

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

AB-9735

File: 21-479473 Reg: 18086517

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store #9591
30842 South Pacific Coast Highway,
Laguna Beach, CA 92651,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: D. Huebel

Appeals Board Hearing: February 7, 2019
Ontario, CA

ISSUED FEBRUARY 20, 2019

Appearances: *Appellants:* Alexa L. Halloran, of Solomon Saltsman & Jamieson, as counsel for Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store #9591.
Respondent: Jonathan Nguyen as counsel for the Department of Alcoholic Beverage Control.

OPINION

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store #9591, appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 10 days because their clerk

1. The decision of the Department, dated July 26, 2018, is set forth in the appendix.

sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 3, 2009. On February 15, 2018, the Department filed an accusation charging that appellants' clerk, Lori Jean Boyd (the clerk), sold an alcoholic beverage to 18-year-old Beck Christian Svensson on June 3, 2017. Although not noted in the accusation, Svensson was working as a minor decoy in a joint operation between the Laguna Police Department and the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on May 21, 2018, documentary evidence was received, and testimony concerning the sale was presented by Svensson (the decoy); by Corporal James Gramer of the Laguna Police Department; by Agent Danny Vergara of the Department of Alcoholic Beverage Control; and by Brian Ferraro, appellants' store manager.

Testimony established that on the date of the operation, the decoy entered the licensed premises followed shortly thereafter by Corporal Gramer and Agent Vergara. Corporal Gramer and Agent Vergara took positions around the front of the store, posing as customers. The decoy walked to the south end of the licensed premises where the alcoholic beverages were located and selected a 12-pack of 12-ounce bottles of Coors Light beer. The decoy brought the 12-pack of beer to the front where the cash registers were located and stood in line behind two customers.

At the counter, the decoy set down the 12-pack of Coors Light beer. The clerk scanned the beer, asked the decoy for his identification, and told him he would be

carded until he was 50 years old. The decoy handed the clerk his valid California driver's license, which the clerk accepted and looked at for two seconds. The decoy's driver's license had a vertical orientation, showed his correct date of birth, and included a red stripe which read "AGE 21 IN 2019" and a blue stripe which read "PROVISIONAL UNTIL AGE 18 IN 2016." The clerk handed the identification back to the decoy and proceeded with the sales transaction. The decoy offered his identification a second time to the clerk, giving her a second chance to look at it because of her comment to him and the fact that she so quickly looked at his identification and proceeded with the transaction. The clerk waved the identification away, refusing to accept it again. The cash register screen requested the clerk enter the customer's date of birth. The clerk entered her own date of birth on the cash register screen. The decoy paid for the beer by handing the clerk \$20 in cash, which the clerk accepted. The clerk then gave the decoy change. The decoy took the change and the 12-pack of Coors Light beer and exited the store.

There was no evidence that the clerk asked the decoy any age-related questions or questions about his identification. Corporal Gramer witnessed these events with a clear, unobstructed view. Agent Vergara witnessed a majority of the sales transaction. Corporal Gramer and Agent Vergara exited the store soon after the decoy.

The decoy reentered the licensed premises with Corporal Gramer and Agent Vergara, along with Laguna Police Sergeant Coda and Officer Lee. Once inside the store, Agent Vergara made contact with the manager on duty, identified himself as an officer, explained they were there conducting a minor decoy operation, and requested to speak with the clerk. Agent Vergara, Corporal Gramer, and the decoy waited at the

north end of the licensed premises across from the registers for the clerk, who walked over to them. Agent Vergara and Corporal Gramer identified themselves as police officers and explained the violation to the clerk. Agent Vergara asked the decoy how old he was, to which the decoy replied, "18." Agent Vergara then asked the decoy to identify the person who sold him the beer. The decoy pointed at the clerk and said, "she did." The decoy and the clerk were standing three feet apart and facing each other at the time of this identification. A photo of the clerk and the decoy was taken after the face-to-face identification, with the decoy holding the 12-pack of Coors Light beer while standing next to the clerk.

After the hearing, the Department issued a decision determining the violation charged was proved and no defense was established. The decision imposed a mitigated penalty of 10-days' suspension.

Appellants then filed this appeal contending the decoy's law enforcement experience, "stature," and "mature demeanor" made him appear over the age of 21.

