

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

AB-9769

File: 21-477837; Reg: 18086724

GARFIELD BEACH CVS, LLC,
LONGS DRUGS STORES CALIFORNIA, LLC,
dba CVS Pharmacy #9951
8036 San Miguel Canyon Road
Salinas, CA 93907-1244,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: December 5, 2019
Sacramento, CA

ISSUED DECEMBER 17, 2019

Appearances: *Appellants:* Adam N. Koslin, of Solomon, Saltsman & Jamieson, as
counsel for Garfield Beach CVS, LLC and LONGS DRUG STORES
CALIFORNIA, LLC,

Respondent: Joseph J. Scoleri III, 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 #9951, appeal from a decision of the Department of
Alcoholic Beverage Control¹ suspending their license for 10 days because their clerk
sold an alcoholic beverage to a police minor decoy, in violation of Business and
Profession Code² section 25658(a).

¹The decision of the Department, dated November 21, 2018, is set forth in the
appendix.

² All statutory references are to the California Business and Professions Code
unless otherwise stated.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. There is no record of prior departmental discipline against the license.

On March 30, 2018, the Department filed a single-count accusation against appellants charging that on December 31, 2017, appellants' clerk, Joseph Dewayne Hanson (the clerk), sold an alcoholic beverage to 16-year-old B.G. (the decoy). Although not noted in the accusation, the decoy was working for the Department at the time.

At the administrative hearing held on August 14, 2018, documentary evidence was received, and testimony concerning the sale was presented by the decoy and Agent Francisco J. Gonzalez, Jr. Appellants did not present any witnesses.

Testimony established that on December 31, 2017, the decoy entered the licensed premises and selected a single can of Bud Light beer from the refrigerated coolers. The decoy took the beer to the register and waited in line. When it was his turn, the decoy presented the beer to the clerk for purchase.

The clerk scanned the beer and asked the decoy for his identification. The decoy handed the clerk his United States passport, which the clerk accepted. The decoy's passport had his correct date of birth, showing him to be 16 years old at the time. After the clerk appeared to look at the decoy's passport, he completed the sale, and the decoy exited the store. The clerk failed to ask any age-related questions during the transaction.

The decoy then re-entered the store with multiple Department agents and approached the clerk. Agent Gonzalez identified himself to the clerk and explained the violation. Agent Gonzalez and the decoy then completed a face-to-face identification of the clerk³ and both the clerk and the decoy were photographed together. (Exh. 3.) Afterwards, the clerk was cited for the sale.

The administrative law judge (ALJ) submitted his proposed decision on August 31, 2018, sustaining the accusation and recommending a 15-day suspension. The Department adopted the proposed decision in its entirety and issued a Certificate of Decision on November 21, 2018.

Appellants then filed a timely appeal contending: (1) The Department's finding that the minor decoy's appearance complied with rule 141(b)(2)⁴ is not supported by substantial evidence, and; (2) the Department acted arbitrarily and capriciously by misrepresenting appellants' arguments in its decision.

DISCUSSION

I

ISSUE CONCERNING RULE 141(b)(2)

Appellants contend that the ALJ's finding that the decoy's appearance complied with rule 141(b)(2) is not supported by substantial evidence. (AOB, at pp. 7-10.) Specifically, appellants argue that the decoy's large stature and elevated success rate gave him an appearance not generally expected of a person under 21 years old. (*Id.* at p. 9.)

³ The face-to-face identification of the clerk is not in dispute.

⁴ References 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.

Rule 141(b)(2) provides:

The decoy shall 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.

This rule provides an affirmative defense, and the burden of proof lies with appellants.

(*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

Here, the ALJ found that the decoy's appearance complied with rule 141(b)(2). (Decision at p. 6.) Therefore, this Board is required to defer to those findings so long as they are supported by substantial evidence. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Southland)* (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652, 659] [citing *Kirby v. Alcoholic Beverage Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628] ["In considering the sufficiency of the evidence issue the court is governed by the substantial evidence rule[;] any conflict in the evidence is resolved in favor of the decision; and every reasonably deducible inference in support thereof will be indulged. [Citations.]"; see also *Kirby v. Alcoholic Bev. etc. Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815] ["When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the department."].) "Substantial evidence" is "evidence of ponderable legal significance, which is 'reasonable in nature, credible and of solid value.'" (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 814 [38 Cal.Rptr.2d 304, 307–308], internal citations omitted.)

