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

AB-9255
File: 21-477572 Reg: 11074751

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store 9556
1740 South Victoria Avenue, Ventura, CA 95003-6592,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: February 7, 2013
Los Angeles, CA

ISSUED MARCH 11, 2013

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store 9556 (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 D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated March 16, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On April 5, 2011, the Department filed an accusation against appellants charging that, on September 24, 2010, appellants' clerk, Jonathan Gaudino (the clerk), sold an alcoholic beverage to 18-year-old Taylor Bradley.[2] Although not noted in the accusation, Bradley was working as a minor decoy for the Ventura Police Department at the time.

At the administrative hearing held on December 28, 2011, documentary evidence was received and testimony concerning the sale was presented by Bradley (the decoy), and by Detectives James Espinoza and Derek Donswyck of the Ventura Police Department.

Testimony established that the decoy entered the licensed premises, selected a six-pack of Budweiser beer in cans from the cooler, and approached the counter. The clerk asked to see the decoy's identification, and the decoy showed her California driver's license. The clerk examined the identification for several seconds, entered something into the register, and proceeded with the sale.

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

Appellants then filed this appeal contending that the ALJ's factual findings do not support his rule 141(b)(2)[3] conclusions.

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[2]Appellants' Opening Brief asserts that the sale was made to another individual, a minor by the name of Nicholas M. (App.Br. at p. 2.) This is incorrect, and we have disregarded that portion of the brief. Counsel for appellants would be wise to edit their briefs and to scrupulously avoid shoddy cut-and-paste jobs.

[3]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.

DISCUSSION

Appellants contend that the ALJ abused his discretion and failed to proceed in the manner required by law because his factual findings do not support his conclusion that the decoy's appearance complied with rule 141(b)(2).

This Board is bound by the factual findings in the Department's decision as long as they are 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. (*CMPB Friends,* [*Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002)] 100 Cal.App.4th [1250,]1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; ....) 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. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

Appellants contend that the ALJ's findings of fact do not support compliance with rule 141(b)(2). Appellants rely on the California Supreme Court's opinion in *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836] as support for their assertion that "[a]n agency's decision must include findings 'to bridge the analytic gap between the raw evidence and the ultimate decision or order.'" (App.Br. at p. 4, citing *Topanga*, *supra*, at p. 515.)

Appellants misconstrue *Topanga*. It does not hold that findings must be

explained, only that findings must be made. This is made clear when one reads the entire sentence that includes the phrase on which appellant relies: "We further conclude that implicit in section 1094.5 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." (*Topanga*, 11 Cal.3d at 515, emphasis added.)

In *No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 258-259 [242 Cal.Rptr. 760], the court quoted with approval, and added italics to, the comment regarding *Topanga* made in *Jacobson v. County of Los Angeles* (1977) 69 Cal.App.3d 374, 389 [137 Cal.Rptr. 909]: "'The holding in *Topanga* was, thus, that *in the total absence of findings justifying a variance*, the granting of such variance could not be sustained.'"

This Board has rejected countless attempts to stretch *Topanga* beyond its limited usefulness. *Topanga* addressed the total absence of findings. It is of no relevance to a case such as this, where the ALJ set forth detailed findings regarding the decoy's appearance at the time of the sale, (Findings of Fact ¶ 5), as well as her "appearance, dress, poise, demeanor, maturity, and mannerisms" at the hearing. (Findings of Fact ¶ 9). Moreover, the ALJ found that the decoy "appeared her age at the time of the decoy operation," (*Id.*), and explicitly rejected appellant's argument to the contrary (Conclusion of Law ¶ 5.) Once again, we express displeasure with counsel's persistent attempts to stretch *Topanga* beyond its reasonable reach.

Appellants refer us to *Garfield Beach CVS, LLC* (2012) AB-9178, in which this Board reversed for insufficient findings. The opinion in that case, however, hinged

largely on the absence of necessary findings:

> No specific finding was made 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.

(*Id.* at p. 5.) The Board, in that case, did not reinterpret the ALJ's findings. Instead, essential findings were missing entirely. That is not the case here; the ALJ specifically rejected the argument that the decoy appeared over 21, stated unambiguously that the decoy "had the appearance generally expected of a person under the age of 21," and referred back to his findings for support. (Conclusions of Law ¶ 5.) There is simply no deficiency of the sort shown in *Garfield Beach*.

Appellants argue that the ALJ's findings undermine his conclusions – that his own "description of the decoy confirms . . . that the decoy did not comply with Rule 141(b)(2)." (App.Br. at p. 5.) We find no such contradiction. The act of attempting to purchase alcohol in no way establishes apparent age. (See *id*.) Moreover, we cannot agree with appellants' unsupported generalization that "[b]oth makeup and jewelry have the effect of making a teenage woman appear older than her actual age." (*Id.*) The ALJ was in the best position to assess whether the presence of makeup and jewelry made this particular decoy appear older; he concluded it did not. (Conclusions of Law ¶ 5.) In any event, the minor decoy was asked by the clerk for, and did present, her valid California driver's license showing she was under 21, so her "appearance" here would be legally irrelevant to the offense.

Ultimately, appellants would merely have this Board reach a different conclusion based on the same set of facts. This Board is unwilling to substitute its judgment for that of the trier of fact.

ORDER

The decision of the Department is affirmed.[4]

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

[4]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.