

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

AB-9787

File: 21-477641; Reg: 18087194

GARFIELD BEACH CVS, LLC,
LONGS DRUGS STORES CALIFORNIA, LLC,
dba CVS Pharmacy #9904
3667 Castro Valley Boulevard
Castro Valley, CA 94546,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: David W. Sakamoto

Appeals Board Hearing: December 5, 2019
Sacramento, CA

ISSUED DECEMBER 17, 2019

Appearances: *Appellants:* David Brian Washburn, of Solomon, Saltsman & Jamieson, as counsel for Garfield Beach CVS, LLC and Longs Drugs Stores California, LLC,

Respondent: Matthew Gaughan, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Garfield Beach CVS, LLC and Longs Drugs Stores California, LLC, doing business as CVS Pharmacy #9904, 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 Code section 25658(a).

¹The decision of the Department, dated December 19, 2018, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. There is one prior record of departmental discipline against the license.

On July 20, 2018, the Department filed a single-count accusation against appellants charging that, on March 29, 2018, appellants' clerk, Stacey-Lynn Kehaulani Nunes-Eblacas (the clerk), sold an alcoholic beverage to 18-year-old Ayna Elizabeth Edwards (the decoy). Although not noted in the accusation, the decoy was working for the Alameda County Sherriff's Office (ACSO) at the time.

At the administrative hearing held on October 24, 2018, documentary evidence was received, and testimony concerning the sale was presented by the decoy and ACSO Detective Moises Gomez. May Chansu, store manager at the licensed premises, testified on appellant's behalf.

Testimony established that on March 29, 2018, the decoy entered the licensed premises while Det. Gomez and two other ACSO deputies waited outside. The decoy selected one can of Bud Light beer from a refrigerator at the rear of the store and carried it to the sales counter. The clerk rang up the beer and sold it to the decoy. The clerk neither asked the decoy her age nor asked her to present identification for inspection. After the transaction was complete, the decoy exited the licensed premises with her can of beer.

Once outside, the decoy met with the waiting deputies. The decoy, Det. Gomez, and another deputy then entered the licensed premises and Det. Gomez asked the decoy to identify who sold her the beer. The decoy identified the clerk.² Det.

² The facts of the face-to-face identification are not in dispute for this appeal.

Gomez contacted the clerk and advised her that she had just sold an alcoholic beverage to an under-age decoy. The clerk told Det. Gomez that she had not asked for the decoy's identification because she mistook the decoy for another customer who buys alcohol regularly. The clerk also told Det. Gomez that she entered a random birthdate into the register in order to complete the sale. The clerk never told Det. Gomez that the decoy appeared over 21 years old.

The administrative law judge (ALJ) issued his proposed decision on November 5, 2018, sustaining the accusation and recommending a 10 day suspension. The Department adopted the proposed decision in its entirety on December 17, 2018 and issued a Certificate of Decision two days later.

Appellants then filed a timely appeal contending that the decoy did not display the appearance which would generally be expected of a person under the age of 21, in violation of rule 141(b)(2).³

DISCUSSION

Appellants contend that the Department's finding that the decoy complied with rule 141(b)(2) is not supported by substantial evidence. (AOB, at pp. 6-8.) Specifically, appellants argue that: 1) the decoy's "aesthetics are hardly the traits and fashion style of a person under the age of 21" and; 2) the decoy's "experiences, training and interactions with the public in an authoritative capacity have led to an increased maturity, poise, demeanor and confidence seen generally in people over the age of 21." (*Id.* at p. 7.)

³ 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.)