In his decision, the ALJ rejected appellants' arguments that the decoy's physical appearance did not comply with rule 141(b)(2). The ALJ found that, "[e]ven though

B.G.'s height and heft made him appear older than 16, he had the appearance 'which could generally be expected of a person under 21 years of age' (Conclusions of Law, ¶ 11.) As noted above, "we are bound to construe the evidence in the light most favorable to the ALJ's decision" and will uphold the findings so long as they are supported by substantial evidence. (*Southland, supra*, 103 Cal.App.4th at 1087.)

To support his findings, the ALJ relied on two photographs of the decoy from the day of the operation: Exhibits D-2 and D-3. (Findings of Fact, ¶¶ 4, 7.) Photographs of a decoy from the day of the operation are "arguably the most important piece of evidence in considering whether the decoy displayed the physical appearance of someone under 21 years of age." (*Southland, supra*, 103 Cal.App.4th at 1094.) Further, the ALJ relied on his personal observations of the decoy's appearance at the hearing, which the decoy credibly testified "matched the appearance he presented to the [clerk] on the date of the operation." (Findings of Fact, ¶4; Conclusions of Law, ¶ 11.) ALJ's are also entitled to rely on their personal observations of a decoy when the decoy testifies that his appearance and mannerisms were "the same on the stand as it was when he purchased the beer." (*Southland, supra*, 103 Cal.App.4th at 1094.) The Board sees no error with the ALJ's findings regarding the decoy's appearance, which are supported by the photographs of the decoy from the date of the operation, as well as the ALJ's personal observations at the hearing. Both sources are "reasonable in nature, credible and of solid value." (*County of Los Angeles, supra*, 32 Cal.App.4th at 814.)

However, appellants contend that certain non-physical factors, such as the decoy's experience and elevated success rate, made him appear older than 21 years old. (AOB, at p. 9.) Although the decoy testified that he successfully purchased

alcohol at approximately seven of the twenty or so locations he visited on the date of the operation (RT at 20:5-18), there is absolutely no evidence in the record that the decoy's success rate was either "high" or the result of his physical appearance. Likewise, there is no evidence in the record that the clerk in this matter sold alcohol to the decoy based on his appearance, experience, or demeanor. As the ALJ noted, the clerk did not testify.⁵ Thus, there is no evidence as to why he sold the decoy alcohol, much less "to establish that his error was the result of B.G.'s appearance." (Conclusions of Law, ¶ 11.)

Based on the above, appellants rely entirely on a difference of opinion — theirs versus the ALJ's — as to what conclusions the evidence in the record supports. Ultimately, appellants are asking this Board to consider the same set of facts as the ALJ and reach a different conclusion, despite substantial evidence to support the findings. This the Board cannot do.

II

ISSUE CONCERNING MISREPRESENTATION

Appellants contend that the Department acted "arbitrarily and capriciously" as evidenced by its "extensive misrepresentations of appellants' arguments" in its decision. (AOB, at p. 10.) Appellants take specific issue with the fact that the ALJ addressed defenses appellants never raised and provided more analysis for these defenses than appellants' rule 141(b)(2) defense. (*Ibid.*)

The Department is prohibited from acting arbitrarily or capriciously; "[i]ts decisions must be based on reason and sound legal principles." (*Santa Ana Food*

⁵ Nor did any of the other clerks who purportedly sold the decoy alcohol on the date of the operation.

Market, Inc. v. Alcoholic Beverage Control Appeals Bd. (1999) 76 Cal.App.4th 570, 574 [90 Cal.Rptr.2d 523, 526].) Said another way, if the Department's decision is based on reason and sound legal principles, then it has not acted arbitrarily or capriciously.

(Ibid.)

