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

AB-9779
File: 21-477426; Reg: 18087213

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store #3944
1520 East F Street, Oakdale, CA 95361-9611,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

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

ISSUED AUGUST 12, 2019

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

Respondent: John P. Newman, 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 #3944, 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 December 6, 2018, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. There is no record of prior departmental discipline against the license.

On July 20, 2018, the Department filed a single-count accusation against appellants charging that, on November 16, 2017, appellants' clerk, Manuel Martin Manza (the clerk), sold an alcoholic beverage to 19-year-old Madyson Paige Falconi (the decoy). Although not noted in the accusation, the decoy was working as a minor decoy in a joint operation between the Oakdale Police Department (OPD) and the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on October 9, 2018, documentary evidence was received and testimony concerning the sale was presented by the decoy and by Department Agent Monica Molthen.

Testimony established that on November 16, 2017, the decoy entered the licensed premises and went to the coolers where she selected a six-pack of Corona beer in bottles. She took the beer to the register and waited in line. When it was her turn, she set the beer on the counter and the clerk asked her for her identification. The decoy held up her California driver's license for the clerk to see. The ID contained her correct date of birth, showing her to be 19 years of age, and contained a red stripe indicating "AGE 21 IN 2019." (Exh. D-3.) The clerk looked at the identification, started to ring up the beer, and then asked to see the ID again. The clerk looked at the ID again, then completed the sale without asking any age-related questions. The decoy exited the premises with the beer and went to the vehicle where law enforcement officers were waiting.

The decoy re-entered the premises with the officers and one of the officers asked the decoy which clerk made the sale. The decoy pointed out the clerk who had sold her the beer. Agent Molthen approached him and explained why they were present. Agent Molthen then asked the decoy to identify the person who sold her the beer. She pointed to the clerk and said "he did" while standing approximately 3 feet away from him. A photograph was taken of the clerk and decoy together (*ibid)* and the clerk was subsequently cited.

The administrative law judge (ALJ) submitted his proposed decision on October 19, 2018, sustaining the accusation and recommending a 10-day suspension. The Department adopted the proposed decision in its entirety on November 28, 2018, and a Certificate of Decision was issued on December 6, 2018.

Appellants then filed a timely appeal contending the decision is not supported by substantial evidence because the decoy operation utilized an individual whose appearance and demeanor did not comport with the requirement of rule 141(b)(2)[2] that the decoy possess the appearance which could generally be expected of a person under 21 years of age.

DISCUSSION

Appellants contend that the ALJ's decision is not supported by substantial evidence because "the decoy's sophisticated and well-put-together apparel and appearance, and her confident demeanor and bearing were not traits that could generally be expected of an individual under 21 years of age." (AOB at p. 2.) They maintain her two years' experience as a police Explorer cadet and other law

[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.

enforcement experience, in addition to her physical presentation, gave her the "appearance and demeanor of a fully mature young woman." (*Id.* at p. 6.)

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 sophisticated physical appearance — including fashionable clothing and an elegant hairstyle — violated this rule, as did the decoy's experience as a police Explorer and in other law enforcement activities, which gave her a confident and practiced demeanor which was not one which could reasonably be expected of someone under age 21.

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:

> 4. Falconi appeared and testified at the hearing. On October 9, 2018 her appearance was generally as depicted in an image that was taken during the operation on November 16, 2017. (Exhibit D-3) Falconi had long,

> brown hair that was worn down below her shoulders. Her face was fully exposed. Falconi wore jeans and brown boots on her lower body and a tan, long sleeved t-shirt and a dark cardigan on her upper body. Falconi had no visible tattoos. Falconi was approximately 5 feet, 8 inches tall and 135 pounds at the hearing. Falconi credibly testified that her size and appearance on the date of the operation were essentially the same except that she was an inch shorter.
>
> [¶ . . . ¶]
>
> 12. November 16, 2017 was the first time Falconi served as a decoy. She had assisted in at least one "Shoulder Tap" operation before this decoy operation. She became involved in the decoy program through her particiation in an Explorer program with OPD for approximately 2 years. Based on her overall appearance, i.e., her physical appearance, clothing, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of Manza at the Licensed Premises on November 16, 2017, Falconi displayed the appearance which would generally be expected of a person less than 21 years of age during her interactions with Manza.

(Findings of Fact, ¶¶ 4-12.) Based on these findings, the ALJ addressed appellants' rule 141(b)(2) argument:

> 10. Respondent also asserted that the appearance of the decoy did not comply with rule 141(b)(2). As noted above, Manza did not testify in this matter to establish that his error was the result of Falconi's appearance or demeanor. Manza, in fact, asked for Falconi's identification and looked at it twice which suggests that he had reason to believe that Falconi might be underage. Manza did not ask any follow up questions after asking Falconi for her identification, so the verbal exchanges between Manza and Falconi were minimal. Further, Falconi testified in this matter and her appearance matched the appearance she presented to Manza on the date of the operation. Falconi had an appearance "which could generally be expected of a person under 21 years of age" which is the standard required by rule 141(b)(2). As previously noted, the clerk did not testify to establish facts suggesting an identificaion issue or whether there was anything in Falconi's actions, manner, or appearance that led Manza to reasonably conclude that Falconi was over 21. The Department has established compliance with rule 141(b)(2) and the Respondent has failed to rebut this evidence.

(Conclusions of Law, ¶ 10.) We concur with the ALJ's assessment.

Appellants argue that the decoy displayed a demeanor which was not typical for a teenager because of her two years of experience working as a police Explorer and several years working for and alongside law enforcement officials. They maintain this experience gave the decoy a confident and mature demeanor. 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.

As this Board has said many times, minors come in all shapes and sizes and we are reluctant to suggest, without more, that a minor decoy automatically violates the rule based on various physical charactistics. (See, e.g., *7-Eleven/NRG Convenience Stores* (2015) AB-9477; *7-Eleven Inc./Lobana* (2012) AB-9164.) 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 <u>not</u> 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 4-12, and Conclusions of Law paragraph 10, the ALJ found that the decoy met this standard.

Appellants argue that the Board's past decisions dictate reversal in this case because the Board previously found that:

> The phrase "could generally be expected" clearly implies, as this board has said, that *not everyone* will necessarily believe that a particular decoy appears to be under 21, but it also means that *most* people will believe that the decoy appears to be under 21.

(Quoting *7-Eleven/Dianne Corp.* (2002) AB-7835 at p. 6, emphasis in original.) While the "most people" standard may have been the position of the Board in 2002, it simply does not state the controlling law on rule 141(b)(2). In a similar minor decoy case, where the Court of Appeal was tasked with assessing whether an ALJ's assessment of the decoy's appearance was correct, the Court said that under the facts before them, while:

> one could reasonably look at the photograph [of the decoy] and reasonably conclude that the decoy appeared to be older than 21 years of age, we cannot say that, as a matter of law, a trier of fact could not reasonably have concluded otherwise.

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (2002) 103 Cal.App.4th 1084, 1087[127 Cal.Rptr.2d 652].)

The instant case is no different. We do not believe the evidence supports a finding that the ALJ "could not reasonably have concluded otherwise." (*Ibid.*) As stated above, case law instructs us that when, as here, "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, supra.*)

Appellants presented no evidence that the decoy's "sophisticated look" or her experience in law enforcement *actually resulted* in her displaying an appearance of a person 21 years old or older on the date of the operation in this case. Absent some

evidence to establish that these factors were the *actual reason* the clerk made this sale, this argument must fail. Ultimately, appellants are 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.