DISCUSSION

Appellants contend the Department did not proceed in the manner required by law when it found the decoy appeared under the age of 21, as required by rule 141(b)(2). (App.Br., at p. 5.) Appellants argue the decoy's law enforcement experience taught him to conduct himself in a mature manner. (*Id.* at p. 4.) In particular, appellants insist that "[a]lthough [the decoy] had only been a Police Aid[e] for about 35 days, [he] had been taught to give parking tickets and to communicate with the public" and to "present himself professionally and respectfully when dealing with the public." (*Id.* at p. 3.) According to appellants, a "typical underage person attempting to purchase

alcohol does not have the police training and experience to purposefully present themselves to the clerk in a mature manner." (*Id.* at pp. 4-5.)

Additionally, appellants contend that at 5' 11" and 165 pounds, the decoy "was a substantial size for a teenager," and that his stature, coupled with his mature demeanor, "made [him] appear over the age of 21 years." (*Ibid.*)

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

Rule 141 states, in relevant part,

A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

(Code Regs., tit. 4, § 141(a).) Additionally, subdivision (b)(2) requires a 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." (Code Regs., tit. 4, § 141(b)(2).) The rule provides an

affirmative defense, and the burden of proof lies with the party asserting it. (*Chevron Stations, Inc.* (2015) AB-9445, at pp. 3-16; *7-Eleven, Inc./Lo* (2006) AB-8384, at pp. 8-11.)

The ALJ made the following relevant findings of fact:

5. Decoy Svensson appeared and testified at the hearing. On June 3, 2017, he was 5'11" tall and weighed 165 pounds. He wore black pants, a black Billabong T-shirt, black Vans shoes, and a black watch on his left wrist. His hair was cut short, and parted to the left. (Exhibits 2 and 3.) His appearance at the hearing was the same, except he was 6 feet tall and weighed 170 pounds.

[¶ . . . ¶]

10. Decoy Svensson had never visited the Licensed Premises prior to June 3, 2017, and that date was the first day of decoy operations in which he participated. He felt safe during the decoy operation of June 3, 2017, in the officers' presence inside the Licensed Premises. While he felt comfortable during the sales transaction, he felt "really uncomfortable" during the face-to-face identification. Decoy Svensson learned about the decoy program through his service as a police aide with the Laguna Beach PD. As of June 3, 2017, the decoy had been a police aide for approximately 35 days and was in training the entire month of May. His training involved traffic control and parking enforcement. As a police aide trainee he was taught to present himself to others in a professional, respectful and courteous manner. Decoy Svensson felt he conducted himself in a mature manner during the decoy operation.

11. Decoy Svensson appeared his 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 and conduct in front of clerk Boyd at the Licensed Premises on June 3, 2017, decoy Svensson displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk. In-person decoy Svensson still has a "boyish" face and looks like an adolescent.

(Findings of Fact, ¶¶ 5, 10-11.)

Based on these findings, the ALJ reached the following conclusions of law:

6. With respect to rule 141(b)(2), Respondents argued decoy Svensson did not have the appearance of someone under 21 because of several factors which made him appear to be older than 21. Those factors

included Respondents' counsel's opinion: (1) decoy Svensson looked under 30, and "he conducts himself in a very mature way," (2) that clerk Boyd's statement to the decoy that he would be carded until he was 50 years old simply meant the decoy looked generally youthful, which is under 30 because store policy was to card people who looked under 30, and the clerk waived [*sic*] the decoy off when he offered his ID a second time because she thought he was obviously over 21, and (3) "it's safe to say, based on the clerk's statements and her conduct, that she thought he appeared over 21 to her, not under 21." Respondents further argued other factors included decoy Svensson's height and weight, his training how to present himself professionally and maturely, that he was comfortable in the situation, was not nervous, and just finished 30 days of training with Laguna Beach PD in how to deal with the public that included how to present himself in public.

