

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

AB-9520

File: 21-463563; Reg: 14081439

CHIPS LIQUOR, INC.,
dba Chips Liquor
1207 West Florida Avenue, Hemet, CA 92543-3953,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 3, 2015
Los Angeles, CA

ISSUED DECEMBER 21, 2015

Appearances: *Appellants:* Ralph Barat Saltsman and Michelangelo Tatone, of the law firm Solomon Saltsman & Jamieson, as counsel for Chips Liquor, Inc.
Respondent: Kerry K. Winters, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Chips Liquor, Inc., doing business as Chips Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 25 days because its clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

¹The decision of the Department, dated May 21, 2015, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on April 23, 2008. On October 23, 2014, the Department filed an accusation charging that appellant's clerk, Marcos Lopez (the clerk), sold an alcoholic beverage to 18-year-old Nicholas Delgado on June 28, 2014. Although not noted in the accusation, Delgado was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on March 18, 2015, documentary evidence was received, and testimony concerning the sale was presented by Delgado (the decoy) and by Department Agent Vic Duong. Appellant presented no witnesses.

Testimony established that on the day of the operation, Agent Duong entered the licensed premises followed shortly thereafter by the decoy. The decoy went to the cooler where he selected a can of Bud Light beer. He took the beer to the sales counter, and the clerk asked to see his identification. The decoy handed the clerk his California driver's license, which had a vertical orientation and contained a red stripe indicating "AGE 21 IN 2017." (Exhibit 4.) The clerk looked at the ID, handed it back to the decoy, and told him the price of the beer. The decoy paid for the beer and exited the premises. Agent Delgado exited as well.

Agent Delgado reentered the premises and informed the clerk that he had sold alcohol to a minor. When the clerk stated that he had checked the minor's identification, he was shown the decoy's ID. The clerk indicated that he had made a mistake in calculating the decoy's age. The decoy reentered the premises with two other Department agents and did a face-to-face identification of the clerk who had sold him the alcohol. A photograph was taken of the decoy and clerk together (Exhibit 5), after which the clerk was cited.

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

Appellant filed a timely appeal contending the Department failed to proceed in the manner required by law by omitting reference to and failing to analyze the decoy's nonphysical characteristics supporting appellant's rule 141(b)(2)² defense.

DISCUSSION

Appellant contends that the Department failed to proceed in the manner required by law because the administrative law judge (ALJ) omitted from his proposed decision analysis of "key evidence" supporting its rule 141(b)(2) defense. (App.Br. at p. 5.) Appellant claims the ALJ failed to analyze the decoy's testimony regarding police training he received after beginning the Explorer program — before becoming a decoy — as well as the extent of the decoy's training while in the Explorer program. (*Ibid.*)

Rule 141(a) provides:

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 (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

To that end, 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." Rule 141 provides an affirmative defense, and the burden of proof lies with the party asserting it — here, appellant. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

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.

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:

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) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

In this case, the ALJ made the following factual findings concerning the decoy's overall appearance:

5. Delgado appeared and testified at the hearing. On June 28, 2014 he was 5'8" tall and weighed 175 pounds. He wore a black and gray t-shirt, tan cargo shorts, and sandals. His hair was cut so short that his scalp was visible. (Exhibits 3 & 5.) His appearance at the hearing was the same, except that his hair was slightly longer.

¶ . . . ¶

8. June 28, 2014 was Delgado's fourth or fifth time acting as a decoy. He was nervous the first time he was a decoy, but became less nervous over time. He was nervous while inside the Licensed Premises. At the time of this operation, Delgado had been an Explorer for four years. As an Explorer he attended an academy and received law enforcement training. On June 28, 2014, he held the Explorer rank of captain. Of the 19 locations which Delgado visited as a decoy as part of this operation, only three sold to him (including the Licensed Premises).

9. Delgado appeared his 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 and conduct in front of Lopez at the Licensed Premises on

June 28, 2014, Delgado displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Lopez.

(Findings of Fact, ¶¶ 5, 8-9.) These findings prompted the ALJ to reach the following conclusion regarding appellant's rule 141 defenses:

5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)^[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondent argued that Delgado's mature demeanor, Explorer training, and experience as a decoy gave him the appearance of a person over the age of 21. This argument is rejected. As noted above, Delgado had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 9.)

(Conclusions of Law, ¶ 5.)

The record reflects that the ALJ expressly considered a great many aspects of the decoy's physical and nonphysical appearance — including his experience and training as an Explorer, prior experience as a minor decoy, and his dress, poise, and demeanor — but nevertheless found that the decoy displayed the appearance which could generally be expected of a person under the age of 21.

