

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

AB-9530

File: 21-477732; Reg: 15081853

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store 9923
1005 East Bidwell Street, Folsom, CA 95630-5548,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: April 7, 2016
Sacramento, CA

ISSUED MAY 2, 2016

Appearances: *Appellants:* Michelangelo Tatone, of Solomon Saltsman & Jamieson, as counsel for appellants Garfield Beach, LLC and Longs Drug Stores California, LLC.
Respondent: Dean Lueders as counsel for the Department of Alcoholic Beverage Control.

OPINION

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store 9923 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 15 days (with 5 days conditionally stayed for a period of one year) because their clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section

¹The decision of the Department, dated July 23, 2015, is set forth in the appendix.

25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On January 15, 2015, the Department filed an accusation against appellants charging that, on October 17, 2014, appellants' clerk, Jonah Munoz (the clerk), sold an alcoholic beverage to 19-year-old Varsha Prakash. Although not noted in the accusation, Prakash was working as a minor decoy for the Folsom Police Department at the time.

At the administrative hearing held on June 10, 2015, documentary evidence was received and testimony concerning the sale was presented by Prakash (the decoy) and by Deborah Holleran, store manager of the licensed premises.

Testimony established that on the day of the operation, the decoy entered the licensed premises and selected a six-pack of Bud Light beer. She took the beer to the counter, and the clerk asked to see her identification. The decoy handed the clerk her California driver's license, which had a portrait orientation and contained a red stripe indicating "AGE 21 IN 2016." (Exhibit 2.) The clerk glanced at the license and said "all right," then completed the sale.

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

Appellants then filed a timely appeal contending: (1) the administrative law judge (ALJ) erred in denying appellants' request to videotape the administrative hearing and by failing to include findings on why the request was denied, and (2) it was error for the ALJ to assess each of appellants' 141(b)(2)² arguments separately and ignore their cumulative effect.

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.

DISCUSSION

I

Appellants contend that the ALJ erred in denying appellants' request to videotape the administrative hearing and by failing to include findings on why the request was denied.

Appellants argue that the California Supreme Court's decision in *Emerson Electronics*, which addressed the use of videography in deposition, applies via analogy to Department administrative hearings. (App.Br. at p. 8, citing *Emerson Electronics Co. v. Superior Ct.* (1997) 16 Cal.4th 1101 [68 Cal.Rptr.2d 883].)

Appellants cite a footnote in which this Board noted the policy arguments in favor of videotaping administrative hearings: "Perhaps the time is now ripe for making digital recordings of all administrative hearings for review by the Board so that we can decide for ourselves whether the record of evidence presented is sufficient to support findings essential to the determination of legal issues." (App.Br. at p. 8, quoting *Garfield Beach CVS/Longs Drug Stores Cal., LLC* (2014) AB-9178a, at p. 7, fn. 2.)

Finally, appellants contend that the ALJ abused his discretion by failing to explain in his decision why he denied appellants' request. They maintain:

The ALJ's denial amounts to a question of law and not one of fact, subject to review by the appeals board. However, because there was no adequate record made by the ALJ for this Board to decide the issue on, this Board is unable to review the decision. Accordingly, due to the ALJ's error, the case should be reversed.

(App.Br. at p. 7.)

Section 11512(d) of the Government Code dictates reporting procedures for administrative hearings: "The proceedings at the hearing shall be reported by a stenographic reporter. However, upon the consent of all the parties, the proceedings

may be reported electronically."

This Board has recently received a number of briefs premised on the same interpretation of section 11512(d) — specifically, that the word "electronically" was intended by the legislature to encompass only audio recordings, and that a videorecorded transcript may be allowed — even absent a party's consent — provided it does not *replace* the stenographic transcript.

In the earliest of these appeals, the Board articulated its support for the notion of videorecorded transcripts generally, but nevertheless rejected appellants' strained interpretation of the statute:

According to the plain language of the statute, the consent of both parties is required before an administrative hearing may be reported by videorecording. Videorecording — along with audiorecording and all other recording methods that invariably depend on electricity — fall under the broad term "electronically." Because consent could not be obtained, denial of appellants' request was proper as a matter of law.

(*7-Eleven, Inc./Arman Corp.* (2016) AB-9535, at p. 8.) The law has not changed, and the facts in this case are, for purposes of this issue, indistinguishable. We therefore repeat our conclusion that "we cannot find error in the ALJ's refusal to allow the production of a video transcript, particularly where the videographer is paid by one party, and the other party has unequivocally exercised its statutory right to decline." (*Id.* at p. 21.)

Unless the legislature modifies section 11512(d) or a higher court shines a brighter light on its meaning, we consider this legal issue duly resolved.

II

Appellants contend that it was error for the ALJ to assess each of appellants' 141(b)(2) arguments separately and ignore their cumulative effect. (App.Br. at p. 10.) They maintain that by failing to consider the decoy's physical and nonphysical characteristics as a whole, the ALJ failed to consider the actual circumstances presented to the seller. (*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, appellants. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

We are 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].)

This Board has recognized the challenges inherent in evaluating compliance with rule 141(b)(2) and has set forth the standard by which it will review appearance findings:

An ALJ's task to evaluate the appearance of decoys is not an easy one, nor is it precise. To a large extent, application of such standards as the rule provides is, of necessity, subjective; all that can be required is reasonableness in the application. As long as the determinations of the ALJ's [*sic*] are reasonable and not arbitrary or capricious, we will uphold them.

