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

AB-9423
File: 21-479586; Reg: 13079239

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #9651
12717 Glenoaks Boulevard, Sylmar, CA 91342-4749,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: November 6, 2014
San Diego, CA

ISSUED DECEMBER 5, 2014

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #9651 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 15 days because their clerk sold 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, of the law firm Solomon Saltsman & Jamieson, 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 March 7, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 10, 2009. On September 19, 2013, the Department filed an accusation against appellants charging that, on December 31, 2012, appellants' clerk, David Guerrero (the clerk), sold an alcoholic beverage to 18-year-old Dalia Gonzalez. Although not noted in the accusation, Gonzalez was working as a minor decoy for the Los Angeles Police Department (LAPD) at the time.

At the administrative hearing held on January 16, 2014, documentary evidence was received and testimony concerning the sale was presented by Gonzalez (the decoy). Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises and went to the beer section where she selected a 24-ounce can of Bud Light beer. She took the beer to the register and the clerk asked for her identification. The decoy handed the clerk her California driver's license, which had a portrait orientation and contained a red stripe indicating "AGE 21 IN 2015." The clerk looked at the identification and commented that she looked young on her identification; the decoy did not recall whether she responded. The clerk completed the sale and the decoy exited the premises. The decoy later re-entered the premises with LAPD officers to make a face-to-face identification of the clerk who sold her the beer.

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

Appellants then filed a timely appeal contending: (1) the decoy operation violated

rule 141(b)(4)[2] because the decoy did not speak up about her age, and (2) the decision is not supported by substantial evidence.

DISCUSSION

I

Appellants contend that the decoy operation violated rule 141(b)(4)[3] because the decoy did not speak up about her age when the clerk commented that she looked young in her ID picture (RT at p. 11) — thus rendering the operation unfair.

The ALJ made the following observations about appellants' argument:

> 6. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(4)[fn] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that Gonzalez should have responded when the clerk commented that she looked young. Phrased another way, the Respondents believe that the clerk's statement should be construed as a question and, therefore, Gonzalez was obligated to provide an answer.
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> This argument is rejected. A statement is not a question. Moreover, the statement at issue referred to Gonzalez's appearance, not her actual age. Since the clerk did not testify, there is no way of knowing exactly what he meant. For example, he might have been flirting, he might have been paying Gonzalez a compliment, or he might of have [*sic*] thought she looked 16 (and, therefore, younger than her actual age of 18). There are far too many possibilities—and no evidence to support any of them—to draw any conclusions what the clerk thought when he made the comment. There is certainly no evidence to support the Respondent's interpretation of this statement, namely, that the clerk thought Gonzalez was in fact over 21, but looked younger, and therefore was asking if she was old enough to buy alcohol.

(Conclusions of Law ¶ 6.)

The Board has, in other cases involving rule 141(b)(4), addressed issues similar

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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(b)(4) provides: "A decoy shall answer truthfully any questions about his or her age."

to this one, and our reasoning as expressed in those decisions gives guidance here.

In *Thrifty Payless, Inc*. (1998) AB-7050, the Board reversed a Department decision — which rejected a proposed decision finding non-compliance with rule 141(b)(4) — when the decoy, after being asked if she was 21, simply offered the clerk her driver's license. The Department deemed the offer a "truthful answer" within the meaning of the rule. The Board described the response as "borderline misleading." (*Id*. at p. 5.) "[H]er explanation for her non-responsive offer of her driver's license suggests that her objective was not to test whether the clerk would sell to a minor, but, instead, actually to make a purchase of an alcoholic beverage." (*Ibid*.)

> The offer of a driver's license instead of an answer to the question which was asked had the potential of creating a distraction. The clerk could well have thought, as appellant contends, that she was being told, in substance, "of course I'm old enough to purchase liquor; go ahead and check my identification." By analogy, a person attempting to cash a check who tenders a driver's license which would show he is not the payee must believe he will fool the merchant to whom the check is presented. Not that he or she will necessarily succeed, but certainly the possibility of confusion or distraction has been created.

