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

AB-9373

File: 21-479587 Reg: 13078211

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #9728
1322 West 6th Street, Corona, CA 92882,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: June 5, 2014
Los Angeles, CA

ISSUED JUNE 26, 2014

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #9728 (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 W. Sakamoto.

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[1]The decision of the Department, dated September 6, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 10, 2009. On March 21, 2013, the Department filed an accusation against appellants charging that, on November 16, 2012, appellants' clerk, Lucille Deluca (the clerk), sold an alcoholic beverage to 16-year-old Jorden R. Although not noted in the accusation, Jorden was working as a minor decoy for the Corona Police Department at the time.

At the administrative hearing held on July 23, 2013, documentary evidence was received and testimony concerning the sale was presented by the decoy and by Jesse Marquez, a Corona Police officer. Appellants presented no witnesses.

Testimony established that on November 16, 2012, the decoy entered the licensed premises and went to the cooler where he selected a six-pack of Bud Light beer in cans. He waited in line, and when it was his turn he placed the beer on the counter. The clerk scanned the beer and then asked him for identification. The decoy handed the clerk his California driver's license, which had a vertical orientation, and which contained a red stripe indicating "AGE 21 IN 2016" and a blue stripe indicating "AGE 18 IN 2013." (See Exhibit 2.) The clerk looked at the ID for 10 to 15 seconds, then entered something into the cash register and completed the sale without asking any age-related questions. Officer Marquez was inside the premises and witnessed the sale as he posed as a customer.

After making the purchase and exiting the store, the decoy met with police and ABC officers outside. He re-entered the premises with the officers, then Officer Marquez identified himself as a police officer to the clerk and advised her of the violation. Officer Marquez asked the decoy to identify the person who sold him the beer, and he pointed at the clerk and said "that's her" or words to that effect while

standing about 5 feet away and facing the clerk. The officer asked the clerk if she understood she was being identified as the seller of alcohol to a minor decoy and she answered in the affirmative. A photo was taken of the clerk and decoy together (Exhibit 3) and the clerk was issued a citation.

The Department's decision determined that the violation charged had been proven and that no defense had been established.

Appellants then filed an appeal contending: (1) rule 141(a)[2] was violated because the store was busy; (2) compliance with rule 141(b)(2) was lacking; (3) the face-to-face identification did not comply with rule 141(b)(5); and (4) the ALJ failed to consider mitigating evidence.

DISCUSSION

I

Appellants contend the decoy operation was not conducted in a fashion that promotes fairness, in violation of rule 141(a),[3] because there were approximately 10 to 15 customers in the licensed premises at the time of the decoy operation and this level of activity made the operation unfair.

This Board has repeatedly noted the flawed logic of the “rush hour” defense. The obligation to prevent sales to minors does not diminish as the number of customers increases; that duty does not operate on the basis of a sliding scale:

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[2]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.

[3]Rule 141(a) provides: “A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a *fashion that promotes fairness*.” (Emphasis added.)

> The prevention of sales to minors requires a certain level of vigilance on the part of sellers. It is nonsense to believe a minor will attempt to buy an alcoholic beverage only when the store is not busy, or that a seller is entitled to be less vigilant simply because the store is busy.

(*Circle K Stores, Inc.* (2000) AB-7476 at p. 5.) If anything, the licensee must ensure that its employees are *more* vigilant during rush hour periods, as a savvy minor may take advantage of a clerk's inattention.

The Board has made it clear that preventing sales to minors must be among the licensee's highest priorities:

> When commerce reaches the point where the desire not to inconvenience customers overrides the importance of preventing sales of alcoholic beverages to minors, the public safety and morals of the people of the State of California will be irreparably injured. Such an unacceptable result will not occur on this Board's watch.

(*The Vons Company, Inc.* (2001) AB-7788 at p. 4.)

As appellants point out, this Board has noted that there may be circumstances where a truly incapacitating level of activity, coupled with an intent on the part of officers to take advantage of the situation, might merit relief:

> It is conceivable that, where an unusual level of patron activity that truly interjects itself into a decoy operation to such an extent that a seller may be legitimately distracted or confused, and the law enforcement officials seek to take advantage of such distraction or confusion, relief might be appropriate.

