

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

AB-9197

File: 21-479443 Reg: 10073918

GARFIELD BEACH CVS LLC, and LONGS DRUG STORES CALIFORNIA LLC,
dba CVS Pharmacy #5809
4775 West Rosecrans Avenue, Hawthorne, CA 90250,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: August 16, 2012
Los Angeles, CA

ISSUED SEPTEMBER 26, 2012

Garfield Beach CVS LLC, and Longs Drug Stores California LLC, doing business as CVS Pharmacy #5809 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk having sold an alcoholic beverage to Joseph Maestro, Jr., a 19-year-old minor, 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 Barat Saltsman and Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer Casey.

¹The decision of the Department, dated October 11, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 8, 2009. On December 10, 2010, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage (Heineken beer) to Joseph Maestro, a 19-year-old minor. Although not stated in the accusation, Maestro was working as a decoy for the Hawthorne Police Department.

At an administrative hearing held on August 11, 2011, documentary evidence was received and testimony concerning the violation charged was presented by Maestro, the decoy, and by Aimee Yoshida, a Hawthorne police lieutenant.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proved, and no affirmative defense had been established.

Appellants have filed a timely appeal, and now contend that there was no compliance with Department rule 141(b)(2) (4 Cal. Code Regs., §141, subd. (b)(2).)

DISCUSSION

Once again we are confronted with the issue whether the ALJ correctly determined that the minor decoy involved in a police decoy operation displayed the appearance required by rule 141(b)(2).

Rule 141(b)(2) requires that a minor decoy 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." Appellants challenge the ALJ's findings that the decoy displayed the appearance the rule requires. They argue that the combination of his two and one-half years of law enforcement training with the Hawthorne Police Department, his

appearance as a mature Hispanic male with a mature face, a shaved head, and a 5 o'clock shadow, reinforced by a photograph of him taken on the day of the decoy operation, together generate the appearance of a male over the age of 21. Appellants cite *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652] (*The Southland Corporation*), and its language describing the photo of the decoy as "arguably the most important piece[s] of evidence in considering whether the decoy displayed the appearance of someone under 21 years of age."

It is the court of appeal, not the Appeals Board, which has referred to the photograph of the decoy taken on the date of the transaction as arguably "the best evidence for determining how a decoy appeared." In the very same paragraph of the court's opinion quoted in appellants' brief, the court cautioned that "[w]hile one could look at the photograph and reasonably conclude that the decoy appeared to be older than 21 years of age, we cannot say that, as a matter of law, a trier of fact could not reasonably have concluded otherwise."

(*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board, supra*, at p.1094.)

The court's language could have been written for this case. Even were we to agree with appellants' argument that the decoy appeared to be older than 21 years of age, we still cannot say as a matter of law that the trier of fact could not reasonably have concluded otherwise. Simply put, we are not permitted to reweigh the evidence.

Appellants' argument that the ALJ "lacked sufficient evidence to support his findings" (App. Br., p. 6) also misses the mark. First, we note the obvious - the ALJ saw and heard the decoy as he testified. That in itself constitutes substantial evidence.

(See *The Southland Corporation/Amir* (2001) AB-7464a.)

The ALJ carefully delineated in his findings of fact (FF) and conclusions of law (CL) the factors he took into account in his assessment of the decoy's appearance, including the photos:

FF 5: Maestro appeared and testified at the hearing. He stood about 5 feet, 5 inches tall and weighed approximately 170 pounds. His hair was cut short. When he visited Respondents' store on May 27, 2010, he wore a gray t-shirt, blue pants and black tennis shoes. (See Exhibit 3A). Maestro's necklace, which is visible in Exhibit 3A and 3B, was not visible when he went to Respondents' store. At all times while Maestro was inside Respondent's store the necklace was underneath the gray t-shirt and not visible. Maestro did wear a watch during the operation. (See Exhibit 2). Maestro has grown about one inch in height and lost about 10 pounds since the date of the operation. At Respondent's Licensed Premises on the date of the decoy operation, Maestro looked substantially the same as he did at the hearing.

FF 9: Decoy Maestro appears his age, 19 years of age 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/conduct in front of Clerk Ramirez at the Licensed Premises on May 27, 2010, Maestro displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to Ramirez. Maestro appeared his true age.

CL 6: Respondents also argue that Rule 141(b)(2) was violated because the decoy appeared to be over 21 years of age. This argument is also rejected. Decoy Maestro appeared his true age, 19 at the time of the operation. (Findings of Fact, ¶¶ 4 through 10)

We agree with the Department that appellants are asking this Board to examine the decoy's appearance and substitute a finding more favorable to them. But this Board cannot overturn or disregard a finding of fact by the Department merely because a contrary finding would have been equally or more reasonable. The Department's factual findings, when supported by substantial evidence, as they are here, are binding on the Appeals Board. (*Harris v. Alcoholic Beverage Control Appeals Board* (212

Cal.App.2d 106, 114 [28 Cal.Rptr. 74.]

ORDER

The decision of the Department is affirmed.²

FRED ARMENDARIZ, CHAIRMAN
BAXTER RICE, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

² This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.