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

AB-9546
File: 21-479658 Reg: 14081196

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy 9104
2427 East Valley Parkway, Escondido, CA,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: May 5, 2016
Los Angeles, CA

ISSUED JUNE 6, 2016

Appearances: *Appellants:* Michelangelo Tatone, of Solomon Saltsman & Jamieson, as counsel for appellants Garfield Beach CVS, LLC and Longs Drug Stores California, LLC.
Respondent: Jacob Rambo and Jonathan Nguyen 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 9104 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for fifteen days, with five days conditionally stayed, because their clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

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1. The decision of the Department, dated September 18, 2015, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' type 21 license was issued on September 10, 2009. On September 16, 2014, the Department filed an accusation against appellants charging that, "[o]n or about 2/5/14," appellants' clerk, Rosie Shramek (the clerk), sold an alcoholic beverage to 16-year-old Ryan M.[2] (Exh. 1.) Although not noted in the accusation, Ryan was working as a minor decoy for the Escondido Police Department at the time.

The administrative hearing was originally scheduled for July 22, 2015. (Notice of Hearing on Accusation, Exh. 1; see also RT at p. 6.) On July 16, 2015, counsel for both parties participated in a telephone conference with the ALJ in which the Department requested a continuance to accommodate the decoy's vacation. (RT at p. 7.) The decoy was out of the country and would not return until July 24. (*Ibid.*) Appellants objected. (*Ibid.*) The ALJ continued the hearing to July 29. (RT at pp. 7-8; see also Notice of Continued Hearing on Accusation, Exh. 1.) As he explained on the record at the hearing, both he and counsel for the appellants were scheduled to be in the San Marcos District Office for another hearing on that date, and he therefore did not consider it "a big unnecessary delay." (RT at p. 8.)

At the administrative hearing held on July 29, 2015, documentary evidence was received and testimony concerning the sale was presented by Ryan M. (the decoy) and

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2. Because the decoy was a minor under the age of 18 on the date of both the decoy operation and the administrative hearing, the Department redacted his identifying information. We do the same here.

by Detective Albert Estrada of the Escondido Police Department. Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises and went to a cooler. He selected a six pack of Budweiser beer in bottles and took the six pack to the sales counter for purchase.

The decoy placed the beer on the counter. The clerk asked the decoy for identification. The decoy handed the clerk his California driver's license. The clerk took possession of the license, appeared to look at it for approximately five seconds, and told the decoy that he looked better in person than on his license. The clerk then asked the decoy why he was so nervous. The decoy told the clerk that he was not nervous. The clerk handed the license back to the decoy, then continued the transaction and completed the sale. The clerk did not ask the decoy any age-related questions. The decoy paid for the beer, received his change, and exited the store with the six pack of Budweiser. Detective Estrada was inside the store posing as a customer during this time and witnessed the events.

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

Appellants then filed an appeal contending the ALJ failed to proceed in the manner required by law when he (1) sustained the accusation despite finding that the violation took place on a different date than the accusation alleged, and (2) allowed a continuance of the administrative hearing due to the minor decoy's absence where there

was no evidence the decoy was either dead or suffering from a then-existing physical or mental illness or infirmity.

DISCUSSION

I

Appellants contend the ALJ failed to proceed in the manner required by law when he sustained the Department's accusation despite finding that the violation took place on a different date than the accusation alleged. Appellants claim the accusation alleged a violation date of February 5, 2014. The ALJ, however, found the violation took place on February 1, 2014, based on testimony from the decoy.

Appellants argue that this change materially prejudiced them. They contend that while "the ALJ was within judicial discretion in determining that the date of [the] incident was February 1, 2014, the ALJ erred in sustaining the Accusation where his findings varied from the Department's allegations therein." (App.Br. at p. 8.) According to appellants, they

> engage in hundreds of transaction[s] per day in the ordinary scope of business; it is of the utmost importance that [they] therefore know with as much specificity as possible which date is in question to adequately prepare for the hearing. In this matter, Appellants had no notice until the administrative hearing was already underway that the date of February 1, 2014, was at issue, and therefore had no opportunity to prepare a defense for that date.