Here, appellants were accused of violating section 25658(a), which prohibits the selling, furnishing, or giving of (or causing to be sold furnished, or given) any alcoholic beverage to a person under 21 years of age. In its decision, the Department sustained the accusation based on the testimony of the decoy and Agent Gonzalez, which established that on December 31, 2017, appellants' clerk sold an alcoholic beverage to the decoy, who was under 21 years of age. (Conclusions of Law, ¶ 4.) The decoy and Agent Gonzalez' testimony constitute substantial evidence to support the Department's findings. (*County of Los Angeles, supra*, 32 Cal.App.4th at 814.)

At the hearing, appellants never disputed that the sale occurred; rather, appellants asserted an affirmative defense under rule 141(b)(2), contending that the decoy's appearance at the time of the sale was not one that "could generally be expected of a person under 21 years of age." However, for the reasons discussed in section I, *supra*, the Department's rejection of appellants' rule 141(b)(2) defense is supported by substantial evidence. Since "substantial evidence" is the standard of review pursuant to section 23084, and the Department's findings regarding the underlying violation and appellants' affirmative defense are supported by substantial evidence, then the Decision is necessarily based on "reason and sound legal principles." (*Santa Ana Food Market, Inc., supra*, 76 Cal.App.4th at 574.) Simply put, the Department's decision is neither arbitrary nor capricious.

Nevertheless, appellants contend that the Department's otherwise sound and reasonable Decision is somehow arbitrary or capricious simply because the ALJ addressed defenses appellants did not raise and provided more analysis for these defenses than the defense appellants actually asserted. This argument is rejected.

Appellants cite no legal authority for the proposition that an otherwise valid Decision is rendered invalid simply because an ALJ included more than what was necessary. The only pertinent inquiry here is whether the Department's findings are supported by substantial evidence. In finding that they are, the Board's inquiry ends. Whether it was error for the ALJ to consider issues not raised by the parties is beyond this Board's scope of review.

ORDER

The decision of the Department is affirmed.⁶

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁶ 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.

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 STORE 9951
8036 SAN MIGUEL CANYON ROAD
SALINAS, CA 93907-1244

OFF-SALE GENERAL - LICENSE

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

SALINAS DISTRICT OFFICE

File: 21-477837

Reg: 18086724

AB 9769

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 October 17, 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 January 2, 2019, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: November 21, 2018



Matthew D. Botting
General Counsel

RECEIVED
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Alcoholic Beverage Control
Office of Legal Services

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Garfield Beach CVS, LLC,	}	File: 21-477837
Long Drug Stores California, LLC	}	
DBA: CVS Pharmacy Store 9951	}	Registration: 18086724
8036 San Miguel Canyon Road	}	
Salinas, California 93907-1244	}	License Type: 21
	}	
Respondent	}	Page Count: 37
	}	
	}	Reporter:
	}	Ken Knuth-CSR # 3476
	}	Absolute Court Reporters, LLC
	}	
<u>Off-Sale General License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Salinas, California, on August 14, 2018.

Matthew Gaughan, Attorney, represented the Department of Alcoholic Beverage Control (Department).

Donna Hooper, Attorney, represented Respondents Garfield Beach CVS, LLC and Long Drug Stores California, LLC. (Respondent)

The Department seeks to discipline the Respondent's license on the grounds that, on or about December 31, 2017 the Respondent, through their agent or employee, Joseph Dewayne Hanson, sold, furnished, or gave alcoholic beverages to B.G.¹, an individual under the age of 21 in violation of Business and Professions Code section 25658(a)² (Exhibit D-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 August 14, 2018.

¹ In this matter, the Decoy used by the Department was under 18 years of age at the time of the hearing. He is referred to by his initials in this proposed decision to protect his privacy.

² All statutory references are to the Business and Professions Code unless otherwise noted.

