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

AB-9120
File: 21-479712 Reg: 10072356

GARFIELD BEACH CVS LLC, dba CVS Pharmacy # 9109
El Cajon Boulevard and 62nd Street SEC, San Diego, CA 92115,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 5, 2011
Los Angeles, CA

ISSUED JUNE 14, 2011

Garfield Beach CVS LLC, doing business as CVS Pharmacy # 9109 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerk selling an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Garfield Beach CVS LLC, appearing through its counsel, Ralph B. Saltsman and Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated June 10, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on September 14, 2009. On January 6, 2010, the Department filed an accusation charging that appellant's clerk, Michelle Rademaker (the clerk), sold an alcoholic beverage to 17-year-old Shannon Pettis on September 24, 2009. Although not noted in the accusation, Pettis was working as a minor decoy for the Department at the time.

At the administrative hearing held on April 20, 2010, documentary evidence was received, and testimony concerning the sale was presented by Pettis (the decoy) and by Dean Maier, a Department investigator. The clerk did not testify.

The evidence established that the clerk sold a 6-pack of Bud Light beer to the decoy after asking for, obtaining, and examining the decoy's true California driver's license. The license bore a red strip on which was printed "Age 21 in 2013."

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established.

Appellant filed an appeal contending: (1) Rules 141(a) and 141(b)(2)[2] were violated and (2) the ALJ failed to "bridge the analytical gap" between the evidence and the ultimate conclusion.

DISCUSSION

I

Rule 141(a) provides that minor decoy operations must be conducted in a manner "that promotes fairness." Rule 141(b)(2) requires that the decoy "display the appearance which could generally be expected of a person under 21 years of age,

[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.

under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense." Proof that the law enforcement agency involved failed to comply with any of the provisions of rule 141 provides a defense to an accusation charging a sale-to-minor violation. (Cal. Code Regs., § 141, subd. (c).)

Appellant contends that the decoy's appearance in this case did not comply with the requirement of rule 141(b)(2). It points out that the 17-year-old decoy was 5'8" tall and weighed 140 pounds which, it states, is "a description of a fully developed mature female." (App. Opening Br. at p. 5.) In addition, appellant argues, the decoy's participation in two previous decoy operations gave the decoy "an unusual degree of confidence." The result, appellant asserts, made it "very likely that a clerk would be led to believe that [such] a decoy . . . was older than her actual age.

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he or she testifies before determining whether the decoy's appearance met the requirement of rule 141(b)(2). The Appeals Board is not in a position to second-guess the trier of fact, and only a clear showing of abuse of discretion would cause the Board to question the ALJ's determination.

The ALJ made detailed findings regarding the appearance of the decoy at the hearing, the photographs taken of her on the day of the decoy operation, and her experience as a decoy (Fndg. of Fact II.D) and concluded that her appearance complied with rule 141(b)(2). Appellant has given us no reason to think the ALJ abused his discretion in making that determination.

Appellant's bald assertion that the decoy's height and weight made her appear to be over 21 is absurd. Appellant's insistence that the decoy's experience caused her to

appear to be over 21 is totally unsupported and unsupportable. The decoy participated in only one or two previous decoy operations, so her experience was not extensive; she testified that she was nervous during the operation, so it is highly unlikely she would have displayed the "unusual degree of confidence" alleged by appellant; and the clerk did not testify, so we have no evidence that the decoy's appearance caused the clerk to believe the decoy was at least 21 years old.

Appellant's supposition that it would be "highly likely" that some hypothetical clerk would think the decoy was old enough to purchase an alcoholic beverage is irrelevant; the Board can only be concerned with evidence of what actually happened with regard to the particular clerk involved. In any case, even if the clerk thought the decoy was old enough, a clerk's mistaken belief that the decoy is over the age of 21 is not a defense if, in fact, the decoy's appearance is one which could generally be expected of a person under 21 years of age.

The ALJ determined that the decoy complied with rule 141(b)(2) and appellant has given us no reason to question that determination.

II

Appellant contends that there is not substantial evidence to support the conclusion that the decoy's appearance complied with rule 141(b)(2) and the ALJ did not "set forth the reasoning, grounds, and patterns of thought" that led him to that conclusion. Therefore, appellant asserts, the decision violates the requirement of *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836] (*Topanga*) that the Department must "bridge the gap between the raw evidence presented . . . and the ultimate conclusion." (App. Opening Br. at p. 2.)

The ALJ observed the decoy in person, and this Board has long held that this provides substantial evidence to support the determination of the decoy's apparent age. (*7-Eleven, Inc./ Nagra & Sunner* (2004) AB-8064.)

Appellants omit an important part of the *Topanga* holding. The court stated that "the agency which renders the challenged decision *must set forth findings* to bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga*, *supra*, 11 Cal.3d 506, 515, italics added.)

The contention that the Department failed to comply with *Topanga* has been rejected by this Board numerous times. For example, in *7-Eleven, Inc./Cheema* (2004) AB-8181, the Board said: "Appellants misapprehend *Topanga*. It does not hold that findings must be explained, only that findings must be made." (Accord, *No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 258-259 [242 Cal.Rptr. 760]; *Jacobson v. County of Los Angeles* (1977) 69 Cal.App.3d 374, 389 [137 Cal.Rptr. 909].)

Appellant is really demanding the Department's reasoning. As this Board has explained many times, the Department is not required to explain its reasoning.

> Appellants' demand that the ALJ "explain how [the conflict in testimony] was resolved" (App. Br. at p. 2) is little more than a demand for the reasoning process of the ALJ. The California Supreme Court made clear in *Fairfield v. Superior Court of Solano County* (1975) 14 Cal.3d 768, 778-779 [122 Cal.Rptr. 543], that as long as findings are made, a party is not entitled to attempt to delve into the reasoning process of the administrative adjudicator:
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> > As we stated in *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836, 522 P.2d 12]: "implicit in [Code of Civil Procedure] section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order."[Fn.]

> In short, in a quasi-judicial proceeding in California, the administrative board should state findings. If it does, the rule of *United States v. Morgan* [(1941)] 313 U.S. 409, 422 [85 L.Ed. 1429, 1435 [61 S.Ct. 999]] precludes inquiry outside the administrative record to determine what evidence was considered, and reasoning employed, by the administrators.

(*United El Segundo, Inc*. (2007) AB-8517.)

Appellant has not shown that substantial evidence was lacking nor that it is entitled to any additional analysis.

ORDER

The decision of the Department is affirmed.[3]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[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.