The Department found that the decoy's appearance complied with rule 141(b)(2). (Decision at pp. 7-8.) Therefore, this Board is required to defer to 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 its decision, the Department rejected appellants' arguments that the decoy's appearance did not comply with rule 141(b)(2). To support its findings, the Department

relied on pictures of the decoy from the date of the sale (exhibits 3 and 4), as well as the ALJ's personal observations of the decoy at the administrative hearing. (Findings of Fact, at ¶ 7.) In fact, the Department specifically found that the photographs of the decoy "depict a youthful appearing person." (Determination of Issues, at ¶ 5.) Further, the Department stated that "[a]lthough the Decoy was wearing a modest amount of make-up, the same amount and type as she wore to the hearing, and a pair of prescription glasses, that did not result in the Decoy looking any older than her actual age." (*Ibid.*)

The Department is entitled to rely on pictures of the decoy from the date of the sale, as well as an ALJ's personal observations of a decoy. (See *Southland, supra*, 103 Cal.App.4th at 1094 [stating that 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."].) Such evidence is "reasonable in nature, credible and of solid value" to support the Department's findings regarding the decoy's appearance. (*County of Los Angeles, supra*, 32 Cal.App.4th at 814.)

In regard to the decoy's purported "experiences, training and interactions with the public in an authoritative capacity," appellants presented no evidence that it caused her to appear as a person 21 years old or older on the date of the operation. As noted in the decision, the clerk did not testify at the hearing and there is nothing in the record that the decoy's demeanor led the clerk to believe she was old enough to legally purchase alcohol. In fact, the opposite is true—the clerk told Det. Gomez that she mistook the decoy for another customer, not that she appeared over 21.

Based on the above, appellants rely entirely on a difference of opinion — theirs versus the Department — 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 Department and reach a different conclusion, despite substantial evidence to support the findings. This the Board cannot do.

ORDER

The decision of the Department is affirmed.⁴

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

⁴ 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 9904
3667 CASTRO VALLEY BLVD
CASTRO VALLEY, CA 94546**

OFF-SALE GENERAL - LICENSE

CONCORD DISTRICT OFFICE

File: 21-477641

Reg: 18087194

CERTIFICATE OF DECISION

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

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 December 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 29, 2019, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: December 19, 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,
Longs Drug Stores California, LLC
Dba: CVS Pharmacy Store 9904
3667 Castro Valley Blvd.
Castro Valley, CA 94546

Respondents

Regarding Their Type-21 Off-Sale General License
Under the State Constitution and the Alcoholic
Beverage Control Act.

} File: 21-477641
}
} Reg.: 18087194
}
} License Type: 21
}
} Word Count Estimate: 16,190
}
} Rptr: Amber Emerick, CSR-13546
} Emerick and Finch Reporters

PROPOSED DECISION

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter in Oakland, California, on October 24, 2018.

After oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing, the matter was argued by the parties and submitted for decision on October 24, 2018.

Matthew Gaughan, Attorney, Office of Legal Services, Department of Alcoholic Beverage Control, appeared and represented the Department of Alcoholic Beverage Control. (Hereafter the Department)

Alexa Halloran, Esq., of Solomon, Saltsman, and Jamieson, represented Garfield Beach CVS, LLC and Longs Drug Stores California, LLC. (Collectively hereafter Respondent)

As set forth in the Department's accusation, it seeks to discipline Respondent's license on the grounds that, on or about March 29, 2018, Respondent, through its agent or employee, Stacey-Lynn-Kehaulani Nunes-Eblacas, at said premises, sold, furnished, or gave away, or caused to be sold, furnished, or given away, an alcoholic beverage to Ayna Elizabeth Edwards., a person under the age of 21, in violation of California Business and Professions Code section 25658(a).¹ (Exhibit1: Pre-hearing pleadings)

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

FINDINGS OF FACT

1. The Department filed its accusation on July 20, 2018. On August 6, 2018, the Department received Respondent's Special Notice of Defense requesting a hearing on the accusation. The Department set the matter for a hearing. (Exhibit 1: Pre-hearing pleadings.)
2. On June 22, 2009, the Department issued Respondent a type-21 off-sale general license for its premises as captioned above.² (Hereafter the Licensed Premises)
3. Since being licensed, Respondent suffered the following disciplinary action:

