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

AB-9188
File: 21-477792 Reg: 10073472

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy 9161
45 North Milpitas Boulevard, Milpitas, CA 95035-4402,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: July 12, 2012
Sacramento, CA

ISSUED AUGUST 16, 2012

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy 9161 (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 Barat Saltsman and Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Sean Klein.

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[1]The decision of the Department, dated August 17, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. Thereafter, the Department instituted an accusation against appellants charging that, on April 16, 2010, appellants' clerk (the clerk), sold an alcoholic beverage (beer) to 19-year-old Jeffery Anadon. Although not noted in the accusation, Anadon was working as a minor decoy for the Department at the time.

An administrative hearing was held on June 8, 2011, at which time documentary evidence was received, and testimony concerning the sale was presented by Anadon (the decoy).

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 contend that there was no compliance with Rule 141(b)(5).

DISCUSSION

Rule 141 requires that a minor decoy operation be conducted in a manner which promotes fairness. Subdivision (b) of the rule sets forth minimum standards which apply to actions brought under Business and Professions Code section 25658 in which it is alleged that a minor decoy has purchased an alcoholic beverage. One of those standards is contained in subdivision (b)(5) of rule 141; it requires the peace officer directing the decoy to have the minor decoy who purchased the alcoholic beverage "make a face to face identification of the alleged seller of the alcoholic beverages." Subdivision (c) of rule 141 provides that a failure to comply with the rule shall be a defense to any action bought pursuant to section 25658. The Board has construed this language to mean the licensee has the burden of establishing a prima facie case that

there was no compliance with the rule. The administrative law judge (ALJ) concluded that appellants had not met that burden.

Appellants argue that the decoy's testimony is insufficient to show compliance with the rule. They contend that the decoy's testimony shows that the clerk was busy with a customer and was not looking at the decoy when he pointed to her when the Department investigator asked him who sold him the beer.

The decoy testified that, after his purchase, the police officers walked him back into the store and asked him to identify the person who sold the alcoholic beverages to him. He pointed to the cashier while he was standing about 10 feet from her.

> Q. And when you pointed out the cashier, did you say anything?
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> A. I probably did, but I don't remember.
>
> Q. And do you recall what the cashier was doing at this point?
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> A. I believe she was helping another customer. ... I think there was a line behind me at that point in time, and then they walked over there.
>
> ...
>
> Q. And do you recall what she was doing at that point after the police had come in and you pointed her out?
>
> A. At that point, I believe she stopped and looked at us.
>
> Q. And when you pointed her out, was she looking at you?
>
> A. Initially, I do not think so. I think she was focused on helping another customer.
>
> Q. But then once the transaction with that customer was done - -
>
> A. She stopped and looked at us. The officer in riot gear attracted a lot of attention.
>
> ...
>
> Q. So what happened after you pointed her out?

A. I remember we walked over there and they spoke with her and then the manager came.

Q. And so were you present at the time that the police were speaking to her?

A. Partially.

[RT 11-13].

This case is a typical example of a face-to-face identification where, as the clerk is being identified by the decoy, the clerk became aware that she was the target of the attention of a police officer and a customer to whom she had just sold an alcoholic beverage. Any doubt she may have had would have vanished when the police officers, accompanied by the decoy, approached her and informed her she had sold an alcoholic beverage to a minor.

Appellants' argument that it was the Department's burden to establish that there had been a face-to-face identification is incorrect. The case upon which they rely, *Southland Corporation/R.A.N., Inc.* (1998) AB-6967, does not correctly state the law. This was made clear in the Board's decision in *7-Eleven, Inc./Lo and Lo* (2006) AB-8384, where, as here, it was argued that the burden was on the Department to establish that a face to face identification had occurred. The Board there stated:

> Appellants cite three Appeals Board decisions: *The Southland Corporation & R.A.N., Inc*. (1998) AB-6967; *Rahman* (2000) AB-7412; and *The Von's Corporation* (2002) AB-7819 (*Vons*). Appellants refer to the first two for their statements that the Department must make a prima facie showing of compliance with the law before the licensee must show that law enforcement did not comply. In the third case, *Vons*, appellants state that the Board "more narrowly framed the Department's obligation in this regard," and they quote the standard definition of prima facie that the Board included in its opinion. Putting that sentence (in italics in the following quotation) in context, however, reveals that *Vons* repudiates not only the first two cases appellants cite, but appellants' arguments as well:
>
> > Appellant asserts that the Department must, at the outset, "demonstrate that there is substantial evidence to

> conclude that the decoy operation was conducted in a fair manner," before appellant is required to present any evidence that the decoy operation was conducted unfairly. Appellant misunderstands the differing natures of the various burden-of-proof standards. The requirement of "substantial evidence" to support a Department decision is the standard used by this Board, and the appellate courts, when reviewing a decision. The ultimate burden of persuasion at the administrative hearing is the preponderance of evidence. The Department's *initial burden of producing evidence, however*, *is merely to make a prima facie case, that is, to produce sufficient evidence to support a finding in its favor in the absence of rebutting evidence.*

Citing a number of Board decisions to the effect that Rule 141 offers an affirmative defense, and that the burden of proof is on the licensee, the Board focused its attention on *The Southland Corporation/R.A.N*. decision, the decision appellants rely on in this case:

> Appellants are attempting to resurrect a long-dead notion, and it appears that much of the impetus for their attempt comes from their reading of *The Southland Corporation/R.A.N., supra*. We have struggled with the anomaly of that appeal for a number of years and have attempted to bring the troublesome language of the opinion into line with the rest of the Board's opinions. It has become obvious to us that this approach requires the Appeals Board to address and reject, over and over again, contentions such as appellants make here. This promotes neither fairness nor justice. Therefore, to the extent that *The Southland Corporation/R.A.N.* is seen as imposing on the Department an initial burden of proof with regard to the affirmative defense of Rule 141 before an appellant has presented any evidence of a violation of that rule, it is overruled.

(*7-Eleven, Inc./Lo and Lo, supra.*)

Thus, appellants' arguments fail in two respects. They are wrong in their view that the Department must first show compliance with Rule 141(b)(5), and the evidence in the record establishes that there was a face-to-face identification.

ORDER

The decision of the Department is affirmed.[2]

FRED ARMENDARIZ, CHAIRMAN
BAXTER RICE, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[2] 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.