

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

AB-8868

File: 21-439680 Reg: 07066126

GARFIELD BEACH CVS LLC, dba CVS Pharmacy 9195
8831 Villa La Jolla Dr., La Jolla, CA 92037,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: June 4, 2009
Los Angeles, CA

ISSUED AUGUST 19, 2009

Garfield Beach CVS LLC, doing business as CVS Pharmacy 9195 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for its clerk selling or furnishing alcoholic beverages to two people under the age of 21 in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Garfield Beach CVS LLC, appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Julia H. Sullivan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer Casey.

¹The decision of the Department, dated March 17, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on July 6, 2006. On June 19, 2007, the Department filed an accusation charging that appellant's clerk, Amanda Miranda (the clerk), sold or furnished alcoholic beverages to Sung Mun Ahn and Benjamin Ro (collectively, the minors), both 19 years old, on May 17, 2007.

At the administrative hearing held on January 15, 2008, documentary evidence was received and testimony concerning the sale was presented by the minors and by Department supervising investigator Matthew Hydar. Appellant presented no witnesses.

The testimony established that the minors entered the licensed premises together and went to the alcoholic beverage section, where they selected two 6-packs and a 12-pack of beer and a bottle of Southern Comfort. They each carried two of the items to the counter and placed them there. Ro stepped back a few feet and made a phone call.

The clerk asked Ahn for identification and he gave her the expired California driver's license of another person. The license showed the owner to be 27 years old and the photograph on the license did not look at all like Ahn. The clerk looked at the license, handed it back to Ahn, and completed the sale. Ro carried some of the purchases out of the store, while Ahn carried the rest.

The minors were stopped outside by investigator Hydar. Ahn admitted that he had used the expired license to purchase the beer, and both eventually admitted they were only 19 years old.

Subsequent to the hearing, the Department issued its decision which determined that the violations charged were proved and no defense under Business and Professions Code section 25660 was established.

Appellant filed an appeal contending: (1) the Department erred when it sustained count 2 because it applied an incorrect standard, and (2) the Department engaged in improper ex parte communications during the time this case was heard and decided.

DISCUSSION

I

Appellant contends that count 2, charging the furnishing of alcoholic beverages to Ro, was erroneously sustained because the administrative law judge (ALJ) used the wrong standard to assess whether alcoholic beverages have been furnished to a person who accompanies an underage purchaser, but who does not participate in the purchase transaction itself.

The statements to which appellant objects are found in Conclusions of Law, paragraph 9:

Any time two persons carry a large quantity of alcoholic beverages to the register for purchase, both persons deserve inspection for legality whether both pay or not. Ro stood back during the sales transaction because he did not want to answer any questions about his age. But he was right there. (Finding of Fact, ¶ 6.) As soon as Ahn had completed the purchase, Ro stepped up and carried half the beverages out of the store. (Finding of Fact, ¶ 7.) Clerk Miranda is responsible, at least for furnishing those alcoholic beverages to Ro.

Appellant states that three problems exist with this "standard": (1) the presumption that further investigation is warranted "any time two persons carry" alcoholic beverages to the counter; (2) the presumption that "a large quantity of alcoholic beverages" requires further investigation, and (3) the lack of any legal support for what appears to be a statement of law imposing obligations on license holders.

We do not agree with appellant that the ALJ has set up "an overly broad and potentially unobtainable obligation for licensees to uphold." (App. Opening Brief at p. 4.)

Appellant breaks down the ALJ's statement, making it into separate presumptions for two people carrying alcoholic beverages and large quantities of alcoholic beverages. The ALJ used these two factors together, however, saying that further investigation is warranted when two people bring a large quantity of alcoholic beverages to the counter. Inherent in the statement is the qualification that at least one of the people involved appears that he or she could be under the age of 21. We believe this is simply a statement of what any reasonably prudent person selling alcoholic beverages should, and would, do to protect his or her license.

Appellant argues that this "standard" will subject licensees to discipline for situations such as a child accompanying a parent who purchases alcoholic beverages. The Board rejected this argument when it was made in *Circle K Stores, Inc.* (2004) AB-8209, pointing out the obvious differences between the parent/child situation and the "group purchase" situation, such as in the present case. The Board said:

The clerk is the person in control of the sale. He or she must be alert to the substance of the transaction, and cannot ignore circumstances that ought to raise questions in the mind of a reasonably prudent person. When the transaction is in the nature of a group purchase, as the one in this case appeared to be, a clerk must establish that each of those who are involved in the transaction [is] 21 or over. It is not enough that the person who assembles the various selections and pays for them is 21. A clerk may not close his or her eyes to the reality of what is taking place. The critical fact in this case is not the mere presence of minors, it is their participation in the transaction, all of which took place in front of the clerk.

As with other aspects of sale-to-minor violations, the seller is held to the standard of a reasonably prudent person observing what is before him or her to see, no more, no less.

As for the alleged lack of legal support for the ALJ's statement, we simply note that appellant, which has the burden of showing error in the Department's decision, has not provided any legal support for its position.

II

Appellant contends that the Department continued to engage in prohibited ex parte communications during the time this case was heard and decided. It also asserts that the Department violated its own General Order No. 2007-09.

The first argument is a familiar one that the Board has rejected many times before. This matter was heard after the adoption by the Department of General Order No. 2007-09. The Appeals Board has made it clear that the Department, by its adoption and implementation of General Order No. 2007-09, has effectively eliminated any basis for claims its prosecutors communicated ex parte with its decision maker.² The Board has held that adoption and implementation of General Order No. 2007-09 shifts the burden of proof to appellant. Since appellant has no proof of an ex parte communication occurring, we reject this contention.

Appellant's second assertion is based on assumptions regarding Department internal procedures and a convoluted analysis of the assumptions. The assumptions and analysis appear to be as follows: In some cases, the Hearing and Legal Unit of the Department requested comments from the parties before the ALJ's proposed decision was sent to the Director for final decision; therefore, the Hearing and Legal Unit must have made a legal review of the proposed decision, in contravention of General Order No. 2007-09; even if, as in this case, comments were not solicited by Hearing and Legal, there still was an ex parte communication because the file without the parties' comments was, by implication, a statement to the Director that the Department had no

² The Board's views, and its assessment of the General Order, can be seen in a number of recent decisions of the Board. (See, e.g., *7-Eleven, Inc./Gonzalez* (2009) AB-8779; *Garfield Beach CVS, LLC* (2009) AB-8784; *Garfield Beach CVS, LLC* (2009) AB-8768.)

objection to the proposed decision. Appellant equates this with a recommendation to adopt the proposed decision.

It is possible, of course, that the Department could have developed a nefarious scheme to violate the directive of the California Supreme Court, its own General Order No. 2007-09, and the due process rights of licensees. We find it impossible, however, to take this contention seriously, as the likelihood of such a scheme being conceived and executed by the Department is, we believe, infinitesimal.

In any case, we will not interpret the possible lack of a document in a file to constitute a prohibited ex parte communication. While there are more reasons to reject this contention, we will limit ourselves to pointing out that the circumstances appellant insists require reversal did not occur in the present case. Appellant's contention is meritless, frivolous, and unworthy of consideration.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, 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.