(*Ibid.*)

The Department responds that the accusation in fact cited a violation date "on or about" February 5 (Dept.Br. at p. 5); that the error was merely "clerical" and therefore harmless (*id.* at p. 7); that appellants ignore testimony from Detective Estrada indicating

the violation took place on February 5 (*ibid.*); and that in any event, the Department is not required to prove the date of a violation, only that a violation occurred (*id.* at p. 6).

The Department accurately cites the standard for reversible error, as provided in the California constitution: "No judgment shall be set aside, or new trial granted, in any cause . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) The Code of Civil Procedure echoes this standard:

> No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed.

(Code Civ. Proc., § 475; see also *Hay v. Allen* (1952) 112 Cal.App.2d 676, 681 [247 P.2d 94] ["[U]nsupported or erroneous findings of fact will be disregarded as being harmless error if the judgment as rendered can be sustained on the supported and proper findings made by the trial court."].) (See Code Civ Proc., § 475.) "The burden is on the appellant in every case affirmatively to show error and to show further that the error is prejudicial." (*Vaughn v. Jonas* (1948) 31 Cal.2d 586, 601 [191 P.2d 432].) This Board will not reverse for an alleged defect in the decision below unless the appellant has shown the defect was prejudicial — that is, that a different result was probable had the defect not occurred.

The question before this Board is therefore twofold: does the decision below contain an error, and if so, have appellants shown that a different result was probable had the error not occurred?

We start with the accusation and the relevant findings. The accusation alleges that

> [o]n or about 2/5/14, respondent-licensee's agent or employee, Rosie Shramek, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Ryan [M.], a person under the age of 21 years, in violation of Business and Professions Code Section 25658(a).

(Exh. 1.)

We are troubled by the use of "on or about" for the violation date, particularly where, as here, counsel for the Department seems quite certain — based on the Department's own sources — that the violation took place on February 5. (See, e.g., Dept.Br. at p. 7 [stating that appellants "conveniently ignore the 10 pages of testimony by Officer Albert Estrada during which he confirmed the date of violation as February 5, 2014"].) Moreover, the Department relies on Black's Law Dictionary for the definition of "on or about." (Dept.Br. at p. 5.) According to that source, it is "[a] phrase used in reciting the date of an occurrence or conveyance, or the location of it *to escape the necessity of being bound by the statement of an exact date*, or place." (Dept.Br. at p. 7, quoting Black's Law Dict., emphasis added.) Section 11503(a) of the Government Code requires that an accusation "set forth in ordinary and concise language the acts or omissions with which the respondent is charged, *to the end that the respondent will be*

able to prepare his or her defense." (Gov. Code, § 11503(a), emphasis added.) The use of an "on or about" date in the accusation "to escape the necessity of being bound by the statement of an exact date" when the exact date was readily available from Detective Estrada strikes us as, at best, lassitude, and at worst, as a deliberate obfuscation of the facts surrounding the violation.[3]

Regardless, the ALJ made the following factual findings regarding the date of the violation:

> 4. [The decoy] was born April 1, 1997. He served as a minor decoy during an operation conducted by Escondido Police Department officers *on February 1, 2014*. On that day [the decoy] was 16 years old.
>
> 5. [The decoy] appeared and testified at the hearing . . . . When he visited Respondents' store *on February 1, 2014*, [the decoy] wore a red t-shirt, blue jeans, a striped jacket and gray Vans shoes . . . .

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3. At oral argument, the Department insisted this vague date was consistent with standard pleading practices. Department counsel gave the example of a murder, in which prosecutors may only know the general timeframe, and not the precise date, that the crime was committed. The analogy fails; this is not an instance in which the circumstances of the crime make the exact date of its commission unknowable. The Department knew, or could easily have determined, the date the violation took place before drafting the accusation. There is no justification for a vague "on or about" allegation where, as here, the prosecuting agency is aware of the precise date in question, and where, as appellants pointed out, the date of the violation may determine applicability of the "three strikes" rule (see Penalty Schedule, Cal. Code Regs., tit. 4, § 144) or other provisions of law.