Date of Violation	Section Violated	Registration Date	Registration Number	Penalty Imposed
06-30-2010	Bus. & Prof. Code 24200(a- b) and 25658(a)	02/02/2011	11074238	15-day license suspension

4. On March 29, 2018, Ayna Elizabeth Edwards (Hereafter the Decoy) assisted the Alameda County Sheriff's Department in conducting a decoy-operation. The decoy operation consisted of the under-age Decoy entering selected businesses licensed by the Department, including the Licensed Premises, wherein she sought to purchase alcoholic beverages.³ The Decoy operated with Alameda County Sheriff's Detective Moises Gomez (Hereafter Det. Gomez), Detective Leo Basped, and Sergeant Brett Scheuller.

5. The Decoy was born on April 6, 1999 and was 18 years old when she went to the Licensed Premises on March 29, 2018.

6. Prior to going to the selected licensed businesses that day, the Sheriff's deputies instructed the Decoy that when she attempted to purchase an alcoholic beverage at those businesses, if the sales person asked her age, she was to truthfully disclose it. They also directed her that if the sales person asked to view her identification, she was to present it to them for inspection. The deputies also told decoys not to have any facial hair and not to wear clothing depicting colleges or that displayed any police or law-enforcement related logos or symbols.

² A type-21 license permits the license-holder to retail beer, wine, and distilled spirits for consumption off the licensed premises.

³ Both decoy Ayna Edwards and Det. Moises Gomez testified at the hearing regarding the investigation at the Licensed Premises.

7. When the Decoy entered the Licensed Premises, she stood approximately 5'4" tall and weighed approximately 118 pounds. She had shoulder length blonde hair tied in a single pony-tail. She wore a pair of prescription glasses. She had on a white shirt over which she wore a light blue long sleeved shirt with a collar. She also wore a navy blue jacket because it was cold. She also wore blue jeans and a pair of white sneakers. (Exhibit 3: Photo of decoy and Exhibit 4: Photo of the Decoy with sales-clerk/cashier.) The Decoy wore some mascara, pencil eye-liner, and tinted lip gloss. She wore the exact same clothing and make-up when she testified at the hearing regarding her role as a decoy that night. The Decoy had an overall youthful appearance and did not appear any older than her actual age.

8. On March 29, 2018, at approximately 8:00 p.m., the Decoy entered the Licensed Premises while the three Sheriff's deputies waited outside. The Decoy selected one can of Bud Light beer from a refrigerator at the rear of the Licensed Premises. She carried it to the sales counter and placed it on a check out stand's conveyer belt. Respondent's sales clerk, 20 year old Stacey-Lynn Nunes-Eblancas (Hereafter the Cashier) rang up the beer and sold it to the Decoy. The Decoy and Cashier made eye-contact during the sale. At some point during the sale, the Decoy had her cell phone out, but was not speaking on it. The Cashier neither asked the decoy her age nor asked the Decoy to present her identification for inspection. After the sale, which took only a few seconds, the Decoy exited the Licensed Premises with her can of beer.

9. Once outside the Licensed Premises, the Decoy met with the waiting deputies. Within a few second thereafter, Det. Gomez, a second deputy, and the Decoy entered the Licensed Premises. Once inside, Det. Gomez, who was dressed in a plainly identifiable dark blue police uniform, asked the Decoy to identify who sold her the beer. The Decoy pointed at the Cashier and said that she was the seller of the beer. The Decoy was somewhere from 3' to 20' from the Cashier who was not attending to any other customers and was facing the Decoy when she identified the Cashier to Det. Gomez as the seller.

10. Det. Gomez immediately contacted the Cashier and asked her if she had just sold a beer to that person, indicating the Decoy, who was standing approximately five feet away from Det. Gomez. The Cashier acknowledged she had just sold a beer to that person. Det. Gomez then informed the clerk that they were conducting a decoy-operation and the person she had just admitted selling a beer to was, in fact, an under-age decoy.