(*Thrifty Payless, Inc.*, *supra*, at pp. 6-7.)

In *The Southland Corp*./*Dandona* (1999) AB-7099, the Board reversed a decision of the Department where the decoy did not respond to the clerk's remark, "1978. You're 21." (*Id*. at p. 4.) The decoy testified she understood the clerk's remark to be a statement rather than a question, but also testified that she had been instructed by the police that if she presented her driver's license, she did not have to answer a question about her age. (*Id*. at pp. 4-6.) The Board stated:

> It is clear from the testimony of the decoy that it would have meant little to her whether [the clerk's] remark was a question or a statement. . . . Consequently, to accept her after-the-fact characterization of the clerk's remark as a mere statement is too charitable. There can be a very fine line between a remark that is a mere statement and a remark that is really

> a question. Delegating that determination to one who believed she should not have answered in either case tacitly ignores the requirement of fairness.

(*Id*. at pp. 7-8.)

In *Lucky Stores, Inc.* (1999) AB-7227, the Board reversed a decision of the Department where the decoy made no response when the clerk said "1978. You are just 21" (per the decoy) or "1978. You are 21" (per the clerk). (*Id*. at p. 4.) The clerk testified he intended what he said to be a question, and got only a grin in response, while the decoy testified he understood it to be a statement, to which no reply was necessary. (*Id.* at p. 4.) The Board stated:

> Our concern is that it is asking too much of a decoy to leave it to him or to her to make that critical judgment whether a remark about age is intended to elicit from them either a confirmation or a correction, or is simply conversation. If fairness of the decoy operation is an important goal, as the Rule proclaims, then, in its implementation, it ought to be the case that where the clerk's remark about age is such that an honest clarification from the decoy may prevent a sale from occurring, the decoy has the obligation to offer such clarification by saying "No, I am not 21," or words to that effect.

(*Id*. at p. 6.)

In *Equilon Enterprises, LLC* (2002) AB-7845, the Board reversed a decision of the Department where the decoy remained silent after the clerk examined the decoy's driver's license, which showed he would be 21 in 2003, and said, "Born in 1981. You check out okay." (*Id*. at p. 2.)

The Board explained why it thought the decision must be reversed:

> Rule 141 requires that a decoy shall answer truthfully questions about his or her age. There is nothing in the rule that requires a decoy to volunteer information about his or her age, or to clear up what may be a misconception about age where a seller is silent and simply goes ahead with the sale either without having requested proof of age or, upon request, having been provided identification. Since a decoy is engaged in a law enforcement process to determine the extent to which sellers are

> complying with the law regarding sales of alcoholic beverages to minors, it would seem unreasonable to expect that process to function if the decoy was obligated to clear up what might be a mistake or misconception on the part of the seller.
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> For example, many transactions involve a seller who requested identification, was furnished identification which showed the decoy to be a minor, yet proceeded with the sale. It could reasonably be assumed the seller was careless, or unable to interpret the information provided. It might also be assumed the seller really did not care, although this is undoubtedly much less frequent.
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> However, where there has been a verbalization of the seller's thought processes such as that in this case, a decoy may be expected to respond. Rule 141 says that a decoy is required to respond to a question. As the Board has said in an earlier case, there may be a thin line between what is a statement and what is a question. And when that line blurs, and the verbalization borders on the ambiguous, it may well be that a response is required.

(*Id*. at p. 5.)

In *Garfield Beach* (2013) AB-9271, the Board considered a case similar to the *Lucky Stores* case discussed above, and held that where there is a verbalization by a clerk or employee expressing the mistaken notion that the decoy is over the age of 21, the decoy has a duty to respond, in the interest of fairness. In *Garfield Beach*, the clerk said "I know you are over 21 and this is only for the cameras." (*Id*. at p. 2.) The decoy said nothing. (*Ibid*.) In both *Lucky Stores* and *Garfield Beach*, the clerk uttered words which clearly expressed that a mistaken calculation had been made. Even though both cases involved statements, and not questions, the Board found in both cases that a response by the decoy was required in the interest of fairness.

