

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

AB-9138

File: 21-477835 Reg: 10073173

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store #3056
2293 H Dela Rosa Sr. Street, Soledad, CA 93960,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: October 6, 2011
Los Angeles, CA

ISSUED DECEMBER 2, 2011

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store #3056 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk selling an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, appearing through their counsel, Soheyl Tahsildoost, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kelly Vent.

¹The decision of the Department, dated October 25, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On May 13, 2010, the Department filed an accusation against appellants charging that, on March 20, 2010, appellants' clerk sold an alcoholic beverage to 17-year-old Sylvia Ramirez. Although not noted in the accusation, Ramirez was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on September 14, 2010, documentary evidence was received and testimony concerning the sale was presented by Ramirez (the decoy).

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

Appellants then filed an appeal contending: (1) The decoy did not display the appearance required by rule 141(b)(2);² (2) rule 141(a) was violated; and (3) the decision fails to account for mitigating factors.

DISCUSSION

I

Appellants maintain that the decoy did not display the appearance required by rule 141(b)(2), which dictates: “[t]he 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.”

The administrative law judge (ALJ) made the following findings about the decoy’s

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.

appearance in Findings of Fact II:

The decoy was approximately 5'2" tall and weighed approximately 135 pounds on the day of the hearing and on the day of the decoy operation. She had participated in seven or eight decoy operations prior to March 20, 2010. She was nervous during her first decoy operation and was not less nervous on the March 20 operation.

The decoy appeared nervous while testifying. She spoke softly, giving short, direct answers to the questions asked. The Administrative Law Judge observed the decoy's mannerism [*sic*], demeanor, and poise while the decoy testified.

Based on this observation, the testimony concerning the decoy's appearance on March 20, 2010, and a copy of a photograph of the decoy and the clerk taken that day, the Administrative Law Judge finds that the decoy appeared under twenty-one years old when she purchased the beer at Respondent store.

Appellants argue that the decoy displayed the appearance of a person over the age of 21 based on her "stocky build" (App.Br. at p. 5). Appellants seem to suggest that a decoy of this height and weight would necessarily appear mature, yet we fail to see how stockiness necessarily equates to an appearance of a person over the age of 21. This Board has repeatedly declined to substitute its judgment for that of the ALJ on this question of fact. Minors come in all shapes and sizes, and we are reluctant to suggest, without more, that a minor decoy of large stature automatically violates the rule.

Appellants also point to the decoy's use of short direct answers, her prior experience as a decoy, and the fact that she wore some makeup during the decoy operation as factors contributing to her more mature appearance, but these too are factual determinations. The ALJ had the opportunity to observe the physical appearance and mannerisms of the decoy as she testified, and, taking all those indicia of age into account, concluded that she displayed the appearance of a person under 21

years of age.

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as she testifies, and making the determination whether the decoy's appearance met the requirement of rule 141 that she possesses 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.

We are not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy lacked the appearance required by the rule, and an equally partisan response that she did not.

II

Appellants contend that rule 141(a) was violated because, they allege, a reasonable person would have believed that the ABC investigator who entered the premises after the decoy, and who stood in line behind her to purchase some tape [RT 17], was somehow associated with the decoy -- thereby making the decoy appear older, and possibly of age. Further, appellants allege that it was unfair to utilize a "professional, paid decoy." (App.Br. at p. 6.)

Rule 141(a) provides:

(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 (persons under the age of 21) and to reduce sales of alcoholic beverages to minors *in a fashion that promotes fairness*. [Emphasis added.]

Appellants maintain that the facts in this case indicate unfairness in that the decoy appeared to be "accompanied" by the investigator, thus making the decoy appear older

than her true age.

Unlike a previous case (*Hurtado* (2000) AB-7246), in which a 27-year-old undercover police officer shared a table with the decoy, both the officer and the decoy ordered beers, and the Board found that the operation was unfair because of the officer's active involvement, this case lacks active participation by the officer. In the instant case, the investigator entered the premises after the decoy, stood in line behind her where she observed the transaction, and no evidence was presented that the clerk in any way believed that the investigator and decoy were associated with one another. The clerk did not testify, so any effect this may have had on the clerk's perception would be mere speculation in any case.

Appellants also argue that this decoy operation was unfair because the decoy received compensation, thus giving her an incentive to prolong the operation. They argue: "since the operation is prolonged by a successful sale to a clerk, the decoy has incentive to sell to the clerk." (App.Br. at p. 6.) Since the decoy is not the one making a sale we must assume that appellants are trying to say the decoy had a financial motivation to convince the clerk she was over the age of 21, since a successful purchase would take longer than an unsuccessful one.

This argument has no basis in the record. The ALJ notes in Findings of Fact III that "[t]he decoy received compensation for some of her earlier decoy operations. There is no evidence whether she received compensation for the March 20 operation." Although appellants describe this decoy as a "professional, paid decoy" (*id.*) they fail to offer any explanation or to cite any authority to support their position; nor do they present any meritorious argument in support of their contention.

We do not find these arguments persuasive.

III

Appellants contend finally that the decision fails to properly account for all relevant mitigating factors – in particular, appellants’ “more than one year of discipline free licensure.” (App.Br. at p. 7.) Appellants have been licensed since June 22, 2009.

Department Rule 144 (4 Cal. Code Regs., §144), which sets forth the Department's penalty guidelines, provides that higher or lower penalties from the schedule may be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances. Mitigating factors may include, but are not limited to, the length of licensure without prior discipline or problems, positive action by the licensee to correct the problem, documented training of licensee and employees, and cooperation by the licensee in the investigation.

“[U]nless the record affirmatively indicates otherwise, the trial court is deemed to have considered all relevant criteria, including any mitigating factors.” (*People v. King* (2010) 183 Cal.App.4th 1281, 1322 [108 Cal.Rptr.3d 333].)

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].)

The extent to which the Department considers mitigating factors is a matter within its discretion, and the Board may not interfere with that discretion absent a clear showing of abuse of discretion. Appellants’ belief that the penalty should have been less does not show that the Department abused its discretion in imposing the penalty.

The penalty imposed was the standard penalty under the Department's penalty

guidelines pursuant to rule 144, considering that this license had been in place for only nine months on the day of the decoy operation. Appellants have not shown that the Department abused its discretion in imposing the standard penalty.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
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.