

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

AB-9187

File: 21-477641 Reg: 11074238

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store 9904
3667 Castro Valley Boulevard, Castro Valley, CA 94546-4403,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: July 12, 2012
Sacramento, CA

ISSUED AUGUST 14, 2012

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store 9904 (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 police 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, Ralph B. Saltsman and D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Heather Hoganson.

¹The decision of the Department, dated August 17, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On February 2, 2011, the Department filed an accusation against appellants charging that, on June 30, 2010, appellants' clerk, Cindy Peixoto (the clerk), sold an alcoholic beverage to 18-year-old Nicholas Mitchell (the decoy). Although not noted in the accusation, the decoy was working for the Alameda County Sheriff's Department at the time.

At the administrative hearing held on May 11, 2011, documentary evidence was received and testimony concerning the sale was presented by the decoy and by Bret Scheuller, an officer with the Alameda County Sheriff's Department. Testimony at the hearing established that the decoy entered the premises, selected a can of Bud Light beer, and purchased it from the clerk. The clerk did not request identification from the decoy or inquire about his age. After the purchase, the decoy exited the premises, and then returned with two sheriff's officers. The decoy initially identified the clerk who sold him the alcohol as they entered the premises. The officers then approached the clerk and informed her that she had sold alcohol to a minor, and confirmed with the decoy that this was the clerk. The clerk admitted to the sale and was subsequently cited.

The Department's decision determined that the violation charged was proved and no defense to the charge was established. Appellants then filed a timely appeal contending that rule 141(b)(5)² was violated.

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.

DISCUSSION

Appellants contend that the administrative record does not support the findings of facts by the administrative law judge (ALJ) that a proper face-to-face identification occurred.

Rule 141(b)(5) provides:

Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

If any of the requirements of rule 141 are violated, subdivision (c) of the rule provides that the licensee has a complete defense to a sale-to-minor charge.

Appellants assert that this decoy operation did not strictly comply with rule 141(b)(5) as required by *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126] (*Acapulco*), because, they allege, the actual face-to-face identification did not occur until after the issuance of a citation when a photo of the clerk and decoy was taken. (Exh. 2.) The initial identification of the clerk by the decoy, which occurred as the decoy and the officers entered the premises, took place at a distance of approximately 15 to 20 feet. Appellants maintain that this was too far away to satisfy the requirements of rule 141(b)(5).

The ALJ made the following findings of fact in regards to the face-to-face identification (FF III-IV):

III

After purchasing the beer, the decoy exited the store with it. He returned to the store with Alameda Sheriff's deputies. While standing on the customer side of the counter, "directly in front of the clerk" who sold the

beer, the decoy identified her as the seller. The identification was made to the sheriff's deputies.

IV

One of the deputies then asked the clerk whether she had sold the beer to the decoy, and the clerk replied that she did.

These findings are confirmed by the testimony of Sergeant Scheuller [RT 36-39], on which the ALJ relies:

Q: Sergeant, first of all, how did you know that this was the clerk who sold the alcohol?

A: 'Cause when we entered the store, our decoy identified the clerk immediately. We went over and contacted her.

Q: And when you say you "went over," what – could you be a little more specific.

A: So she was at the cash register, which I believe was the farthest, west end of the store. She was standing there. We walked in. We asked our decoy to point out the clerk that sold the alcohol. He pointed her out, and we walked directly over to her. And Deputy Gosal confronted her, asked her if she sold alcohol to his person, and she admitted that she had.

[¶ . . . ¶]

Q: Wait. So did he [the decoy] confirm it – did he identify her more than once? That's what I'm trying to –

A: Yes. It was a process. He identified her initially when we walked in, so we could know where to go. She was the only clerk, I believe, that was working at the time. He pointed to her.

We walked over to her. We confirmed with him, "Is this the person?"

He said yeah.

Q: You asked him again?

A: Yes, "Confirm that this is the person who sold you the alcohol."

He said yes.

Deputy Gosal asked her, "Did you sell this person alcohol?"

And she said yes.

[¶ . . . ¶]

A: When we walked over there, we stood directly in front of her and had him confirm, "Is this the person?"

He did. He confirmed it.

We asked her – Deputy Gosal asked her.

And she admitted that she had sold the alcohol to him.

The ALJ acknowledges appellants' objection to the face-to-face identification in

Determination of Issues III:

Respondent argued that an earlier identification of the clerk – when the decoy and the sheriff's deputies were standing near the door – failed to meet the requirement of Rule 141(b)(5). In light of the conclusion that the subsequent identification complied with Rule 141(b)(5), Respondent's argument is rejected as moot.

In *Chun* (1999) AB-7287, the Board explained the concept of "face-to-face" as follows:

The phrase "face to face" means that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

Although the testimony of Sergeant Scheuller could certainly have been clearer as to the sequence of events, the Board must defer to the factual determinations of the ALJ as long as they are not clearly unreasonable. The standard of review is as follows:

We are bound to construe the evidence in the light most favorable to the ALJ's decision. (*Kirby v. Alcoholic Bev. etc. App. 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;' " Bus. & Prof. Code, § 23090.2; see also *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514 [113

Cal.Rptr. 836, 522 P.2d 12] ["the reviewing court must resolve reasonable doubts in favor of the administrative findings and decision".])

(Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.

(2002) 103 Cal.App.4th 1084, 1087[127 Cal.Rptr.2d 652].)

The fact that the clerk in this matter admitted to the deputies that she had sold alcohol to a minor, and realized the consequences of her action by saying she was going to be fired, convinces us that the clerk not only had been identified, but that she knew she had been identified.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
BAXTER RICE, 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.