

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

AB-9889

File: 21-548263; Reg: 19089462

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store #10475
2964 Broadway
Oakland, CA 94611-57111,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: March 12, 2021
Telephonic

ISSUED MARCH 12, 2021

Appearances: *Appellants:* Andrew Mark Grassel, 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 Store #10475 (appellants), appeal from a decision of the
Department of Alcoholic Beverage Control (Department)¹ suspending their license for
10 days because their clerk sold an alcoholic beverage to a police minor decoy, in
violation of Business and Professions Code section 25658, subdivision (a).

¹ The decision of the Department, dated September 18, 2020, is set forth in the
appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on July 9, 2015. There is no history of prior departmental discipline against the license.

On November 1, 2019, the Department filed an accusation against appellants charging that, on September 25, 2019, appellants' clerk, Fetalaiqa Solia (the clerk), sold an alcoholic beverage to 19-year-old Roxana Perez Lima (the decoy). Although not noted in the accusation, the decoy was part of a joint operation conducted by the Oakland Police Department (OPD) and the Department.

At the administrative hearing held on May 27, 2020, documentary evidence was received and testimony concerning the sale was presented by the decoy, OPD Officer Jennifer Sena, and Department Agent Monica Molthen. The licensees' manager, Gladis Garcia-Torres, testified on appellants' behalf.

Testimony established that on September 25, 2019, at approximately 9:00 p.m., the decoy was driven to the premises by Officer Sena along with another decoy. The decoy entered the licensed premises alone. She went to the coolers and selected a six-pack of Sierra Nevada Pale Ale in bottles (exh. 2). The decoy took the six-pack to the cash register. The clerk told her the price of the ale and asked if she had a CVS card. The clerk did not ask the decoy for identification nor any age-related questions before completing the sale.

The decoy exited the premises with the ale and a receipt for the sale (exh. 3). She re-joined Officer Sena and filled out a written report regarding the transaction (exh. 4). Officer Sena radioed other officers and ABC agents who then entered the premises to contact and detain the clerk.

The decoy re-entered the premises to make a face-to-face identification of the clerk. The officers asked her who sold her the ale and the decoy identified the clerk from a distance of about one foot. A photo was taken of the clerk and decoy together (exh. 5) and Agent Molthen issued the clerk a citation (exh. A). The clerk's employment was subsequently terminated.

On June 16, 2020, the administrative law judge (ALJ) issued a proposed decision, sustaining the accusation and recommending a 10-day suspension. On August 31, 2020, the Department adopted the proposed decision in its entirety. A certificate of decision was issued on September 18, 2020.

Appellants then filed a timely appeal contending: (1) the decoy did not display the appearance required by rule 141(b)(2),² (2) the face-to-face identification of the clerk did not comply with rule 141(b)(5), and (3) the penalty fails to take into consideration all of the mitigating factors presented.

DISCUSSION

I

DECOY'S APPEARANCE

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.)

² 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.

Appellants contend that the decoy did not display the appearance required by rule 141(b)(2). (AOB at pp. 9-11.) They contend her “physical appearance, stature, jewelry, training and experience as a cadet for the Oakland Police Department” caused her to appear over the age of 21. (*Id.* at p. 10.)

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].)

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department’s decision.

(*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106, 112 [28 Cal.Rptr.74].)

Therefore, the issue of substantial evidence when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; *Harris, supra*, at p. 114.)

This Board has stated many times that, in the absence of compelling reasons, it will ordinarily defer to the Department's findings on the issue of whether there was compliance with rule 141(b)(2). The Department made the following findings regarding the decoy's appearance and experience:

12. When Lima purchased ale at the licensed premises, she was approximately 4' 9" tall and weighed 120 lbs. She was wearing a black shirt and black shorts. Her hair was in a bun and she wore one bracelet on her left wrist. She wore no make-up but was wearing glasses. Officer Sena assessed Lima as appearing 19 years old.

13. In March 2019, Lima became an Oakland Police cadet. As a cadet, she received some police training and assisted the community relations team. She received some instruction on how to de-escalate situations and learned some defensive tactics.

(Findings of Fact, ¶¶ 12-13.) Based on these findings, the Department addressed appellants' rule 141(b)(2) arguments:

6. Respondent asserted decoy Lima 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 was an Oakland Police cadet, received training in that capacity, participated in prior decoy operations, and had a developed figure and appearance.