Moreover, although accomplished by way of an unedited boilerplate Notice of Defense, appellants did object to the accusation "on the grounds that the form of Accusation is so indefinite and uncertain that he [*sic*] cannot identify the transaction or prepare his [*sic*] defense." (Special Notice of Defense, Exh. 1, ¶ 4; see also Gov. Code, § 11506(a)(3) [a respondent may "[o]bject to the form of the accusation . . . on the ground that it is so indefinite or uncertain that the respondent cannot identify the transaction or prepare a defense"].)

> [¶ . . . ¶]
>
> 9. [The decoy] appears his age, 16 years of 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/conduct in front of clerk Shramek at the Licensed Premises *on February 1, 2014*, [the decoy] displayed the appearance that could generally be expected of a person less than 21 years of age . . . .

(Findings of Fact, ¶¶ 4-5, 9, emphasis added.) Additionally, the ALJ reached a conclusion of law[4] that provides the same violation date:

> 4. Cause for suspension or revocation of Respondents' license exists under Article XX, Section 22 of the California State Constitution and Sections 24200(a) and (b) in that *on February 1, 2014*, Respondents, acting through their employee/agent . . . sold an alcoholic beverage to [the decoy] . . . .

(Conclusions of Law, ¶ 4, emphasis added.)

The recitation of February 1, 2014, as the date of the violation seems inexplicable given the quantity of testimony supporting a violation date of February 5. It is true that at the beginning of his testimony — upon prompting by Department counsel — the decoy did confirm a date of February 1:

[BY MR. NGUYEN:]

> Q. Did you participate in a minor decoy operation *on February 1st, 2014*, with the Escondido Police Department?
>
> A. Yes.

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4. The Department states, incorrectly, that the ALJ only used the February 1 date in two paragraphs of the decision. (Dept.Br. at p. 6.) As shown, he used it in four.

(RT at p. 9, emphasis added.) This is the only reference to February 1 in the course of the decoy's testimony. Later, counsel for the Department questioned the decoy solely with reference to February 5:

> [BY MR. NGUYEN:]
> Q. Ryan, looking at Exhibit 4, do you recognize it?
>
> A. Yes.
>
> Q. What is it?
>
> A. A photo of me prior to the decoy operation.
>
> Q. This was taken on *February 5, 2014*?
>
> A. Yes.
>
> [¶ . . . ¶]
>
> Q. Ryan, looking at Exhibit 5, do you recognize it?
>
> A. Yes.
>
> Q. What is it?
>
> A. This is the photo of me prior to the decoy operation.
>
> Q. And this is a full-length photo of you?
>
> A. Yes.
>
> Q. How tall were you on that day, *February 5, 2014*?
>
> A. Approximately 5'10" to 5'11".
>
> [¶ . . . ¶]
>
> Q. How old were you on *February 5th, 2014*?
>
> A. 16.

(RT at pp. 18-20, emphasis added.) Notably, in none of these instances did the decoy independently recite the date of the operation. Nevertheless, the decoy thrice confirms a date of February 5, and only once confirms a date of February 1. Moreover, during cross-examination, neither the decoy nor counsel for appellants discussed the exact date of the operation. (See RT at pp. 20-28.)

Detective Estrada twice confirmed, at the prompting of Department counsel, a date of February 5:

> [BY MR. NGUYEN:]
> Q. Do you recall taking part in a minor decoy operation *on February 5th, 2014*?
>
> A. Yes.
>
> [¶ . . . ¶]
>
> Q. Looking at Exhibit 3, Detective, do you recognize it?
>
> A. Yes.
>
> Q. What is it?
>
> A. It's a photograph taken of [the decoy] and Rosie Shramek with the purchased alcohol and his identification.
>
> Q. Was this taken *on February 5th, 2014*?
>
> A. Yes.

