

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

AB-9478

File: 21-477760 Reg: 14080038

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC
dba CVS Pharmacy Store #9833
4242 South El Camino Real, San Mateo, CA 94403-5133,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: July 9, 2015
San Francisco, CA

ISSUED JULY 31, 2015

Appearances by counsel:

Jennifer L. Oden of Solomon Saltsman & Jamieson for appellants Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, dba as CVS Pharmacy Store #9833.

Heather Cline Hoganson for the respondent Department of Alcoholic Beverage Control.

Opinion:

This is an appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending appellants' 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).

¹The decision of the Department, dated November 7, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On February 27, 2014, the Department filed an accusation against appellants charging that, on December 15, 2013, appellants' clerk, Scott Gahagen (the clerk), sold an alcoholic beverage to 18-year-old Remy Loubriel. Although not noted in the accusation, Loubriel was working as a minor decoy for law enforcement at the time.

At the administrative hearing held on August 19, 2014, documentary evidence was received and testimony concerning the sale was presented by Loubriel (the decoy). Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy went to the licensed premises with law enforcement officers. She entered the premises and went straight to the alcohol aisle, where she selected a bottle of Malibu Rum. She then proceeded to the checkout area. The decoy testified that there were customers in line in front of her, but could not recall how many.

Eventually the decoy was waited on by the clerk, who asked for her identification. The decoy produced her valid California driver's license, which bore her correct date of birth as well as a red stripe reading "AGE 21 IN 2016." The clerk examined the decoy's identification and said, "Your eyes are better than mine. What is your date of birth?" or words to that effect. The decoy responded with "September 13, 1995," her correct date of birth. The clerk returned the decoy's identification, scanned the bottle of rum, and proceeded with the sale. The decoy then exited the premises.

The Department's decision determined that the violation charged was proved and no defense was established. A penalty of fifteen days' suspension was imposed.

DISCUSSION

Appellants contend that the decoy appeared to be over the age of 21, in violation of rule 141(b)(2), because she had experience as a police Explorer; because she had served as a decoy on approximately 20 prior operations, each of which entailed visiting several premises; and because she admitted at hearing that her experience gave her confidence and, by the date of the instant operation, relieved her of any nervousness she felt when attempting to purchase alcohol. (App.Br. at p. 2.)

Rule 141 states, in relevant part:

(a) 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.

(b) The following minimum standards 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:

¶ . . . ¶

(2) 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.

This Board is bound by the factual findings in the Department's decision if 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.]

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani) (2004)

118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; see also *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628] ["In considering the sufficiency of the evidence issue the court is governed by the substantial evidence rule[;] any conflict in the evidence is resolved in favor of the decision; and every reasonably deducible inference in support thereof will be indulged."].)

The ALJ made the following findings of fact relevant to appellants' rule 141(b)(2) defense:

C. The decoy's overall appearance including her demeanor, her mannerisms, and her physical appearance were consistent with that of a person under the age of twenty-one years. There was no evidence presented that her appearance at hearing was different than on December 15, 2013.

1. On the day of the sale, the decoy weighed approximately 160 pounds, and was 5 feet, 7 inches tall. On the date of the hearing, [the decoy] was the same height and weight. [The decoy] has a fairly stocky frame, but she is not overweight. She wears her light brown hair over her shoulders and pulled back. Although the photocopy of her [California driver's license] makes [the decoy's] hair appear darker, she wears it in much the same style as is depicted on the [driver's license].

2. The decoy testified at hearing. [The decoy] spoke rather softly during her testimony, and her responses to questions were short and to the point. She did not appear overly nervous or apprehensive. [The decoy's] testimony was credible concerning the salient events surrounding the purchase of an alcoholic beverage in Repondents' premises.

3. [The decoy] was an Explorer with the Pacifica Police Department for about 2 ½ years, starting in February 2012 and culminating in the summer of 2014. As an Explorer, [the decoy] received training in car stops, report writing, citation writing, and domestic violence calls. The car stops were re-enacted and did not involve actually pulling drivers over. Likewise, the domestic violence training involved re-enactments to simulate real life events. She held no rank as an Explorer. She received no payment for participating as a minor decoy on December 15, 2013.

[The decoy] estimates she participated in "probably 20" prior decoy operations. She has become less nervous participating in decoy operations over time. Further, [the decoy] testified her training and experience have resulted in her being more confident. By December 15,

2013, she was no longer nervous during decoy operations. However, there was no credible evidence presented that [the decoy's] prior experience and training as a police Explorer, nor her experience as a minor decoy, caused or contributed to the clerk selling an alcoholic beverage to her. The selling clerk did not testify at the hearing.

4. After considering the decoy's overall appearance when she testified, and the way she conducted herself at the hearing, and the photograph on her [driver's license], a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under the age of twenty-one years under the actual circumstances presented to the seller at the time of the sale.

(Findings of Fact ¶¶ C.1 through 5.) Based on these findings, he rejected appellants' rule 141(b)(2) defense:

Respondents' counsel argues that . . . Rule 141, subsection (b) (2) was violated because the decoy did not present the appearance of a person under 21 years of age. Respondents' counsel contends the decoy's police explorer experience and her 20 prior decoy operations, coupled with her mature look and demeanor, violated the appearance standard set out in Rule 141(b)(2).

These arguments are rejected. The Court had the opportunity to observe the decoy at hearing and concluded [the decoy] displayed an overall appearance which could generally be expected of a person under the age of twenty-one years under the actual circumstances presented to the seller at the time of the sale. [See Findings of Fact II]

Respondents' arguments are also conjecture since the selling clerk did not testify and no other evidence was presented by the Respondents on the issue. The lack of evidence to support the Respondents' contentions is a material failure of proof and no affirmative defense was established.

(Determination of Issues II.)

With regard to the decoy's experience and confidence, appellants have failed to show how either factor is relevant. In their brief, appellants do not explain — let alone show with testimony or other evidence — how her Explorer and decoy experience would have any outwardly perceivable impact on her apparent age. As we have observed dozens of times:

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 or older.

(*Azzam* (2001) AB-7631, at p. 5, emphasis in original; see also *7-Eleven, Inc./Said* (2011) AB-9118, at p. 6 [“The assertion that a decoy looked over the age of 21 simply because of prior experience as a decoy or a police Explorer has been rejected by this Board *ad nauseum*.”].) The ALJ expressly acknowledged the decoy's experience on prior decoy operations and as an Explorer, and held that her appearance nevertheless complied with the rule. (Conclusions of Law ¶ 5.) We see no reason to doubt his conclusion.

Moreover, appellants explain the decoy's confidence and admitted lack of nervousness in detail (App.Br. at p. 6), but fail to show whether or how that confidence manifested in a outwardly visible manner that would mislead a seller into believing she over was the age of 21. As noted, appellants bear the burden of proof on a rule 141(b)(2) defense. We agree with the ALJ that the mere assertion that the decoy was not nervous is insufficient to carry that burden of proof.

Finally, the clerk did not testify, so there is no evidence indicating that he believed the decoy to be over 21 based on her experience or on some show of confidence. Indeed, the decoy's undisputed testimony indicates that he sold her the bottle of rum despite both viewing her identification *and* hearing her verbally recite her

correct date of birth. Appellants write that “the purpose of decoy operations . . . is limited to fairly test only for the licensee who ‘is lax, or does not care, or sells to whoever is in front of that seller.’” (App.Br. at p. 1, quoting *Assaedi* (1999) AB-7144, at pp. 3-4.) It seems the decoy operation served its purpose, since the facts of this case suggest pure laxity.

ORDER

The decision of the Department is affirmed.²

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

²This 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.