(*Circle K Stores, Inc.*, *supra*, at p. 5.) Such an exception would require "persuasive evidence of something associated with the timing of the decoy operation that truly *prevents* a seller from acting with circumspection when faced with the possibility that a prospective purchaser of alcoholic beverages is a minor." (*The Vons Company, Inc.*, *supra*, at p. 4, emphasis added.) Notably, we are unaware of any case where such an abuse has been proven and this case is no exception.

Contrary to appellants' assertion, there is no evidence that the clerk was overwhelmed or distracted. The clerk did not testify, and there is no evidence indicating that the store was "busy." The decoy testified that there were about 15 other customers in the store when he entered. [RT at p. 33.] Officer Marquez testified that there were 10 to 15 people in the store. [RT at p. 48.]

Appellants have shown neither a level of activity sufficient to distract a diligent clerk nor an intent on the part of officers to exploit such a situation. On the contrary, there is a total lack of evidence to support appellants' position that 10 to 15 people somehow renders the decoy operation unfair because the store was busy. As the ALJ found:

> ¶ 5. Respondents argue that [the] decoy operation was unfair, violating rule 141(a), because the store was busy. That argument is rejected. Although there was testimony that there were about 15 customers in the store, there was no evidence that they were standing in line to check out. The testimony established that there may have been one customer ahead of decoy Jorden R. No evidence was presented by Respondents to establish their argument. Neither the clerk nor any other employee testified as to what the conditions were or how they may have influenced the outcome.

(Conclusions of Law ¶ 5.) We find no cause to reconsider the ALJ's conclusion that appellants failed to establish that the decoy operation was unfair.

II

Appellants contend that the decoy did not display the appearance generally expected of a person under the age of 21 because of his prior experience on one decoy operation and his lack of nerves.

Rule 141(b)(2) provides: "The 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 maintain that the decoy appeared older than 21 because of his experience and lack of nerves.

The Appeals Board has rejected the "experienced decoy" argument for reasons applicable here:

> A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. . . .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.

(Azzam (2001) AB-7631.)

This Board is bound by the factual findings in the Department's decision as long as they are supported by substantial evidence.

> We cannot interpose our 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.4th [1250,] 1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.4th 364, 367 [3 Cal.Rptr.2d 770; . . . 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. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 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 Bev. Control v. Alcoholic Bev. Control Appeals Bd*. (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826] (*Masani*).)

The ALJ's Findings of Fact paragraphs 4, 5, 9, and 10, concerning the decoy's appearance and compliance with rule 141(b)(2), were as follows:

> ¶ 4. Jorden R. was born November 21, 1995. He served as a minor decoy during an operation conducted by Corona Police Department

> officers on November 16, 2012. On that day Jorden R. was 16 years old.
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> ¶ 5. Jorden R. appeared and testified at the hearing. He stood about 5 feet, 7 inches tall and weighed approximately 150 pounds. His hair was "spiked". When he visited Respondents' store on November 16, 2012, he wore a red hoodie, a black Hurley t-shirt, blue jeans and red Vans shoes. (See Exhibits 3 and 4). Jorden's height has remained about the same since the date of the operation. He had gained about 15 to 20 pounds since then, although it is not noticeable in comparison to Exhibits 3 and 4. At Respondents' Licensed Premises on the date of the decoy operation, Jorden R. looked substantially the same as he did at the hearing.
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> ¶ 9. Decoy Jorden R. appears his age, 16 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 Deluca the Licensed Premises on November 16, 2012, Jorden R. displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to Deluca. Jorden R. appeared his true age.
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> ¶ 10. This was Jorden R.'s first or possibly second time operating as a decoy. He testified that by the time he entered Respondents' store he was less nervous than when he began the decoy operation. This was the 15th store visited on that day. However, it should be noted that Jorden R. appeared nervous during the time he was testifying, constantly fidgeting with his hands and moving his feet about.

Appellants maintain the ALJ failed to consider factors which made the decoy appear older, but in Conclusions of Law paragraph 6 the ALJ noted:

> ¶ 6. Respondents argue that the decoy Jorden R. appeared older than 21 thereby violating Rule 141(b)(2). That argument is rejected. It is also absurd. Jorden R. appeared and acted his true age. If anything, he appears younger than his actual age. (Findings of Fact, ¶¶ 9 through 11) There was no evidence to the contrary.