It is apparent from the Board's prior cases involving this rule that it considers an appropriate response — whether to a statement or a question by a clerk — to be one which is free of ambiguity, unlikely to cause confusion or distraction, and which errs on the side of responding if the clerk has made a mistaken calculation as to age. An

unspoken response or gesture, which leads a clerk to guess at what the decoy intended to say, is not in the spirit of the rule and will not suffice. However, the cases also tell us that *not all statements require a response* — contrary to appellants' assertion that a decoy is required "to respond to any verbalization about his or her age, regardless if it is a question or statement." (App.Br. at p. 8.) This statement is an overly-broad interpretation of the Board's holding in *Garfield Beach*, *supra*.

Recently, in *7-Eleven/Johal* (2014) AB-9403, the Board specifically declined to enlarge its previous holdings to include a requirement that any and all statements by a clerk require a response from the decoy. The Board held that when there is no ambiguity which requires clarification, and no miscalculation as to age by the clerk, no duty to speak arises. (*Id*. at p. 12.) In *7-Eleven/Johal*, the clerk said: "oh, you are so young." (*Id*. at p. 2.) Similarly, in the case before us, the clerk observed that the decoy looked young in her ID picture. As the ALJ noted, the clerk may have been flirting or paying her a compliment — we don't know, because the clerk did not testify. The word "young" is a subjective term, and gives no indication that the clerk has made a miscalculation and as a result believes the decoy to be over 21. Therefore, we do not believe the clerk's observation about the decoy looking young in her ID photo was a statement or question which required the decoy to respond.

II

Appellants contend that the decision is not supported by substantial evidence because the decoy's testimony, upon which the decision rests, was not credible. Appellants allege "Because the Decoy's testimony was not based on her memory, observations, or perception of the events, the Department failed to prove its case. The Department's decision to suspend Appellants' license is not supported by substantial

evidence." (App.Br. at p. 10.)

When an appellant contends that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734].) "Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

Appellants maintain that the decoy's testimony is not credible because she could not remember certain details, such as: what the clerk looked like; whether there was a line at the counter; where the face-to-face identification occurred; how many officers accompanied her; or whether she responded to the officer when she was asked to identify the clerk. (App.Br. at p. 11.) Because the decoy did not recall these particular

details, appellants allege that the Department failed to prove the allegations in the accusation, and that therefore the decision is not supported by substantial evidence. (*Ibid*.)

It is a fundamental precept of appellate review that it is the province of the administrative law judge (ALJ), as trier of fact, to make determinations as to witness credibility and to resolve any conflicts in the testimony. (*Lorimore v. State Personnel Bd*. (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) The Appeals Board will not interfere with those determinations in the absence of a clear showing of an abuse of discretion.

The ALJ was satisfied that the elements of the accusation had been established, in spite of the decoy not remembering some details about the operation:

> 4. Cause for suspension or revocation of the Respondents' license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that, on December 31, 2012, the Respondents' clerk, inside the Licensed Premises, sold an alcoholic beverage to Dalia Gonzalez, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-9.)
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> 5. Since Gonzalez was the only witness who testified, it goes without saying that this conclusion, and the underlying findings, are based on her testimony, which is found to be credible. The Respondent's argument that Gonzalez's memory was too vague to establish the elements of the violation is rejected.

(Conclusions of Law ¶¶ 4-5.)

We agree with the ALJ that the decision is supported by substantial evidence. We have reviewed the record and find that it supports the ALJ's conclusion, and that the details which the decoy could not remember were nonessential for proving the allegations in the accusation.

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.