7. Based upon the evidence presented and reasonable inferences thereon, decoy Lima met the appearance standard set forth in rule 141(b)(2). At the licensed premises she was 19 years old, stood only 4' 9" tall, and weighed 120 lbs. She was casually dressed in a simple black t-shirt, black shorts, and tennis shoes. She wore glasses and a bracelet on her left wrist but wore no make-up. Her hair was tied up in a bun. The photo taken of the decoy, Exhibit 5, depicts an overall youthful appearing person, even a person under 19 years old.

8. While the decoy was an Oakland police cadet for about six months, had received some cadet training, and had participated in decoy operations before her visit to respondent's licensed premises, it was not established those experiences made decoy Lima appear any older than her actual age, 19. There was no evidence clerk Solia told the investigating officers, respondent's manager, or anyone else she thought the decoy appeared 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, decoy Lima displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Solia at the time she sold the six-pack of ale to Lima, and therefore decoy Lima met rule 141(b)(2)'s decoy appearance standard.

(Determination of Issues, ¶¶ 6-8.) We agree with this assessment.

As this Board has said many times, minors come in all shapes and sizes and we are reluctant to suggest that a minor decoy automatically violates the rule based on her physical characteristics. (See, e.g., *7-Eleven/ NRG Convenience Stores* (2015) AB-9477; *7-Eleven Inc./Lobana* (2012) AB-9164.) This Board has noted that:

[a]n ALJ's task to evaluate the appearance of decoys is not an easy one, nor is it precise. To a large extent, application of such standards as the rule provides is, of necessity, subjective; all that can be required is reasonableness in the application. As long as the determinations of the ALJs are reasonable and not arbitrary or capricious, we will uphold them.

(*O'Brien* (2001) AB-7751, at pp. 6-7.) Notably, the standard is not that the decoy must display the appearance of a "childlike teenager" but "the appearance which could generally be expected of a person under 21 years of age." (Rule 141(b)(2).) In Findings of Fact paragraphs 12 and 13, and Determination of Issues paragraphs 6

through 8, the Department found that the decoy met this standard, notwithstanding the details of the decoy's physical appearance highlighted by appellants. We agree.

Appellants also argue that the decoy displayed a demeanor which was more mature and confident because of her experience as a OPD cadet. They maintain this experience gave the decoy a confident demeanor which made her appear more mature. The Board has, however, rejected the "experienced decoy" argument many times. As the Board previously observed:

A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. . . . There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.

(Azzam (2001) AB-7631, at p. 5, emphasis in original.) This case is no different.

In a similar minor decoy case, where the Court of Appeal was tasked with determining whether an ALJ's assessment of the decoy's appearance was correct, the Court said that under the facts before them, while:

[O]ne could reasonably look at the photograph [of the decoy] and reasonably conclude that the decoy appeared to be older than 21 years of age, we cannot say that, as a matter of law, a trier of fact could not reasonably have concluded otherwise.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (2002) 103

Cal.App.4th 1084, 1087 [127 Cal.Rptr.2d 652].) The instant case is no different. We

do not believe the evidence supports a finding that the ALJ "could not reasonably have concluded otherwise." (*Ibid.*) As stated above, case law instructs us that when, as

here, "two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those

of the Department—all conflicts in the evidence must be resolved in favor of the Department’s decision” (*Kirby, supra*, 25 Cal.App.3d at p. 335.)

Appellants presented no evidence that the decoy’s physical appearance or demeanor *actually resulted* in her displaying the appearance of a person 21 years old or older on the date of the operation in this case. The clerk did not testify. We cannot know what went through her mind in the course of the transaction, why she failed to ask for identification, or why she made the sale. There is simply no evidence to establish that the decoy’s physical appearance or demeanor were the *actual reason* the clerk made the sale.

Ultimately, appellants are simply asking this Board to second guess the ALJ and reach a different conclusion, despite substantial evidence to support the findings in the decision. This we cannot do.

II

FACE-TO-FACE IDENTIFICATION

Appellants contend that the face-to-face identification of the clerk failed to comply with rule 141(b)(5). (AOB at pp. 8-9.) They maintain, “[t]he evidence and testimony in the records demonstrated that, more likely than not, the face-to-face identification occurred sometime after the citation was issued.” (*Id.* at p. 8.) This assertion is based on the fact that the decoy and officers arrived at the premises at 9:05 p.m., the receipt indicates a sale at 9:08 p.m., and the citation indicates that it was issued at 9:10 p.m. Appellants contend too much activity transpired between the sale and the citation being issued for this time to be accurate.