7. This rule 141(b)(2) argument is rejected. Respondents presented no evidence as to why clerk Boyd allegedly believed decoy Svensson to be 21 years old. Respondents' counsel's unsupported assertions are nothing but assumption and conjecture. Clerk Boyd never testified. The hearsay statement by clerk Boyd to the officers that she thought[t] the decoy "looked at least 21 years old," is found not credible and self-serving, especially in light of the fact clerk Boyd also claimed she had no training in checking IDs, and yet Respondents' witness credibly testified otherwise. There was nothing about decoy Svensson's training and experience as a police aide, his stature or demeanor which made him appear older than his actual age. In fact, when viewing Svensson in-person at the hearing, he has a "boyish" face. With his "boyish" features, it is more probable that is the reason clerk Boyd told the decoy he would be carded until he was 50 years old. In other words, decoy Svensson had the appearance generally expected of a person under the age of 21.

(Conclusions of Law, ¶¶ 6-7.)

As the ALJ noted, appellants presented no evidence to indicate that this particular decoy's experience influenced his physical appearance or apparent age. Instead, they rely on speculation, generalizations, and the opinion of their own counsel for support. Speculation and generalizations are not evidence, and counsel's opinion of the decoy's appearance is wholly irrelevant. We see no cause to reconsider the ALJ's findings or conclusions.

Finally, as we have emphasized elsewhere, there is no rule prohibiting the use of a decoy with past law enforcement experience. (See Code Regs., tit. 4, § 141(b).) Nor does the use of an experienced decoy violate rule 141(a). As the court of appeal observed in *Garfield Beach CVS*, fairness in minor decoy operations is ensured by the five safeguards outlined in rule 141, subdivision (b). (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Garfield Beach CVS)* (2017) 7 Cal.App.5th 628, 638 [213 Cal.Rptr.3d 130].) This Board cannot and will not "add a new defense to Rule 141" based on the extent of a decoy's experience. (*Id.* at p. 640.) Indeed, such a rule would be foolish. Experienced decoys are more likely to execute an operation safely and fairly, since they are familiar with the procedures and requirements of a decoy operation and are comfortable communicating with law enforcement officials.

ORDER

The decision of the Department is affirmed.²

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
MEGAN MCGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

2. This 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.

APPENDIX

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION
AGAINST:

GARFIELD BEACH CVS LLC, LONGS DRUG
STORES CALIFORNIA LLC
CVS PHARMACY 9591
30842 S PACIFIC COAST HWY
LAGUNA BEACH, CA 92651

SANTA ANA DISTRICT OFFICE

File: 21-479473

Reg: 18086517

AB: 9735

OFF-SALE GENERAL - LICENSE

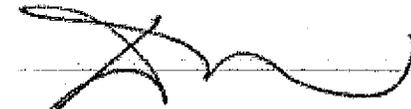
Respondent(s)/Licensee(s)
under the Alcoholic Beverage Control Act.

CERTIFICATION

I, Dominique Williams, do hereby certify that I am a Senior Legal Analyst for the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that annexed hereto is a true, correct and complete record (not including the Hearing Reporter's transcript) of the proceedings held under Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code concerning the petition, protest, or discipline of the above-listed license heretofore issued or applied for under the provisions of Division 9 of the Business and Professions Code.

IN WITNESS WHEREOF, I hereunto affix my signature on September 13, 2018, in the City of Sacramento, County of Sacramento, State of California.



Office of Legal Services

2018 SEP 17 AM 8:17
RECEIVED
ABC APPEALS BOARD

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

GARFIELD BEACH CVS LLC
LONGS DRUG STORES CALIFORNIA, LLC
CVS PHARMACY 9591
30842 S. PACIFIC COAST HWY
LAGUNA BEACH, CA 92651

OFF-SALE GENERAL - LICENSE

Respondent(s)/Licensee(s)
Under the Alcoholic Beverage Control Act

SANTA ANA DISTRICT OFFICE

File: 21-479473

Reg: 18086517

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on July 3, 2018. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after September 6, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: July 26, 2018



Matthew D. Botting
General Counsel

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION AGAINST:

Garfield Beach CVS LLC, and
Longs Drug Stores California LLC
Dbas: CVS Pharmacy 9591
30842 South Pacific Coast Highway
Laguna Beach, California 92651

Respondents

Off-Sale General License

} File: 21-479473
}
} Reg.: 18086517
}
} License Type: 21
}
} Word Count: 15,260
}
} Reporter:
} Dorothy Simpson
} Kennedy Court Reporters
}
} **PROPOSED DECISION**

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Santa Ana, California, on May 21, 2018.

