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

AB-9516
File: 21-520356; Reg: 14081580

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #10121
2655 Telegraph Avenue, Berkeley, CA 94704-3323,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: January 7, 2016
Sacramento, CA

ISSUED MARCH 1, 2016

Appearances: *Appellants*: Ralph Barat Saltsman and Michelangelo Tatone, of Solomon Saltsman & Jamieson, counsel for Garfield Beach CVS, LLC and Longs Drug Stores California, LLC.
Respondent: Heather Cline Hoganson, counsel for the Department of Alcoholic Beverage Control.

OPINION

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #10121 (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, in violation of

[1]The decision of the Department, dated April 24, 2015, is set forth in the appendix.

Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on July 20, 2012. On November 13, 2014, the Department filed an accusation against appellants charging that, on September 25, 2014, appellants' clerk, Charles Porter (the clerk), sold an alcoholic beverage to 19-year-old Laura Gallaga. Although not noted in the accusation, Gallaga was working as a minor decoy for the Berkeley Police Department at the time.

At the administrative hearing held on March 17, 2015, documentary evidence was received and testimony concerning the sale was presented by Gallaga (decoy #1) and by Detective Darrin Rafferty, a Berkeley Police officer. Appellants presented no witnesses.

Testimony established that on the day of the operation, the decoy entered the licensed premises with a second decoy, Emily Reyes (decoy #2). The two of them talked and laughed while they selected a single 24-ounce can of Coors Light beer, which decoy #1 took to the sales counter. Decoy #2 stood approximately 5 feet away while decoy #1 purchased the beer. The clerk did not ask decoy #1 for identification, nor did he ask her any age-related questions. The two decoys then exited the premises together.

Both decoys re-entered the premises with two police officers after being outside for approximately five minutes. The clerk was no longer behind the counter, so one of the police officers asked the manager to find him. The manager brought the clerk out, and the officers identified themselves. Decoy #1 was asked who sold her the beer, and she pointed at the clerk and said “yeah, this is the guy.” Decoy #1 and the clerk were approximately three to five feet apart at the time. Decoy #2 was not involved in the

face-to-face identification. A photograph was taken of the clerk and decoy #1 (Exhibit 3A), and a citation was issued to the clerk.

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

Appellants then filed a timely appeal contending: (1) it violates the fairness requirement of rule 141(a)[2] to use two decoys and not have both of them available for questioning at the administrative hearing; (2) rule 141(b)(2) was violated because the decoy was one month shy of her 20th birthday and displayed other indicia of majority; and (3) the face-to-face identification of the clerk did not comply with rule 141(b)(5).

DISCUSSION

I

Appellants contend that it violates the fairness requirement of rule 141(a) to use two decoys in a single decoy operation, but not produce both of them for questioning at the administrative hearing, when the facts suggest the second decoy actively participated in the decoy operation and affected the clerk's judgement.

This Board is bound by the factual findings in the Department's decision as long as they 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. [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.]

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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.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; see also *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628] ["In considering the sufficiency of the evidence issue the court is governed by the substantial evidence rule[;] any conflict in the evidence is resolved in favor of the decision; and every reasonably deducible inference in support thereof will be indulged."].)

Rule 141, subdivision (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.

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

There is nothing in rule 141 that requires a decoy to purchase the alcoholic beverage alone. In *7-Eleven, Inc./Janizeh Corp.* (2002) AB-7790, however, the Board explained that "the real question to be asked when more than a single decoy is used is whether the second decoy engaged in some activity intended or having the effect of distracting or otherwise impairing the ability of the clerk to comply with the law." (*Id.* at p. 4 [no testimony from clerk, so no evidence that clerk was distracted].) Subsequent cases consistently follow this rule. (See, e.g., *Dave & Busters of Cal., Inc.* (2015) AB-9464, at pp. 8-9 [uncontroverted evidence supported finding that second decoy's presence was irrelevant].)

In *7-Eleven, Inc./Mousavi* (2002) AB-7833, two successive decoys were sent into the licensed premises, one after the other, and one of the two was able to purchase

alcohol. Finding there was a lack of compliance with rule 141(a), the Board said, "it is how the decoy operation is conducted, not its result, that must be judged in determining fairness." (*Id*. at p. 8.) The Board explained, "If the police conduct a decoy operation in an unfair manner, that is a complete defense to the charge." (*Id*. at p. 6.) This is the correct standard, and the Board must examine the specific facts in each case to ascertain whether a particular decoy operation was unfair. (See also *Trader Joe's Company* (2014) AB-9429, at p. 8 [police officers standing in line behind decoy made the operation unfair where factual determinations essential to a legal conclusion were absent].)