Rule 141(b)(5) provides:

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.

This rule provides an affirmative defense. The burden is, therefore, on appellants to show non-compliance. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.) The rule requires "strict adherence." (See *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126] (*Acapulco*) [finding that no attempt, reasonable or otherwise, was made to identify the clerk in that case].)

The ALJ made the following findings on this issue:

4. Respondent contended there was non-compliance with rule 141(b)(5) that states: " 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: 1) because Agent Molthen wrote "2110" hours (commonly known as 9:10 p.m.) on her citation to the clerk; 2) that the sales receipt indicated the sale occurred at 9:08 p.m., and 3) considering decoy Lima exited the store for some time before re-entering to do the face-to-face identification, that sufficiently established Agent Molthen issued the citation to Solia before Lima completed her face-to-face identification of Solia inside the licensed premises.

5. However, Agent Molthen expressly testified she issued the citation to clerk Solia after both decoy Lima executed her face-to-face identification of clerk Solia and after the photo of clerk Solia and decoy Lima (Exhibit 5) was taken. No witness testified to the contrary.^[fn.] Agent Molthen never testified she entered/wrote on the citation the exact time she issued the citation to clerk Solia. It may well have been that as the citation form, Exhibit A, asked for the "Date of Violation" and the adjacent box asked for "Time" that Agent Molthen entered the approximate time of the violation. The time listed on the citation was only two minutes different from the time on the sales receipt. Based upon the facts and circumstances presented, there was sufficient persuasive evidence to prove Agent Molthen issued

the citation to clerk Solia after the face-to-face identification occurred. A defense under rule 141(c) for non-compliance with rule 141(b)(5) was not established.

(Determination of Issues, ¶¶ 4-5.) We agree with this assessment. There is simply no evidence — only speculation — that the identification failed to comply with the rule.

As noted above, appellants bear the burden of proof to establish that the face-to-face identification did not comply with rule 141(b)(5), once the Department presents sufficient evidence to establish its prima facie case. As this Board stated previously:

Once there is affirmative testimony that the face-to-face identification occurred, the burden shifts to appellants to demonstrate non-compliance, i.e., that the normal procedure of issuing a citation after identification of the clerk, was not followed. We are unwilling to read our decision in *The Southland Corporation/R.A.N.* as expanding the affirmative defense created by rule 141 to the point where appellants need produce no evidence whatsoever to support a contention that there was a violation of that rule.

(*7-Eleven, Inc. & Azzam* (2001) AB-7631 at p. 4.)

We find that the face-to-face identification in this matter fully complied with rule 141(b)(5) and its core purpose of ensuring that the seller of the alcohol is properly identified by the decoy before the conclusion of the decoy operation. The Board is prohibited from reweighing the evidence or exercising its independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result (*Masani, supra*, 118 Cal.App.4th at 1437) when, as here, appellants fail to satisfy their burden of proof to establish an affirmative defense.

III

PENALTY

Appellants contend that the penalty is excessive because it fails to take into consideration all of the factors in mitigation presented by appellants. (AOB at pp. 7-8.)

Appellants argue that the decision should be reversed because of its failure to recite — in the penalty section of the decision — *all* the mitigating factors which were presented by appellants at the administrative hearing, thereby constituting an abuse of discretion. (*Id.* at p. 8.)

The Board will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) “Abuse of discretion’ in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.]” (*Brown v. Gordon* (1966) 240 Cal.App.2d 659, 666-667 [49 Cal.Rptr. 901].)

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

Rule 144 provides:

In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act (Bus. and Prof. Code Sections 23000, *et seq.*), and the Administrative Procedures Act (Govt. Code Sections 11400, *et seq.*), the Department shall consider the disciplinary guidelines entitled “Penalty Guidelines” (dated 12/17/2003) which are hereby incorporated by reference. Deviation from these guidelines is appropriate where the Department in its sole discretion determines that the facts of the particular case warrant such a deviation - such as where facts in aggravation or mitigation exist.

(Cal. Code Regs., tit. 4, § 144.)

