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

AB-9170
File: 21-479294 Reg: 10073724

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA LLC, dba
CVS Pharmacy #9708
150 West Willow Street, Pomona, CA 91768,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: May 3, 2012
Los Angeles, CA

ISSUED JUNE 11, 2012

Garfield Beach CVS, LLC and Longs Drug Stores California LLC, doing business as CVS Pharmacy #9708 (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

[1]The decision of the Department, dated April 21, 2011, is set forth in the appendix.

Drug Stores California LLC, appearing through their counsel, Ralph Barat Saltsman and D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer Casey.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 1, 2009. Thereafter, the Department instituted an accusation against appellants charging that, on June 27, 2010, appellants' clerk, Paulette Partida (the clerk), sold an alcoholic beverage to 17-year-old Hunter M. Although not noted in the accusation, Hunter M. was working as a minor decoy for the Pomona Police Department at the time.

An administrative hearing was held on February 23, 2011, at which time documentary evidence was received, and testimony concerning the sale was presented by Hunter M. (the decoy), and by Robert Scheppmann, a Pomona police officer. Denise Smith, the assistant store manager, testified on behalf of appellants. The evidence established that, at the clerk's request, the decoy produced his California identification card. The card set forth the decoy's true date of birth and contained both a red and a blue stripe. The clerk examined the identification, spoke the words "three two nine," returned the card to the decoy, and completed the sale. The transaction was observed by police officer Scheppmann, who also heard the words spoken by the clerk.

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

Appellants filed a timely appeal, and make the following contentions: (1) There was no compliance with Department Rules 141(b)(2)[2] and 141(b)(5)[3]; and (2) the ALJ[2]

[2] Rule 141(b)(2) provides that a minor decoy "shall display the appearance which (continued...)

abused his discretion by failing to mitigate the penalty.

DISCUSSION

I

Appellants argue that a decoy who is six feet two inches tall and has substantial experience as a decoy cannot display the appearance required by Rule 141(b)(2). They contend that the administrative law judge (ALJ) "downplayed" the decoy's confidence and physical stature by considering irrelevant evidence having no effect on his appearance at the time of the sale, specifically that he was soft spoken at the hearing, displayed nervousness, and was successful in making only a single purchase although visiting 21 stores.

This is simply one more case where this Board is asked to substitute its judgment for that of the ALJ as to whether the standards of the rule have been met. The Board does not see or hear the decoy; at best, the record offers several photographs taken at or shortly before the decoy operation. The ALJ has the benefit of those photographs, and, more importantly, the opportunity to see and hear a decoy as he or she testifies, to observe his or her poise, demeanor, mannerisms, facial countenance and physical stature, all factors bearing on the appearance that decoy projects.

The ALJ in this case heard the evidence, observed and listened to the decoy,

---

[2](...continued)
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."

[3] Rule 141(b)(5) requires, following any completed sale, that a decoy make a face to face identification of the alleged seller of alcoholic beverages.

and concluded (Finding of Fact 9):

> Decoy Hunter M. appears his age, 17 years of 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/conduct in front of Clerk Partida at the Licensed Premises on June 27, 2010, Hunter M. displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to Partida. Hunter M. appeared his true age.

Contrary to appellants, we do not view the decoy's height and weight as atypical of a 17-year-old male, and we have explained that one's personal experience is not, by itself, relevant to a determination of the decoy's apparent age.

> [I]t 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.

(*7-Eleven, Inc./Azzam (*2001) AB-7631.)

We have said time and again that the ALJ is the person who observes the decoy as he or she testifies and is cross-examined. The ALJ, unlike any member of this Board, observes the demeanor, mannerisms and behavior of the minor decoy and makes the determination called for by the rule. The Board is not equipped to do this, and, of course, does not have that right. Although we have at other times indicated that extraordinary circumstances might warrant our faulting an ALJ's decision on this issue, we have rarely done so, and we are unwilling to do so in this case.

