

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

AB-9446

File: 21-479457; Reg: 14079833

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #8849
1545 West 17th Street, Santa Ana, CA 92706-3300,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: February 5, 2015
Los Angeles, CA

ISSUED FEBRUARY 25, 2015

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #8849 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 15 days because their clerk sold an alcoholic beverage to a minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances include appellants Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, through their counsel, Ralph Barat Saltsman and Margaret Warner Rose of the law firm Solomon, Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, through its counsel, David W. Sakamoto.

¹The decision of the Department, dated May 21, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 8, 2009. On January 22, 2014, the Department filed a one-count accusation against appellants charging that, on December 7, 2013, appellants' clerk, Mike [REDACTED] (the clerk), sold an alcoholic beverage to 18-year-old Wendy Barragan. Although not noted in the accusation, Barragan was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on April 15, 2014, documentary evidence was received and testimony concerning the sale was presented by Barragan (the decoy) and by Eric Gray, a Department agent. Appellants presented no witnesses.

Testimony established that on the day of the operation, Agent Gray entered the licensed premises followed a short time later by the decoy. The decoy went to the coolers where she selected a 12-pack of Bud Light beer. She took the beer to the counter, and the clerk scanned it. The clerk asked to see her identification. She handed him her California Identification Card (Exhibit 3), which had a vertical orientation and bore a red stripe indicating "AGE 21 IN 2016." The clerk glanced at the ID card, handed it back to the decoy without asking her any age-related questions, and told her the price of the beer. The decoy paid and exited the premises, followed by Agent Gray.

The decoy reentered the premises with several Department agents. Agent Gray contacted the clerk and told him about the violation. The clerk was asked to come out from behind the counter, and Agent Gray asked the decoy to identify the person who sold her the beer. The decoy pointed at the clerk and said that he had. They were approximately three feet apart and facing each other at the time. A photo was then taken (Exhibit 4) and the clerk was cited.

The Department's decision determined that the violation charged had been proven and no defense had been established.

Appellants then filed a timely appeal contending: (1) The administrative law judge (ALJ) improperly made a boilerplate finding on the decoy's age, without discussing facts pertaining to her nonphysical characteristics, and (2) the Board cannot determine if the ALJ's determination is supported by substantial evidence unless the Board views the decoy in person.

DISCUSSION

I

Appellants contend that the ALJ improperly made a boilerplate finding on the decoy's age without discussing facts pertaining to her nonphysical characteristics. Appellants allege that a discussion of decoy's nonphysical characteristics is required in order for there to be compliance with rule 141(b)(2).²

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." The rule provides an affirmative defense, and the burden of proof lies with the appellants. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

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:

²References 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.

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends, Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002) 100 Cal.App.4th 1250, 1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; . . .) 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. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control (Lacabanne)* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734].) 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].)

The ALJ made the following findings of fact regarding the decoy's appearance and demeanor:

5. Barragan appeared and testified at the hearing. On December 7, 2013, she was 5'1" tall and weighed 115 pounds. She wore a pink blouse, a black jacket, black leggings, and Converse shoes. Her dark brown hair was long and parted near the top of her head. She was not wearing any make-up. (Exhibits 2 & 4.) Her appearance at the hearing was the same except that she was five pounds heavier and her hair had some red highlights in it.

[¶ . . . ¶]

8. December 7, 2013 was Barragan's second time acting as a decoy. She learned of the decoy program through her work as an Explorer with the Orange County Sheriff's Department. She had been an Explorer for 16 months before participating in this decoy operation. During that time, she went through the Explorer's academy operated by OCSD, attended classes at the station, and underwent physical training. Of the ten locations she visited on December 7, 2013, four sold alcoholic beverages to her.

9. Barragan appeared her age at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her

appearance and conduct in front of ██████████ at the Licensed Premises on December 7, 2013, Barragan displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to ██████████.

(Findings of Fact ¶¶ 5, 8-9 .) Based on these findings, the ALJ reached the following conclusion:

5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rules 141(b)(2)^[fn.] and 141(b)(5) and, therefore, the accusation should be dismissed pursuant to rule 141(c). With respect to rule 141(b)(2), the Respondents argued that Barragan’s training, experience, and demeanor made her appear to be 21 or older, as evidenced by the fact that four of ten locations sold alcoholic beverages to her. This argument is rejected. Barragan’s appearance was consistent with that of someone who was 18 years old, her actual age at the time of the sale. (Finding of Fact ¶ 9.)

