

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

AB-9664

File: 21-479361; Reg: 16084970

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #5170
9952-56 Las Tunas Drive, Arcadia, CA 91780-2212,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: August 2, 2018
Los Angeles, CA

ISSUED AUGUST 20, 2018

Appearances: *Appellants:* Ralph Barat Saltsman and Donna J. Hooper, of
Solomon, Saltsman & Jamieson, as counsel for Garfield Beach
CVS, LLC and Longs Drug Stores California, LLC,

Respondent: John P. Newton, as counsel for Department of
Alcoholic Beverage Control.

OPINION

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing
business as CVS Pharmacy #5170, appeal from a decision of the Department of
Alcoholic Beverage Control¹ suspending their license for 10 days because their clerk
sold an alcoholic beverage to a Department minor decoy, in violation of Business and

¹The decision of the Department, dated August 10, 2017, is set forth in the
appendix.

Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on July 9, 2010, and there is no record of prior departmental discipline against the license.

On November 21, 2016, the Department filed an accusation against appellants charging that, on August 27, 2016, appellants' clerk, Miguel Angel Fletes (the clerk), sold an alcoholic beverage to 18-year-old Dong Chan Ahn. Although not noted in the accusation, Ahn was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on June 15, 2017, documentary evidence was received and testimony concerning the sale was presented by Ahn (the decoy) and by Department Agent Danny Vergara. Appellants presented no witnesses.

Testimony established that on August 27, 2016, Agent Vergara entered the licensed premises in plain clothes, followed shortly thereafter by the decoy. The decoy went to the coolers where he selected a 3-pack of 25-ounce Bud Light beer in cans. He took the beer to the sales counter, waited in line behind two people, then set it down.

The clerk asked the decoy for his identification and the decoy handed him his California driver's license — which had a vertical orientation, showed his correct date of birth (showing him to be 18 years of age), and contained a red stripe indicating "AGE 21 IN 2018." The clerk took the ID, looked at it briefly, and handed it back to the decoy. He then completed the sale without asking any age-related questions. Agent Vergara observed the transaction from inside the store. The decoy exited the premises, followed by Vergara.

The decoy re-entered the premises with Agents Vergara, Burlingame and Duong.

Vergara contacted the store manager, identified himself, and explained the violation to him. He then spoke to the clerk, explained the violation to him, and asked him to come out from behind the counter. Agent Vergara asked the decoy his age, and he replied, "18." He then asked him to identify the person who sold him the alcohol. The decoy pointed at the clerk and said, "he did." The decoy and clerk were standing approximately four feet apart and facing each other at the time. A photo was taken of the clerk and decoy together. (Exh. 4.)

Agent Vergara testified that after the face-to-face identification he asked the clerk how old he believed the decoy was. The clerk stated that he believed the decoy was 21 or 22. Vergara also asked him if he understood he was being identified as the person who sold alcohol to the decoy and he said he did. Agent Vergara also asked about the cash register, and whether it had any software system in place to assist in preventing the sale of alcoholic beverages to minors. The clerk indicated that it did and he demonstrated to Vergara how a warning screen appears when alcohol is scanned, asking the clerk to check identification. In this case, the clerk indicated that he had entered a date with a birth year of 1994 when prompted by the register. The decoy was born in 1997.

The administrative law judge (ALJ) submitted a proposed decision on June 19, 2017, sustaining the accusation and recommending a penalty of 10-days' suspension. Thereafter, on June 28, 2017, the Department's Administrative Hearing Office sent a letter from its Chief ALJ to both appellants and Department counsel, inviting the submission of comments on the proposed decision and stating that the proposed decision and any comments submitted would be submitted to the Director of ABC in 14

days.

Appellants submitted comments to the Director, arguing that neither the Administrative Procedure Act (APA) nor the ABC Act authorize the Department to permit the parties in a disciplinary procedure to comment on a proposed decision, and that by requesting submission of these comments, the Department exceeded the authority granted to it by the APA. The Department did not submit comments.

On July 19, 2017, the Department adopted the decision in its entirety and on August 10, 2017 it issued its Certificate of Decision.

Appellants then filed a timely appeal contending the Department failed to proceed in the manner required by law when the ALJ applied an incorrect evidentiary standard to the admission of evidence.

DISCUSSION

Appellants contend that the ALJ applied an incorrect evidentiary standard to the admission of evidence — specifically, the statement of the clerk that he thought the decoy looked 21 or 22. (AOB at pp. 5-8.) Appellants maintain the application of the incorrect evidentiary standard materially prejudiced appellants. Accordingly, they urge the Board to reverse the Department's decision. (*Ibid.*)

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. "Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647]; *Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456].)

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].) 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 — all conflicts in the evidence must be resolved in favor of the Department's decision. *(Kirby v. Alcoholic Bev. Control Appeals Bd. (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; Harris v. Alcoholic Beverage Control Appeals Board (1963) 212 Cal.App.2d 106 [28 Cal.Rptr.74].)*

Appellants maintain that the clerk's statement — that he thought the decoy looked 21 or 22 at the time of the sale — was given insufficient weight by the ALJ. The clerk did not testify. This statement was introduced during the administrative hearing via the testimony of Agent Vergara:

BY MS. HOOPER:

Q: Agent. Agent Vergara, so you indicated that you asked Mr. Fletes how old he thought the decoy was?

A: Yes.

Q: And he responded "21 or 22"; correct?

A: Yes.

(RT at p. 51; also see: Finding of Fact, ¶13.)

Appellants argue that the decoy's appearance did not comply with rule 141, subdivision (b)(2), which mandates:

The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the circumstances presented to the seller of the alcoholic beverages at the time of the alleged offense.