(*O'Brien* (2001) AB-7751, at pp. 6-7 [rejecting collateral estoppel where separate ALJs in unrelated cases reached opposite conclusions regarding appearance of same decoy]; see also *Younan* (2012) AB-9198; *7-Eleven, Inc./Cacy* (2012) AB-9193; and *7-Eleven, Inc./Lobana* (2012) AB-9164 [each applying the *O'Brien* reasoning to an isolated rule 141(b)(2) defense].)

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

IV

The decoy was 4' 10" tall and weighed 95 to 100 pounds on the day of the decoy operation. Her hair was combed down and straight. She wore a sweater-shirt, black jeans, a black and white scarf, brown boots, and a diamond ring. She had on eyeliner, lip gloss, eye shadow, and light foundation. She felt nervous while in Respondents' store. A photograph (State's Exhibit 3) was taken of the decoy, holding the beer which Respondents' clerk had sold to her, standing next to the clerk.

V

The decoy had been a police explorer with the Elk Grove Police

Department for approximately 2 ½ years prior to [the] day of the decoy operation. As a police explorer, the decoy attended classes and training about being a police officer, worked as a volunteer at events, and, as a field training officer, trained seven or eight other explorers. The decoy had participated in more than twenty decoy operations prior to October 17, 2014, visiting between ten to sixteen licensed businesses on each operation.

VI

The decoy was 4' 10" tall and weighed 95 to 100 pounds on the day of the hearing. Her hair was shorter and wavier than her hair in the photograph.

Other than this difference, the decoy's appearance was similar to her appearance in the photograph. She sat with her hands folded and spoke softly. She appeared a little nervous, and stated that she was nervous.

VII

The photograph of the decoy, the testimony about her appearance on the day of the decoy operation, and her appearance at the hearing (including her demeanor, poise, and mannerism [*sic*]) show that the decoy did display the appearance which could generally be expected of a person under twenty-one years old when she purchased the beer at Respondents' store.

(Findings of Fact, ¶¶ IV-VII.)

Appellants contend the ALJ considered their arguments regarding the decoy's appearance individually and separately, rather than as a whole. (App.Br. at p. 11.) They maintain the ALJ was required to analyze the various factors cumulatively, rather than individually, in order to determine whether the decoy appeared over 21 under the actual circumstances presented to the clerk. (*Ibid.*) Appellants offer no authority for this position, however, and we know of none.

The ALJ considered and rejected each of appellants' 141(b)(2) arguments as follows:

II

Respondents argued that there was a violation of the Department's rule 141(b)(2) because the decoy wore make-up. This argument is rejected, as it has also consistently been rejected by the Alcoholic Beverage Control Appeals Board.

“(T)he fact that the decoy wore makeup has never been found by this Board to be justification for claiming the decoy appeared to be older than 21.” 7-Eleven/Johal Stores, Inc. (2014) Alcoholic Beverage Control Appeals Board Case Number AB-9403, page 5.

“Anyone who has walked around with eyes open would know that the use of makeup is not restricted to women over 21 years of age. . . .” 7-Eleven/Said (2011) Alcoholic Beverage Control Appeals Board Case Number AB-9118, page 6.

III

Respondents also argued that there was a violation of the Department’s Rule 141(b)(2) because of the decoy’s experience as an explorer and as a decoy. This argument is also ejected [*sic*]. There is no evidence that the decoy’s experience as an explorer and as a decoy made her appear older, or younger, than her age when she purchased the beer at Respondents’ store. Or, as the Alcoholic Beverage Control Appeals Board said, “The assertion that a decoy looked over the age of 21 simply because of prior experience as a decoy or police Explorer has been rejected by this board *ad nauseam*.” 7-Eleven/Said (2011) Alcoholic Beverage Control Appeals Board Case Number AB-9118, page 6.

IV

Finally, Respondents argued that there was a violation of the Department’s Rule 141(b)(2) because the decoy wore a diamond ring. This argument is also rejected. There is no evidence that Respondents’ clerk noticed the ring, or, how the ring made the decoy appear at least twenty-one years old.

As the Alcoholic Beverage Appeals Board [*sic*] said about a decoy wearing a wedding ring, “While a wedding ring may be seen as an indicator of age, it can only indicate that the person is at least 18. Can a person wearing a wedding ring display the appearance one could generally expect from a person under the age of 21? We believe the answer has to be yes. The presence of the wedding ring is only one thing to consider. It is certainly possible for someone wearing a wedding ring to have overall physical and behavioral features that clearly show he or she is under 21.” Circle K Stores (2001) Alcoholic Beverage Control Appeals Board Case Number AB-7641, page 3. The Appeals Board’s statement is just as applicable to the present case, where the decoy wore a diamond ring which was not a wedding ring.

(Determination of Issues, ¶¶ II-IV.)

We have reviewed the entire record. We find no flaws in the factual findings below, nor can we say that the conclusions reached by the ALJ are arbitrary or

capricious. The ALJ was aware of all the factors cited by appellants — makeup, experience, and diamond ring — and determined that the decoy appeared under the age of 21. As we have said many times, there is no requirement that the ALJ explain his reasoning, or, in this case, explain whether he considered the cumulative effect of these factors. Simply because the ALJ does not explain his analytical process does not invalidate his determination, or constitute an abuse of discretion.

In the instant case, appellants have offered no evidence that the decoy displayed the appearance of a person 21 years old or older during the decoy operation — regardless of whether the details of her appearance are considered separately or as a whole. Indeed, evidence of how the decoy appeared from the clerk’s perspective would be nearly impossible to ascertain since the clerk did not testify at the administrative hearing. In the end, all the Board is left with is a difference of opinion — appellants’ 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.

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.