(RT at pp. 29, 33, emphasis added.) Moreover, the ALJ questioned Detective Estrada regarding the date of the report and the citation, and Estrada twice independently recited February 5 as the date the citation issued:

> ADMINISTRATIVE JUDGE: Okay. What was the date of this incident?
>
> [DET. ESTRADA]: My report says February 12.
>
> ADMINISTRATIVE JUDGE: February 12? Okay.
>
> THE WITNESS: The citation says *February 5th.*
>
> ADMINISTRATIVE JUDGE: Okay. Is the February 12 date, is that the date the report was written or is that the date that the incident occurred?
> THE WITNESS: That will be the report — the date, most likely, the report was written.
>
> ADMINISTRATIVE JUDGE: Okay. The citation was issued — do you have a copy of the citation? I don't want to see it. Do you have one?
>
> THE WITNESS: I do.
>
> ADMINISTRATIVE JUDGE: And what is the date that's listed on your citation?
>
> THE WITNESS: *February 5th, 2014.*
>
> ADMINISTRATIVE JUDGE: Okay. All right. Just so you know, I thought I heard February 1st mentioned when the decoy . . . was first questioned. I thought I heard February 1st. We'll go back and check that on a break. I just wanted to see how my hearing is doing. Okay. February 5th.

(RT at pp. 37-38, emphasis added.)

Finally, the Department concedes in its brief that February 5 was indeed the correct date of the violation:

> The fact that the [ALJ] misstates the date of violation as February 1, 2014 instead of February 5, 2014 should not be grounds to find that no violation occurred at all. Appellants also conveniently ignore the 10 pages of testimony by Officer Albert Estrada during which he confirmed the date of violation as February 5, 2014. Appellants were not prejudiced by the [ALJ's] use of the wrong date in two paragraphs of his proposed decision. The [ALJ] simply made a clerical error as to the date of the violation. The

> mistake was an inadvertent typographical error and constitutes harmless error.

(Dept.Br. at p. 7.)

With the exception of a single question from Department counsel, then, it is undisputed that the evidence consistently supports a violation date of February 5. Nevertheless, the decision recites a violation date of February 1 no less than four times. It is clear, as the Department admits, that an error occurred.

As noted, the Department characterizes the error as harmless. It contends that "[t]he record as a whole supports the fact that a violation of Business and Professions Code section 25658, subdivision (a) occurred at appellants' premises by appellants' clerk in February of 2014." (Dept.Br. at p. 7.)

As this Board has observed, however, multiple violations often take place at the same premises, occasionally within a single month. Having issued a decision finding that this violation took place on February 1, 2014, what was there to stop the Department from prosecuting a *second* violation with a date of February 5?[5] Moreover, appellants are correct that they were deprived of the opportunity to defend against a violation alleged to have taken place on February 1 — a significant deprivation since, as the Department concedes in its brief, no violation actually took place on that date.

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5. As appellants acknowledged at oral argument, prosecution of a second violation is, at this point, foreclosed by operation of the statute of limitations. We are not inclined to rely on the statute of limitations alone, however, to protect licensees from the legal consequences of the Department's errors.

Finally, we are not persuaded by the Department's contention that the error was merely clerical. We are, as the Department so often reminds us, bound to liberally construe the findings in favor of the judgment. We therefore assume that the ALJ *intended* to find that the violation took place on February 1, and not February 5, despite the weight of evidence suggesting otherwise. Based on the evidence available to this Board, it is very likely that appellants could have proven, conclusively, that no violation took place at their licensed premises on February 1, 2014. Whether the error was intentional or not, it was material and prejudicial and demands reversal.

II

Appellants contend that the ALJ failed to proceed in the manner required by law when he found good cause to continue the administrative hearing because the decoy was on vacation. Appellants rely on Business and Professions Code section 25666, as well as two recent decisions from this Board, which, they argue, do not allow for a continuance due to the absence of the decoy unless the decoy is dead or suffering from a physical or mental illness or infirmity. (App.Br. at pp. 9-11, citing Bus. & Prof. Code, § 25666(a).)