(Conclusions of Law ¶ 5.)

Contrary to appellants’ claim, the ALJ did in fact consider the decoy’s experience and training — in addition to her physical appearance, dress, poise, demeanor, maturity, and mannerisms — in determining that the decoy presented the appearance of a person under the age of 21. To say that he “disregarded” this evidence is patently false; in reality, he considered the evidence and found appellants’ position unpersuasive.

On one point, appellants are technically correct: the ALJ did not explain *why* he was not persuaded that the decoy’s lack of nervousness made her appear more mature. But, as this Board has noted elsewhere, the ALJ need not provide a “laundry list” of factors he deems inconsequential. (See, e.g., *Lee* (2014) AB-9359; 7-*Eleven/Patel* (2013) AB-9237; *Circle K Stores* (1999) AB-7080). Nor, as the Board has said many times, is there a requirement that the ALJ explain his reasoning. Simply because the ALJ does not explain his analytical process does not invalidate his

determination or constitute an abuse of discretion. (See *Garfield Beach* (2014) AB-9430.)

The case cited by appellants — for the proposition that an ALJ's opinion must include a discussion of the decoy's poise, demeanor, maturity and mannerisms — was one which presented no findings at all about the decoy's non-physical appearance, and concentrated exclusively on his physical appearance:

1. Although [the minor] was six feet in height and weighed approximately 150 pounds as of December 20, 1996, he is a youthful looking male, whose physical appearance is such as to reasonably be considered as being under twenty-one years of age and who would reasonably be asked for identification to verify that he could legally purchase alcoholic beverages. The minor's appearance at the time of his testimony was substantially the same as his appearance at the time of the sale which occurred on the licensed premises on December 20, 1996, except that he was about ten pounds lighter as of the date of the hearing.

(*Circle K Stores* (1999) AB-7122, Department Decision, Findings of Fact ¶ 1.) The Board held in that case that the findings were insufficient to support a conclusion that there had been compliance with rule 141(b)(2) and it reversed the decision of the Department. (*Ibid.*)

The case before us, however, does not present this paucity of findings and, altogether, appellants have provided no valid basis for the Board to question the ALJ's determination that the decoy's appearance complied with rule 141. This Board has on innumerable occasions rejected invitations to substitute its judgment for that of the ALJ on a question of fact when, as here, it is supported by substantial evidence. We must do so here as well.

II

Appellants contend that the decoy must appear in person before the Board in order for the Board to conduct an adequate review of the Department's decision.

Appellants are simply raising the same decoy-as-evidence argument we addressed at length — and firmly rejected — in *Chevron Stations* (2015) AB-9415. (See also *7-Eleven, Inc./Niaz* (2015) AB-9427; *7-Eleven, Inc./Jamreonvit* (2015) AB-9424; *7-Eleven, Inc./Assefa* (2015) AB-9416.) We offer only a summary of our reasoning here, and refer appellants to *Chevron Stations, supra*, for a more comprehensive analysis.

Section 23083 limits our review to evidence included in the administrative record. (Bus. & Prof. Code § 23083; see also *7-Eleven, Inc./Grover* (2007) AB-8558, at p. 3.) Section 1038(a) of the California Code of Regulations defines the items to be included in the administrative record — none of which conceivably allows for an actual human being. (See Cal. Code Regs., tit. 1, § 1038(a).) The properly compiled record — including testimony, arguments, photographs of the decoy, and the Department’s decision containing the administrative law judge’s (ALJ) firsthand impressions — is both legally and practically sufficient for the Board to determine whether the conclusions reached regarding the decoy’s appearance are supported by the evidence.

As we noted in *Chevron Stations, supra*, this argument has no merit and wholly lacks support in either law or logic. In our previous decisions addressing this issue, we strongly encouraged appellants to seek a writ of appeal if they disagree, and counsel at oral argument indicated that such a writ is forthcoming. Until such time as a writ is granted and this matter is resolved by an appellate court, we do not wish to see this argument again.

ORDER

The decision of the Department is affirmed.³

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

³This 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.