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

AB-9771
File: 21-479751; Reg: 18086583

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store #9695
551 South Ventura Road, Oxnard, CA 93030-6523,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: July 25, 2019
Los Angeles, CA

ISSUED AUGUST 12, 2019

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: Joseph J. Scoleri III, 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 Store #9695, 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).

[1]The decision of the Department, dated November 21, 2018, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 14, 2009. There is no record of prior departmental discipline against the license.

On Februry 28, 2018 the Department filed a single-count accusation against appellants charging that, on August 5, 2017, appellants' clerk, Daniel Walker (the clerk), sold an alcoholic beverage to 19-year-old Juan DeHaro (the decoy). Although not noted in the accusation, the decoy was working for the Oxnard Police Department (OPD) at the time.

At the administrative hearing held on June 14, 2018, documentary evidence was received and testimony concerning the sale was presented by the decoy and by OPD Officer Joseph Marks.

Testimony established that on August 14, 2017, Officer Marks entered the licensed premises in an undercover capacity, followed shortly thereafter by the decoy. The decoy selected a 12-pack of Bud Light beer and took it to the counter where he waited in line. When it was his turn, the decoy set the beer down. The clerk rang up the beer and asked to see his identification. The decoy handed him his California driver's license which contained his correct date of birth, showing him to be 19 years of age, as well as a red stripe indicating "AGE 21 IN 2019." (Exh. 2.)

The clerk looked at the ID for three to four seconds, then handed it back to the decoy. The clerk asked him if he had a CVS card because it would reduce the price of the beer. The decoy said he did not. The clerk asked if he would like to apply for one, and the decoy said no. The clerk then turned to Officer Marks, who was being assisted at the other register, and asked him if the decoy could use his card. Officer Marks said yes, and gave the clerk his phone number. The clerk then completed the sale without

asking the decoy any age-related questions. The decoy exited the store.

Officer Marks exited the store after making a purchase and met up with the decoy and Officer Meagan Toby. The three of them then re-entered the premises. Officer Marks contacted the clerk and explained the violation to him. Officer Marks asked the decoy to identify the person who sold him the beer and the decoy identified the clerk from a distance of approximately four to five feet. A photo of the clerk and decoy was taken (exh. 3) after which the clerk was issued a citation.

The administrative law judge (ALJ) issued his proposed decision on August 24, 2018, sustaining the accusation and recommending a 10-day suspension. The Department adopted the proposed decision in its entirety on October 16, 2018, and a Certificate of Decision was issued on November 21, 2018.

Appellants then filed a timely appeal contending the ALJ's finding — that the decoy displayed the appearance which would generally be expected of a person under the age of 21 — is not supported by substantial evidence, in violation of rule 141(b)(2).[2]

DISCUSSION

Appellants contend that the decoy's appearance did not meet the standard required by rule 141(b)(2). They argue he appeared to be in his mid to late 20's, had a five o'clock shadow, and that "[t]his combined with his deep-set eyes, closely cropped hair, and plaid shirt give the impression of someone who has been out in the blue-collar working world for a number of years." (AOB at p. 6.) In addition, they maintain the decoy's intensive training as a police Explorer gave him a mature and confident manner. (*Ibid*.)

[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.

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 appellants. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

Appellants maintain the police used a decoy in this case that failed to comply with the standards set forth in rule 141(b)(2). They argue that the decoy's mature physical appearance violated this rule. In addition, appellants contend that the decoy's training as a police Explorer gave him a confident demeanor. They maintain that when the decoy handed the clerk his ID with confidence it reinforced the impression that he was over 21 years of age. Appellants contend all these factors contributed to the decoy presenting an appearance which did not comply with rule 141(b)(2).

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].)

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—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].)

Therefore 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. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (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]; Harris, *supra*, at 114.)

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). The ALJ made the following findings regarding the decoy's appearance:

> 5. De Haro appeared and testified at the hearing. On August 5, 2017, he was 5' 10" tall and weighed 180 pounds. He wore a red flannel shirt, ripped blue jeans, a heart necklace, and a black watch. His hair was short. (Exhibits 3-4.) His appearance at the hearing was the same, except that he was five pounds lighter, had slightly longer hair, and had

> some beard stubble.
>
> [¶ . . . ¶]
>
> 13. De Haro appeared his age—19—at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance and conduct in the Licensed Premises on August 5, 2017, De Haro displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Walker.

(Findings of Fact, ¶¶ 5-13.) Based on these findings, the ALJ addressed appellants' rule 141(b)(2) arguments:

> 5. . . . With Respect to rule 141(b)(2), the Respondents argued that De Haro's physical appearance and demeanor was that of a person over the age of 21. This argument is rejected. As noted above, De Haro's appearance was consistent with his actual age, 19. Phrased another way, De Haro displayed the appearance which could generally be expected of a persun under 21 years of age. (Finding of Fact ¶ 13.)

(Conclusions of Law, ¶ 5 .) We agree with this assessment.

This Board has noted that:

> [a]n 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 ALJs are reasonable and not arbitrary or capricious, we will uphold them.

(*O'Brien* (2001) AB-7751, at pp. 6-7.) Notably, the standard is not that the decoy must display the appearance of a "childlike teenager" but "the appearance which could generally be expected of a person under 21 years of age." In Findings of Fact paragraphs 5-13, and Conclusions of Law paragraph 13, the ALJ found that the decoy met this standard.

Appellants argue that the decoy displayed a demeanor which was not typical for a teenager because of his training as a police Explorer. They maintain his extensive training gave the decoy a confident demeanor which made him appear more mature.

The Board has, however, rejected the "experienced decoy" argument many times. As the Board 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, emphasis in original.) This case is no different.

In addition, appellants contend that the "simple act of handing over identification for a clerk to check is in and of itself a signal that the person offering the identification is of age." (AOB at p. 7.) It contends that a typical teenage would not readily hand over his or her identification to purchase beer. We reject this contention. The clerk did not testify — we have no way of knowing if the decoy's demeanor *actually resulted* in the clerk making the sale. Further, there is nothing in the record indicating that the decoy's presentation of the driver's license was done "confidently," as appellants contend. Appellants seem to suggest that the mere presentation of any driver's license, when asked, would give a decoy the appearance of someone older than 21. However, by that logic, everything a decoy does could be seen as "confident" — from presenting an alcoholic beverage to a clerk to volunteering to be a decoy in the first place. Under those circumstances, all decoys would appear over 21 years of age and the criteria of 141(b)(2) would lose all meaning.

Appellants presented no evidence that the decoy's training, physical appearance, or demeanor *actually resulted* in his displaying the appearance of a person 21 years old or older on the date of the operation in this case. The clerk did not testify. We cannot know what went through his mind in the course of the transaction, or

why he made the sale — in spite of looking directly at evidence to the contrary, showing the decoy to be 19 years of age. There is simply no evidence to establish that the decoy's physical appearance, experience, or demeanor were the *actual reason* the clerk made the sale.

Ultimately, appellants are simply asking this Board to second guess the ALJ and reach a different conclusion, despite substantial evidence to support the findings in the decision. This we cannot do.

ORDER

The decision of the Department is affirmed.[3]

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[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.