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

AB-9444
File: 21-479325 Reg: 14079766

GARFIELD BEACH CVS, LLC and LONGS DRUGS STORES CALIFORNIA, LLC,
dba CVS Pharmacy 9791
2532 West Valley Boulevard, Alhambra, CA 91803-1934,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: February 5, 2015
Los Angeles, CA

ISSUED FEBRUARY 23, 2015

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy 9791 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 15 days because their employee sold an alcoholic beverage to a minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances include appellants Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, through their counsel, Margaret Warner Rose of the law firm of Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, through its counsel, David W. Sakamoto.

---

[1]The decision of the Department, dated May 21, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 1, 2009. On January 13, 2014, the Department filed an accusation against appellants charging that, on September 18, 2013, appellants' clerk, Guillermina Rosales (the clerk), sold an alcoholic beverage to nineteen-year-old Nery Rodriguez. Although not noted in the accusation, Rodriguez was working as a minor decoy in a joint operation between the Alhambra Police Department and the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on April 10, 2014, documentary evidence was received and testimony concerning the sale was presented by Rodriguez (the decoy), and by Vic Duong, an agent for the Department. Appellants presented no witnesses.

Testimony established that, on the date of the operation, the decoy entered the licensed premises, walked straight to the beer coolers, and selected a twelve-pack of Bud Light beer in cans. He took the beer to the sales counter and placed it on the counter where the clerk was working. The decoy paid for the beer, received some change from the clerk, and walked toward the exit with the beer. The clerk did not ask the decoy for identification, nor did she ask any age-related questions before selling the beer to the decoy.

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

Appellants then filed an appeal contending: (1) the Board must itself view the decoy in person in order to fulfill appellants' statutory and constitutional right to a review

of the Department's decision under rule 141(b)(2);[2] and (2) the Department's findings on the decoy's appearance and apparent age are not supported by substantial evidence.

DISCUSSION

I

Appellants contend that the decoy must appear before the Board in order for the Board to fulfill appellants' statutory and constitutional right to a review of the Department's decision.

Appellants are simply raising the same decoy-as-evidence argument we addressed at length — and firmly rejected — in *Chevron Stations* (2015) AB-9415. (See also *7-Eleven, Inc./Niaz* (2015) AB-9427; *7-Eleven, Inc./Jamreonvit* (2015) AB-9424; *7-Eleven, Inc./Assefa* (2015) AB-9416.) We offer only a summary of our reasoning here, and refer appellants to *Chevron Stations*, *supra*, for a more comprehensive analysis.

Section 23083 limits our review to evidence included in the administrative record. (Bus. & Prof. Code § 23083; see also *7-Eleven, Inc./Grover* (2007) AB-8558, at p. 3.) Section 1038(a) of the California Code of Regulations defines the items to be included in the administrative record — none of which conceivably allows for an actual human being. (See Cal. Code Regs., tit. 1, § 1038(a).) The properly compiled record — including testimony, arguments, photographs of the decoy, and the Department's decision containing the administrative law judge's (ALJ) firsthand impressions — is both legally and practically sufficient for the Board to determine whether the conclusions

[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.

reached regarding the decoy's appearance are supported by the evidence.

As we noted in *Chevron Stations*, *supra*, this argument has no merit and wholly lacks support in either law or logic. In our previous decisions addressing this issue, we strongly encouraged appellants to seek a writ of appeal if they disagree. During oral argument for this appeal, counsel for appellants informed the Board that they are indeed pursuing a writ at this time. That established, until such time this issue is resolved by a higher authority, we do not wish to see this argument again.

II

Appellants contend that the Department's findings on the decoy's appearance and apparent age are not supported by substantial evidence because the Department omitted facts which supported appellants' position and which detracted from its own.

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." This rule provides an affirmative defense, and the burden of proof lies with the party asserting it.

This Board is bound by the factual findings in the Department's decision so long as those findings 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* (*Lacabanne*) (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734].) 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.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

This Board has stated many times that, in the absence of compelling reasons, it will ordinarily defer to the ALJ's findings on the issue of whether there was compliance with rule 141(b)(2).