In *Hurtado* (2000) AB-7246, the decoy was accompanied into a nightclub by a 27-year-old officer, who sat with him at the table. (*Id.* at p. 2.) The decoy and the officer each ordered their own beer from the server. (*Ibid.*) The licensee argued that the presence of the officer "was part of the circumstances presented to the seller, and would have had an impact on the assessment of the decoy's age." (*Id.* at p. 3.) The Department held that the presence of the officer did not render the operation unfair. (*Id.* at pp. 3-4.) This Board reversed, holding that the officer actively participated in the transaction, and that "consideration of the effect of another person is essential for disposition." (*Id.* at p. 5.)

In the present case, the ALJ made the following factual finding regarding decoy #2's presence:

IV

> The decoy had entered Respondents' store with a friend, another nineteen-year old decoy. The two decoys talked and laughed while inside the store. When decoy Gallaga purchased the beer, the other decoy had "drifted off" and was approximately five feet from her. The

other decoy did not participate in the purchase of the beer.

(Findings of Fact IV.) The ALJ then reached the following conclusion on this issue:

III

> Respondents noted that there was another decoy in Respondents' store during the sale of the beer. However, Respondents did not show why that fact is relevant to this case. Since the other decoy was also nineteen years old, it is not likely that she affected the decoy's appearance in terms of age. Moreover, because the other decoy did not participate in the purchase of the beer, there is no evidence that the clerk even saw her, or, if he did, that he gave her any thought.

(Determination of Issues III.)

Appellants maintain that this case is similar to *7-Eleven, Inc./Lee* (2015) AB-9502, and should likewise be reversed. In *Lee,* the clerk observed the decoy exiting from the same vehicle as a police officer, and subsequently observed the two of them standing next to one another in line. The clerk in that case testified that he believed the decoy and officer were together, and the Board reversed the Department's decision because of the officer's active participation in the operation. The present case, however, is very different. The decoy here was not observed with an adult officer, but with another 19-year-old individual — who did not engage in any activity that would have distracted the clerk or impaired his ability to comply with the law. Moreover, the clerk did not testify, so any allegation that the clerk was distracted is mere speculation. We see no evidence of distraction to establish an affirmative defense.

II

Appellants contend that the decoy did not possess the appearance required by rule 141(b)(2) because she was one month from being 20 years old, wore tall boots,

had highlighted hair, carried a cell phone, and had tattoos. (App.Br. at pp. 8-9.)

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." Rule 141 is an affirmative defense, and the burden of proof lies with the party asserting it. (*Chevron Stations, Inc.*, *supra*; *7-Eleven, Inc./Lo*, *supra*.)

The ALJ made the following factual findings concerning the decoy's overall appearance:

VIII

> The decoy was 4' 11" tall and weighed approximately 120 pounds on the day of the decoy operation. Her hair was in a little bun and parted on the side. She wore a long, black cardigan, leather boots with heels, mascara, nail polish, no eyeliner, no lipsticks [*sic*], and no jewelry. It is not clear whether the tattoos on her arms, which were under the sleeves of the cardigan, were visible to the clerk. The decoy felt "normal" while in Respondents' store.

IX

> The decoy's height and weight on the day of the hearing were the same as what they were on the day of the decoy operation. Her appearance was similar to her appearance in the photographs. The decoy spoke softly, and answered most questions with very short answers. She appeared a little nervous while testifying.

X

> The decoy had never been a decoy prior to September 25, 2014. She also had not had any experience with law enforcement. She had, however, been employed as a barber for approximately two years. There is no evidence that the decoy's lack of experience as a decoy, lack of experience in law enforcement, or experience as a barber made her appear either older or younger than her age on September 25.

XI

> The photographs of the decoy (Exhibits 3A and 3B), the testimony about her appearance on the day of the decoy operation, and her appearance at the hearing (including her demeanor, poise, and mannerism) show that the decoy did display the appearance which could generally be expected of a person under twenty-one years old when she bought the beer from Respondents' clerk.

(Findings of Fact VIII-XI.) These findings prompted the ALJ to reach the following conclusion regarding appellants' rule 141(b)(2) defense:

> II
>
> Respondents argued that there was a violation of the Department's Rule 141(b)(2). Based on the findings in Paragraphs VIII, IX, X, and XI in the Findings of Fact, there was no violation of Rule 141(b)(2).

(Determination of Issues II.)

The record shows that the ALJ expressly considered a great many aspects of the decoy's physical and nonphysical appearance and found that the decoy displayed the appearance which could generally be expected of a person under the age of 21.

Appellants have offered no explanation for *how* the factors they mention — being one month shy of 20, wearing tall boots, having highlighted hair, carrying a cell phone, and having tattoos — actually resulted in the decoy displaying the appearance of a person 21 years old or older. Rule 141(b)(1) merely states that the decoy must be under 20 years of age — not that she must be many months younger — and the other factors are subject to the ALJ's and appellants' differing and subjective interpretations. Indeed, evidence of how this decoy appeared from the clerk's perspective would be nearly impossible to ascertain since the clerk did not testify at the administrative hearing. In the end, all the Board is left with is a difference of opinion — appellants' versus that of the ALJ — as to the conclusion that the evidence supports. Without more, this is simply an insufficient basis upon which to overturn the determination by the

ALJ.

