

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

AB-9650

File: 21-477781 Reg: 15083366

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store 9915
352 University Avenue,
Palo Alto, CA 94301-1715,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: David W. Sakamoto

Appeals Board Hearing: July 12, 2018
South San Francisco, CA

AUGUST 2, 2018

Appearances: *Appellants:* Donna Hooper, of Solomon Saltsman & Jamieson, as counsel for Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store 9915.
Respondent: Joseph J. Scoleri III 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 9915 (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 police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

1. The decision of the Department, dated May 11, 2017, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On November 20, 2015, the Department filed an accusation charging that appellants' clerk, Jemariah Jackson (the clerk), sold an alcoholic beverage to 17-year-old Dylan T. on August 21, 2015.² Although not noted in the accusation, Dylan was working as a minor decoy in a joint operation between the Palo Alto Police Department and the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on January 31, 2017, documentary evidence was received, and testimony concerning the sale was presented by Dylan (the decoy) and by Officer Daniel Ryan of the Palo Alto Police Department. Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises alone and selected a six pack of Budweiser beer. He carried the beer to the counter and waited in line behind two patrons. When it was his turn to make his purchase, he handed the six pack of beer to the clerk.

The clerk asked the decoy questions similar to "How are you?" and "Did you find everything okay?" The decoy indicated things were fine. The clerk then asked the decoy what he was buying the beer for. The decoy stated the beer was for a "party."

The clerk then asked for the decoy's identification. The decoy handed the clerk his identification with his purchase money. The clerk appeared to examine the decoy's

2. The decoy was a minor on the date of the operation. His surname is therefore omitted.

identification for about 30 seconds. The clerk returned the identification to the decoy along with his change and a sales receipt.

The decoy gave the clerk his valid, current California driver's license. The identification clearly stated the decoy's birthdate was 10/15/1997. In a red striped area it said "Age 21 in 2018." Within a blue striped section it stated "Age 18 in 2015." The decoy's driver's license was also in a vertical format, not a horizontal format.

Once the transaction was complete, the decoy carried the beer, the sales receipt, and his change towards the store's exit. Near the exit, he met with Officer Ryan. As the decoy remained near the store entrance with the beer, Officer Ryan approached the sales clerk. Officer Ryan informed the clerk that he was a police officer and that she had just sold an alcoholic beverage to a minor. He directed her to accompany him to the storeroom area of the premises and to get someone to replace her at the sales counter.

The decoy, Officer Ryan, the clerk, and either Officer Shaw or Department Agent Molthen gathered in the storeroom area of the premises. One of the officers asked the decoy to identify who sold him the beer. The clerk then looked in the decoy's direction. The decoy pointed his finger at the clerk and indicated she had sold the beer to him. The decoy felt embarrassed in literally pointing his finger at the clerk because to him, that would normally be an impolite gesture. The clerk was approximately five to ten feet from the decoy and she was facing him when he identified her to the officers. The decoy and the clerk had an unobstructed view of one another.

Officer Ryan asked the clerk if she had looked at the decoy's identification. She confirmed she had. The decoy removed his identification from his pocket and gave it to Officer Ryan. He, in turn, showed it to the clerk and pointed out to her that the

identification showed the decoy was not old enough to lawfully purchase alcoholic beverages.

After the clerk was shown the decoy's identification, it was returned to the decoy. A photo of the decoy and the clerk was taken, and Officer Ryan issued a citation to the clerk for selling an alcoholic beverage to a minor.

After the hearing, the Department issued a decision determining that the violation charged was proved and no defense was established.

Appellants then filed this appeal contending the ALJ failed to consider credible evidence supporting their rule 141(b) defense, including the decoy's confidence, experience, and his 60% "success rate."

DISCUSSION

Appellants contend the ALJ dismissed or ignored evidence supporting their rule 141(b)(2) defense, including the decoy's experience as an Explorer and as a decoy, his admitted confidence, and his so-called "success rate" at the five premises he visited on the day of the operation. (App.Br., at p. 6.)