Among the mitigating factors provided by the rule are the length of licensure without prior discipline, positive actions taken by the licensee to correct the problem,

cooperation by the licensee in the investigation, and documented training of the licensee and employees. Aggravating factors include, *inter alia*, prior disciplinary history, licensee involvement, lack of cooperation by the licensee in the investigation, and a continuing course or pattern of conduct. (*Ibid.*)

The Penalty Policy Guidelines further address the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

Penalty Policy Guidelines:

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

(*Ibid.*)

In the decision, the ALJ addresses the issue of penalty and the consideration of aggravating and mitigating factors:

3. The Department recommended a 15-day license suspension. It contended the evidence established clerk Solia illegally sold an alcoholic beverage to minor-decoy Lima without confirming she was at least 21 years old. Clerk Solia simply over-rode the cash register system and allowed the sale to proceed. The Department also contended that respondent had only been licensed since 2015 and its discipline-free history since then was not long enough to warrant a mitigated penalty.
4. Respondent argued that under rule 144, documented training of licensee and employees is a mitigating factor and respondent had given sufficient and appropriate training to Solia and its other employees regarding proper sales of alcoholic beverages. Respondent also

contended rule 144 lists "Positive action by licensee to correct problem" as a mitigating factor and respondent dismissed clerk Solia and resumed its regular training efforts with the remaining staff. Lastly, respondent argued it has not suffered any prior disciplinary action since being licensed in 2015. Therefore, if some penalty were assessed, respondent contended a mitigated penalty of a 5- or 10-day suspension was more appropriate.

5. In this matter, a downward adjustment to the standard penalty is appropriate. While decoy Lima's age should have been verified by Solia, respondent presented sufficient evidence of its training efforts and policies to prevent selling alcoholic beverages to minors. These were in effect and conveyed to respondent's employees well prior to the date of violation herein. Clerk Solia was dismissed from employment due to the violation herein and respondent again admonished the remaining licensed premises employees to follow respondent's policies and practices aimed at preventing the sales of alcoholic beverages to minors.

(Decision at p. 9.)

Appellants fault the decision for failing to mitigate the penalty further. However, as we have said time and again, this Board's review of a penalty looks only to see whether it can be considered reasonable, and, if it is reasonable, the Board's inquiry ends there. The *extent* to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion — pursuant to rule 144 — and the Board may not interfere with that discretion absent a clear showing of abuse of discretion. Accordingly, the fact that the ALJ recommended a 5-day reduction in the standard 15-day penalty, rather than the penalty requested by appellants, is entirely within his discretion.

Appellants appear to want the Board to go behind the ALJ's findings and require him to explain his reasons for recommending a 10-day rather than an all-stayed penalty. However, such a requirement has been rejected by this Board numerous times. For example, in *7-Eleven, Inc./Cheema* (2004) AB-8181, the Board said:

“Appellants misapprehend *Topanga*.³ It does not hold that findings must be explained, only that findings must be made.” (Also see: *No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 258-259 [242 Cal.Rptr. 760]; *Jacobson v. Co. of Los Angeles* (1977) 69 Cal.App.3d 374, 389 [137 Cal.Rptr. 909].)

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

Appellants have not established that the Department abused its discretion by imposing a 10-day penalty in this matter.

ORDER

The decision of the Department is affirmed.⁴

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

³ *Topanga Assn. for a Scenic Community v. Co. of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836].

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 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 AND LONGS DRUG
STORES CALIFORNIA, LLC
CVS PHARMACY STORE 10475
2964 BROADWAY
OAKLAND, CA 94611

OFF-SALE GENERAL - LICENSE

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

CONCORD DISTRICT OFFICE

File: 21-548263

Reg: 19089462

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 August 31, 2020. 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 October 29, 2020, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: September 18, 2020



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	}	File: 21-548263
Longs Drug Stores California, LLC	}	
Dbas: CVS Pharmacy Store 10475	}	Reg.: 19089462
2964 Broadway	}	
Oakland, CA 94611	}	License Type: 21
	}	
Respondents	}	Word Count Estimate: 20,527
	}	
	}	Rptr: Christy Curry, CSR-13982
	}	Emerick and Finch Reporters
	}	
Regarding Their Type-21 Off-Sale General License	}	<u>PROPOSED DECISION</u>
Under the State Constitution and the Alcoholic Beverage	}	
<u>Control Act</u>	}	

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter in Oakland, California on May 27, 2020.

