

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

AB-9349

File: 21-477729 Reg: 12077493

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store 2661
4785 Granite Drive, Rocklin, CA 95677,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: January 9, 2014
Sacramento, CA

ISSUED MARCH 4, 2014

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store 2661 (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, Sean Klein.

¹The decision of the Department, dated March 7, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On September 24, 2012, the Department filed an accusation against appellants charging that, on June 20, 2012, appellants' clerk, Dalton Brewster (the clerk), sold an alcoholic beverage to 16-year-old Samantha G. Although not noted in the accusation, Samantha was working as a minor decoy for the Rocklin Police Department at the time.

At the administrative hearing held on January 29, 2013, documentary evidence was received and testimony concerning the sale was presented by Samantha (the decoy) and by Scot Coveyou, a store manager at the licensed premises.

Testimony established that on June 20, 2012, the decoy entered the licensed premises and selected an 18-pack of Miller Light beer which she took to the counter. The clerk asked for her identification, and the decoy handed him her California driver's license which contained her correct date of birth, November 21, 1995, and the words "AGE 21 IN 2016." The clerk looked at the license for three to four seconds and then completed the sale without asking any age-related questions. Subsequently, the decoy made a face-to-face identification of the clerk and the two of them were photographed.

The Department's decision determined that the violation charged had been proven and that no defense had been established.

Appellants then filed a timely appeal contending the ALJ erred by failing to consider evidence of mitigation in assessing the penalty.

DISCUSSION

Appellants contend that the ALJ erred by failing to consider or give appropriate weight to appellants' evidence of mitigation, including: four years of discipline-free history; positive action taken to correct the problem; documented training of employees;

and cooperation by the licensee in the investigation. (App.Br. at p. 2.)

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].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Unless some statute requires it, an administrative agency's decision need not include findings with regard to mitigation. (*Vienna v. California Horse Racing Bd.* (1982) 133 Cal.App.3d 387, 400 [184 Cal.Rptr. 64]; *Otash v. Bureau of Private Investigators* (1964) 230 Cal.App.2d 568, 574-575 [41 Cal.Rptr. 263].) Appellants have not pointed out a statute with such requirements. Findings regarding the penalty imposed are not necessary as long as specific findings are made that support the decision to impose disciplinary action. (*Williamson v. Board of Medical Quality Assurance* (1990) 217 Cal.App.3d 1343, 1346-1347 [266 Cal.Rptr. 520].)

Department rule 144 (Cal. Code Regs., tit. 4, § 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.

Rule 144 itself addresses the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

Penalty Policy Guidelines:

The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

Appellants do not dispute that the Department's findings support the decision to impose disciplinary action. Because this requirement has been satisfied, we believe that the ALJ in this case acted well within the discretion provided to him by rule 144.

Whether appellants' evidence serves to mitigate the standard penalty is a discretionary determination left in the hands of the ALJ. Depending on the facts of the individual case, the factors cited by appellants may indeed constitute mitigating evidence; in other cases, such as appellants', the ALJ may determine that these factors do *not* mitigate the penalty. Either way, the law is clear: the ALJ is not required to make findings regarding the penalty imposed. A 15-day suspension is reasonable and in line with rule 144 and we find no abuse of discretion.

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.