II

Appellants contend that the decoy's testimony established that "the alleged face-

to-face identification failed to make the clerk aware that she was being identified and who was identifying her." (App. Br., p. 6.) Appellants list a number of factors said by the Board in an early 141(b)(5) decision[3] to be relevant to whether a clerk should have known he or she was being identified as a seller; from this, they argue that the decoy testified the clerk was looking at the police officers at the time he identified her, that he merely pointed to her, and that there is no evidence the clerk reacted in a manner indicating that she knew who the minor was.

It is useful to look at what the ALJ found with respect to the face-to-face identification (Finding of Fact 8):

> After making the purchase and leaving the store with the beer, Hunter M. Met outside the store with the police officers. Hunter M. was taken back into Respondent' store. Officer Scheppmann identified himself as a police officer to Clerk Partida and advised her that she had just sold an alcoholic beverage to a minor. Hunter M. was asked who sold him the beer. Hunter M. pointed his finger at Clerk Partida and said "She did", or words to that effect. They were standing about 3 feet apart at the time of this identification. Clerk Partida was aware that she was being identified as the person who sold the beer to Hunter M. A photo of Clerk Partida and Hunter M. holding the beer he purchased was taken at the same [ap]proximate time as the identification. (See Exhibit 2).

Appellants make no attempt to refute any part of this factual determination. Their speculation that the clerk was unaware she had been identified as the seller is simply that - the clerk did not testify. Our reading of Officer Scheppmann's testimony

---

[3] In cases where the Board has held that someone reasonably should have been aware that he or she was being pointed out as the seller, the Board has considered the following: the proximity of the decoy to the seller; how the identification was accomplished (pointing, verbally, answering question); what the clerk was doing at the time of the identification (where his or her attention was focused); whether the seller had been informed by the officer that he or she had sold to a minor; and the clerk's immediate reaction.

(Prestige Stations, Inc. (2001) AB-7764.)

convinces us there is ample support for the finding.

Rule 141, of which 141(b)(5) is a component part, offers an affirmative defense; the burden of establishing that defense falls on appellants. The record in this case is overwhelmingly clear that they have failed to meet that burden.

III

Appellants argued at the hearing that their assistant manager's testimony describing their employee program of annual alcohol training, in which employees must review training materials and pass a computerized test, her personal review of the training materials with the clerk involved in the transaction at issue, her observation that the clerk passed the test, her hands-on employee supervision and monitoring, and the voluntary furnishing of the store surveillance video, coupled with her offer to provide further information if needed, warranted only a 10-day, all-stayed, suspension. They say that the 15-day suspension ordered by the ALJ was an abuse of discretion, and that he created a new standard, one which does not appear in Rule 144, requiring that mitigation be "out of the ordinary," "extraordinary," or "above and beyond the basics." (App. Br., p. 8.)

In concluding that mitigation of the 15-day standard penalty under Rule 144 was not warranted, the ALJ wrote:

> However, the testimony of [assistant manager] Smith did not establish mitigation. The training given to Clerk Partida was nothing out of the ordinary to be worthy of mitigation. Nor was the fact that Smith did what the police officers asked her to do establish any mitigation. These are the types of things expected of each and every licensee, not extraordinary or above and beyond the basics."

It is this language that appellants say goes beyond Rule 144.

We do not agree with appellants. The store had been licensed less than a year.

The fact that the training program involves computers and tests does not impress us as anything unique, and employee training would especially seem a must for new licensees. Quite obviously, the training was ineffective in this instance. We do not read the ALJ's comments as creating a new standard for mitigation.

Penalties imposed by an ALJ will not be disturbed without a showing of "palpable abuse." *(Rice v. Alcoholic Beverage Control Appeals Bd.* (1979) 89 Cal.App.3d 30, 39 [152 Cal.Rptr. 285].) We find no abuse in this case.

ORDER

The decision of the Department is affirmed.[4]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[4] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.