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

AB-9318
File: 21-479404 Reg: 12076622

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #9584
4345 West Century Boulevard, Inglewood, CA 90304,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: September 5, 2013
Los Angeles, CA

ISSUED SEPTEMBER 30, 2013

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #9584 (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 Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, David Sakamoto.

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[1]The decision of the Department, dated September 28, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 2, 2009. On March 8, 2012, the Department filed an accusation against appellants charging that, on January 5, 2012, appellants' clerk sold an alcoholic beverage to 17-year-old Alexx J.. Although not noted in the accusation, Alexx was working as a minor decoy for the Department at the time.

At the administrative hearing held on July 31, 2012, documentary evidence was received and testimony concerning the sale was presented by Alexx (the decoy). Appellants presented no witnesses.

On the date of the violation, Agent Andrea Florentinus entered the premises. The decoy followed shortly thereafter. The decoy proceeded to the alcoholic beverage section, where he selected a three-pack of Bud Light beer. He took the beer to the counter, paid for it, and left the premises.

Afterward, a second agent, Kim Marquez, entered the premises, then exited again and told the decoy to reenter the premises. Agent Marquez led the decoy to a back room. The clerk was already in the room. One of the agents asked the decoy to identify the individual who had sold him the alcohol. He pointed to the clerk and stated that she had. A photograph of the decoy and the clerk was taken.

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

Appellants then filed an appeal contending: (1) the decoy's appearance violated rule 141(b)(2); (2) the ALJ abused his discretion when he disregarded appellants' rule 141(b)(2) argument; and (3) the face-to-face identification was unduly suggestive.

DISCUSSION

I

Appellants contend that the decoy's appearance did not comply with rule 141(b)(2). In particular, appellants argue that the decoy's large physical stature and previous decoy experience violate the rule.

Rule 141, subdivision (b)(2), provides that "[t]he decoy shall display 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 at the time of the alleged offense."

Appellants argue that"the decoy was an experienced minor decoy, stood over six feet tall, and had a large physical stature." (App.Br. at p. 5.) The decoy testified that he was six feet, one inch tall, and weighed approximately 175 lbs. [RT at p. 17, ll. 16-20.] He also testified that he had participated in four or five previous operations, and that during each previous operation, he had visited about ten locations. [RT at p. 10, ll. 15-21.]

The ALJ discussed the decoy's appearance and made the following findings of fact:

> FF 5. Alexx appeared and testified at the hearing. On January 5, 2012, he was 6' 1" tall and weighed 175 pounds. He was wearing a t-shirt, jeans, and tennis shoes. His hair was very close cut. His appearance at the hearing was similar.
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> ¶ . . . . ¶
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> FF 8. Alexx's father formerly worked as an investigator for the Department, which is how he learned of the decoy program. He had served as a decoy four or five times before January 5, 2012, visiting approximately ten locations each time. He visited approximately ten locations on January 5, 2012, as well.

> FF 9. Alexx appeared his 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 and conduct in front of the clerk at the Licensed Premises on January 5, 2012, Alexx displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk.

Appellants suggest that the decoy's experience made him appear less nervous at the sale. (See App.Br. at p. 6.) Notably, appellants presented no witnesses; their assertion that the decoy did not appear nervous at the time of the sale is therefore mere speculation. In any event, as this Board has recently observed,

> [i]t is difficult to understand how, other than, perhaps, to eliminate nervousness, experience changes the appearance that is presented to the seller. Nervousness, or lack thereof, is only one consideration, to be balanced against such other considerations as overall appearance, demeanor, manner of dress, manner of speaking, physical movements, and the like.

(*7-Eleven Inc./Kaur* (2012) AB-9202.)

With regard to the decoy's physical stature, we have repeatedly declined to substitute our judgment for that of the ALJ on this particular question of fact. Minors come in all shapes and sizes, and we are reluctant to suggest, without more, that minor decoys of large stature automatically violate the rule. (See, e.g., *7-Eleven Inc./Lobana* (2012) AB-9164.) This Board has noted that

> [a]n ALJ's task to evaluate the appearance of decoys is not an easy one, nor is it precise. To a large extent, application of such standards as the rule provides is, of necessity, subjective; all that can be required is reasonableness in the application. As long as the determinations of the ALJ's are reasonable and not arbitrary or capricious, we will uphold them.

(*O'Brien* (2001) AB-7751.)

As we have said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he testifies, and

making the determination whether the decoy's appearance met the requirement of rule 141 that he possess 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.

We are not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy lacked the appearance required by the rule, and an equally partisan response that he did not.

II

Appellants contend that the ALJ abused his discretion by summarily dismissing their 141(b)(2) argument. Specifically, appellants assert that the ALJ merely recited boilerplate language relating to the decoy's appearance, thus violating the requirements of the Administrative Procedures Act, section 11425.50.

Section 11425.50 reads, in relevant part:

> The statement of the factual basis for the decision may be in the language of, or by reference to, the pleadings. If the statement is no more than mere repetition or paraphrase of the relevant statute or regulation, the statement shall be accompanied by a concise and explicit statement of the underlying facts of record that support the decision.

(Cal. Gov. Code § 11425.50(b).) Appellants contend that the ALJ's opinion merely recites boilerplate language related to the decoy's "physical appearance, dress, poise, demeanor, maturity, and mannerisms." Appellants claim that the ALJ does not "adequately" accompany these statements with facts from the record. (App.Br. at p. 6.)

Appellants' assertion is simply incorrect. The ALJ made explicit findings, cited above, regarding the decoy's height, weight, and previous experience. Based on these findings of fact, the ALJ reached the following conclusion of law:

5. The Respondents argued that the decoy operation at the Licensed

> Premises failed to comply with rule 141(b)(2) and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that Alexx's height, weight, and lack of nervousness (based on his experience) gave him the appearance of someone age 21 or older. This argument is rejected. As set forth above, Alexx had the appearance generally expected of a person under the age of 21.

In fact, the ALJ did not disregard appellants' argument, nor did he merely recite boilerplate language. He made concise, explicit findings of fact and, based on them, reached a reasonable conclusion. There is no violation of section 11425.50(b).

Moreover, even if the ALJ's opinion did *not* satisfy the requirements of section 11425.50 – and we are confident it does – the statute is silent regarding the consequences that would flow from such a deficiency. As this Board has noted in prior cases, a failure to meet the requirements of section 11425.50 does not necessarily merit reversal. (See, e.g., *Chuenmeesri* (2002) AB-7856.)

III

Appellants contend that rule 141(b)(5) was violated because the face-to-face identification was unduly suggestive. Appellants argue that the decoy was led to a back room where he had "no other choice but to identify the clerk." (App.Br. at p. 7.)

We first note that appellants' argument contradicts the decoy's undisputed testimony. According to the decoy's testimony, there were *two* female employees in the back room:

> Q And who was located in that room?
> A It was Kim, Andrea, myself, the female clerk, and another female.
> Q Okay. And do you know who that other female was?
> A She was another employee at the CVS.

[RT at p. 20, ll. 19-24.] The decoy did, in fact, have another choice.

Regardless, this Board need not address the issue, as appellants did not raise it at the administrative hearing.

It is settled law that the failure to raise an issue or assert a defense at the administrative hearing bars its consideration when raised or asserted for the first time on appeal. (*Hooks v. California Personnel Board* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Wilke & Holzheiser, Inc. V. Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; *Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 1182, 1187 [17 Cal.Rptr. 167].) Since appellants did not raise this issue at the administrative hearing, this Board is entitled to consider it waived. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal § 400, p. 458.)

ORDER

The decision of the Department is affirmed.[2]

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

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[2]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.