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

AB-9457
File: 21-477874; Reg: 14079823

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store #9872
788 Gravenstein Highway North, Sebastopol, CA 95472,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: April 2, 2015
Sacramento, CA

ISSUED APRIL 20, 2015

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store #9872 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 10 days because their clerk sold an alcoholic beverage to a police minor decoy, in 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, Ralph Barat Saltsman and Margaret Warner Rose of the law firm Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, through its counsel, Heather Cline Hoganson.

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[1]The decision of the Department, dated July 23, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On January 21, 2014, the Department filed an accusation against appellants charging that, on November 1, 2013, appellants' clerk, Bailey Nichole Slack (the clerk), sold an alcoholic beverage to 19-year-old Ivan Senock. Although not noted in the accusation, Senock was working as a minor decoy for the Sebastopol Police Department at the time.

At the administrative hearing held on June 5, 2014, documentary evidence was received and testimony concerning the sale was presented by Senock (the decoy) and by David Edney, a Sebastopol Police officer.

Testimony established that on the day of the operation, the decoy entered the licensed premises alone and proceeded to the coolers where he selected a bottle of Langunitas India Pale Ale. He took the beer to the cash register, where the clerk asked him for his identification. The decoy showed her his California drivers license, and she looked at it for four to five seconds. The license had a vertical orientation, showed his correct date of birth, and contained a red stripe indicating "AGE 21 IN 2014." The clerk then asked him for his birth date, and he answered truthfully, "11/16/1993." She appeared to be doing mental calculations, but she did not swipe the license through the cash register, nor did she ask the decoy his age, before completing the sale.

While the decoy was making his purchase, the clerk was engaged in casual conversation with another customer — an unidentified male individual, in line behind the decoy — with whom the clerk appeared to be acquainted. The decoy testified that the clerk did not appear to be distracted from her duties during his transaction.

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

Appellants then filed a timely appeal contending: (1) the decoy must appear in person before the Board; (2) the decoy did not display the appearance that could generally be expected of a person under the age of 21; and (3) the decoy operation was unfair because the clerk was distracted.

DISCUSSION

I

Appellants contend that decoy must appear in person before the Board in order for the Board to conduct an adequate 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 and numerous subsequent cases. The Second District Court of Appeal has now rejected a writ of review in the *Chevron* case, which leaves our decisions rejecting this bizarre argument in full force and effect. We reject it here again and (unless reversed by the California Supreme Court), inform all counsel who appear before us that if raised again in future appeals before the Board they risk the imposition of sanctions.

II

Appellants contend that the decoy's experience as a decoy and his two years of experience working as a police cadet — doing security patrol two to three times a week at his junior college campus — made him appear more mature than a typical person under the age of 21. They contend it is unfair to use a "working professional" as a decoy. (App.Br. at p. 2.)

This Board is bound by the factual findings in the Department's decision if 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. [Citations.] 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. [Citations.] 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 1439, 1437 [13 Cal.Rptr.3d 826].)

Rule 141, subdivision (b)(2),[2] restricts the use of decoys based on appearance:

> 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.

The rule provides an affirmative defense, and the burden of proof lies with the appellants. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

This Board has rejected the "experienced decoy" argument many times. As we explained in *Azzam* (2001) AB-7631:

> Nothing in Rule 141(b)(2) prohibits using an experienced decoy. 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.

(*Id.* at p. 5, emphasis in original.)

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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.

This Board has further clarified that:

> An 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, at pp. 6-7.)

In the decision below, the ALJ made the following findings of fact regarding the decoy's appearance:

> H. The decoy's overall appearance including his demeanor, his poise, his mannerisms, his size and his physical appearance were consistent with that of a person under the age of twenty one years and his appearance at the time of the hearing was substantially the same as his appearance on the day of the decoy operation.
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> 1. On the day of the sale and at the hearing, the decoy was six feet tall. On November 1, 2013, Senock weighed 145 pounds. At hearing he weighed a bit more; 150 pounds. Senock has a slight, lanky build. His complexion is fair and there was no evidence of facial hair on his cheeks or chin area. He has short brown hair.
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> 2. A photograph was taken of Senock on the day of the decoy operation. The decoy's appearance in the photograph and at the hearing is that of a very youthful young man. He has a "baby face." (State's Exhibit 2 - pg. 5)
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> 3. The decoy testified in a straightforward, polite manner at hearing. Senock's testimony was credible concerning the salient events of purchasing an alcoholic beverage in Respondents' premises.
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> 4. Senock had participated in approximately two prior alcoholic beverage decoy operations; one in November 2012 and the other in May 2013.
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> 5. Senock became a police cadet in 2011 at his local junior college. Senock's training involved studying the Penal Code and the Health & Safety Code. While performing his duties, Senock patrols the campus 2 or 3 times a week. He has never arrested or detained anyone. He works 8 hour shifts. Senock wears a uniform, but he does not carry a weapon. There was no credible evidence presented that Senock's prior experience as a police cadet caused or contributed to the clerk selling an alcoholic beverage to him. As previously noted, the selling clerk did not testify at the hearing.

