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

AB-9526
File: 21-479474; Reg: 14081289

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #8872
26891 Aliso Creek Road, Aliso Viejo, CA 92656,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: February 4, 2016
Los Angeles, CA

ISSUED MARCH 10, 2016

Appearances: *Appellants*: Michelangelo Tatone, of Solomon Saltsman & Jamieson, as counsel for Garfield Beach CVS, LLC and Longs Drug Stores California, LLC.
Respondent: John P. Newton as counsel for the Department of Alcoholic Beverage Control.

OPINION

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #8872 (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 Department minor decoy, in violation

[1]The decision of the Department, dated July 23, 2015, is set forth in the appendix.

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

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 3, 2009. On September 29, 2014, the Department filed an accusation against appellants charging that, on August 9, 2014, appellants' clerk, Christopher Mack (the clerk), sold an alcoholic beverage to 18-year-old Gilbert Centeno. Although not noted in the accusation, Centeno was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on April 29, 2015, documentary evidence was received, and testimony concerning the sale was presented by Centeno (the decoy), by Department Agent Eric Burlingame, and by Gary Liss, an assistant store manager at the licensed premises.

Testimony established that on the day of the operation, Department Agent Eric Burlingame entered the licensed premises followed shortly thereafter by the decoy. The decoy went to the liquor aisle and selected a six-pack of Bud Light beer which he took to the register. He waited in line behind approximately two people, and when it was his turn, the clerk scanned the beer and then asked him for identification. The decoy handed the clerk his California Identification Card, which contained his correct date of birth and a red stripe indicating “AGE 21 IN 2017.” (Exhibit 2B.) The clerk looked at the ID, entered something into the register, then completed the sale without asking any age-related questions. The decoy exited the premises, followed by Agent Burlingame. A short time later, the agent and decoy re-entered the premises to do a face-to-face identification of the clerk who had sold the beer, and a photograph was

taken of the decoy and clerk together. (Exhibit 3.) The clerk's employment was subsequently terminated as a result of this incident.

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

Appellants then filed a timely appeal contending the administrative law judge (ALJ) failed to proceed in the manner required by law, and abused his discretion, by disregarding appellants' rule 141(b)(2)[2] defense — based on the decoy's athletic participation and large stature — and basing his conclusions of law on the issue of facial hair instead.

DISCUSSION

Appellants contend that the ALJ failed to proceed in the manner required by law and abused his discretion by disregarding appellants' rule 141(b)(2) defense — based on the decoy's athletic participation and large stature — and basing his conclusions of law on the issue of facial hair instead. Appellants maintain that the "ALJ therefore deprived Appellants of their right to have the merits of their argument addressed, and also violated this Board's mandate that the ALJ not focus on only one single facet of the minor decoy's appearance." (App.Br. at p. 4.) Appellants contend the issue of facial hair is "moot" because they did not raise it at the administrative hearing. (*Ibid*.)

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

[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.

> minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

To that end, 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 provides an affirmative defense, and the burden of proof lies with the party asserting it — here, appellants. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

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. [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 1429, 1437 [13 Cal.Rptr.3d 826].)

In this case, the ALJ made the following factual findings concerning the decoy's overall appearance and experience:

> 5. Centeno appeared and testified at the hearing. On August 9, 2014, he was 5' 8" tall and weighed 220 pounds. He was wearing a gray t-shirt, blue jeans, and blue and white Jordans. He was clean shaven.

> (Exhibits 2A & 3.) His appearance at the hearing was the same, except that he was five pounds heavier. He also had some "peach fuzz" on his chin.
>
> [¶ . . . ¶]
>
> 8. Centeno learned of the decoy program through his involvement in the South Gate Police Department's Explorer program. Centeno had been an Explorer for five months as of August 9, 2014. As an Explorer he helped out with various events, learned about codes and regulations, and engaged in physical training.
>
> [¶ . . . ¶]
>
> 10. Centeno appeared his 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 and conduct in front of Mack at the Licensed Premises on August 9, 2014, Centeno displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Mack.