Colleen Villarreal, Attorney III, Office of Legal Services, Department of Alcoholic Beverage Control, represented the Department of Alcoholic Beverage Control. (Hereafter the Department)

Adam Koslin, attorney-at-law, of Solomon, Saltsman, and Jamieson, represented Garfield Beach CVS, LLC and Longs Drug Stores California, LLC. (Collectively hereafter respondent)

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 May 27, 2020.

The Department's accusation alleged cause for suspension or revocation of respondent's license exists under California Constitution, article XX, section 22, and Business and Professions Code, section 24200, subdivision (a) and (b), based on the following ground:¹

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

Count 1 : “On or about September 25, 2019, respondent-licensee’s agent or employee, Fetalaiqa Solia, at said premises, sold, furnished, gave or caused to be sold, furnished, or given, an alcoholic beverage, to-wit: beer, to Roxana Perez Lima, a person under the age of 21 years, in violation of Business and Professions Code Section 25658(a).” (Exhibit 1: Pre-hearing pleadings, accusation)

FINDINGS OF FACT

1. The Department filed its accusation on November 1, 2019. On November 18, 2019, the Department received respondent’s Notice of Defense and 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 July 9, 2015, 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 has not suffered any prior disciplinary action at the licensed premises.
4. Roxana Perez Lima was born on May 30, 2000. (Hereafter Lima) On September 25, 2019, 19-year old Lima assisted the Oakland Police Department and the Department of Alcoholic Beverage Control with a minor decoy operation at the licensed premises. Lima’s role was to see if she could purchase an alcoholic beverage there. Prior to going to the licensed premises, the police instructed Lima that if she was asked for her age she had to tell the truth. Also, if she was asked for her identification she had to produce it. Lastly, she was to use the \$20 purchase money given to her by the police officers to make her purchase.
5. At approximately 9:00 p.m. on September 25, 2019, Oakland Police Officer Sena and Officer Vierra drove Lima and another decoy to the licensed premises.³ Lima exited the car and entered the licensed premises alone to attempt to purchase an alcoholic beverage. Officer Sena, Officer Vierra, and the second decoy remained in the police car.

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

³ Officer Sena could not recall the name of the second decoy but that decoy played no role in the decoy operation at respondent’s premises.

6. A separate group of assisting officers, designated as an arrest-team, stood by outside the licensed premises. The arrest team consisted of Oakland Police Sgt. Dohram, Oakland Police Officer Romero, an Oakland Police service technician, and Alcoholic Beverage Control Agent Molthen.⁴
7. Once inside the licensed premises, Lima went to its alcoholic beverage section and selected a six-pack of bottled Sierra Nevada Pale Ale to purchase. (Exhibit 2: photo of item) She carried it to the cash register tended by a female clerk, Fetalaiqa Solia. (Hereafter clerk Solia)
8. At the sales counter, clerk Solia told Lima the price of the ale. She also asked Lima if she had a CVS card. Clerk Solia neither asked Lima to produce her identification nor asked Lima any questions to determine her age. Lima paid for the six-pack of ale and clerk Solia provided a receipt evidencing the sale. (Exhibit 3: sales receipt)
9. Lima exited the licensed premises with her ale and sales receipt and rejoined Officer Sena in her police car. She told Officer Sena that a sale was made to her and she also described clerk Solia as being the only clerk near the front of the store. Lima also completed filling out a brief written statement about her purchase of ale. (Exhibit 4: decoy statement) Using her radio, Officer Sena told the arrest-team a sale was made to Lima in the licensed premises.
10. Within a few minutes of receiving Officer Sena's radioed update, the arrest-team entered the licensed premises. Once inside, they promptly contacted and detained clerk Solia and determined it was safe for decoy Lima to re-enter the licensed premises.
11. Within the next few minutes, decoy Lima re-entered the licensed premises with her ale and sales receipt. The police officers asked her who sold to her. While Lima was about one foot from clerk Solia, she pointed towards clerk Solia and identified her as the person who sold her the six pack of ale. Within approximately the next five minutes, the police service technician took a photo of clerk Solia and Lima standing next to each other inside the licensed premises. (Exhibit 5: photo) Within a few added minutes after the photograph was taken, Agent Molthen issued a citation to clerk Solia for violating section 25658(a), selling an alcoholic beverage to a minor, decoy Lima. (Exhibit A: citation)

⁴ There was some evidence that another un-named Oakland Police officer was also part of the arrest team.