Additionally, appellants call into question the conclusions the ALJ reached based on the evidence he did consider. For instance, appellants insist that a "Polo shirt and golf shorts are not typical teenage attire" and that he "wore his hair short and neat." (App.Br., at p. 7.) According to appellants, "there was nothing about [the decoy's] physical appearance that was typical of someone under 21 years of age." (*Ibid.*)

Rule 141(b)(2) states, in relevant part, "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." (Code Regs., tit. 4, § 141(b)(2).) The rule provides an affirmative defense, and the burden of proof lies with the party asserting it. (*Chevron Stations, Inc.* (2015) AB-9445, at pp. 3-16; *7-Eleven, Inc./Lo* (2006) AB-8384, at pp. 8-11.)

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

With regard to the decoy's appearance, confidence, experience, and success rate, the ALJ made the following findings:

6. On August 21, 2015, when the decoy visited Respondents' store, he stood 5' 8" tall and weighed approximately 155 pounds. He wore a black t-shirt. Due to a back injury, he was also wearing a brace that wrapped around his stomach and back area. Over that he wore a purple colored short-sleeved polo style shirt. He wore black golfing shorts and black and white tennis shoes. On his left wrist he wore a black military style wristwatch and on his right wrist he wore a medic alert band. He also wore a pair of sunglasses. However, when he was in Respondents' store, they were spun around 180 degrees so that the bottom of the lenses were resting on the rear of his upper neck area, while the arms of the sunglass frames were on [sic] resting on top of his ears. No part of the sunglasses covered his face. He had brown hair styled with a spike in it. (Exhibit 4- a photo of decoy and clerk taken at Respondents' store) His overall appearance at the hearing was basically the same, or very similar to, his

appearance on the date of the decoy operation at Respondents' premises.^[fn.]

[¶ . . . ¶]

15. The decoy was a Palo Alto police explorer for approximately 2-3 years prior to his visit to Respondents' store. As an explorer, he attended a police explorer academy which met every Sunday for nine Sundays.^[fn.] In the academy they studied various police topics including, but not limited to: how traffic accidents are handled; gun safety; and even traffic flare patterns. After the academy was over, his explorer post met on the first and third Wednesdays of the month. There they continued their studies of police related matters. By the date of the decoy's visit to Respondents' store, the decoy was the senior explorer, though the unit did not utilize formal ranks. The decoy helped coordinate and organize some of the explorer activities and schedules. The decoy is no longer a police explorer.

16. In July 2015, prior to visiting Respondents' store, the decoy participated in one or two prior decoy operations visiting multiple ABC licensed businesses on each occasion. At these prior decoy operations, police had instructed the decoy to go to the premises, attempt to buy a national brand of alcoholic beverage, present his identification if a clerk asked to see it, and disclose his true age if asked by the clerk. He was told to dress like a regular teenager and, as a safety factor, remain in sight of the police officers. Also, if he needed help quickly in the store, he should give a designated signal to the awaiting police officers.

17. By the time of the operation at Respondents' CVS store, the decoy felt confident in acting as a decoy. He felt he had a "system", to wit, he would have his money and identification in his pocket, not his wallet, so that his identification would be easy to produce if requested or needed. He was also comfortable with the concept that if the clerk asked for his identification he would show it, and if asked his age, he would disclose that to the clerk.

18. The decoy purchased an alcoholic beverage at three of five licensees he visited the same night of his visit to Respondents' store.

19. The decoy herein appeared his actual age, 17, 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 the clerk that sold the decoy his beer, the decoy displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the sales clerk herein.