Appellant disagrees with the ALJ's conclusion and states:

The ALJ, however, failed to recognize the unique extent of Mr. Delgado's experience, which included law enforcement training subsequent to his training from the Explorer Program. The decoy's subsequent law enforcement training was crucial to assess the general appearance displayed by the decoy on June 28, 2014, as it gave the decoy a calm and mature demeanor not seen in someone possessing the general appearance of someone younger than twenty-one. Did the law enforcement training impact Delgado's appearance? The decision should have but did not ask this question or then conduct that inquiry. The analysis, therefore, is incomplete.

(App.Br. at pp. 6-7.)

The fact that the ALJ did not specifically consider the effect of subsequent law enforcement training on this decoy's appearance does not render the ALJ's

determination an abuse of discretion. An ALJ is not required to provide a “laundry list” of factors he deems inconsequential. (See, e.g., *Lee* (2014) AB-9359, at p. 8; *7-Eleven/Patel* (2013) AB-9237, at p. 9; accord *Circle K Stores* (1999) AB-7080.) Indeed, “[i]t is not the Appeals Board’s expectation that the Department, and the ALJ’s [sic], be required to recite in their written decisions an exhaustive list of the indicia of appearance that have been considered.” (*Circle K Stores, supra*, at p. 4.) An ALJ’s failure to explain *all* of his reasons for a decision does not invalidate his determination or constitute an abuse of discretion. (See *Garfield Beach* (2014) AB-9430, at p. 5.)

As the Board explained in a recent opinion addressing the same attack on an ALJ’s findings that appellant makes here:

[T]his Board is entitled to review whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. (Cal. Const. art. XX, § 22; Bus. & Prof. Code. § 23084, subd. (c) and (d).) If this Board observes that the evidence appears to contradict the findings of fact, it will review the ALJ’s analysis — assuming some reasoning is provided — to determine whether the ALJ’s findings were nevertheless proper. Should this Board be faced with evidence clearly at odds with the findings and no explanation from the ALJ as to how he or she reached those findings, this Board will not hesitate to reverse. This should not be read to require an explanation or analysis to bridge any sort of “gap”; typically, the evidence an appellant insists is essential and dispositive is either irrelevant or has no bearing whatsoever on the findings of fact. While an ALJ may better shield himself against reversal by thoroughly explaining his reasoning, he is not required to do so. The omission of analysis alone is not grounds for reversal, provided findings have been made.

(*Garfield Beach CVS, LLC/Longs Drug Stores, LLC* (2015) AB-9501, at pp. 5-6.)

The Board’s position regarding the “experienced decoy” argument has been repeated countless times:

While the trier of fact must consider the entire person, physical and demeanor attributes, in determining the apparent age of a decoy, work or education experience and levels of responsibility attained do not, *ipso*

facto, aid in that determination or otherwise produce a given result. A person, all things considered, appears to be a certain age. Achievements and responsibility, while they certainly have a bearing on the apparent age, are just an inherent part of the appearance the decoy projects. They do not, independently, become elements which permit a magic addition of a year or two or three to a person's physical appearance.

(*Azzam* (2001) AB-7631, at p. 5, quoting *Prestige Stations, Inc.* (2001) AB-7624, at p. 3.)

In *Azzam* the Board went on to say:

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 (or any other employer, for that matter) 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.*

(*Id.* at p. 5, second emphasis added.)

Appellant has offered no *evidence* that the decoy's experience or training *actually resulted* in him displaying the appearance of a person 21 years old or older. Indeed, evidence of how the decoy appeared from the clerk's perspective would be nearly impossible to ascertain; the clerk did not testify at the administrative hearing. In the end, all the Board is left with is a difference of opinion — appellant's versus that of the ALJ — as to the conclusion that the evidence supports. Without more, this is simply an insufficient basis upon which to overturn the determination by the ALJ.

Even though we find no reversible error in this matter, we wish to emphasize that when an appellant raises an issue, it is the expectation of this Board that it will be

addressed in an ALJ's proposed decision. In *Garfield Beach CVS, LLC* (2014) AB-9381, we remanded the matter because of the ALJ's failure to reach a conclusion of law on a defense raised by appellants, and said that we were left to guess whether the ALJ had ignored the defense, or had simply overlooked it in drafting his decision. (*Id.* At p. 6.) Although we do not find it necessary to remand in this matter, in the future we would encourage less reliance on boilerplate language and more thorough consideration of all arguments raised — even if an ALJ wishes to discount or reject those arguments.

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.