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

AB-9178a
File: 21-477918 Reg: 10073852

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy 9599
801 East Avenue, Chico, CA 95926-1250,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: April 3, 2014
Sacramento, CA

ISSUED MAY 9, 2014

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy 9599 (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 B. Saltsman and Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

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[1]The decision of the Department, dated June 5, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

This is the second appeal in this matter. Appellants' off-sale general license was issued on June 22, 2009. On November 18, 2010, the Department filed an accusation against appellants charging that, on July 8, 2010, appellants' clerk sold an alcoholic beverage to a 19-year-old police decoy. Following two administrative hearings, the Department issued a decision which determined that the violation charged had been proven and that no defense to the charge had been established.

In the first appeal, the Board reversed the decision of the Department on the ground it was not supported by the findings; specifically, that “no factual findings were set forth to support a determination that the [minor] decoy appeared to be under the age of 21” as required by law. (See AB-9178, issued August 10, 2012, p. 5.) Our reversal was not accompanied by any express instructions to the Department, thereby leaving it with three responses: (1) accept our decision and dismiss its complaint against the licensee; (2) seek judicial review of our order by writ of mandamus; or (3) remand the matter for the making of an essential factual finding on the decoy’s general appearance as to age.

The Department remanded the matter to the same administrative law judge (ALJ) who rendered the initial decision. At the proceeding this time, the Department — because it contends the burden is on the licensee to present evidence of the decoy’s appearance as an affirmative defense — presented no evidence; nor did it ask the ALJ to make a specific finding (based on previously presented evidence) consistent with our opinion. Neither did the licensee present any evidence, believing that our order

established that the essential finding on the decoy's appearance as to age was missing and that was all that was necessary for the licensee to prevail.

The ALJ, then, heard no new evidence and came to the same conclusion as he had before, stating that he was making no new findings because (1) the parties did not present sufficient evidence to support such a finding, (2) it is not the ALJ's role to elicit sufficient evidence to support such a finding, and (3) the Department's rule 141 does not require such a finding. (Proposed Decision on Remand, March 7, 2013, p. 6 ("Proposed Decision").) Thereafter, the Department entered the decision which is the subject of appellants' present appeal.

In the instant case, the issues are: (1) whether the Department had the authority to remand the matter to an ALJ, and, if so, (2) whether the ALJ complied with the remand order and made a specific finding as to whether the evidence presented showed, and was required to show, that the minor decoy's general appearance was of a person under the age of 21 years.

DISCUSSION

I

Appellants allege the Department lacks the authority and jurisdiction to remand the matter to an administrative law judge following a reversal by the Appeals Board. (App.Br. at p. 4.) We disagree.

Appellants assert that, since the Appeals Board did not order the case remanded to the Department, which was within its power, the Department's sole recourse from the Appeals Board's order of reversal is provided in Business and Professions Code §§

23089 and 23090 — i.e., by petition for writ of review to a Court of Appeal or to the Supreme Court. Since the Department did not seek judicial review, appellants argue the Appeals Board decision is final, and the Department's order beyond its jurisdiction.

The Board addressed this issue in *Circle K Stores, Inc.* (1999) AB-7080a, and concluded that the Department had jurisdiction to enter the order it did. That decision discussed the pertinent case law considering the effect of an unqualified order of reversal, and concluded it was the equivalent of an automatic remand for further proceedings not inconsistent with the Board's decision. The same is true in this case, and remand was appropriate to provide the ALJ, presumably with help from the parties, an opportunity to remedy his deficient findings.

II

Appellants next contend that even if the remand order was proper, that "the ALJ's decision is still devoid of the necessary factual findings to support a determination that the decoy appeared under the age of 21." (App.Br. at p. 8.) We agree.

The ALJ made the following Findings of Fact pertaining to the appearance of the decoy:

> FF III: Neither the Department nor the Licensee presented evidence regarding the decoy's height or weight on either the day of the decoy operation or on the day of the hearing. The decoy was nervous while in the licensee store. He had thinning and receding hair. He had been a police explorer for "a couple of years" and had participated in "no more than two prior decoy operations." A photograph (State's Exhibit 2) of the decoy with the manager was taken shortly after the sale of the beer.
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> FF IV: The Licensee's manager believed the decoy to be twenty-five years old at the time of the sale, due to his "general stature, stubby facial hair, ... and mature appearance."

> FF V: Because neither party presented additional evidence at the remand hearing, the findings of fact stated above are identical to the findings of fact in the proposed decision submitted by the ALj, adopted by the Department, and reversed by the Appeals Board.

Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836] (*Topanga)*, holds that "implicit in [the law] . . . is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order." The court explained that

> among other functions, a findings requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions. [Citations.] In addition, findings enable the reviewing court to trace and examine the agency's mode of analysis. [Citations.] [¶ . . . .¶] Absent such road signs, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency. Moreover, properly constituted findings enable the parties to the agency proceeding to determine whether and on what basis they should seek review. [Citations.] They also serve a public relations function by helping to persuade the parties that administrative decision-making is careful, reasoned, and equitable."

(*Id.* at pp. 516-517, fns. omitted.)

We do not know, except by assumption, whether the ALJ actually observed the decoy — since this fact is omitted from both of his decisions, and no specific finding was made in either that the decoy displayed 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 — as required by B & P Code § 25658(f) and rule

141(b)(2). In fact, the ALJ's findings lend support to the inference that the decoy did *not* meet the standard required by the rule, given that the description of the decoy includes "nervousness . . . thinning and receding hair . . . stubbly facial hair . . . and mature appearance." (FF III-IV.)

The Board consistently recognizes we must defer to the factual determinations of the ALJ as long *as they are reasonable*. However, the Board cannot accord deference when, as here, a factual determination essential to a legal conclusion is *absent* and some factual determinations made lend support to the opposite conclusion. It cannot be denied that in minor decoy prosecutions a "finding" that the decoy has the general appearance of a person under 21 years of age is necessary to the Department's imposition of discipline. That is the clear lesson of, *inter alia*, *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2002) 103 Cal. App.4th 1084 [123 Cal. Rptr.2d 652], an opinion that arose from a remand to this same ALJ, due to similarly insufficient findings he made the first time respecting the minor decoy's appearance as to age. In that case, however, in contrast to this one, the ALJ made the requisite new findings about the decoy's appearance based on evidence previously presented. Here, the ALJ refused to make such a finding because he mistakenly believed rule 141 "does not require" it. (Proposed Decision, p. 6.)

The ALJ's statement here (the second time around) that "[t]he Licensee has not shown, and the [ALJ] does not see, how the decoy's appearance in Exhibit 2 [*i.e.*, the photograph of the minor decoy] was not that of a nineteen-year old man," (Proposed Decision at p. 4) does not suffice. In the first place, it improperly relieves the

Department from any obligation to satisfy the requirement that the minor decoy's general appearance be of a person under 21 years of age, contrary to the plain language of the statute and rule, as well as decisions of appellate courts and this Board. Second, it puts this Board in the difficult (if not impossible) position of trying to determine from the dry printed record and a photograph of the minor decoy what his general appearance was (in regards to his age) at the time of sale and at the hearing. Unlike the ALJ, we did not and could not observe important factors about the decoy, including his demeanor, gestures, nervousness, and so forth that are relevant to his general age appearance.[2] The ALJ is the fact finder the Board depends upon in making such determinations and when, as here, he refuses to make essential findings because he claims there is insufficient evidence to support doing so, we must take him at his word and decide this dispute in accordance with applicable law. Finally, the ALJ's triple negative remark ("the licensee has *not* shown and the ALJ does *not* see how the decoy's appearance . . . was *not* that of a nineteen-year old man") is less an essential "finding" than a illustration of the leap from " evidence to conclusion " that *Topanga* countenances against.

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[2]As a distinguished judge long ago noted, and video advances now make feasible, "if on appeals we used records consisting of talking motion pictures of trials [and administrative hearings], this particular difficulty [of ascertaining essential facts when sufficient findings are not made by the trier of fact] could be largely overcome." (*United States v. Rubenstein* (1945) 151 F.2d 915, 921, fn. 5 (dissenting opinion by Frank, J.)) Perhaps the time is now ripe for making digital recordings of all administrative hearings for review by the Board so that we can decide for ourselves whether the record of evidence presented is sufficient to support findings essential to the determination of legal issues. (See also Jerome Frank, *Law and the Modern Mind* (1930) p. 110.)

By refusing to make a finding the law requires, the ALJ's decision constitutes an " abuse of discretion." "'Abuse of discretion' in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.]" (*Brown v. Gordon* (1966) 240 Cal.App.2d 659, 666-667 [49 Cal.Rptr. 901].) Accordingly, the Board concludes the decision in this matter is not supported by the findings and, as such, constitutes an abuse of discretion.

ORDER

The decision of the Department is reversed.[3] We believe no remand is warranted as we are ruling as a matter of law that the Department's decision was incorrect. The accusation should be dismissed.

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[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.