11. The Cashier told Det. Gomez she had not asked for and inspected the Decoy's identification because she mistook the Decoy for another customer who buys alcoholic beverages.⁴ The Cashier never told Det. Gomez the Decoy appeared over 21 years old.

12. Det. Gomez was aware cash registers at the Licensed Premises prompted cashiers to verify a customer's age if the register detected an alcoholic beverage was presented for sale. The Cashier told him that when she rang up the Decoy's sale, she just entered a random birthdate into the register that would have been for someone at least 21 years old. The register cleared the can for beer for sale to the Decoy. The register calculated the age solely based upon the birthdate entered by the Cashier.

13. One of the deputies took a photo of the Decoy holding the can of beer she purchased while also pointing to the Cashier. (Exhibit 4: Photo). The Cashier and the Decoy were approximately 3' to 4' apart and facing each other while the photo was taken. Det. Gomez explained to the Cashier the photo was for informational purposes as part of the investigation. Det. Gomez asked the Decoy to point to the Cashier as shown in Exhibit 4. After the photo was taken, the deputies issued a citation to the Cashier for selling an alcoholic beverage to a minor, the Decoy.

14. For approximately six months prior to March 29, 2018, the Decoy worked part-time as a Sheriff's service cadet, a civilian employee of the Sheriff's Department. During that time she had been through a cadet orientation, informed of Sheriff's Department policies, and assisted doing office work and also assisted in the crime lab. When the Decoy worked as a cadet, she dealt with the public. Being a cadet made her more aware of her surroundings and confident.

15. Prior to serving as a decoy on March 29, 2018, the Decoy had participated in at least one, or possibly more than one, decoy operation where she visited other licensed businesses to determine if they would sell her an alcoholic beverage. That experience led her to not feel nervous when she acted as a decoy at the Licensed Premises.

16. Within a day or so after the incident herein, Respondent's store manager, May Chonsu (Hereafter Chonsu), attempted to discuss with the Cashier her sale of beer to the Decoy.⁵ However, the Cashier refused to discuss the matter with Chonsu. The Cashier failed to appear for subsequent scheduled work shifts and ultimately was terminated from her job at Respondent's Licensed Premises because she sold an alcoholic beverage to a minor (the Decoy) in violation of Respondent's store policy.

⁴ As the Cashier did not testify at the hearing, there was no way to verify the accuracy or reasonableness of the Cashier's explanation.

⁵ Store manager May Chonsu testified at the hearing regarding the handling of the Cashier and Respondent's training procedures and policies.

17. Chonsu also reviewed store surveillance video of the Cashier's transaction with the Decoy. The video reflected the Cashier did not view or otherwise check the Decoy's identification at the time of sale.

18. Respondent's newly hired employees attend a 4 hour "on-board" class where they are informed and instructed on Respondent's store policies and practices, including retailing of alcoholic beverages. When they are assigned out to work at a particular CVS Pharmacy-store, they are given added training at that specific site, including proper handling of sales of alcoholic beverages.

19. Chonsu verified that store registers are programmed to notify the cashier when an item rung up for sale is an alcoholic beverage. It will ask the cashier whether or not identification has been presented by the customer. If the clerk indicates one has been presented, the cash register will wait for the clerk to manually enter the birthdate from the identification into the register. The register will calculate if, based upon the birthdate entered, it reflects someone at least 21 years old. If it so calculates, the register will permit the sale to advance. If not, the register will deny processing the item for sale. The register's calculation of age is solely based upon whatever birthdate the cashier enters.

20. Since this sale to decoy incident, Chonsu has reminded and retrained Respondent's store staff regarding proper sales practices regarding alcoholic beverages and that a customer's identification should be inspected unless the patron is obviously over 21 years old. Employees were also reminded that selling an alcoholic beverage to a minor could result in dismissal from their job. Chonsu also sent her store's operations manager to a class given by the Sheriff's Department regarding proper sales practices for alcoholic beverages.