(Findings of Fact, ¶¶ 5, 8, 10.) These findings prompted the ALJ to reach the following conclusion regarding appellants' rule 141 defenses:

> 5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rules 141(a) and 141(b)(2)[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that Centeno's mature demeanor and athletic build gave him the appearance of a person old enough to purchase alcohol. This argument is rejected. Centeno's appearance was consistent with his actual age, 18 years old. Even the "peach fuzz" on his chin indicated his youth—such fuzz is common among boys who have not started shaving, which Centeno had not. These fine hairs are a far cry from stubble, which is the result of hair growing back after having been shaven off. (Finding of Fact ¶ 10.)

(Conclusions of Law, ¶ 5.)

Contrary to appellants' assertion that the ALJ focused on a single aspect of the

minor decoy's appearance (*i.e.*, the "peach fuzz"),[3] the record reflects that the ALJ expressly considered a great many aspects of the decoy's appearance — including his experience and training as an Explorer, his dress, poise, demeanor, and physical attributes — but nevertheless found that the decoy displayed the appearance which could generally be expected of a person under the age of 21.

Appellants disagree with the ALJ's conclusion and state: "A 220 pound male athlete who routinely participates in three sports, including tennis, football, and swimming, in addition to Police Explorer training, which involves pushups, sit-ups, and 'a lot of running' likely does not have the appearance generally expected of a person under the age of 21." (App.Br. at p. 5, quoting RT at p. 20.) Appellants also complain that "Mr. Centeno's height and weight are only mentioned in passing, with no meaningful analysis or recognition." (*Id*. at p. 6.)

The fact that the ALJ did not specifically consider the effect of the decoy's participation in sports or the specific effects police Explorer physical training may have had on this decoy's appearance does not render the ALJ's determination an abuse of discretion. Similarly, an omission of a detailed analysis of the decoy's height and weight is not grounds for reversal. An ALJ is not required to provide a "laundry list" of factors he deems inconsequential. (See, e.g., *Lee* (2014) AB-9359, at p. 8; *7-Eleven/Patel* (2013) AB-9237, at p. 9; accord *Circle K Stores* (1999) AB-7080.) An ALJ's failure to explain *all* of his reasons for a decision does not invalidate his

[3]Appellants maintain the issue of the decoy's facial hair is irrelevant. However, appellants themselves raised this issue at the administrative hearing. (See RT at p. 23.) Simply because appellants did not discuss facial hair during closing argument does not make the issue irrelevant.

determination or constitute an abuse of discretion. (See *Garfield Beach* (2014) AB-9430, at p. 5.) Further, as this Board has stated many times, "[m]inors come in all shapes and sizes, and we are reluctant to suggest, without more, that minor decoys of large stature automatically violate the rule." (*Garfield Beach* (2015) AB-9483, at p. 6.)

> As we explained in an opinion addressing a similar attack on an ALJ's findings:
>
> [T]his Board is entitled to review whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. (Cal. Const. art. XX, § 22; Bus. & Prof. Code. § 23084, subd. (c) and (d).) If this Board observes that the evidence appears to contradict the findings of fact, it will review the ALJ's analysis — assuming some reasoning is provided — to determine whether the ALJ's findings were nevertheless proper. Should this Board be faced with evidence clearly at odds with the findings and no explanation from the ALJ as to how he or she reached those findings, this Board will not hesitate to reverse. This should not be read to require an explanation or analysis to bridge any sort of "gap"; typically, the evidence an appellant insists is essential and dispositive is either irrelevant or has no bearing whatsoever on the findings of fact. While an ALJ may better shield himself against reversal by thoroughly explaining his reasoning, he is not required to do so. The omission of analysis alone is not grounds for reversal, provided findings have been made.

(*Garfield Beach* (2015) AB-9501, at pp. 5-6.)

Appellants have offered no *evidence* that the decoy's height, weight, physical

training, or participation in sports *actually resulted* in him displaying the appearance of a person 21 years old or older. Indeed, evidence of how the decoy appeared from the clerk's perspective would be nearly impossible to ascertain; 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.

ORDER

The decision of the Department is affirmed.[4]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, 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.