FINDINGS OF FACT

1. The Department filed the accusation on March 30, 2018. (Exhibit D-1)
2. On June 22, 2009 the Department issued a type 21, off-sale general license to the Respondent for the above-described location (the Licensed Premises). There is no record of prior Department discipline against the Respondent's license.
3. B.G. was born March 18, 2001 and was 16 years old on December 31, 2017. On that date, B.G. served as a minor decoy in an operation conducted by the Department at multiple locations, including at the Licensed Premises.
4. B.G. appeared and testified at the hearing. On August 14, 2018 his appearance was generally as depicted in an image that was taken during the operation on December 31, 2017. (Exhibit D-2) The one significant difference was that B.G. had light facial hair at the hearing and he was clean shaven on the date of the operation. B.G. wore a black jacket over a dark t-shirt during the operation. He wore dark jeans and white sneakers on his lower body. His face was fully exposed and his hair was combed back in a neat haircut. B.G. was approximately 5 feet, 9 inches tall and 200 pounds at the hearing. His build was heavysset, not muscular. B.G. credibly testified that his size and appearance on the date of the operation were essentially the same.
5. On December 31, 2017 B.G. went to the Licensed Premises with agents of the Department for the purpose of trying to buy alcohol. B.G. was instructed to carry his identification, show it if requested, and to be truthful regarding his age if asked. B.G. carried his passport as the identification he would produce if asked.
6. B.G. entered the Licensed Premises and searched for the refrigerated coolers since he was unfamiliar with the location. Once he found them, B.G. selected a single Bud Light beer can. One of the Department agents was in the Licensed Premises during the time B.G. was there but they did not interact. B.G. later held the can he selected in an image taken of B.G. and the clerk he interacted with. (Exhibit D-3) B.G. took the can to the line for the register. Four to five people were in the line so B.G. waited behind them. After they were assisted, B.G. approached the register. B.G. presented the Bud Light beer can to the clerk for purchase.
7. This clerk was the same individual in the image that was later taken of B.G. standing next to the clerk that served him. (Exhibit D-3) The clerk scanned the beer can and then asked B.G. for identification. B.G. handed his United States passport to the clerk. The clerk took the identification and appeared to look at it.

8. The passport B.G. presented was in booklet form. On one of the pages, it showed his picture to the left of lines that had his full name and nationality. Below these lines was an entry that said "Date of Birth" with his birthdate of "18 Mar 2001". (Exhibit D-2) Despite this information, the clerk asked no questions of B.G. about his age during any of their interaction. The clerk rang up the beer and told B.G. the price. B.G. paid this clerk for the beer, took possession of it and a receipt, (Exhibit D-4) and then left. The receipt established that the transaction took place just prior to 3 p.m. on December 31, 2017.

9. After leaving, B.G. approached the vehicle where the Department agents were waiting. The agents were aware of what happened when they saw B.G. carrying the beer he had purchased. After this, multiple agents went into the Licensed Premises with B.G. Upon entering, B.G. pointed out the clerk to the agents from approximately 15 feet away. The clerk was in the process of helping other customers when B.G. initially pointed him out. After this initial identification, Department Agent Francisco Gonzalez, Jr. (Gonzalez) approached the clerk and identified himself. Gonzalez explained why they were present and told the clerk that he had sold beer to a minor.

10. After Gonzalez told the clerk they were there because he had sold alcohol to a minor, Gonzalez asked B.G. to identify the clerk who sold the beer. B.G. responded "there he was" towards the clerk while the clerk was looking at B.G. and the agents. B.G. was then asked how old he was to which he responded by saying he was 16 years old. B. G. was standing just across the counter from the clerk when B.G. responded to Gonzalez's question. The clerk was identified as Joseph Dewayne Hanson (Hanson) during Gonzalez's investigation of the sale to B.G.

11. Hanson was subsequently photographed while standing next to B.G. while he held the Bud Light beer can in one hand. (Exhibit D-3) From the initial law enforcement contact with Hanson until after this photograph was taken; B.G. was in the immediate presence of Hanson and the agents. Hanson was subsequently issued a citation for the sale.

12. B.G. had served as a decoy on one prior operation for the Department before December 31, 2017. Because of his large size, B.G. appeared slightly older than his chronological age of 16 years old at the time of the decoy operation. However, based on his overall appearance, i.e., his physical appearance, clothing, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of Hanson at the Licensed Premises on December 31, 2017, B.G. displayed the appearance which would generally be expected of a person less than 21 years of age during his interactions with Hanson. Hanson did not testify in this matter to explain his age related impressions of B.G. or why he sold B.G. alcohol after B.G. presented a passport that identified him as being 16 years of age. Hanson remarked to Gonzalez that he did make the sale to B.G.