Here, the ALJ made the following findings regarding the decoy's physical and nonphysical appearance, including his demeanor, muscular build, and experience in law enforcement:

> 8. The decoy's overall appearance including his demeanor, his poise, his mannerisms, his maturity, his size and his physical appearance were consistent with that of a person under the age of twenty-one and his appearance at the time of the hearing was similar to his appearance on the day of the decoy operation except that he was ten pounds heavier on the day of the hearing.
>
> 9. On the day of the sale, the decoy was clean shaven and his hair was short. His clothing consisted of a burgundy T-shirt, blue jeans and black and brown Van's [*sic*] tennis shoes. Exhibit 3 is a photograph that was taken at the premises and Exhibits 5 and 6 are photographs that were taken on the day of the sale before going out on the decoy operation. All three of these photographs show how the decoy looked and what he was wearing on the day of the sale. Although the decoy has a muscular build, he is only five feet two inches in height and he is a youthful looking young man.
>
> 10. The decoy testified that he had participated in one prior decoy operation, and that he had served as an Explorer with the Alhambra Police Department since January of 2013. The decoy had attended an Explorer Academy with the Los Angeles Sheriff's Department and he had achieved the rank of sergeant. As an Explorer, he assisted at City events, he helped out at the police station and he participated in competitions with

other Explorers.

(Findings of Fact, ¶¶ 8-10.) The ALJ also found that on the day in question, the decoy visited eleven locations and was able to purchase alcoholic beverages at three. (*Id*. at ¶ 11.) The ALJ ultimately concluded that there was compliance with rule 141(b)(2). (Determination of Issues, ¶ 2.)

Appellants first take issue with the ALJ's conclusion regarding the effect, or lack thereof, the decoy's experience as a Police Explorer had on his overall appearance. They observe that the ALJ incorrectly found that the decoy had been an Explorer since January 2013, when in fact he had been an Explorer since January 2012. (App.Br. at p. 10.) Appellants also claim that the decoy's extensive training as an Explorer coupled with his participation in various Explorer competitions rendered him more than just a "starry-eyed teenager." (*Ibid.*)

Appellants' contentions on this point have no merit. This Board has on countless occasions rejected the "experienced decoy" argument. As we have previously observed:

> 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, at p. 5.) Appellants have presented no *evidence* that the decoy's experience *actually resulted* in him displaying an appearance of a person 21 years old or older on the date of the operation in this case. Rather, they simply rely on a difference of opinion between themselves and the ALJ as to the conclusion that the evidence in the record supports. Absent an evidentiary showing, even taking into

consideration the ALJ's mistaken finding that the decoy had approximately eight months' of Explorer experience as opposed to twenty, appellants' argument on this point simply fails.

Appellants also claim that the ALJ improperly dismissed the decoy's intensive physical workout regime in making his determination. (*Id.* at p. 11.) This contention is likewise without merit. First, while it is true that the ALJ did not mention the decoy's workout regime, he did expressly consider the decoy's "muscular build" (Findings of Fact, ¶ 9), but nevertheless found that it did not make him appear older. Moreover, it is appellants who fail to mention other attributes of the decoy's physical appearance that the ALJ found make the decoy appear younger — specifically his relatively short height and youthful face. (*Ibid*.) Finally, the ALJ was not required to detail all the factors of the decoy's appearance that he found inconsequential, nor was he required to recite an exhaustive list of indicia that he took into consideration in making his determination regarding the decoy's overall appearance. (*7-Eleven, Inc./Niaz* (2014) AB-9352, at p. 5; *Circle K Stores* (1999) AB-7080, at p. 4.)

Finally, appellants challenge the ALJ's selective use of various witnesses' testimony to make his findings. (App.Br. at p. 11.) To this point, appellants make the following observations:

> In addition to diminishing [the decoy's] experience and physical stature, the Department's support for its Rule 141(b)(2) findings are further undermined by the Department's efforts to pick among the testimony and select the parts of [the decoy] and Agent Duong's testimony where it supported their position. Most notably, the Proposed Decision found that [the decoy] visited eleven locations and that he was only able to purchase an alcoholic beverage at three. (Proposed Decision, Findings of Fact, p. 3.) That finding appears to be based on ABC Agent Duong's testimony, though not perfectly based, that [the decoy] visited 11 locations, two of which sold. (RT at 45:7-15.) That testimony, however, is strikingly different from the testimony of [the decoy]

> himself, who recalled that he had visited approximately eight locations, at which between two and four sold to him. (RT at 35:10-15.) The Proposed Decision fails to mention [the decoy's] testimony altogether and the potentially significantly higher success rate even though this Board has determined that an operation's success rate can be evidence of the decoy's apparent age. (7-*Eleven, Inc./Dianne Corporation* (2002) AB-7835, p. 8.) Then, the ALJ's [*sic*] switched witnesses and relied on [the decoy's] statement that he had only been on one prior decoy operation (RT 25:1-7) to the complete exclusion of ABC Agent Duong's testimony that he had worked with [the decoy] on three to four prior decoy operations (RT 51:16-25), which is valid evidence of [the decoy's] experience and possible maturity. The Department's determination must be supported by substantial evidence in light of the *whole* record, not only the parts which support the Department's decision. By choosing to credit one witness' testimony over another and then later switching reliance as it suits the Department's decision seriously undermines this Board's ability to conclude that the Department adequately considered the *whole* record.

