

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

AB-9501

File: 21-477564 Reg: 14081054

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #9236
50 North Ashwood Avenue, Ventura, CA 93003-1810,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED SEPTEMBER 25, 2015

Appearances: Melissa Gelbart of the law firm Solomon, Saltsman & Jamieson, for appellants Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #9236. Jennifer M. Casey, for respondent Department of Alcoholic Beverage Control.

OPINION

This appeal is from a decision of the Department of Alcoholic Beverage Control¹ suspending appellants' license for 10 days because their clerk sold an alcoholic beverage to a minor decoy in violation of Business and Professions Code section 25658, subdivision (a).

¹The decision of the Department, dated March 12, 2015, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On August 25, 2014, the Department filed an accusation against appellants charging that, on June 19, 2014, appellants' clerk, Yolanda Reyna (the clerk), sold an alcoholic beverage to 18-year-old Megan Soller. Although not noted in the accusation, Soller was working as a minor decoy for the Department at the time.

At the administrative hearing held on January 14, 2015, documentary evidence was received and testimony concerning the sale was presented by Soller (the decoy), and by Brian Parsons, an agent for the Department.

Testimony established that on the date of the operation, the decoy entered the licensed premises and was followed shortly thereafter by Agent Parsons. The decoy picked up a six-pack of Bud Light beer and took it to the register area, where she waited in line. When it was her turn to be served, the decoy set the beer on the sales counter, and the clerk scanned it. The decoy paid, and the clerk provided the decoy with change and bagged the beer. The decoy exited the premises followed approximately 30 seconds later by Agent Parsons.

The decoy met up with Agent Parsons outside of the licensed premises, and they discussed the sales transaction before re-entering the premises. Parsons contacted the clerk and explained the violation. Parsons then asked the decoy to identify the person who had sold her the beer, and the decoy pointed to the clerk and said that she had. The group moved to a back room where Parsons asked the decoy to identify the person who had sold her the beer a second time. Again, the decoy pointed to the clerk and said that she had. A photo of the decoy and the clerk standing next to one another was taken after which the clerk was cited.

The Department's decision determined that the violation charged was proved and no defense was established. Prosecuting counsel for the Department argued for a 15-day suspension but the administrative law judge (ALJ) ultimately proposed — and the Department adopted — a 10-day suspension.

Appellants then filed an appeal contending the Department erred in failing to consider evidence supporting appellants' rule 141(b)(2)² defense.

DISCUSSION

Appellants contend that the ALJ omitted key evidence of the decoy's nonphysical characteristics that supported their rule 141(b)(2) defense. More specifically, appellants contend that, in his proposed decision, the ALJ omitted reference to the decoy's testimony that she became more comfortable in her role as a decoy over the course of her participation in prior decoy operations. (See App.Br. at p. 3.) Additionally, appellants claim that the ALJ failed to reference the volume of locations that the decoy had visited prior to the operation at the subject licensed premises, and the effect of the decoy's work experience, if any, on her nonphysical appearance. (App.Br. at p. 5.) Altogether, appellants contend that, by failing to expressly consider these nonphysical characteristics and the observable effect they had on the decoy's overall appearance, the ALJ, and thus the Department, failed to proceed in the manner required by law. (*Ibid.*)

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

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.

offense.”

The requirements of rule 141 must be strictly obeyed: “The Department’s increasing reliance on decoys demands strict adherence to the rules adopted for 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.2d 126].) However, non-compliance with rule 141 is an affirmative defense, with the burden of proof lying with the party asserting it. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

Certain principles guide the Board’s review of the Department’s decision. 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].)

The ALJ made the following findings of fact concerning the decoy’s overall appearance, including her physical appearance, nonphysical appearance, and previous experience as a minor decoy:

9. Soller learned of the decoy program indirectly. She contacted the Department and volunteered. She had been a decoy once or twice before June 19, 2014 and had worked a shoulder-tap program. On June 19, 2014, two of twelve locations sold alcoholic beverages to her.

10. Soller 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 [the clerk] at the Licensed Premises on June 19, 2014, Soller displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to [the clerk].

(Findings of Fact ¶¶ 9-10.) Based on these findings, the ALJ reached the following conclusion regarding appellants' rule 141(b)(2) defense:

5. The Respondents 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 Respondents argued that Soller was confident based on her prior experience as a decoy. This confidence, in turn, made her appear mature. This argument is rejected — Soller had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 10.)

(Conclusions of Law ¶ 5.)

Contrary to appellants' contention, the ALJ made ample findings concerning the decoy's previous decoy experience and overall appearance, including her physical appearance, poise, demeanor, maturity, and mannerisms. While he may not have specifically referenced the decoy's "comfort level" with working as a minor decoy, or her work experience, he was not required to do so. 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.)

Notably, this 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.

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity to observe the decoy as she testifies, and make the determination whether the decoy's appearance met the requirement of rule 141 that she possess 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. The ALJ's findings and conclusions of law established that he considered a vast array of indicia of the decoy's age in making his assessment, and we see no reason to upset his determination.

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.