

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

AB-9178

File: 21-477918 Reg: 10073852

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC, dba
CVS Pharmacy 9599 801 East Avenue, Chico, CA 95926-1250,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: July 12, 2012
Sacramento, CA

ISSUED AUGUST 10, 2012

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing
business as CVS Pharmacy 9599 (appellants), appeal from a decision of the
Department of Alcoholic Beverage Control¹ which suspended their license for 15 days
for their clerk selling an alcoholic beverage to a police minor decoy, a violation of
Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Garfield Beach CVS, LLC and Longs
Drug Stores California, LLC, appearing through their counsel, Ralph B. Saltsman and
D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing
through its counsel, Dean Lueders.

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The decision of the Department, dated June 23, 2011, is set forth in the
appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On November 18, 2010, the Department filed an accusation against appellants charging that, on July 8, 2010, appellants' clerk, Marcelina Romo, sold an alcoholic beverage to 19-year-old Jay Golightly. Although not noted in the accusation, Golightly was working as a minor decoy for the Chico Police Department.

At the administrative hearings held on February 23, 2011, and April 20, 2011, documentary evidence was received and testimony concerning the sale was presented by Golightly (the decoy), by Greg Rogers, a Chico Police officer, and by Romo (the clerk).

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

Appellants then filed a timely appeal contending: (1) Rule 141(b)(2)² was violated and (2) rule 144 was violated.

DISCUSSION

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's

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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.

decision is supported by the findings. The Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084 & 23085; *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].)

In the instant case, it is not disputed that a sale of an alcoholic beverage to a minor took place, but rather, whether Department rules 141 and 144 were properly applied and whether the decision is supported by the findings.

Appellants contend that the decoy in this matter did not display the appearance required by rule 141(b)(2) thereby violating the requirement of rule 141(a) that decoy operations be conducted in a “fashion that promotes fairness.”

Rule 141(b) sets forth “minimum standards [which] shall apply to actions filed pursuant to Business and Professions Code Section 25658 in which it is alleged that a minor decoy has purchased an alcoholic beverage.” The second of these dictates: “[t]he 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.” Rule 141(a) prescribes that a “law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages in a fashion that promotes fairness.” And subdivision (c) states: “[f]ailure to comply with this rule shall be a defense to any action brought pursuant to Business and Professions Code Section 25658.”

Appellants maintain that it was unfair to utilize a decoy in this operation who was one month shy of being 20 years of age; who had a receding hairline and thinning hair,

as well as a “manly physique”; and who had 2 years experience as a police Explorer.

The clerk, who testified as to the appearance of the decoy, stated that she thought the decoy was 25 years old [II RT 8] because of his general stature, facial hair, and mature appearance [II RT 10] and thus did not ask for his identification.

In *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836] (*Topanga*), the Supreme Court held that "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." The court explained that

among other functions, a findings requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions. [Citations.] In addition, findings enable the reviewing court to trace and examine the agency's mode of analysis. [Citations.] ¶ . . . ¶ Absent such road signs, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency. Moreover, properly constituted findings enable the parties to the agency proceeding to determine whether and on what basis they should seek review. [Citations.] They also serve a public relations function by helping to persuade the parties that administrative decision-making is careful, reasoned, and equitable."

(*Id.* at pp. 516-517, fns. omitted.)

The administrative law judge (ALJ) made only the following finding about the appearance of the decoy in his decision (Findings of Fact III):

Neither the Department nor the Licensee presented evidence regarding the decoy's height or weight on either the day of the decoy operation or on the day of the hearing. The decoy was nervous while in the Licensee store. He had thinning and receding hair. He had been a police explorer

for “a couple of years” and had participated in “no more than two prior decoy operations.” A photograph (State’s Exhibit 2) of the decoy with the manager was taken shortly after the sale of the beer.

No specific finding was made that the decoy displayed 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.

The Board has consistently taken the position that the 141(b)(2) issue is one of fact and that we must defer to the factual determinations of the ALJ as long as they are not clearly unreasonable. However, the Board cannot accord deference when no factual determinations have been made. The decision fails the test of reasonableness, and the decoy operation in this matter does not appear to have been conducted in a fashion which promotes fairness, when the observations of the ALJ support appellants’ assertion that the decoy displayed the appearance of an individual over the age of 21, and yet the conclusion is that no defense to the charge in the accusation has been established.

In the instant case, no factual findings were set forth to support a determination that the decoy appeared to be under the age of 21. Instead, the ALJ describes a nervous person with thinning and receding hair, and fails to recite any evidence to support his bare conclusion in Determination of Issues II that “[t]he Licensee has not shown, and the Administrative Law Judge does not see, how the decoy’s appearance in Exhibit 2 was not that of a nineteen-year old man.” This groundless opinion is precisely the leap from “evidence to conclusion” sought to be avoided in *Topanga, supra*.

The Board finds that such an unsupported determination is unreasonable and that the decision in this matter is not supported by the findings.

ORDER

The decision of the Department is reversed.³

FRED ARMENDARIZ, CHAIRMAN
BAXTER RICE, MEMBER ALCOHOLIC
BEVERAGE CONTROL APPEALS
BOARD

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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.