Jonathan Nguyen, Attorney, represented the Department of Alcoholic Beverage Control (the Department).

Donna Hooper, Attorney, represented Respondents, Garfield Beach CVS LLC, and Longs Drug Stores California LLC.

The Department seeks to discipline the Respondents' license on the grounds that, on or about June 3, 2017, the Respondents, through their agent or employee, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Beck Christian Svensson, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on May 21, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on February 15, 2018.

¹ All statutory references are to the Business and Professions Code unless otherwise noted.

2. The Department issued a type 21, off-sale general license to the Respondents for the above-described location on September 3, 2009 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Beck Christian Svensson (hereinafter referred to as decoy Svensson) was born on July 17, 1998. On June 3, 2017, he was 18 years old. On that date he served as a minor decoy in an operation conducted by the Laguna Beach Police Department (Laguna Beach PD) in conjunction with the Department.
5. Decoy Svensson appeared and testified at the hearing. On June 3, 2017, he was 5'11" tall and weighed 165 pounds. He wore black pants, a black Billabong T-shirt, black Vans shoes, and a black watch on his left wrist. His hair was cut short, and parted to the left. (Exhibits 2 and 3.) His appearance at the hearing was the same, except he was 6 feet tall and weighed 170 pounds.
6. On June 3, 2017, decoy Svensson entered the Licensed Premises followed shortly thereafter by Laguna Beach PD Police Corporal James Gramer and Department Agent Danny Vergara. Police Corporal Gramer and Agent Vergara took positions around the front of the store posing as customers. Decoy Svensson walked to the south end of the Licensed Premises where the alcoholic beverages were located, and selected a 12-pack of 12 ounce bottles of Coors Light beer. (Exhibit 2.) Beer is an alcoholic beverage. Decoy Svensson brought the 12-pack of beer to the front where the cash registers were located and stood in line behind two customers.
7. At the counter decoy Svensson placed the 12-pack of Coors Light beer. Clerk Lori Jean Boyd (hereinafter referred to as clerk Boyd), scanned the beer, asked decoy Svensson for his identification (ID) and told him he would be carded until he was 50 years old. Decoy Svensson handed clerk Boyd his valid California Driver License, which clerk Boyd accepted and looked at for two seconds. Decoy Svensson's California Driver license had a vertical orientation, showed his correct date of birth and included a red stripe which read, "AGE 21 IN 2019," and a blue stripe which read, "PROVISIONAL UNTIL AGE 18 IN 2016." (Exhibit 4.) Clerk Boyd handed the ID back to the decoy and proceeded with the sales transaction. Decoy Svensson offered his ID a second time to clerk Boyd, giving her a second chance to look at his ID because of her comment to him and the fact she so quickly looked at his ID and proceeded with the transaction. Clerk Boyd waived the ID away, refusing to accept it again. The cash register screen requested the clerk enter the customer's date of birth. Clerk Boyd entered her own date of birth on the cash register screen. Decoy Svensson paid for the beer, by handing clerk Boyd \$20 in cash, which the clerk accepted. Clerk Boyd then gave the decoy change. Decoy Svensson took the change and the 12-pack of Coors Light beer and exited the store.

There was no evidence clerk Boyd asked decoy Svensson any age-related questions or questions about his ID. Police Corporal Gramer witnessed these above-described events with a clear, unobstructed view. Agent Vergara witnessed a majority of the sales transaction. Police Corporal Gramer and Agent Vergara exited the store soon after decoy Svensson.

8. Decoy Svensson re-entered the Licensed Premises with Police Corporal Gramer, Agent Vergara and Laguna Beach PD Sergeant Coda and Officer Lee. Once inside the store Agent Vergara made contact with the manager on duty, identified himself as an officer, explained they were there conducting a minor decoy operation, and requested to speak with clerk Boyd. Agent Vergara, Police Corporal Gramer and decoy Svensson waited at the north end of the Licensed Premises across from the registers for clerk Boyd, who walked over to them. Agent Vergara and Police Corporal Gramer identified themselves as police officers and explained the violation to clerk Boyd. Agent Vergara asked decoy Svensson how old he was, to which the decoy replied, "18." Agent Vergara then asked decoy Svensson to identify the person who sold him the beer. Decoy Svensson pointed at clerk Boyd and said, "She did." Decoy Svensson and clerk Boyd were standing three feet apart, and facing each other at the time of this identification. A photo of clerk Boyd and decoy Svensson was taken after the face-to-face identification, with decoy Svensson holding the 12-pack of Coors Light beer while standing next to clerk Boyd. (Exhibit 2.)