12. When Lima purchased ale at the licensed premises, she was approximately 4'9" tall and weighed 120 lbs. She was wearing a black shirt and black shorts. Her hair was in a bun and she wore one bracelet on her left wrist. She wore no make-up but was wearing glasses. Officer Sena assessed Lima as appearing 19 years old.

13. In March 2019, Lima became an Oakland Police cadet. As a cadet, she received some police training and assisted the community relations team. She received some instruction on how to de-escalate situations and learned some defensive tactics.

14. As of September 25, 2019, Lima had served as a decoy on four prior dates wherein she visited between 5-10 licensed premises on each date to determine if they would sell her an alcoholic beverage.

15. Gladis Garcia Torres was respondent's store manager at the licensed premises on the night of the decoy operation. That evening, clerk Solia came into the office area of the licensed premises and indicated to Torres she was looking for her wallet, she was caught selling to a minor, and she might get a ticket. Torres later viewed clerk Solia's sale to the decoy on respondent's video surveillance system. Within two to three weeks after September 25, 2019, respondent dismissed Solia from employment for selling an alcoholic beverage to a minor, the decoy. Torres testified Solia had not followed respondent's sales policies because Solia did not: look at the customer, check the decoy's identification, and improperly used the cash-register's over-ride function so the register would process the sale.

16. Torres testified that respondent's cash-register receipts, such as Exhibit 3, are set to the correct date and time. In this instance, the sales receipt indicated the sale occurred on September 25, 2019 at 9:08 p.m.⁵

17. Respondent's policy is that when selling alcoholic beverages, its clerks/cashiers must ask for and inspect the identifications of those customers who do not appear at least 35 years old. When respondent's cash-registers scan the items/products presented for purchase, the register will prompt the clerk/cashier to confirm the age of the customer when age restricted items, such as alcoholic beverages, are scanned. If the customer appears over 35 years old, the clerk/cashier can enter a birthdate into the register making the customer over 21 or a clerk may also enter the actual birthdate given to them by the customer who appears over 35 years old.

⁵ Exhibit 3 was a correctly dated copy of the sales receipt for decoy Lima's purchase. While the date on the receipt appeared to read "September 26, 2019", it is determined that possibly due to some imprecision in the printing, copying, or some other graphic anomaly, the bottom of the number "5" appeared closed up so as to resemble a "6", rather than appearing as the number "5".

18. Solia worked for approximately 10 years for respondent, although Torres was not sure if it was one continuous term of employment or partial terms of employment spanning that time.
19. While working for respondent, clerk Solia was trained in an on-going manner regarding proper sales practices of alcoholic beverage and tobacco products. The training consisted of viewing various training videos and successful passage of a quiz on the material.
20. After the sale-to-minor incident herein, Torres met with the other licensed premises employees to re-emphasize respondent's policy against selling alcoholic beverages to minors and to be sure to check the identifications of customers purchasing alcoholic beverages who did not appear at least 35 years old. Torres continued a practice of meeting weekly with respondent's employees at this licensed premises to re-emphasize proper retailing practices regarding alcoholic beverages. As needed, training for new employees was done on a more frequent basis.

LEGAL BASIS OF DECISION

1. Article XX, section 22, of the California Constitution and Business and Professions Code section 24200, subdivision (a), provide 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, subdivision (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, subdivision (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, subdivision (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, section 141, (Hereafter 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 Constitution and Business and Professions Code section 24200, subdivision (a) and (b), because on September 25, 2019, respondent's agent or employee, Fetalaiiga Solia, upon the licensed premises, sold, furnished, or gave an alcoholic beverage to Roxana Perez Lima, a person under the age of 21, in violation of Business and Professions Code section 25658, subdivision (a). (Findings of Fact ¶¶ 4-8)
2. The evidence established clerk Solia sold a six-pack of Sierra Pale Ale, an alcoholic beverage, to 19-year old decoy Lima. Solia made no effort to determine if Lima was at least 21 years old.
3. Under rule 141(c): "Failure to comply with this rule shall be a defense to any action brought pursuant to Business and Professions Code Section 25658."
4. Respondent contended there was non-compliance with rule 141(b)(5) that states: "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: 1) because Agent Molthen wrote "2110" hours (commonly known as 9:10 p.m.) on her citation to the clerk; 2) that the sales receipt indicated the sale occurred at 9:08 p.m., and 3) considering decoy Lima exited the store for some time before re-entering to do the face-to-face identification, that sufficiently established Agent Molthen issued the citation to Solia before Lima completed her face-to-face identification of Solia inside the licensed premises.
5. However, Agent Molthen expressly testified she issued the citation to clerk Solia after both decoy Lima executed her face-to-face identification of clerk Solia and after the photo of clerk Solia and decoy Lima (Exhibit 5) was taken. No witness testified to the contrary.⁶ Agent Molthen never testified she entered/wrote on the citation the exact time she *issued* the citation to clerk Solia. It may well have been that as the citation form, Exhibit A, asked for the "Date of Violation" and the adjacent box asked for "Time" that Agent Molthen entered the approximate time of the violation. The time listed on the citation was only two minutes different from the time on the sales receipt. Based upon the facts and circumstances presented, there was sufficient persuasive evidence to prove Agent Molthen issued the citation to clerk Solia after the face-to-face identification occurred. A defense under rule 141(c) for non-compliance with rule 141(b)(5) was not established.

