

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

AB-9476

File: 21-479755 Reg: 14080588

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy 9790
4440 Alamo Street, Simi Valley, CA 93063-1733,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: May 7, 2015
Los Angeles, CA

ISSUED MAY 20, 2015

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy 9790 (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, in 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 Barat Saltzman and Margaret Warner Rose of the law firm Solomon Saltzman & Jamieson, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M.

¹The decision of the Department, dated October 2, 2014, is set forth in the appendix.

Casey.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 14, 2009. On June 3, 2014, the Department filed an accusation against appellants charging that, on March 13, 2014, appellants' clerk, Rachel Carpenter (the clerk), sold an alcoholic beverage to nineteen-year-old Brian Schooler. Although not noted in the accusation, Schooler was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on August 13, 2014, documentary evidence was received and testimony concerning the sale was presented by Schooler (the decoy) and by Brian Wayne Parson, an agent for the Department. Appellants produced 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 Bud Light beer in bottles and took it to the sales counter. The decoy placed the beer on the counter, and the clerk scanned the beer and then asked the decoy for identification. The decoy handed his California driver's license to the clerk, and the clerk took possession of the license, appeared to look at it, and then handed it back to the decoy. The clerk continued with the sales transaction without asking the decoy any age-related questions, or any questions regarding the information on the decoy's driver's license. The decoy paid for the beer, received change, and then exited the store with the beer.

The Department's decision determined that the violation charged was proved and no defense to the charge was established. The Department imposed a penalty of 15 days' suspension.

Appellants then filed an appeal contending: (1) the Department's decision improperly omitted consideration of key evidence supporting appellants' rule 141(b)(2)² defense; and (2) the Board must view the decoy in person in order to properly review the Department's decision.

DISCUSSION

I

Appellants contend that the ALJ improperly omitted from consideration discussion of certain facets of the decoy's appearance that support appellants' defense. (App.Br. at p. 6.) Specifically, appellants claim the ALJ omitted discussion of the decoy's experience as a police explorer and law enforcement training, and failed to adequately discuss the decoy's previous experience as a minor decoy although each of these factors were specifically addressed by appellants' counsel during the administrative hearing. (*Id.* at pp. 6-7.)

Rule 141(a) requires "fairness" in the use of minor decoys:

A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors . . . and to reduce sales of alcoholic beverages to minors in a *fashion that promotes fairness*.

(Emphasis added.) To that end, rule 141(b)(2) provides, in pertinent part: "[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."

The requirements of rule 141 must be strictly obeyed: "The Department's

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.

increasing reliance on decoys demands strict adherence to the rules adopted of the protection of the licensees, the public and the decoys themselves.” (*Acapulco Restaurants, Inc. v. Alcoholic Bev. Control Appeals Bd.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.3d 126].) However, non-compliance with rule 141 is an affirmative defense with the burden of proof on the party asserting it. (*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 they 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)* 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

It is therefore the task of 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. (Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].)

The ALJ made the following findings of fact concerning the decoy’s appearance:

5. Decoy Schooler appeared and testified at the hearing. He stood about 6 feet, 1 inch tall and weighed approximately 147 pounds. His hair was short and “spiked” at the hearing. His hair was short and flat when he

visited Respondents [sic] store. When he visited Respondents' store on March 13, 2014, decoy Schooler wore a gray t-shirt and black basketball shorts. (See Exhibit 3). Shcooler's [sic] height has remained about the same since the date of the operation. He has gained about 7 pounds since then, although it is not noticeable in comparison to Exhibits 3 and 4. He also wore a black wrist watch. At Respondents' Licensed Premises on the date of the decoy operation, decoy Schooler looked substantially the same as he did at the hearing.

¶ . . . ¶

9. Decoy Schooler appears his age, 19 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 Carpenter at the Licensed Premises on March 13, 2014, decoy Schooler displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to clerk Carpenter. Decoy Schooler appeared his true age.

10. This was approximately the fourth time Schooler operated as a decoy. Decoy Schooler admitted to being a little nervous at Respondents [sic] store.

(Findings of Fact, ¶¶ 5-10.)

Based on these findings, the ALJ expressly rejected appellants' rule 141(b)(2) arguments:

5. Respondents argue that the decoy Schooler appeared older than 21 thereby violating Rule 141(b)(2). That argument is rejected. Decoy Schooler appeared and acted his true age. (Findings of Fact, ¶¶ 5 through 10) There was no evidence to the contrary.

(Conclusions of Law, ¶ 5.)

Appellants take issue with the ALJ's failure to consider, or failure to *adequately* consider, certain aspects of their rule 141(b)(2) arguments relating to the decoy's previous law enforcement training and past experience as a minor decoy. To support their position, appellants rely on various previous decisions of the Appeals Board, none of which are helpful to their case.