9. Agent Vergara then asked clerk Boyd if she had any alcoholic beverage sales training relating to checking IDs, to which clerk Boyd replied that CVS did not train her regarding looking at IDs. Clerk Boyd was issued a citation after the face-to-face identification. Clerk Boyd did not appear and did not testify at the hearing.

10. Decoy Svensson had never visited the Licensed Premises prior to June 3, 2017, and that date was the first day of decoy operations in which he participated. He felt safe during the decoy operation of June 3, 2017, in the officers' presence inside the Licensed Premises. While he felt comfortable during the sales transaction, he felt "really uncomfortable" during the face-to-face identification. Decoy Svensson learned about the decoy program through his service as a police aide with the Laguna Beach PD. As of June 3, 2017, the decoy had been a police aide for approximately 35 days and was in training the entire month of May. His training involved traffic control and parking enforcement. As a police aide trainee he was taught to present himself to others in a professional, respectful and courteous manner. Decoy Svensson felt he conducted himself in a mature manner during the decoy operation.

11. Decoy Svensson appeared his 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 and conduct in front of clerk Boyd at the Licensed Premises on June 3, 2017, decoy Svensson displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk. In-person decoy Svensson still has a “boyish” face and looks like an adolescent.

(Respondents’ Witness)

12. Brian Ferraro appeared and testified at the hearing. He has worked at the Licensed Premises as a store manager for four years, and has worked for the CVS “company” since 2001. Mr. Ferraro was not present at the Licensed Premises on June 3, 2017, but received a telephone call from the on-duty operations supervisor that a sale to minor violation had occurred. On June 3, 2017, after the minor decoy operation was completed, clerk Boyd was placed on suspension and two days later was terminated pursuant to policy. Clerk Boyd was hired on February 7, 2017, and had been working approximately four months as of June 3, 2017. On February 7, 2017, clerk Boyd signed a Clerk’s Affidavit acknowledging review of certain laws, including, but not limited to prohibiting alcohol sales to minors. (Exhibit B.)

13. Each of Respondents’ newly hired associates are required to attend a new associate orientation class in La Habra, which lasts approximately six hours, and includes training on sales of age-restricted merchandise. Associates are then required to complete a six to eight hour in-store, on-line computer based training module which includes age-restricted merchandise training, the latter of which takes approximately 90 minutes to complete and includes alcohol-related training. (Exhibit A.) The associates, thereafter, take a test based off the training. Mr. Ferraro also provides one hour of one-on-one training with associates, in which he reviews store policy and requirements before they are placed on the sales floor. The associates are also required to undergo the same on-line computer based module training bi-annually. Store managers keep track of associate training through a system referred to as the Learn Net.

14. Garfield Beach CVS LLC/Longs Drug Stores California LLC nationwide policy requires employees ask for the ID of anyone who appears under 27 years of age. At the Licensed Premises Mr. Ferraro requires his associates to ask for the ID of anyone appearing under 30 years old. If someone appears under 30 years of age the associate is required to ask for the ID, compare the ID picture to the customer, look at the birth date on the ID, and manually input the customer’s date of birth into the point of sale (POS) cash register system. Employees are also taught to look at the vertical and horizontal IDs, with a minor’s vertical ID containing blue and red stripes, with the latter advising the year when the customer will turn 21. If a customer appears over 30 years of age the

associate is required only to request the customer's date of birth, which is then manually entered into the POS system.

15. Clerk Boyd underwent the above-described training, which consisted of approximately 13 to 16 hours of training prior to being placed on a cash register. Despite that training, and against store policy, clerk Boyd admitted to Mr. Ferraro that she completed the sales transaction with decoy Svensson by entering her own date of birth, claiming that after she looked at the ID she did the math in her head. Clerk Boyd offered no explanation to Mr. Ferraro as to why she proceeded in this manner.

16. After the said violation of June 3, 2017, Mr. Ferraro held a meeting with each of his employees, reviewed the importance of the alcohol-related policies and had all employees retrained in store policy twice, including once in September of 2017 and again in January/February of 2018.

