

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

AB-9331

File: 21-477831 Reg: 12076504

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store #9349
347 East Alisal Street, Salinas, CA 93901-4302,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: October 3, 2013
Sacramento, CA

ISSUED NOVEMBER 18, 2013

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store #9349 (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 Barat Saltzman and Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

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

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On February 15, 2012, the Department filed an accusation against appellants charging that, on December 19, 2011, appellants' clerk sold an alcoholic beverage to 16-year-old Yazmine P. Although not noted in the accusation, Yazmine P. was working as a minor decoy for the Department at the time.

At the administrative hearing held on September 13, 2012, documentary evidence was received and testimony concerning the sale was presented by Yazmine P. (the decoy) and by Brandon Knott, a Department agent. Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the premises and went straight to the beer coolers. She saw Department Agent Knott enter the premises about five or ten seconds later. She selected a six-pack of Corona beer and took the beer to the only open cash register. She observed Agent Knott standing about five feet away. There was one customer in line before her.

When it was her turn, the decoy placed the beer on the sales counter. The unidentified male clerk scanned the beer. The decoy heard something "beep." The clerk asked the decoy for identification. She produced her California identification card, which bore the portrait orientation indicating she was a minor, as well as two stripes reading "AGE 21 IN 2016" and "AGE 18 in 2013." She showed her identification to the clerk, who took possession of it and examined it for a couple seconds. The clerk punched something into the register, then asked the decoy for money. The decoy gave him a marked \$20 bill. The clerk gave her change and a receipt.

The decoy exited the premises, where she met with Department agents. She

gave them the beer, the change, and the receipt. The decoy then reentered the premises with the Department agents, including Agent Knott.

During cross-examination, the decoy testified that she identified the clerk upon reentering the store, when she was approximately fifteen feet away from the clerk, and that the clerk was then escorted to a separate area where a photograph was taken.

During additional questioning by the ALJ, she testified that she and the Department Agents approached the counter, that the clerk came out from behind the counter and stood approximately three feet away, and that a Department Agent asked, "Is this the man that sold you the alcohol?" The decoy replied affirmatively.

Agent Knott testified that the identification took place at the counter, that the decoy and the clerk were approximately five feet apart, and that the clerk did not come out from behind the counter.

Agent Knott and a second Department Agent took the clerk to an upstairs office. Agent Knott asked the clerk if he knew why he was being cited. The clerk told Agent Knott, "You know what I did. You watched me." The clerk also said he was tired and had misread the decoy's birthdate. A photograph of the clerk and the decoy was taken in the upstairs office.

The Department's decision addressed all credibility issues, and determined that the violation charged was proved and no defense was established.

Appellants then filed an appeal contending: (1) the photographic evidence was insufficient to show that the decoy's appearance complied with rule 141(b)(2); (2) rule 141(b)(5) was violated because there is no evidence that the clerk knew the decoy was identifying him as the seller; and (3) the ALJ failed to make credibility findings to address discrepancies in the decoy's testimony.

DISCUSSION

I

Appellants contend that because the Department failed to produce a clear image of the decoy on the date of the operation, it cannot prove that the decoy's appearance complied with the requirements of rule 141(b)(2). (See Exhibit 2.) Appellants argue that the ALJ "openly admitted" that he could not determine the appearance of the decoy on the date of the operation, because he was unable to distinguish the decoy's facial characteristics. (App.Br. at p. 5.) This issue was not raised at the administrative hearing.

It is settled law that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*Hooks v. California Personnel Board* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Wilke & Holsheizer, Inc. v. Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; *Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].)

Appellants did not object to the admission of the photograph into evidence at the hearing. In fact, appellants made absolutely no mention of the quality of the photograph until this appeal.

Appellants were apparently incited to raise this new argument by the following language in the Department's decision:

1. Exhibit 2 is a photocopy of a picture of [Yazmine] and the clerk that sold her the six-pack or [sic] Corona beer at the CVS Pharmacy Store 9349 in Salinas, CA, on December 19, 2011. [Yazmine] is holding the six-pack of

Corona beer and [California identification card]. However, the photocopy is very dark and blurred, so it is difficult to distinguish the decoy's facial characteristics.

(Findings of Fact II.D.1.) Staff notes that the ALJ only found it "difficult," not impossible, to distinguish the decoy's facial characteristics. At no point did he "openly admit" that he could not determine the decoy's appearance at the time of the sale, as appellants would have this Board believe.

Appellants rely on a fundamental misstatement of the decision below to introduce a new argument on appeal. This Board is entitled to consider the issue waived. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 400, p. 458.)

II

Appellants contend that the face-to-face identification of the clerk did not comply with rule 141(b)(5) for two reasons: first, "because there is no evidence to suggest that the decoy identified the clerk in each other's presence," and second, because there is no evidence that "the clerk knew that he was being accused and pointed out as the seller." (App.Br. at p. 6.)

Rule 141(b)(5) states:

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.

The failure to comply with this rule provides the licensee with an affirmative defense.

(See rule 141(c).)

The licensee bears the burden of proving an affirmative defense. The Department is *not* required to make a prima facie showing of compliance with rule 141(b)(5). (See, e.g., *Garfield Beach CVS, LLC* (2012) AB-9188; *7-Eleven, Inc./Lo and*

Lo (2006) AB-8384; *The Von's Corporation* (2002) AB-7819.)

There is no explicit language within the rule requiring that the clerk and decoy be standing in close proximity to each other, or that the clerk be conscious of the identification as it is taking place. Appellants, however, refer this Board to its decision in *Chun* (1999) AB-7287, which states:

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.