Garfield Beach CVS, LLC.
Long Drug Stores California, LLC
DBA: CVS Pharmacy Store 9951
File #21-477837
Reg. #18086724
Page 4

and that he was familiar with other forms of identification but was not familiar with passports.

13. 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 Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on December 31, 2017 the Respondent's clerk, Joseph Dewayne Hanson inside the Licensed Premises, sold an alcoholic beverage to B.G., a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 2-12)

5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141³ and, therefore, the accusation should be dismissed. Specifically, the Respondent argued that the face to face identification failed to comply with rule 141(b)(5), the appearance of the decoy did not comply with rule 141(b)(2), and that the use of a United States passport was not in compliance with rule 141(b)(3). Any of these alleged violations, if established, would be affirmative defenses and require dismissal of the accusation pursuant to rule 141(c).

6. There is no credible evidence supporting the assertions by the Respondent that there was a failure to comply with rule 141. Regarding the rule 141(b)(5) violation, *Acapulco Restaurants, Inc. v. Alcoholic Beverages Control Appeals Board* (1998) 67 Cal.App.4th

³ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

575 confirmed that a face to face must occur for compliance, but that case never established a baseline standard for what was a compliant face to face identification. The subsequent decision in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1687 held that the regulation at "section 141, subdivision (b)(5), ensures-admittedly not as artfully as it might-that the seller will be given the opportunity, soon after the sale, to come "face-to-face" with the decoy." *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1687, 1698. This decision confirmed that the purpose of the face to face was to give the seller notice of who the decoy was.

7. Further clarification of what constituted a compliant face to face occurred in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2017) 18 Cal.App.5th 541. This case is particularly helpful since the identification by B.G. of Hanson in this matter was substantively similar to the identification that was found to be compliant with rule 141(c) in that case. In finding that identification compliant, that court ruled:

"Here there is no violation of Rule 141, as explained above, because the decoy made a face-to-face identification by pointing out the clerk to the officer inside the store while approximately 10 feet from her, standing next to her when the officer informed her she had sold alcohol to a minor, and taking a photograph with her as the minor held the can of beer he purchased from her. She had ample opportunity to observe the minor and to object to any perceived misidentification. The rule requires identification, not confrontation. The identification here meets the letter and the spirit of Rule 141." *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2017) 18 Cal.App.5th 541, 547

8. While, general due process considerations demand a fair identification be facilitated by law enforcement, these cases makes clear that this particular regulation is focused on the more narrow concern of allowing the *seller* the opportunity to be aware of the identity of the decoy. It stands to reason that compliance with Rule 141, subdivision (b)(5) occurs if the clerk and the decoy, during the process of the investigation, prior to the citation being issued or departure of the decoy, are brought in reasonable proximity to each other to assure that the seller knows (or reasonably ought to know) that he or she is being identified as the seller by the decoy.

9. B.G. testified to first identifying Hanson to the agents at the entranceway of the Licensed Premises. This alone would have been insufficient because Hanson was approximately 15 feet away and appeared to be preoccupied with customers when this occurred. However, much more occurred in this case to put Hanson on notice that he was accused of selling beer to B.G. Gonzalez then approached Hanson at the counter, got his

attention and identified himself as a law enforcement officer investigating a sale of alcohol to a minor. While the sale to B.G. was discussed between Gonzalez and Hanson at the counter, B.G. stood adjacent to Gonzalez. Right after this discussion, while in the immediate presence of Hanson, B.G. again pointed out Hanson as the seller and said he was sixteen years old in response to Gonzalez's question about his age. Hanson was clearly aware that the decoy was B.G. because he discussed making the sale to B.G. with the agents and described that he was unfamiliar with passports. Before Hanson was cited on December 31, 2017, B.G. and Hanson were photographed next to each other. (Findings of Fact ¶ 11 and Exhibit D-3) Hanson clearly came face to face with B.G. under circumstances that made it clear that Hanson had been identified as the person who sold B.G. beer and that B.G. was the minor at issue. Though Hanson did not testify in this matter, his statement to Gonzalez made it clear that he understood the decoy was B.G. (Findings of Fact ¶¶ 3-12)

10. None of the evidence presented by the Respondent rebutted the credible evidence presented by the Department that this was a fully compliant identification that allowed Hanson to become aware that B.G. was the decoy. Respondent has offered no evidence or argument suggesting that the identification violated state or federal due process considerations. Given the totality of the evidence presented by the Department credibly establishing compliance with rule 141(b)(5), the Respondent's assertions that compliance did not occur are unsupported.