As we have stated many times, the ALJ is the trier of fact, and has the opportunity to observe the decoy as she testifies, and make the determination whether the decoy's appearance met the requirement of rule 141 that she 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. The Board cannot second guess that determination.

III

Appellants contend that the face-to-face identification of the clerk did not comply with rule 141(b)(5) because the decoy was unclear about the details when she testified about the identification and therefore the ALJ's findings on the face-to-face identification of the clerk are not supported by substantial evidence and are inadequate to show compliance with rule 141(b)(5). (App.Br. at pp. 9-11.)

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815].)

The issue of substantial evidence, when raised by an appellant, leads to an examination by the Appeals Board to determine, 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. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].)

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.

This rule, as with 141(a) and 141(b)(2), provides an affirmative defense. The burden is therefore on appellants to show non-compliance. (*Chevron Stations, Inc.*, *supra*; *7-Eleven, Inc./Lo*, *supra*.)

The ALJ made the following findings on the issue of the face-to-face identification:

VI

> After purchasing the beer, the decoy exited the store with it. She then returned to the store to identify the clerk who had sold her the beer. Because the clerk was not at the register, one of the police officers asked the manager to find him. The manager did so and brought the clerk to Berkeley Detective Darrin Rafferty and the decoy. Detective Rafferty then asked the decoy who had sold her the beer. The decoy pointed at Porter. During the identification, the decoy and the clerk stood between 3 feet to 5 feet from each other, with Detective Rafferty "in the middle, to the side." The clerk did not display any "notable" reaction. After the identification took place, one of the officers took a photograph of the decoy standing next to the clerk (Exhibit 3A).

(Finding of Fact VI.) Based on these facts, the ALJ reached the following conclusion:

IV

> Respondents also argued that there was a violation of the Department's Rule 141(b)(5), noting that there was no "notable reaction" from their clerk when he was identified as the seller of the beer. However, Respondents have not shown how a lack of notable reaction from the clerk is relevant. Unless the clerk was going to deny making the sale, it is not clear what notable reaction he should have made.

(Determination of Issues IV.)

In *Chun* (1999) AB-7287, cited at length by appellants, this Board observed:

> The phrase "face to face" means that the two, 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.

(*Id.* at p. 5.) In *7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983, the Board clarified application of the rule in cases where an officer initiates contact with the clerk, as the officers did in this case:

> 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.

(*Id.* at pp. 7-8; see also *7-Eleven, Inc./Paintal Corp.* (2013) AB-9310, at pp. 4-6; *7-Eleven, Inc./Dars Corp.* (2007) AB-8590, at pp. 9-11; *BP West Coast Products LLC* (2005) AB-8270, at pp. 3-6; *Chevron Stations, Inc.* (2004) AB-8187, at pp. 2-4.)

In the instant case, appellants contend that the clerk did not understand what was happening during the face-to-face identification and thus was not aware that he was being identified as the seller of the alcohol to the decoy, in violation of rule 141(b)(5). (App.Br. at p. 11.) This contention is not supported by the evidence. The clerk did not testify, so there was no direct testimony to establish whether the clerk knew or should have known he was being identified. However, testimony was given by both Detective Rafferty and the decoy about the face-to-face identification, which, taken together, supports the finding that the clerk knew he had been identified as having sold

alcohol to a minor.

The core objective of rule 141 is fairness to licensees when decoys are used to test their compliance with the law. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd*. (*7-Eleven, Inc.*) (2003) 109 Cal.App.4th 1687, 1698 [1 Cal.Rptr.3d 339].) Rule 141(b)(5) is concerned with both identifying the seller and providing an opportunity for the seller to look at the decoy again, soon after the sale. (*Ibid*.) It does not require a direct "face off" to accomplish these purposes, nor is the clerk required to make any kind of statement. Regardless of whether the clerk registered a “notable reaction” to indicate that he understood what the decoy said to the officer, he had the opportunity to look at the decoy again. The clerk knew, or reasonably ought to have known, that he was being accused and pointed out as the seller, when the decoy identified him and Detective Rafferty explained the situation to him immediately thereafter.

The record contains sufficient evidence to support a finding that a proper face-to-face identification took place, in compliance with rule 141(b)(5).

ORDER

The decision of the Department is affirmed.[3]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD ORDER

PETER J. RODDY, MEMBER, listened to oral argument of this case by telephone, but did not participate in this decision, because the Board did not provide sufficient advance notice to all parties of this fact pursuant to Government Code section 11123, subdivision (b)(1)(C).

[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.