(Findings of Fact, ¶¶ 6, 15-19.) Based on these findings, he reached the following conclusions of law:

8. Respondents contend the 17 year old decoy did not meet the appearance standard set forth under Rule 141(b)(2) because he was confident in that he knew what to do at Respondents' store based on his decoy experiences a month or so earlier. Even if the decoy did not feel nervous about acting as a decoy in Respondents' store, the decoy's state of mind does not constitute a defense to the accusation. Respondents did not establish how the decoy's mental state had the effect of making the decoy appear any older than his 17 years to the clerk. Respondents also did not show how the decoy's explorer scout experiences made him appear any older either. The fact that he purchased at three of five licensed premises he visited on August 21, 2015 also does not necessarily prove he appeared any older than his actual age. Further, Respondents' clerk did not testify at the hearing so as to establish her state of mind regarding the decoy's appearance on the day of the investigation. Also, Respondents' manager, who was later in the storeroom and shown the decoy's identification, did not testify at the hearing so as to establish any observations she made about the decoy that made him appear any older than his 17 years. Respondents' argument the decoy did not meet the appearance standard set forth in Rule 141(b)(2) is speculative, unsupported, and has no merit.

(Conclusions of Law, ¶ 8.)

Appellants complain that these conclusions amount to a failure to proceed in the manner required by law. (App.Br., at p. 6.) Citing past Board decisions, they argue that "an ALJ must consider all aspects of the decoy," including past experience and its effect on a decoy's physical appearance. (App.Br., at p. 7, citing *7-Eleven, Inc.* (2001) AB-7631.) According to appellants, the ALJ disregarded this evidence.

As an initial matter, appellants misinterpret this Board's decisions. As we recently clarified,

This Board has indeed held that an ALJ should not focus his analysis solely on a decoy's *physical* appearance and thereby give insufficient consideration to relevant *non-physical* attributes such as poise, demeanor, maturity, and mannerisms. (See, e.g., *Circle K Stores, Inc.* (2004) AB-8169; *7-Eleven, Inc./Sahni Enterprises* (2004) AB-8083; *Circle K Stores* (1999) AB-7080.) This should not, however, be interpreted to

require that the ALJ provide a "laundry list" of factors he or she found inconsequential. (*Lee* (2014) AB-9359; *7-Eleven, Inc./Patel* (2013) AB-9237; *Circle K Stores* (1999) AB-7080.)

(*7-Eleven, Inc./Mann Convenience Stores, Inc.* (2016) AB-9564, at pp. 5-6, emphasis in original [rejecting contention that the ALJ failed to consider the decoy's experience].)

We reiterate that holding here: the ALJ is *not* required to address evidence he finds inconsequential.

In this case, however, the ALJ did address the decoy's Explorer experience, his level of confidence, and his so-called "success rate" in both his findings and conclusions of law. He did not "dismiss" the evidence, but rather found it did nothing toward proving appellants' rule 141(b)(2) defense. In particular, he noted appellants' repeated failure to show how the decoy's experience, confidence, or success rate had any bearing whatsoever on his apparent age.

The ALJ's conclusion that appellants' arguments were "speculative, unsupported," and meritless is justified. (See Conclusions of Law, ¶ 8.) Even on appeal, appellants rely on unsupported generalizations, rather than actual facts. They contend, for example, that "[c]onfidence is an attribute that tends to make someone appear older and more mature," but never explain how confidence altered the appearance of *this particular decoy*. (App.Br., at p. 8.) Similarly, they would have this Board infer that a high "success rate" necessarily implicates the decoy's apparent age, when it could equally suggest that the operation successfully targeted premises with lax age verification practices. (See App.Br., at pp. 6-7.) Appellants do not argue or show why their preferred interpretation is more valid. (See generally App.Br.) Unsupported inferences and broad generalizations are not proof. The ALJ did in fact consider the evidence, but properly found it did not prove appellants' defense.

Most tellingly, appellants' argument depends largely on shifting the burden of proof. They write, "The burden is on the Department to show adherence and conformity to its own rules," and cite as support *Southland Corporation/RAN, Inc.* (1998) AB-6967. In a detailed opinion, this Board emphatically rejected *Southland's* interpretation of the burden of proof in a rule 141 affirmative defense. (See *Chevron Stations, supra*, at pp. 3-16 [detailing *Southland's* misstatement of the law, as well as its tendency to invite purely speculative rule 141 defenses].) In this case, as in all rule 141 defenses, the burden of proof lay with the appellants, and they failed to carry it.

ORDER

The decision of the Department is affirmed.³

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
MEGAN MCGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

3. This 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.