> 6. After considering State's Exhibit 2 (pgs. 5 & 11), the decoy's overall appearance when he testified, and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under the age of twenty-one years under the actual circumstances presented to the seller at the time of the sale.

(Findings of Fact II.H.1-6.)

The ALJ specifically acknowledged the decoy's training and experience and rejected the contention that these qualities made him appear older. The clerk did not testify, so any assertion that the decoy's experience resulted in an "observable effect" of that experience is mere conjecture. Further, as this Board has stated in the past, the ALJ need not provide a "laundry list" of factors he deems inconsequential. (See, e.g., *Lee* (2014) AB-9359; *7-Eleven/Patel* (2013) AB-9237; *Circle K Stores* (1999) AB-7080.)

The ALJ made ample findings regarding the decoy's age, physical appearance, and experience in law enforcement, and this Board cannot interfere with the ALJ's factual determinations in the absence of a clear showing of an abuse of discretion. No such showing was made in this case.

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity to observe the decoy as he testifies, and make 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 see no flaw in the ALJ's findings or determinations. Ultimately, appellants are asking this Board to consider the same set of facts and reach a different conclusion, despite substantial evidence to support those findings. This we cannot do.

III

Appellants contend that the decoy operation was not conducted in a fashion that promotes fairness, in violation of rule 141(a), because the clerk was distracted during the decoy operation by a conversation with another customer. They contend that "[w]hen the clerk is occupied by another customer for the whole transaction, the potential for unfair distraction should bring the operation to a halt." (App.Br. at p. 2.)

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 rule provides an affirmative defense. The burden is therefore on the appellant to show non-compliance. (*Chevron Stations, Inc.*, *supra*; *7-Eleven, Inc./Lo, supra.*)

The distraction argument is a variation of the "busy premises" defense. This Board has acknowledged in those cases that, under truly rare circumstances,

> It is conceivable that in a situation which involved an unusual level of patron activity that truly interjected itself into a decoy operation *to such an extent that a seller was legitimately distracted or confused, and the law enforcement officials sought to take advantage of such distraction or confusion*, relief would be appropriate.

(*Tang* (2000) AB-7454, at p. 5, emphasis added; see also *Equilon Enterprises* (2001) AB-7765, at p. 4.) Thus, the level of busyness in a premises is *only* relevant to a rule 141 defense if the licensee can show first that the seller was "legitimately distracted or confused," and second, that law enforcement "sought to take advantage of such distraction or confusion." (*Ibid.*) Anything less and appellants have failed to uphold their burden of proving the affirmative defense. Similar to the "busy" defense, in order

to successfully argue that a clerk was unfairly distracted by some activity, in violation of rule 141(a), appellants must prove that the clerk was legitimately distracted by the activity *and* that law enforcement sought to take advantage of that distraction.

Appellants presented no evidence or argument that officers acted improperly or took advantage of the circumstances, or, for that matter, that the decoy did so. In addition, appellants presented no evidence to prove that the clerk was "legitimately confused or distracted" by speaking to this second individual. Indeed, this was impossible without the clerk's testimony, so argument to that effect is merely speculation.

We agree with the ALJ that the evidence did not establish that the decoy operation violated the fairness provision of rule 141(a):

> Respondents' counsel argues that the general *fairness* provision of Rule 141, subsection (a), was violated because the clerk was talking with another customer while she was waiting on the decoy. Specifically, counsel contends that by allowing the operation to continue during this period of "distraction" violates the promotion of fairness clause. A determination concerning the *fairness* of any particular minor decoy operation must be judged by a multitude of factors surrounding each sale. Generally, a single factor like a clerk speaking to another customer during a transaction is not, in and of itself, dispositive of the fairness issue. The act of a clerk voluntarily speaking to another customer while waiting on a minor decoy is not *per se* unfair. Under the facts and circumstances of this case, the decoy operation was conducted in a manner that promoted fairness. The decoy did not cause the clerk to speak with another customer to try and divert attention away from him or the sale of an alcoholic beverage. There was nothing the decoy did that aided or abetted the conversation between the clerk and the unknown customer behind him. Indeed, it is not unheard of for clerks to speak with customers other than the one in front of them during the course of their everyday duties. If they do engage in other conversations, then it is still incumbent on them to be vigilant during alcoholic beverage sales at the same time. According to the decoy, Ms. Slack did not appear distracted during the transaction. This is borne out by her request to see his identification, asking him his date of birth, and appearing to make silent mental calculations after hearing his date of birth.

> Respondents' argument also suffers from a material failure of proof. Namely, the clerk who supposedly fell prey to the "distraction" did not testify. Without the clerk's testimony there is no way of telling what she was thinking during the transaction. What the Court does know, however, is the clerk did request Senock's identification, which contained the decoy's correct date of birth and a prominent stripe indicating "AGE 21 IN 2014."
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> She sold an alcoholic beverage to the minor decoy despite the unequivocal information pertaining to the decoy's true age; 19 years old.

(Determination of Issues II.)

There is no dispute that there was a sale of alcohol to a minor. The ALJ carefully considered the evidence relating to the claim of unfairness in the decoy operation and found appellants' contention lacked merit. We see no basis for questioning his decision.

ORDER

The decision of the Department is affirmed.[3]

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

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[3]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.