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

AB-9124
File: 21-477862 Reg: 10072456

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC
dba Longs Drug Store #9316
1707 Grant Avenue, Novato, CA 94945-2229,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: July 14, 2011
San Francisco, CA

ISSUED AUGUST 10, 2011

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as Longs Drug Store #9316 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for appellants' 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 Soheyl Tahsildoost, and the Department of Alcoholic Beverage Control, appearing through its counsel, Sean Klein.

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[1]The decision of the Department, dated July 9, 2010, is set forth in the appendix.

PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On January 29, 2010, the Department filed an accusation against appellants charging that, on November 20, 2009, appellants' clerk sold an alcoholic beverage to 16-year-old Alfredo Limeta. Although not noted in the accusation, Limeta was working as a minor decoy for the Novato Police Department at the time.

At the administrative hearing held on May 11, 2010, documentary evidence was received, and testimony concerning the sale was presented by Limeta (the decoy) and by Amelia Strong, a Novato police officer.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no affirmative defense had been established.

Appellants have filed an appeal making the following contentions: (1) There was no compliance with Rule 141(b)2[2]; and (2) there was no compliance with Rule 141(b)(5).

DISCUSSION

I

Appellants describe 16-year-old Alfredo Limeta as a "professional decoy" because he has acted as a minor decoy in as many as 15 decoy operations, and has visited approximately 90 locations in that capacity.

The Administrative Law Judge (ALJ) described the decoy's appearance in Finding of Fact IV:

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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.

> The decoy was approximately 5' 3" tall and weighed between 145 and 150 pounds on the day of the hearing and on the day of the decoy operation. He was a police explorer and had participated in approximately fifteen decoy operations prior to November 20, 2009. On each of the prior operations, the decoy attempted to purchase alcoholic beverages at approximately six or seven businesses. He was not nervous while at Respondent store.
>
> The decoy was polite while testifying. He sat with his hands folded, giving short, direct [answers] to the questions asked. The Administrative Law Judge observed the decoy's mannerism, demeanor, and poise while the decoy testified.
>
> Based on this observation, and on the testimony concerning the decoy's appearance, the Administrative Law Judge finds that the decoy appeared under twenty-one years old when he purchased the beer at Respondent store.

Appellants' brief is silent with respect to the decoy's facial and physical appearance, relying solely on his lack of nervousness, his experience as a decoy, and the fact that he was a police Explorer and aspired to be a police officer. These arguments did not sway the ALJ, and we find they fall short of reasons for this Board to substitute its own judgment for that of the ALJ.

The Appeals Board has long considered as unpersuasive arguments that because a decoy had prior decoy experience or police Explorer training, the Board should ignore the ALJ's findings and find that an affirmative defense has been established under Rule 141(b)(2). In *7-Eleven, Inc./Azzam* (2001) AB-7631, the Board stated:

> 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 when 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.

II

Appellants contend secondly that there is no properly admissible evidence in support of the finding that there was compliance with Rule 141(b)(5) which states:

> 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 ALJ stated, in Determination of Issues III:

> Respondent also argued that, because no evidence was presented about the decoy identifying the clerk, there was a violation of the Department's Rule 141(b)(5). This argument is also rejected, as there was evidence that the decoy conducted a face-to-face identification of the clerk. Moreover, even if no evidence were presented regarding a face-to-face identification, it would not mean that no such identification occurred. It would simply mean that both parties chose not to present evidence on this matter. In such a situation, Respondent, which has the burden of proving a violation of the rule, would not meet its burden of proof.

The ALJ's reasoning is consistent with the position the Appeals Board has taken in a number of cases. For example, in *7-Eleven/Dhami* (2009) AB-8871, the Board stated:

> In this case, there was evidence that the decoy reentered the premises after having made the purchase. However, the decoy was not asked whether a face to face identification was made. With the burden of proof on appellants, and no evidence on the issue, it necessarily follows that appellants failed to establish the affirmative defense.

We reach the same conclusion here.

ORDER

The decision of the Department is affirmed.[3]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, 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.