11. Respondent also asserted that the appearance of the decoy did not comply with rule 141(b)(2). As noted above, Hanson did not testify in this matter to establish that his error was the result of B.G.'s appearance. Hanson, in fact, asked for B.G.'s identification which suggests that he had reason to believe that B.G. might be underage. Hanson did not ask any follow up questions after asking B.G. for identification, so the exchanges between him and B.G. were minimal. Further, B.G. testified in this matter and his appearance matched the appearance he presented to the Hanson on the date of the operation. Even though B.G.'s height and heft made him appear older than 16, he had the appearance "which could generally be expected of a person under 21 years of age" which is the standard required by rule 141(b)(2). As previously noted, the clerk did not testify to establish facts suggesting an identification issue or whether there was anything in B.G.'s actions, manner, or appearance that led Hanson to reasonably conclude that B.G. was over 21. The Department has established compliance with rule 141(b)(2) and the Respondent has failed to rebut this evidence.

12. The Respondent argued that the use of a United States passport by B.G. was in violation of rule 141(b)(3). That subsection of the regulation, in its entirety, requires that:

Garfield Beach CVS, LLC,
Long Drug Stores California, LLC
DBA: CVS Pharmacy Store 9951
File #21-477837
Reg. #18086724
Page 7

“[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[.]”

13. This regulation does not require, as Respondent asserted, that the identification be a California driver’s license or identification card. It does not require any particular identification; just that any identification used meets certain minimum standards. The United States passport met all of the identification requirements of this regulation and B.G. complied with the presentation requirement when he was asked to show identification. The United States passport was B.G.’s own identification. It had his correct date of birth on display on the same page as his picture. B.G. presented the identification when Hanson asked for it. The Respondent has cited no facts or authorities that establish that the use of the United States passport by B.G. failed to comply with the letter or spirit of this regulation. The Department has established compliance with rule 141(b)(3) and the Respondent has failed to rebut this evidence.

PENALTY

The Department recommended that the Respondent’s license be suspended for the standard penalty of 15 days with the lack of evidence of training being an aggravating factor that weighed against mitigation.

The Respondent argued for a 10 day stayed penalty if the Accusation were sustained based on the long period of licensure without prior incidents.

No evidence was presented regarding the Respondent’s policies to prevent sales of alcoholic beverages to underage individuals. The Respondent has been licensed since June 2009 and this is their first incident. This fact does support mitigation. However, this mitigation is somewhat blunted by the lack of evidence suggesting that the Respondent was acting with care to prevent underage sales.

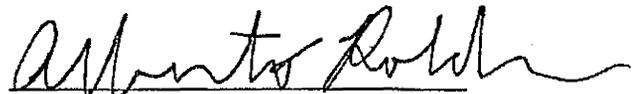
There appear to be no specific factors in aggravation applicable to this violation beyond the lack of evidence of training or policies to prevent underage sales. Mitigation is found to slightly outweigh aggravation which supports a downward departure from the standard penalty. The penalty recommended herein complies with rule 144.

Garfield Beach CVS, LLC,
Long Drug Stores California, LLC
DBA: CVS Pharmacy Store 9951
File #21-477837
Reg. #18086724
Page 8

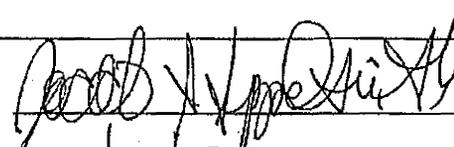
ORDER

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

Dated: August 31, 2018



Alberto Roldan
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: 10/17/18