In *Garfield Beach CVS, LLC* (2014) AB-9381, for instance, the Board considered a case where the ALJ failed to make a specific conclusion of law regarding the appellants' rule 141(b)(3) defense. (*Garfield Beach CVS, supra*, at p. 5.) The Board observed that the ALJ's decision recited the legal standard for all portions of rule 141 except subdivision (b)(3), and determined there was compliance with other portions of the rule without mention of subdivision (b)(3). (*Ibid.*) The Board also noted that the decision addressed other legal arguments that were neither raised by the parties nor relevant to the facts of the case. (*Id.* at pp. 5-6.) In light of the woeful deficiencies in the ALJ's opinion in *Garfield Beach CVS*, the Board remanded the matter because it was "left to guess whether the ALJ ignored appellants' rule 141(b)(3) defense, or simply overlooked it in drafting the decision. (*Id.* at p. 6.)

In this case, by contrast, the only defense raised by appellants at the administrative hearing was pursuant to rule 141(b)(2) (see RT at pp. 46-47), and it was squarely rejected by the ALJ. Although the ALJ did not address every specific aspect of appellants' rule 141(b)(2) defense, this Board has stated many times that an ALJ need not provide a "laundry list" of factors he found inconsequential. (*7-Eleven, Inc./Patel* (2013) AB-9237; accord *Circle K Stores* (1999) AB-7080.) Indeed, "[i]t is not the Appeals Board's expectation that the Department, and the ALJ's, be required to recite in their written decisions an exhaustive list of the indicia of appearance that have been considered." (*Circle K Stores, supra*, AB-7080, at p. 4.) Moreover, "as the Board has said many times, there is no 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." (*Garfield Beach* (2015) AB-9430,

at p. 5.) As such, appellants' reliance on *Garfield Beach CVS, supra*, AB-9381 is misplaced.

Appellants also rely on *Circle K Stores, Inc.* (2010) AB-8919 for its statement that the "decision should contain enough of a description of the decoy's overall appearance to assure the Board that the [ALJ] has considered the decoy's overall appearance and has not focused on only a single facet of that appearance and ignored others that might support the appellant's burden of proof." (*Circle K Stores, Inc., supra*, at pp. 2-3; App.Br. at p. 5.) Notwithstanding this premise, the Board is not convinced that it applies here. As is evident on the face of the proposed decision, the ALJ expressly considered numerous aspects of the decoy's appearance, including his "physical appearance, dress, poise, demeanor, maturity, . . . mannerisms shown at the hearing, and his appearance/conduct in front of [the] clerk" on the date of the sale, as well as his previous experience as a minor decoy. (See Findings of Fact, ¶¶ 9-10.) Hence, the ALJ did not focus on only a "single facet" of the decoy's appearance in making his determination, and the cause for concern voiced by the Board's statement in *Circle K Stores, supra*, is altogether absent from this matter. As such, *Circle K Stores* is unavailing to appellants' position.

The remainder of appellants' argument is premised on the notion that the decoy's law enforcement training and previous experience as a minor decoy somehow made him appear older. (App.Br. at pp. 5-6.) While appellants cite *Azzam* (2001) AB-7631 in passing, they fail to note its critical holding that a decoy's experience and training are not per se indicative of a violation of rule 141(b)(2). As the Board observed:

Nothing in Rule 141(b)(2) prohibits using an experienced decoy. 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. While extensive experience as a decoy or working in some other capacity for law enforcement . . . may sometimes make a young person appear older because of his or her demeanor or mannerisms or poise, that is not always the case, and even where there is an observable effect, it will not manifest itself the same way in each instance. 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, supra*, at p. 5, emphasis in original.) Appellants have provided no evidence that the decoy's experience or training actually made him appear older on the date of the sale. Their argument that the decoy's training and experience had an observable effect on the decoy's appearance as seen by the clerk is clearly biased and wholly speculative. After all, the clerk did not testify at the hearing.

Appellants are essentially asking this Board to exercise independent judgment by reweighing the evidence, considering the same set of facts as the Department, and reaching the opposite conclusion — something the Board cannot do. As the Board has stated on many occasions, the ALJ is the trier of fact, and has the opportunity, which the Board does not, of observing the decoy as he testifies, and making the determination whether the decoy's appearance met the requirements of rule 141.

II

Appellants contend that, in order for the Board to fulfill appellants' constitutional and statutory right to a meaningful review, the Board must view the decoy in person. (App.Br. at pp. 7-8.)

Appellants are simply raising the same decoy-as-evidence argument that this Board has heard from appellants' counsel and rejected *ad nauseam*. Once again, we find this argument and appellants' counsel's repeated attempts to assert it frivolous.

We therefore strongly encourage appellants' counsel not to raise it 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

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.