(Cal. Code Regs., tit. 4, § 141(b)(2).) They allege that the clerk's statement to Agent Vergara — about how old he thought the decoy looked — should have been given greater weight by the ALJ when considering their assertion that the decoy did not display the appearance expected of a person under the age of 21.

The ALJ addressed appellants' contention as follows:

6. If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust. (Evidence Code, section 412.)

The undersigned finds incredulous clerk Fletes hearsay statement that he believed decoy Ahn was 21 or 22 years old. It was within the Respondents' power to produce stronger and more satisfactory evidence of this fact than relying on clerk Fletes hearsay statement as introduced through the testimony of agent Vergara. When clerk Fletes looked at decoy Ahn's driver license he had the opportunity to immediately see that it was in the vertical format and had a red stripe indicating "Age 21 in 2018," two clear red flags decoy Ahn was still a minor. Despite having just seen the decoy's ID, which contained the decoy's correct date of birth, clerk Fletes entered a date of birth with the wrong birth year, 1994. By entering 1994 this made the decoy 22 years old. There was no evidence presented that clerk Fletes entered the birth year of 1994 by mistake. He had held the ID in his hand and could easily have referred to it to input the correct birth date and year. It is more probable that he entered the year 1994 to enable the cash register system to permit the sale of alcohol to the minor, as decoy Ahn clearly did not appear three or four years older than his actual age.

(Conclusions of Law, ¶ 6.)

Appellants maintain that the use of Evidence Code 412 to analyze the evidence was improper. They maintain that the clerk's statement was highly relevant and should have been given greater weight by the ALJ. Furthermore, they allege the ALJ abused her discretion by dismissing the statement as untruthful.

Technical rules of evidence do not apply to administrative hearings. Government Code section 11513, subdivision (c), provides that "any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs"

(DeMartini v. Department of Alcoholic Beverage Control
(1963) 215 Cal.App.2d 787, 799
[30 Cal.Rptr. 668].)

While administrative bodies are not expected to observe meticulously all of the rules of evidence applicable to a court trial, common sense and fair play dictate certain basic requirements for the conduct of any hearing at which facts are to be determined. Among these are the following: the evidence must be produced at the hearing by witnesses personally present, or by authenticated documents, maps or photographs; **ordinarily, hearsay evidence standing alone can have no weight** "

(Desert Turf Club v. Board of Supervisors (1956) 141 Cal.App.2d 446, 455 [296 P.2d 882], emphasis added.)

In spite of evidentiary standards in an administrative setting which are less strict (as noted in Government Code section 11513 and the cases noted above) than those utilized in a trial proceeding, an ALJ is not prohibited from taking guidance from the Evidence Code. Evidence Code section 412's admonishment that "if weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust" is particularly useful to an ALJ when faced with having to weigh the sufficiency

of the evidence.

The courts have regarded the weight and sufficiency of the evidence as matters of administrative discretion and have sustained the agency's decision if "substantial evidence" supports it. (Witkin, California Evidence, § 7, p. 9.)

(*Floresta, Inc. v. City Council of San Leandro (1961)* 190 Cal.App.2d 599, 608-609 [12 Cal.Rptr. 182].) The ALJ simply used her discretion here in deciding how much weight to give the clerk's hearsay statement.

In the instant matter, appellants attempted to establish a rule 141(b)(2) defense, by arguing that the Department used a decoy that did not comply with the rule. The ALJ rejected that defense, saying:

5. The Respondents argued the decoy operation at the Licensed Premises failed to comply with rules 141(a) and 141(b)(2), therefore, the accusation should be dismissed pursuant to rule 141(c).

Respondents argued the decoy operation did not proceed in a manner which promoted fairness, citing a violation of rule 141(b)(2) arguing that decoy Ahn did not have the appearance of someone under 21 because of certain factors which made him appear to be older than 21. Respondents' counsel asserted that in her opinion the decoy presented himself at the hearing as a "very confident, mature acting man." Additionally, she cited the decoy's height and weight at the time of the decoy operation and the clerk's claim he thought the decoy was 21 or 22 years old. This rule 141(b)(2) argument is rejected. Counsel's opinion as to the decoy's demeanor is supposition, at best. There is no evidence that decoy Ahn's height, weight or demeanor had any impact on clerk Fletes. In fact, there was nothing about decoy Ahn's demeanor, height or weight which made him appear older than his actual age. Decoy Ahn has a youthful appearance, appearing his true age. In other words, decoy Ahn had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 12.)

(Conclusions of Law, ¶ 5.) While the ALJ was not required to apply strict rules of

evidence to appellants' presentation of their case, neither was she barred from taking guidance from the evidence code. As *Floresta, supra* instructs us, the weight and sufficiency of the evidence are matters of administrative discretion. Here, the ALJ was faced with having to reconcile the clerk's statement that he thought the decoy looked 21 or 22, with all the other evidence of the decoy's appearance such as sworn testimony, documentary evidence, and the actual decoy himself. The ALJ weighed the evidence and decided *not* to give the clerk's statement the weight appellants desired.

Appellants argue at length in their brief about the admissibility of the clerk's hearsay statement — even though the statement was not excluded as hearsay evidence by the ALJ. Appellants seem to conflate admissibility and persuasiveness. In contrast to appellants' representation of the issue, the clerk's statement was considered by the ALJ — she simply was not persuaded that the clerk really thought the decoy appeared over the age of 21. The fact that the ALJ did not give appellants' hearsay evidence the "greater weight" they desired does not create reversible error. It is the function of the ALJ to weigh the evidence and make findings. Appellants' conflation of admissibility and persuasiveness is simply an attempt to have the Board re-weigh the evidence and reach a different conclusion, and as we have said countless times, the function of the Board is not to substitute its judgment for that of the ALJ.

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 the decision. This the Board cannot do.

ORDER

The decision of the Department is affirmed.²

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This 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.