21. Respondent subsequently received a letter from the Alameda County Sheriff's Office that stated on July 27, 2018, another under-age decoy was sent into the Licensed Premises to attempt to purchase an alcoholic beverage and the sale was properly denied. (Exhibit A: Letter from Sheriff's Department)

LEGAL BASIS OF DECISION

1. Article XX, section 22 of the California Constitution and Business and Professions 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. Business and Professions Code 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. Business and Professions Code 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. Business and Professions Code Section 25658(f) permits law enforcement officials to use persons under 21 years old to apprehend licensees, employees or agents or other persons who sell or furnish alcoholic beverages to minors. The Department was directed to and did adopt and publish a rule regarding the use of underage decoys.
5. Under California Code of Regulations, title 4, division 1, article 22, section 141, commonly referred to as "rule 141",

(a) 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.

(b) The following minimum standards shall apply to actions filed pursuant to Business and Professions Code Section 25658 in which it is alleged that a minor decoy has purchased an alcoholic beverage:

- (1) At the time of the operation, the decoy shall be less than 20 years of age;
- (2) 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;
- (3) 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;
- (4) A decoy shall answer truthfully any questions about his or her age;
- (5) 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.

(c) Failure to comply with this rule shall be a defense to any action brought pursuant to Business and Professions Code Section 25658.

DETERMINATION OF ISSUES

1. Cause for suspension or revocation of Respondent's license exists under Article XX, section 22 of the California State Constitution and Business and Professions Code sections 24200(a) and (b) because on March 29, 2018, Respondent's employee, Stacey-Lynn Nunes-Eblacas, inside the Licensed Premises, sold an alcoholic beverage to Ayna Elizabeth Edwards, a person under the age of 21, in violation of Business and Professions Code section 25658(a).
2. The evidence established the Cashier sold a single can of beer to the Decoy. The Cashier neither asked the Decoy her age nor asked for and inspected her identification. The Cashier told Det. Gomez she did not do so because she mistook the Decoy for another patron who purchases alcoholic beverages there. To that extent, there was sufficient evidence to sustain Count 1, a violation of section 25658(a). (Findings of Fact ¶¶ 4-11)
3. Under rule 141(c) a defense to the accusation is established if there was non-compliance with rule 141(b)(1) through rule 141(b)(5).
4. Respondent asserted the Decoy did not meet the decoy appearance standard set forth in Rule 141(b)(2) that states: "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." Respondent argued the Decoy participated in eight other decoy operations and that, in this instance, she was confident and dressed in a "motherly" and/or mature manner and wore her hair "back". Respondent also noted the Decoy was a police service cadet, such experience adding to her confident demeanor when she purchased her beer at the Licensed Premises.
5. Based upon the evidence presented and reasonable inferences thereon, the Decoy in this instance clearly met the appearance standard set forth in Rule 141(b)(2). The Decoy was only 18 years old, stood 5'4' tall, and weighed only 118 lbs. She was casually dressed in a shirt and blue jeans with sneakers. She wore a jacket because it was cold that night. The photos taken of the decoy, Exhibit 3 and Exhibit 4, depict a youthful appearing person. Although the Decoy was wearing a modest amount of make-up, the same amount and type she wore to the hearing, and a pair of prescription glasses, that did not result in the Decoy looking any older than her actual age.

While the decoy had participated in at least one decoy operation prior to her visit to the Licensed Premises, it was not established that experience made the Decoy appear any older than she was even if the Decoy subjectively felt confident conducting the operation at the Licensed Premises based upon her prior decoy experience.⁶ Also, the Cashier told Det. Gomez the reason she did not ask the Decoy for her identification was that she mistook her for a regular customer who purchased alcoholic beverages. The Cashier never told the Detective she believed the Decoy herself looked old enough to legally purchase alcoholic beverages. Based on the Decoy's overall appearance, i.e., her physical appearance, persona, dress, poise, demeanor, maturity and conduct, the Decoy displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the Cashier and therefore met Rule 141(b)(2)'s decoy appearance standard.