We agree that appellants' contention is absurd. The decoy looks extremely young in Exhibits 3 and 4.

Appellants have provided no valid basis for the Board to question the ALJ's determination that the decoy complied with rule 141. As this Board has 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 requirements of rule 141. We must decline appellants' invitation to reweigh the evidence — particularly when the ALJ has made extensive findings on both the physical and non-physical characteristics of the decoy.

III

Appellants contend that the face-to-face identification of the clerk failed to comply with rule 141(b)(5) because it took place after the police officer initiated contact with the clerk. (App.Br. at p. 7.)

Rule 141(b)(5) provides:

> Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

Appellants maintain the face-to-face identification was unduly suggestive because the officer made the initial contact with the clerk, and informed her that she had sold an alcoholic beverage to a minor. They contend that the identification was actually made by the police officer, rather than by the decoy, and thus failed to comply with the requirement that the decoy make the identification. They argue that the face-to-face identification failed to strictly comply with this Board's decision in *Chun* (1999) AB-7287, which defined face-to-face identification as:

> . . . the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

Appellants fail to support this argument, and as the ALJ found in Conclusions of Law ¶ 7, the face-to-face identification complied with rule 141(b)(5):

> ¶ 7. Respondents argue that the face to face identification was improper and therefore violated Rule 141(b)(5). That argument is rejected. The only evidence presented regarding the face to face identification was the testimony of decoy Jorden R. and Officer Marquez. Both were credible witnesses. The identification was conducted properly. (Findings of Fact ¶ 8).

The Board has addressed this issue before, and rejected the same argument appellant makes here:

> The fact that the officer first contacts the clerk and informs him or her of the sale to a minor has been used to show that the clerk was aware of being identified by the decoy. (See, e.g., *Southland & Anthony* (2000) AB-7292; *Southland & Meng* (2000) AB-7158a.) ¶ . . . ¶ As long as the decoy makes a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error, we do not believe that the officer's contact with the clerk before the identification takes place causes the rule to be violated.

(*7-Eleven, Inc./M&N Enterprises, Inc*. (2003) AB-7983.)

Appellants' contentions are not supported by the evidence. While an "unduly suggestive" identification is impermissible, appellants have presented no evidence that the identification in this instance was unduly suggestive.

IV

Appellants contend the ALJ failed to consider mitigating evidence which was presented, regarding the length of licensure at the location without any prior discipline, and that the penalty is therefore excessive. (App.Br. at p. 9.)

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty

imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. “If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion.” (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Unless some statute requires it, an administrative agency's decision need not include findings with regard to mitigation. (*Vienna v. Cal. Horse Racing Bd*. (1982) 133 Cal.App.3d 387, 400 [184 Cal.Rptr. 64]; *Otash v. Bureau of Private Investigators* (1964) 230 Cal.App.2d 568, 574-575 [41 Cal.Rptr. 263].) Appellants have not pointed out a statute with such requirements, and we know of none. Findings regarding the penalty imposed are not necessary as long as specific findings are made that support the decision to impose disciplinary action. (*Williamson v. Bd. of Med. Quality Assurance* (1990) 217 Cal.App.3d 1343, 1346-1347 [266 Cal.Rptr. 520].)

Department rule 144 (Cal. Code Regs., tit. 4, § 144), which sets forth the Department's penalty guidelines, provides that higher or lower penalties from the schedule may be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances. Mitigating factors may include, but are not limited to, the length of licensure without prior discipline or problems, positive action by the licensee to correct the problem, documented training of licensee and employees, and cooperation by the licensee in the investigation.

Rule 144 itself addresses the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

Penalty Policy Guidelines:

> The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

Whether appellants' evidence serves to mitigate the standard penalty is a discretionary determination left in the hands of the ALJ. Depending on the facts of an individual case, length of licensure without discipline may indeed constitute mitigating evidence; in other cases, the ALJ may determine that it does *not* mitigate the penalty. Either way, the law is clear: the ALJ is not required to make findings regarding the penalty imposed, nor is he bound to mitigate the penalty according to some formula.

A 15-day suspension is reasonable and in line with rule 144. The ALJ in this case acted within the discretion provided to him by the rule.

ORDER

The decision of the Department is affirmed.[4]

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

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[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.