Section 25666(a) provides:

> In any hearing on an accusation charging a licensee with a violation of Sections 25658, 25663, and 25665, the department shall produce the alleged minor for examination at the hearing unless he or she is unavailable as a witness because he or she is dead or unable to attend the hearing because of a then-existing physical or mental illness or infirmity, or unless the licensee has waived, in writing, the appearance of the minor. When a minor is absent because of a then-existing physical or mental illness or infirmity, a reasonable continuance shall be granted to

> allow for the appearance of the minor if the administrative law judge finds that it is reasonably likely that the minor can be produced within a reasonable amount of time.

In *Purciel* (2015) AB-9454, the Department had arranged for the decoy, who was attending school in Utah, to fly in for the administrative hearing. (*Id.* at p. 2.) The decoy's flight was delayed due to a snow storm. (*Ibid.*) The hearing commenced as scheduled, and the Department requested a continuance on account of the decoy's inability to attend. (*Ibid.*) The ALJ granted the continuance over the appellants' objection. (*Ibid.*)

On appeal, this Board interpreted the language of the statute as strictly limiting the circumstances in which a continuance may be granted:

> The nature, purpose, and mandate of section 25666 are obvious from its face: absent a written waiver, a licensee facing discipline for any of the listed offenses — all of which involve minors — has the right to have the alleged minor present at the disciplinary hearing, and the Department is obligated to produce the minor unless certain extenuating circumstances exist. Those specific extenuating circumstances are that the minor must either be *dead* or otherwise unable to attend due to a *physical or mental illness or infirmity*. If none of the extenuating circumstances are present, section 25666 is violated if the Department fails to produce the minor at any such disciplinary hearing wherein the appellant has not waived its right.

(*Id.* at pp. 7-8, emphasis in original.)

Similarly, in *Circle K Stores, Inc.* (2015) AB-9490, the administrative hearing commenced as scheduled. (*Id.* at p. 2.) Despite proper notification and subpoena, the decoy failed — for unknown reasons — to appear at the administrative hearing. (*Ibid.*) The Department requested a continuance, and the ALJ granted the request over the appellant's objection. (*Ibid.*)

This Board rejected the Department's interpretation of the statute, along with a previous Board decision holding, without analysis, that such a continuation was permissible. We emphasized that the failure of the decoy to appear at a scheduled administrative hearing prejudiced the appellant:

> Absent one of the narrow exceptions listed in section 25666, the alleged minor's attendance at any — i.e., every and all [cite] — hearing(s) on an accusation charging a violation of section 25658 is statutorily compelled. This statutory compulsion is unsurprising, especially in decoy cases such as this, because the minor is singlehandedly the most important witness — for both licensees and the Department — to the events resulting in the accusation, and is the only presumably unbiased witness who can testify to matters vital to the very limited defenses against such an accusation available to licensees.[fn.] To that end, licensees have a statutorily protected right to rely on the alleged minor's presence at *any* hearing on an accusation charging a violation of one of the enumerated sections[fn.] in preparing their defenses thereto, and if the Department fails to fulfill its obligation to produce the alleged minor, even temporarily, it has violated that legal right to the detriment of the licensees.

(*Id.* at pp. 17-18, emphasis in original.)

There is a significant factual difference between *Purciel* and *Circle K Stores* and the case now before us. In both the earlier cases, the administrative hearing commenced as scheduled and the decoy simply failed to appear — in *Purciel*, because of weather delays, and in *Circle K Stores*, for no known reason whatsoever. In this case, the Department made opposing counsel and the ALJ aware of the decoy's vacation in advance — six days before the hearing. (RT at p. 7.) This is not an instance in which the Department actually failed to produce a minor decoy at a hearing, as contemplated by section 25666. Indeed, the minor was never "absent," since the hearing had yet to take place. (See Bus. & Prof. Code, § 25666(a).) Instead, this is an instance in which

the Department specifically took steps to comply with the statute by requesting, in advance, a continuance in order to ensure that it *could* produce the decoy at the hearing as required by the statute. The ALJ committed no error by granting a continuance in order to ensure the decoy's presence.

ORDER

For the reasons addressed in Part I, *supra*, the decision of the Department is reversed.[6]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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6. 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.