17. Respondents' cash registers are touch-screen computers. Anytime alcohol is scanned a screen prompts the clerk to enter the customer's date of birth onto the touch screen. If the customer refuses to provide their ID or date of birth the clerk is supposed to press "Cancel" and the cash register will cancel the sale and request the associate remove the item from the counter. If the associate enters a date of birth of someone under the age of 21 the system will cancel the sale and require the associate to remove the alcoholic beverage from the counter. If the associate enters a date of birth of someone over the age of 21 the POS permits the sale of alcohol.

18. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.

4. Cause for suspension or revocation of the Respondents' license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on June 3, 2017, the Respondents' clerk, Lori Jean Boyd, inside the Licensed Premises, sold alcoholic beverages, to-wit: a 12-pack of Coors Light beer, to Beck Christian Svensson, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-11.)

5. The Respondents argued the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2), therefore, the accusation should be dismissed pursuant to rule 141(c).

6. With respect to rule 141(b)(2), Respondents argued decoy Svensson did not have the appearance of someone under 21 because of several factors which made him appear to be older than 21. Those factors included Respondents' counsel's opinion: (1) decoy Svensson looked under 30, and "he conducts himself in a very mature way," (2) that clerk Boyd's statement to the decoy that he would be carded until he was 50 years old simply meant the decoy looked generally youthful, which is under 30 because store policy was to card people who looked under 30, and the clerk waived the decoy off when he offered his ID a second time because she thought he was obviously over 21, and (3) "it's safe to say, based on the clerk's statements and her conduct, that she thought he appeared over 21 to her, not under 21." Respondents further argued other factors included decoy Svensson's height and weight, his training how to present himself professionally and maturely, that he was comfortable in the situation, was not nervous, and just finished 30 days of training with Laguna Beach PD in how to deal with the public that included how to present himself in public.

7. This rule 141(b)(2) argument is rejected. Respondents presented no evidence as to why clerk Boyd allegedly believed decoy Svensson to be 21 years old. Respondents' counsel's unsupported assertions are nothing but assumption and conjecture. Clerk Boyd never testified. The hearsay statement by clerk Boyd to the officers that she thought the decoy "looked at least 21 years old," is found not credible and self-serving, especially in light of the fact clerk Boyd also claimed she had no training in checking IDs, and yet Respondents' witness credibly testified otherwise. There was nothing about decoy Svensson's training and experience as a police aide, his stature or demeanor which made him appear older than his actual age. In fact, when viewing decoy Svensson in-person at the hearing, he has a "boyish" face. With his "boyish" features, it is more probable that is the reason clerk Boyd told the decoy he would be carded until he was 50 years old. In other words, decoy Svensson had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 11.)

PENALTY

The Department requested the Respondents' license be suspended for a period of 10 days, factoring in their length of licensure since 2009 without discipline.

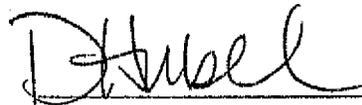
The Respondents recommend a 10-day all stayed penalty based on its discipline free operation since September 3, 2009, and the enumerated positive steps taken by Respondents.

Respondents' discipline-free history and some of its preventative measures warrant mitigation. However, the bulk of the preventative measures, while a good start, do not address the underlying problem that Respondents' POS system allows for a clerk to manually enter an age-appropriate date of birth that tricks the system into allowing the sale of alcoholic beverages to a minor, despite training, a youthful appearing minor and the minor's vertical ID, which advises in red the cardholder will not be 21 until a future year. The foregoing is of grave concern, given it is exactly what clerk Boyd did when she entered her own date of birth, despite her training and commenting about the youthful appearing minor who stood before her, along with holding a vertical formatted minor's ID, which advised he would not be 21 until the year 2019. The penalty recommended herein complies with rule 144.

ORDER

The Respondents' off-sale general license is hereby suspended for a period of 10 days.

Dated: May 31, 2018



D. Huebel
Administrative Law Judge

Garfield Beach CVS LLC, and
Longs Drug Stores California LLC
Dbas: CVS Pharmacy 9591
File #21-479473
Reg. #18086517
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By:	<u>Carol A. Applebaum</u>
Date:	<u>7/3/18</u>

JA