⁶ Clerk Solia did not testify at the hearing.

6. Respondent asserted decoy Lima 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 was an Oakland Police cadet, received training in that capacity, participated in prior decoy operations, and had a developed figure and appearance.

7. Based upon the evidence presented and reasonable inferences thereon, decoy Lima met the appearance standard set forth in rule 141(b)(2). At the licensed premises she was 19 years old, stood only 4’9” tall, and weighed 120 lbs. She was casually dressed in a simple black t-shirt, black shorts, and tennis shoes. She wore glasses and a bracelet on her left wrist but wore no make-up. Her hair was tied up in a bun. The photo taken of the decoy, Exhibit 5, depicts an overall youthful appearing person, even a person under 19 years old.

8. While the decoy was an Oakland police cadet for about six months, had received some cadet training, and had participated in decoy operations before her visit to respondent’s licensed premises, it was not established those experiences made decoy Lima appear any older than her actual age, 19. There was no evidence clerk Solia told the investigating officers, respondent’s manager, or anyone else she thought the decoy appeared 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, decoy Lima displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Solia at the time she sold the six-pack of ale to Lima, and therefore decoy Lima met rule 141(b)(2)’s decoy appearance standard.

9. 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 a penalty, the Department’s penalty guidelines are in California Code of Regulations, title 4, section 144. (Hereafter 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.

2. However, rule 144 also permits imposition of a revised penalty based on the presence of aggravating or mitigating factors, a non-exhaustive list of which are stated therein.

3. The Department recommended a 15-day license suspension. It contended the evidence established clerk Solia illegally sold an alcoholic beverage to minor-decoy Lima without confirming she was at least 21 years old. Clerk Solia simply over-rode the cash register system and allowed the sale to proceed. The Department also contended that respondent had only been licensed since 2015 and its discipline-free history since then was not long enough to warrant a mitigated penalty.
4. Respondent argued that under rule 144, documented training of licensee and employees is a mitigating factor and respondent had given sufficient and appropriate training to Solia and its other employees regarding proper sales of alcoholic beverages. Respondent also contended rule 144 lists "Positive action by licensee to correct problem" as a mitigating factor and respondent dismissed clerk Solia and resumed its regular training efforts with the remaining staff. Lastly, respondent argued it has not suffered any prior disciplinary action since being licensed in 2015. Therefore, if some penalty were assessed, respondent contended a mitigated penalty of a 5- or 10-day suspension was more appropriate.
5. In this matter, a downward adjustment to the standard penalty is appropriate. While decoy Lima's age should have been verified by Solia, respondent presented sufficient evidence of its training efforts and policies to prevent selling alcoholic beverages to minors. These were in effect and conveyed to respondent's employees well prior to the date of violation herein. Clerk Solia was dismissed from employment due to the violation herein and respondent again admonished the remaining licensed premises employees to follow respondent's policies and practices aimed at preventing the sales of alcoholic beverages to minors.
6. Except as set forth in this decision, all other arguments, contentions, and assertions raised by the parties with respect to the penalty are without merit.

ORDER

1. Count 1 of the accusation is sustained.
2. Respondent's license is suspended for 10 days.

Dated: June 16, 2020


David W. Sakamoto
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By:  _____
Date: <u>08/31/20</u>