(*Id.* at p. 5.) The testimony in that case indicated an egregious failure to have the decoy identify the clerk:

What makes this scenario open to suspicion, is the decoy's testimony as to what happened after he left the premises: "Then I just waited because the officers went into the store and did their thing. I had to come back in [to the premises] and take a photo, me and the gentleman who sold me the 40-ounce." [Citation.]

Then, later, testifying: "I didn't approach the clerk at all. I let the other detectives do that. I was supposed to sit back" [citation]. To a question that the police approached the clerk and accused the clerk as to the sale, and telling the clerk he was to be cited, the decoy affirmed and said: "First they asked me to point out the clerk." [Citation.] With such speculative testimony, the decision needs to be reversed."

(*Ibid.*)

In this case, uncontradicted testimony establishes that the face-to-face identification did indeed take place; the only inconsistency is the distance between the decoy and the clerk at the moment of identification:

C. The decoy re-entered the premises to conduct a face-to-face identification of the seller. The Department agents, including Agent Knott, entered with her. . . . One of the agents asked who sold her the alcohol and [Yazmine] pointed to the selling clerk. She was approximately fifteen feet away at the time. Initially, [Yazmine] testified that she and the agents then immediately proceeded toward the clerk, who was waiting on two

customers. At some point the agents identified themselves to the clerk and moved him to a separate area away from the customers.

When the clerk was taken to the separate area a picture was taken of [Yazmine] holding the six-pack of Corona beer and her [California identification card]. The selling clerk was standing next to her when the picture was taken. (Exhibit 2.) While the picture was being taken one of the agents asked her who sold the beer to her and [Yazmine] replied, "This is the man who sold me the alcohol", or words to that effect. She exited the CVS store after the photograph was taken.

During additional questioning, [Yazmine] testified she pointed out the clerk to Department Agents when they re-entered the store for the identification process. [Yazmine] stated the clerk came out from behind the counter at this point and approached them at the front door. Agent Francisco asked her if this was the man that sold her the beer and she replied, "Yes." When she identified the clerk, he was standing right across from her about three feet away. The Department Agents then identified themselves and told the clerk they needed to take a picture for evidence. (Exhibit 2.)

D. Department Agent Brandon Knott testified at the hearing. On December 19, 2011, he was running the minor decoy operation with the decoy at the CVS Store on 347 East Alisal Street in Salinas, CA. Knott entered the CVS Store two times on that date. The first time he entered was for the decoy's safety. . . . The second time he entered the CVS Store was to have the decoy identify the sales clerk. Upon entering the store, the decoy pointed the selling clerk out to Agent Knott. Agent Knott and the decoy approached the sales counter. Agent Knott informed the clerk that he had sold an alcoholic beverage to a sixteen year old. The decoy was standing next to him at the counter. Agent Knott asked the decoy who sold her alcoholic beverages. [Yazmine] pointed to the clerk and said, "He sold me alcoholic beverages", or words to that effect. The clerk was standing behind the sale counter about five feet away from the decoy when she identified him.

(Findings of Fact II.C through D.) Notably, appellants presented no testimony or evidence on this point.

In the Department's decision, the ALJ resolved all credibility questions and determined that, despite some inconsistencies in the decoy's testimony, "there is no doubt that she performed the required face-to-face identification of the seller in the Respondent's premise." (Findings of Fact II.E.2.) We find the ALJ's conclusion entirely

reasonable, particularly in light of Agent Knott's consistent testimony that the identification took place at the counter approximately five feet away from the clerk.

Appellants, however, also try to shift the burden of proving the clerk's state of mind onto the Department, arguing that there is no evidence "the clerk knew that he was being accused and pointed out as the seller." It is not the Department's burden to establish that the clerk was aware he was being identified. Appellant's clerk did not testify; mere speculation about his possible state of mind is insufficient to prove an affirmative defense.

III

Appellants contend that the ALJ failed to make credibility findings regarding the decoy's testimony. In particular, appellants argue that the ALJ summarily dispensed with the credibility determination despite discrepancies in the decoy's description of the face-to-face identification.

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Beverage Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].)

Appellants assert that the ALJ "failed to make a credibility finding surrounding the decoy's testimony." (App.Br. at p. 7.) Appellants argue that the ALJ's failure to make findings is particularly significant, since the decoy's testimony contained several discrepancies, and was in "direct conflict" with the testimony of Agent Knott.

Again, appellants fundamentally misstate the decision below. The ALJ did not, in fact, "summarily dismiss any argument surrounding the decoy's [sic] credibility." (App.Br. at p. 7.) Rather, the ALJ noted the apparent contradictions in the decoy's

testimony, and made the following detailed credibility findings:

2. [Yazmine] was nervous and anxious during her testimony at hearing. She responded swiftly to questions, and would oftentimes answer before a question was fully posed. At some points, it appeared she would not completely understand a question before answering. This may account for some of her inconsistent testimony pertaining to the face-to-face identification. Nevertheless, [Yazmine P.]’s testimony was credible concerning the salient events surrounding the purchase of an alcoholic beverage in Respondent’s premises. Likewise, despite some inconsistency in her recollection of where and how the face-to-face identification process occurred, there is no doubt that she performed the required face-to-face identification of the seller in the Respondent’s premise.

(Findings of Fact ¶ 2.) The ALJ acknowledged the discrepancies, put those discrepancies in context based on the mannerisms and attitude the decoy presented at the hearing, and determined that her testimony was ultimately credible. This Board is not entitled to second-guess this determination.

ORDER

The decision of the Department is affirmed.²

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

²This 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.