodriguez re-entered the premises and explained to the clerk that she had sold alcohol to an individual under the age of 21. The decoy joined the officer, who asked him to identify the person who had sold him the beer. The decoy pointed to the clerk and said she was the one. The clerk and decoy were standing on opposite sides of the counter, a few feet apart, when this took place. The clerk then came out from behind the counter and a photograph was taken of the two of them. (Exh. 4.) The clerk

was later cited.

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

Appellants then filed a timely appeal contending: (1) the face-to-face identification of the decoy did not comply with rule 141(b)(5),[2] and 2) the findings on the decoy's appearance omitted key evidence regarding the decoy's nonphysical characteristics.

DISCUSSION

I

Appellants contend that the face-to-face identification of the decoy did not comply with rule 141(b)(5) because the clerk was not aware of (or focused on) being identified as the seller of the alcohol by the decoy. (App.Br. at p. 5.)

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.

This rule provides an affirmative defense. The burden is, therefore, on appellant to show non-compliance. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.) As appellant correctly points out, the rule requires "strict adherence." (See *Acapulco Restaurants, Inc.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126] [finding that no attempt, reasonable or otherwise, was made to identify the clerk].)

The ALJ made the following findings on this issue:

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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. Lt. Rodriguez re-entered the Licensed Premises. He contacted Ganasheva and explained the violation to her. Solano re-entered the Licensed Premises; Lt. Rodriguez waved him over. Lt. Rodriguez asked him to identify the person who sold him the beer. He pointed to Ganasheva and said that she was. Solano and Ganasheva were a few feet apart at the time, on opposite sides of the sales counter. Ganasheva was brought out from behind the counter. Solano stood next to her and a photo of the two of them was taken. (Exhibit 4.) A citation was subsequently issued to Ganasheva.

(Finding of Fact, ¶ 7.) Based on these findings, the ALJ reached the following conclusions:

> 5. With respect to rule 141(b)(5), the Respondents argued that Ganasheva's attention was on the officers, not Solano, at the moment Solano identified her. This argument is rejected. Solano testified that Ganasheva was looking at him when he identified her. Lt. Saul Rodriguez testified that Ganasheva was focused on what they were doing, looking at him when he was talking to her and at Solano at other points. In other words, Ganasheva was paying attention during the identification process, including Solano's identification of her.

(Conclusions of Law, ¶ 5.)

In *Chun* (1999) AB-7287, cited by appellants, this Board observed:

> The phrase "face to face" means that the two, 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.

(*Id.* at p. 5.) The Department maintains the Board may not rely upon *Chun* because it has not been designated as a precedential decision.

The Board explained its position on relying on prior decisions of the Board at some length in *Garfield Beach* (2013) AB-9258, at p. 4:

> To be sure, while "[t]here is . . . no rule of administrative stare decisis" (*BankAmerica Corp. v. United States* (1983) 462 U.S. 122, 149 [103 S.Ct. 2266]), **agency adjudications and appellate decisions therefrom produce administrative norms that, like judicial interpretations of statutes and regulations, operate as rules of general application and**

> **thus enjoy analogous stare decisis precedential value**. (See *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade* (1973) 412 U.S. 800, 807-08 [93 S.Ct. 2367] [stating **agency adjudicatory decisions "may serve as precedents,"** that there is "a presumption that those policies [announced in adjudications] will be carried out best if the settled rule is adhered to," and that the agency's "duty to explain its departure from prior norms" flows from that presumption]; *Kelly ex rel. Mich. Dept. of Natural Res. v. FERC* (1996) 96 F.3d 1482, 1489 [321 U.S.App.D.C. 34].) (Emphasis added.)

The Board's decisions, as we have made clear in previous decisions, are persuasive authority and, as such, they have precedential value — even if they have not been formally designated as "precedential" decisions. (See *Garfield Beach, supra.*) The distinction between "persuasive authority" and "precedential value" may be difficult to explain from a practical standpoint — but so far as this Board is concerned, any party who fails to cite and discuss decisions we have rendered that are relevant to issues before us, does so at its peril.

We obviously cannot and do not make each decision in a vacuum — something the Department seems to suggest is our only option when it decrees neither we nor appellants may rely upon prior decisions because they have not been designated as "precedential." Our prior decisions, as persuasive authority, must and should inform and guide our decision-making process — and we endeavor to make our decisions consistent with prior adjudications unless we give a reasoned basis for departing from those precedents.

The rule we apply then — consistent with a long line of the Board's prior adjudications of rule 141(b)(5), including *Chun* — is that a proper face-to-face identification includes some indicia that the person being identified knows (or reasonably ought to know) that he or she is being accused and pointed out as the

seller.

Appellants' contention that the clerk was unaware she was being identified, and their suggestion that the possibility exists that she was, in fact, assisting other customers at that time, is not supported by the record. The clerk did not testify, so there was no direct testimony to establish whether the clerk knew or should have known she was being identified. However, testimony was given by the decoy about the face-to-face identification, which supports the finding that the clerk knew she had been identified as having sold alcohol to a minor.

[MR. NGUYEN]
Q Were you asked to identify the clerk that sold you the alcohol?

[DECOY]
A Yes.

Q Where did this occur?

A She was still behind the register and I was on the customer side when I identified her.

Q About how far away were you from the clerk?

A Five to six feet.

Q Were you asked any questions when you were facing her?

A She asked me - - well, the officer asked me if she was the one that sold the alcohol and I said yes.

Q Referring to the clerk?

A Yes, to the female clerk.

Q. How did you respond exactly to the question?

A I said yes. And he also told me to point at her and I pointed at her and I said she was the one that sold me the alcohol.

Q Did the officer say anything else?

A They asked her a question.