6. Respondent also argued there was non-compliance with Rule 141(b)(5) due to an insufficient face-to-face identification by the decoy of the Cashier. Rule 141(b)(5) states that: "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." Respondent argued that after the sale, when the Decoy re-entered the Licensed Premises and identified the Cashier to the Sheriff's detectives, the Cashier was approximately 20' away. Respondent also argued that there was no proper face-to-face identification when the Detective took the photo of the decoy pointing out the clerk because Det. Gomez told the decoy to point at the Cashier. (Exhibit 4: Photo of clerk and decoy)

7. In *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board* (1998) 67 Cal. App.4th 575, the court determined there must be strict compliance with Rule 141, including its requirement that the decoy perform a face-to-face identification of the seller. In that case, because the decoy never performed any face-to-face identification whatsoever, there was no compliance with Rule 141(b)(5) and therefore a defense to the accusation under Rule 141(c) was established. However, that case did not expressly decide what actions would be sufficient to comply with the face-to-face identification requirement.

8. Subsequently, the court in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board; 7-Eleven, Inc., et al., Real Parties in Interest* (2003) 109 Cal.App.4th 1687, 1698 addressed what actions would constitute a sufficient face-to-face identification. In that case, the investigating officers decided to move the clerk and the

⁶ It was not established exactly how many prior decoy operations the Decoy had participated in prior to the night she visited the Licensed Premises. The Decoy testified she had worked on at least one prior decoy operation by the time she visited Respondent's Licensed Premises. She added she had collectively worked on approximately eight separate dates as a decoy operative.

decoy outside the licensed premises where the decoy identified the selling clerk. The court stated: "Regulation section 141, subdivision (b)(5), ensures-admittedly not as artfully as it might-that the seller will be given an opportunity, soon after the sale, to come "face-to-face" with the decoy." There was no requirement that the face-to-face identification actually occur inside or within the licensed premises. Therefore, although the investigating officer moved the decoy and clerk outside the premises, at which time the decoy identified the clerk, that sequence of events still complied with Rule 141(b)(5).

9. Very recently, the Court of Appeal in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board; Garfield Beach CVS, LLC, et.al, Real Parties in Interest*(2017) 18 Cal.App.5th 541,547 found compliance with Rule 141(b)(5) where, "...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 spirit of Rule 141."

10. In this instance, the evidence supports a finding there was compliance with Rule 141(b)(5) when the Decoy made a face-to-face identification of the seller after the Decoy re-entered the Licensed Premises with the Deputies. Det. Gomez asked her to identify the clerk who just sold her the beer. The Decoy pointed out the Cashier from a distance of no more than 20' while the Decoy and Cashier had a view of each other and the Cashier was not busy tending to other customers. Det. Gomez, dressed in his police uniform, immediately approached the Cashier and asked her if she had just sold a beer to the person who was standing approximately five feet from him, indicating the Decoy. The Cashier admitted selling beer to that person, the Decoy. Det. Gomez told the Cashier they were conducting a decoy operation and the person she had just admitted selling a beer to was an under-age decoy. The Cashier told Det. Gomez she had not checked the Decoy's identification because she mistook the Decoy for a regular customer of the store who purchased alcoholic beverages. The deputies next took a photo of the Cashier and Decoy together (Exhibit 4: Photo of the Decoy and Cashier). The Deputies explained to the Cashier the photo was needed for the investigation. Exhibit 4 depicts the Decoy pointing at the Cashier while they are about 3'-4' apart and facing one another. Det. Gomez had asked the Decoy to point to the Cashier for the photo. In this instance, the Cashier not only had a clear and ample opportunity to view the Decoy and object to any perceived misidentification but, in fact, she expressly admitted she sold beer to the Decoy confirming she knew she had been identified by the Decoy as the seller of beer to the decoy. There was neither any hint of any actual misidentification by the Decoy of the Cashier nor was there any question the Cashier understood she had been identified as the seller of beer to the

Decoy. The Cashier did not testify at the hearing so as to present any evidence supporting any other conclusion. There was compliance with Rule 141(b)(5) in this instance.