(*Id*. at pp. 11-12, emphasis in original.) Appellants' arguments on this point are puzzling and outright baseless.

First, we note that it is the province of the ALJ, as the trier of fact, to make determinations as to which witness he finds more believable in certain instances. (See *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].) Moreover, to the extent there are conflicts in the evidence, the Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Second, we observe that, in each instance of so-called testimonial discrepancy

cited by appellants, the ALJ merely found in accordance with the witness whose testimony seemed more certain. With regard to the success rate, Agent Duong testified as follows:

> [MS. BELVEDERE:]
>
> Q. Okay. During this — were you present during this entire decoy operation?
>
> A. I was.
>
> Q. Okay. How many locations did you and Corporal Kim and this decoy visit on September 18th, 2013?
>
> A. It was 11 locations.
>
> Q. Okay. And of those 11 locations, *not including this purchase*, was the decoy able to purchase anywhere else?
>
> A. Yes.
>
> Q. At how many locations?
>
> A. Two *other* locations.

(RT at p. 45, emphasis added.) On cross-examination, Agent Duong confirmed that the decoy purchased at a total of three locations on September 18, 2013, including appellants' establishment:

> [MS. CARR:]
>
> Q. And I believe you testified Decoy Rodriguez visited other locations on this date; is that right?
>
> A. Yes.
>
> Q. And he was able to purchase alcohol at a total of 3 locations?
>
> A. Including CVS.
>
> Q. Yes.
>
> A. Yes.

(RT at p. 52.) The decoy, on the other hand, was less certain about his success rate during the instant operation:

> [MS. CARR:]
>
> Q. I believe you stated you went to other locations as a decoy on September 18th, 2013; is that right?
>
> A. Yes.
>
> Q. Were you able to purchase at any other locations?
>
> A. Yes.
>
> Q. Do you recall how many other locations you were able to purchase at?
>
> A. I don't remember.
>
> Q. Was it more than 2?
>
> A. Yes.
>
> Q. More than 5?
>
> A. No.
>
> Q. And I believe you testified you visited, approximately, 8 locations?
>
> A. Yes.
>
> Q. And so you were able to purchase at somewhere between 2 and 4, total?
>
> A. Yes.

(RT at pp. 34-35.) In light of the fact that Agent Duong unambiguously testified, in two separate instances, that the decoy was able to purchase alcohol at a total of three out of eleven locations on September 18, 2013, it was perfectly reasonable for the ALJ to find his tabulation more accurate than the decoy's, especially when the decoy by his own words did not remember. (See RT at p. 35.) Moreover, appellants' assertion that

the ALJ's findings were "not perfectly based" on Agent Duong's testimony is plainly wrong. (See App.Br. at p. 11.) Agent Duong never testified that only two locations sold alcohol to the decoy on September 18, 2013. Rather, he clearly stated that two locations *other than appellants'* sold to the decoy on that date. (See RT at p. 45.) Unless appellants are privy to some form of arithmetic to which the Board is not, two plus one equals three.

Similarly, the decoy was more certain than Agent Duong about his own participation in prior minor decoy operations. The decoy's testimony on this subject proceeded as follows:

> [MS. CARR:]
>
> Q. Prior to September 18th, 2013, had you been on a minor decoy operation?
>
> A. Yes.
>
> Q. How many minor decoy operations prior to the date that we're talking about today, September 18th, 2013, had you been involved in?
>
> A. Just one before that.

(RT at p. 25.) Agent Duong was not quite as sure and admitted as much:

> [MS. CARR:]
>
> Q. Had you participated in a minor decoy operation with Decoy Rodriguez in the past?
>
> A. I have.
>
> Q. Let me be a little bit more specific. Had you participated in a decoy operation with Decoy Rodriguez prior to September 18th, 2013?
>
> A. Yes.
>
> Q. And how many operations had you worked with Decoy Rodriguez prior to the date we're talking about, September 18th, 2013?

A. I don't remember the exact number of operations.

Q. Could you give your best estimate?

A. 3 or 4.

(RT at p. 51.) Again, it was reasonable for the ALJ to presume that the decoy's memory concerning the number of past minor decoy operations the decoy himself participated in would be more accurate than that of a Department agent who, in any given year, oversees many different minor decoy operations involving many different minor decoys. As such, appellants' contention that the ALJ abused his discretion by finding in accord with the decoy's testimony — as opposed to the agent's — concerning this topic must be rejected.

ORDER

The decision of the Department is affirmed.[3]

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

[3]This final decision 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 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.