

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

AB-9381

File: 21-477888 Reg: 13078461

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store 9681
1105 Myrtle Avenue, Eureka, CA 95501-1222,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: July 10, 2014
San Francisco, CA

ISSUED AUGUST 1, 2014

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store 9681 (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 Ryan M. Kroll, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

¹The decision of the Department, dated October 3, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On May 6, 2013, the Department filed an accusation against appellants charging that, on January 17, 2013, appellants' clerk, Thomas Andrew Grubb (the clerk), sold an alcoholic beverage to 17-year-old Adam N. Although not noted in the accusation, Adam was working as a minor decoy for the Eureka Police Department and the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on August 28, 2013, documentary evidence was received and testimony concerning the sale was presented by Adam N. (the decoy); by Officer Joshua Siipola of the Eureka Police Department; and by Nanci Hankerd, appellants' store manager.

Testimony established that on the date of the operation, the decoy entered the premises alone, walked to the beer coolers, selected a tall can of Budweiser beer, then proceeded to the sales counter.

The clerk asked the decoy for his identification. The decoy presented his California driver's license, which bore his correct date of birth as well as a blue stripe stating "PROVISIONAL UNTIL AGE 18 IN 2013" and a red stripe indicating "AGE 21 in 2016." The clerk looked at the identification briefly, then rang up the beer. After paying for the beer, the decoy exited the premises and met up with the officers.

The Department's decision determined that the violation charged was proved and no defense was established.

Appellants then filed this appeal contending rule 141(b)(3)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 investigation violated rule 141(b)(3) because the decoy presented his identification without removing it from its plastic wallet sleeve. Appellants argue that the ALJ ignored their evidence and arguments on this point, and failed to make necessary findings.

Rule 141, subdivision (b)(3), states: “A decoy shall either carry his or her own identification showing the decoy’s correct date of birth or shall carry no identification; a decoy who carries identification *shall present it* upon request to any seller of alcoholic beverages.” (Emphasis added.)

The pertinent question in a rule 141(b)(3) challenge is whether the decoy *presented* the identification to the clerk. The fact that the identification remained in a plastic wallet sleeve is in no way dispositive. In *Prestige Stations* (2002) AB-7802, for example, the clerk requested the decoy’s identification, but the decoy had difficulty removing his identification from his wallet. The clerk told him “that’s okay.” (*Id.* at pp. 2-3.) The decoy pushed the identification back into his wallet and held it up, still inside the wallet, for the clerk to see. (*Id.* at p. 3.) The appellant argued that rule 141(b)(3) would be meaningless if decoys could simply display their wallets with their identification located somewhere inside, but not fully visible. (*Id.* at p. 4.) The undisputed testimony, however, indicated that the critical information on the identification was visible. (*Ibid.*) In its decision affirming the Department, this Board observed:

In the absence of any evidence that the identification was purposely concealed, or that a more complete inspection was denied, we doubt that the rule was intended to require more. A seller is always free to insist that he or she be handed the identification, and to refuse to sell if the request is not honored.

(*Id.* at p. 4.)

During closing arguments, counsel for appellants undeniably raised a defense under rule 141(b)(3):

Respondent would also contend that there's been a violation of Rule 141(b)3 [sic], as far as the minor did testify that he handed his identification to the clerk, Mr. Grub, in this instance.

However, your Honor, you viewed the surveillance as well, and that identification remained in his wallet the entire time, which that video surveillance has been entered into evidence as Department's Exhibit 3; and at no time did the clerk actually take physical possession of the minor's identification as the minor indicated in his testimony.

Appellants' argument, however, appears to focus on the credibility of the decoy, rather than his actual compliance with the rule. (RT at pp. 39-40.) The ALJ questioned appellants' argument on this point:

THE COURT: I didn't understand — you're arguing that Rule 141(b)3 was violated. The only thing I heard was that it's your opinion that the decoy did not hand his ID to the clerk, but that he kept it in his wallet. How would that violation relate to Rule 141(b)3?

MS. CARR: Your Honor, I'm more arguing the minor did not testify truthfully what happened as far as the requirements of Rule 141(b)3 and that the ID remained in his wallet throughout the transaction; and the clerk never did, in fact, take possession of the identification as the minor had indicated, and is indicated in the video surveillance.

As far as Rule 141(b)3, *the ID was presented upon request to the seller*, but the circumstances surrounding that were not truthfully testified to.

(RT at p. 41, emphasis added.)

The crux of appellants' argument, of course, is that the decoy's testimony is inconsistent with appellants' own interpretation of the events on the surveillance video. At no point in the course of the administrative hearing, however, did appellants assert that the decoy's identification was obscured or unreadable, or that it was not provided at the clerk's request — only that it was not removed from the decoy's wallet. This is

insufficient to show a violation of rule 141(b)(3) — the rule requires only that “a decoy who carried identification shall present it upon request to any seller of alcoholic beverages.” It is undisputed that the decoy presented his identification.

The ALJ made the following finding of fact:

2. The clerk who was on duty behind the counter asked the decoy for identification and the decoy presented his California driver license to the clerk. This driver license contained the decoy’s correct date of birth, a blue strip stating, “PROVISIONAL UNTIL AGE 18 IN 2013” and a red stripe indicating “AGE 21 in 2016.” The clerk looked at the driver license briefly and then rang up the beer. After paying for the beer, the decoy exited the premises with the beer and met the officers.

(Findings of Fact ¶¶ II.2.) While these findings do not directly address the question of credibility or the content of the surveillance video, they do reflect the meat of a rule 141(b)(3) defense — that is, whether the decoy presented the identification upon request. It is undisputed that he did so, and it is undisputed that the clerk viewed the identification and nevertheless proceeded with the sale. No additional factual findings were necessary.

We are troubled, however, by the absence of a specific conclusion of law on the issue of appellants’ rule 141(b)(3) defense. The decision recites the legal standard for all portions of rule 141 *except* subdivision (b)(3). (See Legal Basis for Decision ¶¶ B-C.) It also determines compliance with subdivisions (b)(2), (b)(4), and (b)(5), as well as rule 141 in general, but does not specifically conclude that the decoy presented his driver license as required by subdivision (b)(3). (Determination of Issues II.)

Inexplicably, the ALJ made findings and reached legal conclusions on a section 25660 defense — an issue neither raised nor relevant to the facts of this case.

(Findings of Fact III; Determination of Issues III.) Moreover, the ALJ notes that he does not have jurisdiction to rule on a challenge to the constitutionality of a state statute —

another issue not raised in this case. The presence of legal rulings on matters unrelated to the case brings the absence of a ruling on appellants' rule 141(b)(3) defense into stark relief. Because the factual findings on the issue are sparse — there is no comment, for example, on the decoy's credibility or the content of the surveillance video — we are left to guess whether the ALJ ignored appellants' rule 141(b)(3) defense, or simply overlooked it in drafting the decision.

Without a legal determination on appellants' affirmative defense, the decision is incomplete. We therefore remand for a clear ruling on the 141(b)(3) issue and for any additional fact-finding necessary to reach such a conclusion.

ORDER

The decision of the Department is remanded.³

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

³This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.