

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

AB-9293

File: 21-477618 Reg: 12076262

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy 9893
2439 North 11th Avenue, Hanford, CA 93230-1426,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: July 11, 2013
Sacramento, CA

ISSUED JULY 30, 2013

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy 9893 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their off-sale general license for fifteen 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 Barat Saltzman and D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kelly Vent.

¹The decision of the Department, dated July 27, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. Thereafter, the Department instituted an accusation against appellants charging that, on December 2, 2011, appellants' clerk sold an alcoholic beverage to 17-year-old Amaranta J.² Although not noted in the accusation, Amaranta J. was working as a minor decoy for the Hanford Police Department at the time.

An administrative hearing was held on May 9, 2012, at which time documentary evidence was received, and testimony concerning the sale was presented by Amaranta J. (the decoy).

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellants filed a timely appeal, and contend that there was no compliance with rule 141(b)(5).³

DISCUSSION

A single issue is raised by this appeal. Was there compliance with rule 141(b)(5)?

The ALJ's findings with respect to the 141(b)(5) identification are set forth in Finding of Fact II-C, and are based solely on the testimony of the decoy (the clerk did

²The decoy is a juvenile and, therefore, her full name was not used in the accusation, the hearing record, or the Department decision, and is not used here.

³Rule 141(b)(5) states:

(5) 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 to make a face to face identification of the alleged seller of alcoholic beverages.

not testify):

C. The decoy re-entered the premises to conduct a face-to-face identification of the seller. The law enforcement officers involved in the operation, Detective Petacorvo and the Department agent entered with her. As the decoy and the officers entered the premises through the front door, one of the officers asked Amaranta who sold her the beer. The decoy pointed to the clerk and said “that’s him.” At this time, the decoy and the officers were about five to seven feet away from the clerk. The clerk was waiting on a customer, but he looked at them as they walked in. The decoy and the officers were about five to seven feet away from the clerk. The clerk was waiting on a customer, but looked at them as they walked in. The decoy and the officers then proceeded to the sales counter. Both law enforcement officers had badges hanging around their necks. The officers identified themselves to the clerk and told him he sold alcohol to a minor. They requested the clerk summon a manager. When a manager arrived, the minor, the officers, the clerk, and the manager went to a break or crew room in the back. In the back room, one of the officers asked the decoy who sold her the alcohol. Amaranta J. said, “Yes, this is him” or words to that effect. She was looking at the clerk and he was looking at the decoy when the identification was made. They were about three or four feet apart.

Appellants contend that the ALJ required a showing that the clerk *could not have known* he was being identified as the seller rather than a showing that the identification was not performed in a way that the clerk *knew or should have known* that he was being identified as the seller. (App.Br. at p. 1.)

There is nothing in the Department’s decision that indicates in any way that the ALJ required the showing appellants claim. The mere fact that he rejected appellants’ claim that the clerk could not have known he was being identified does not mean he applied that standard. His findings make it abundantly clear that the identification that took place in the break room amply informed the clerk he was being identified as a seller of an alcoholic beverage to a minor.

Language from a 2001 Board decision cited by appellants could have been written for this case:

It is clear that the Board believes the focus must be on the decoy's identification of the seller. This approach reduces to an absolute minimum the possibility that an innocent clerk, one who had no involvement in the transaction, will be falsely accused. And, since the practical requirement of the identification process is to return the decoy to the store shortly after his or her purchase, the likelihood that his or her renewed presence, accompanied by police officers, will go unnoticed by the selling clerk is virtually nonexistent.

(Prestige Stations, Inc. (2001) AB-7764.)

Appellants' suggestion that the clerk could not have known he was being identified as the seller borders on the absurd. In the presence of his manager, he was told by a police officer he had sold alcohol to a minor; he sat three or four feet across from the decoy when she said he was the person who sold the beer to her; the two were looking at each other as she was speaking; and he stood next to her when the two were photographed (Exhibit 2), the decoy holding the beer and displaying her ID.

There is no merit to this appeal.

ORDER

The decision of the Department is affirmed.⁴

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This 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.