Q What did the officer ask her?

[¶ . . . ¶]

A They asked her if she was the one that sold me the case of beer.

Q What was her response, if any?

A She said yes.

(RT at pp. 14-15.) An identical picture emerges from cross-examination on this point:

[MR. TATONE]
Q So when you re-entered the store, you were told to identify the individual that sold you the alcohol?

[DECOY]
A Correct.

Q You were how far away from them?

A Five to six feet.

Q You stated that she was behind the counter in the area where she would typically stand to ring someone up and you were standing outside of the counter?

A Yes.

Q So what was she doing? What was the clerk doing when you identified her?

A When I identified her, she was looking at me.

Q Was she helping any customers?

A I don't think so.

Q Were any of the agents speaking with her at the same time?

A No, because the Santa Monica police officer that was already inside asked me to identify her.

Q So there was eye contact between you and the clerk when you identified her?

A Yes.

(RT at p. 34.)

Nothing in the record suggests that the identification was erroneous, that the decoy was in any way pressured to misidentify the seller, that law enforcement personnel interfered with the identification, or that the clerk was unaware she was being identified. In fact, according to the decoy, when asked if she was the one who made the sale, the clerk said "yes." (RT at p. 15.) The face-to-face identification was conducted in full compliance with rule 141(b)(5).

II

Appellants contend that the findings on the decoy's appearance omitted key evidence regarding the decoy's nonphysical characteristics. Appellants maintain the failure to consider the observable effect the decoy's training and experience had on his apparent age is reversible error. (App.Br. at p. 7.)

Rule 141, subdivision (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.

The rule provides an affirmative defense, and the burden of proof lies with appellants. (*Chevron Stations, Inc.*, *supra*; *7-Eleven, Inc./Lo*, *supra*.)

This Board has rejected the "experienced decoy" argument many times. As we noted in *Azzam* (2001) AB-7631:

> 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. . . . 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.

(*Id.* at p. 5, emphasis in original.)

This Board has further noted that:

> An ALJ's task to evaluate the appearance of decoys is not an easy one, nor is it precise. To a large extent, application of such standards as the rule provides is, of necessity, subjective; all that can be required is reasonableness in the application. As long as the determinations of the ALJ's are reasonable and not arbitrary or capricious, we will uphold them.

(*O'Brien* (2001) AB-7751, at pp. 6-7.)

In the decision below, the ALJ made the following findings of fact regarding the decoy's appearance:

> 5. Solano appeared and testified at the hearing. On May 9, 2015 he was 5'7" tall and weighed 165 pounds. He wore black pants, a white t-shirt, a gray zip-down sweatshirt with a hood, and Vans. The hood on the sweatshirt was down at all times He had a buzz cut. (Exhibits 4-6.) At the hearing his hair was longer and he was 27 pounds heavier; otherwise, his appearance was the same.
>
> [¶ . . . ¶]
>
> 8. Solano learned of the decoy program thorough his role as an Explorer. He had been an Explorer for approximately two years as of May 9, 2015. As an Explorer he participated in DUI checkpoints and traffic control in addition to his activities as a decoy. He attended an Explorer academy during which he was taught firearms, first aid, and various code sections.
>
> 9. Solano 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 Ganasheva at the Licensed Premises on May 9, 2015, Solano displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Ganasheva.

(Findings of Fact, ¶¶ 5-9.) Based on these findings, the ALJ reached the following conclusions:

> 5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rules 141(b)(2)[fn.] and 141(b)(5) and,

> therefore, the accusation should be dismissed pursuant to rule 141(c). With respect to rule 141(b)(2), the Respondents argued that Solano's Explorer training and his large stature (particularly in relation to Ganasheva) gave him the appearance of a person of a person [*sic*] over the age of 21. This argument is rejected. As noted above, Solano had the appearance generally expected of a person under the age if 21.[fn.]

(Conclusions of Law, ¶ 5.)

This Board is bound by the factual findings in the Department's decision if 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. [Citations.] 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. [Citations.]

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; see also *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628].)

Appellants maintain that the ALJ "improperly made a boilerplate determination about Mr. Solano's age without sufficiently examining his past experience and training and their effect on his apparent age" and that as a result the decision should be reversed. (App.Br. at p. 6.)

This Board has indeed held that an ALJ should not focus his analysis solely on a decoy's *physical* appearance and thereby give insufficient consideration to relevant *non-physical* attributes such as poise, demeanor, maturity, and mannerisms. (See, e.g., *Circle K Stores, Inc.* (2004) AB-8169; *7-Eleven, Inc./Sahni Enterprises* (2004) AB-8083; *Circle K Stores* (1999) AB-7080.) This should not, however, be interpreted to require that the ALJ provide a "laundry list" of factors he or she found inconsequential.

(*Lee* (2014) AB-9359*; 7-Eleven, Inc./Patel* (2013) AB-9237; *Circle K Stores* (1999) AB-7080.)

In this case, however, the ALJ specifically acknowledged the decoy's experience as an Explorer, and rejected the contention that it made him appear over the age of 21. (See Conclusions of Law, ¶ 5, *supra*.) The fact that the ALJ did not explain his reasoning does not render his determination an abuse of discretion as appellants allege. The clerk did not testify, so any "observable effect" of the decoy's training and experience is mere conjecture.

The ALJ made ample findings regarding the decoy's age, and both his physical and non-physical appearance. This Board cannot interfere with the ALJ's factual determinations in the absence of a clear showing of an abuse of discretion. No such showing was made in this case.

As this Board has said on many occasions, 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.

We see no flaw in the ALJ's findings or determinations. Ultimately, appellants are asking this Board to consider the same set of facts and reach a different conclusion, despite substantial evidence to support those findings. This we cannot do.

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.