11. As Respondent did not establish there was non-compliance with rule 141(b)(2) or rule 141(b)(5), a defense to the accusation under Rule 141(c) was not established. The evidence supported sustaining Count 1 of the accusation.

12. Except as set forth in this decision, all other allegations in the accusation and all other contentions made by the parties in the pleadings or at the hearing regarding those allegations lack merit.

PENALTY

1. In assessing an appropriate measure of discipline, the Department's penalty guidelines are in California Code of Regulations, title 4, division 1, article 22, section 144, commonly referred to as "rule 144". Under rule 144, the presumptive penalty for a first violation of selling or furnishing an alcoholic beverage to a minor in violation of section 25658 is a 15-day license suspension. If there is a second violation for selling or furnishing an alcoholic beverage to a minor within 36 months of a prior violation, then a 25 day license suspension is recommended. If there are three sale-to-minor violations within a 36 month term then license revocation is recommended.

2. Rule 144 also permits imposition of a revised penalty based on the presence of aggravating or mitigating factors. Rule 144 contains a non-exhaustive list of those factors. One of the aggravating factors listed is the "Appearance and actual age of minor". One of the mitigating factors listed is "Length of licensure at subject premises without prior discipline or problems." Added listed mitigating factors are "Positive action by licensee to correct problem." and "Documented training of licensee and employees."

3. The Department recommended a 15 day license suspension for this matter. It acknowledged Respondent had been discipline free since 2010. However, the Department contended that term of being discipline free was equally off-set by the aggravating factor that the Decoy was only 18 years old and had a very youthful appearance when she purchased beer at the Licensed Premises. Also, the Cashier did not confirm the Decoy was at least 21 years old.

4. Respondent argued that, if the accusation was sustained, a mitigated penalty of a 10 day suspension was more appropriate. Respondent noted it has been licensed since 2009 with only one prior violation approximately eight years ago. Further, Respondent dismissed the Cashier from employment.

Respondent has also retrained and reminded its remaining employees regarding proper procedures for responsible retailing of alcoholic beverages and that selling an alcoholic beverage to a minor may result in their termination from employment.

5. In assessing the proper penalty for this matter, the evidence established the Decoy was only 18 years old and had a youthful appearance when the Cashier sold her beer. The Cashier did not ask for her identification or to disclose her age because, according to the Cashier's statement, she mistook the Decoy for another "regular" customer who purchased alcoholic beverages at the Licensed Premises. Yet, Respondent's operation for nearly eight years since its last disciplinary action is also noteworthy. Further, after the violation herein, Respondent re-trained and reminded its staff regarding proper practices in retailing of alcoholic beverages. Lastly, approximately four months after the violation herein, the Sheriff's Department conducted another decoy operation at the Licensed Premises and the sale was appropriately denied or refused. After weighing the aggravating and mitigating factors, some penalty reduction from the 15 day suspension called for in rule 144 is warranted. The penalty ordered below is a result of that assessment and complies with Rule 144.

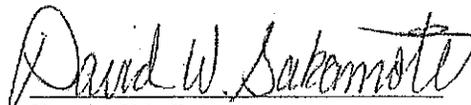
6. Except as set forth in this decision, all other arguments, contentions, and assertions raised by the parties with respect to the appropriate penalty are without merit.

ORDER

Count 1 of the accusation is sustained.

Respondent's license is suspended for 10 days.

Dated: November 5, 2018


David W. Sakamoto
Administrative Law Judge

Garfield Beach CVS, LLC and
Longs Drug Stores California, LLC
File #21-477641
Reg. #18087194
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By: <u>Joel A. Applegate</u>
Date: <u>12/17/18</u>