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

AB-9940
File: 21-541762; Reg: 21091213

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #9828
574 West Lacey Boulevard
Hanford, CA 93230,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: April 8, 2022
Sacramento, CA

ISSUED APRIL 11, 2022

Appearances: *Appellants:* Jade Quintero, of Solomon, Saltsman & Jamieson, as counsel for Garfield Beach CVS, LLC and Longs Drug Stores California, LLC,

Respondent: Jason Liu, 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 #9828 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control (Department)[1] suspending their license for 20 days because their clerk sold alcoholic beverages to two police minor decoys, in violation of Business and Professions Code section 25658, subdivision (a).[2]

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[1] The decision of the Department, dated November 30, 2021, is set forth in the appendix.

[2] All statutory references are to the Business and Professions Code unless otherwise indicated.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on October 1, 2014. There is one prior instance of departmental discipline against the license for the sale of alcohol to a minor in 2017.

On June 1, 2021, the Department filed a two-count accusation against appellants charging that, on March 20, 2021, appellants' clerk, Arkeena Washington (the clerk), sold alcoholic beverages to two minor decoys, 16-year-old M.M. and 15-year-old J.G. (the decoys).[3] Although not noted in the accusation, the decoys were working for the King's County Sheriff's Office (KCSO) at the time.

At the administrative hearing held on August 24, 2021, documentary evidence was received and testimony concerning the sale was presented by the decoys and by KCSO Senior Deputy Joshua Hunt. Julie Miller, district leader for CVS Health — the person in charge of front store managers, pharmacy managers, and their teams — testified on appellants' behalf.

Testimony established that on March 20, 2021, the KCSO conducted a decoy operation using two decoys, a 16-year-old female and a 15-year-old male. The decoys entered the licensed premises together and located the alcoholic beverage section. They selected a 3-pack of Modelo beer and took it to the register. The clerk scanned the beer and asked the female decoy for payment. The cost was more than the amount of money the deputies had given her, so she asked the male decoy for more money for the purchase. He handed her $3 and she completed the sale. The clerk did not ask either decoy for identification, nor did she ask them any age-related questions

[3] Both decoys are referred to only by their initials because they are minors.

before making the sale. The decoys exited the premises with the beer and met up with the KCSO deputies who were waiting outside to report on what had transpired.

While standing at the entrance to the premises with the deputies, the decoys pointed out the clerk who sold them the beer. Deputy Hunt waited until the clerk was done assisting another customer, then approached her to identify himself as a law enforcement officer and to inform her that she had sold alcohol to two minors. The decoys stood next to Deputy Hunt and other officers while this occurred. They stepped outside for more privacy and decoys were asked who sold them the beer. They both identified the clerk while standing approximately six feet away from her. A photograph was taken of the clerk and decoys together (exh. D-5), and the clerk was issued a citation. The clerk admitted to Deputy Hunt during their conversation that she entered a made-up date into the register to allow the sale to go through.

The administrative law judge (ALJ) issued a proposed decision on August 26, 2021, sustaining both counts of the accusation and recommending a 20-day suspension. The Department adopted the proposed decision in its entirety on November 24, 2021, and a certificate of decision was issued six days later.

Appellants then filed a timely appeal contending: (1) the ALJ abused his discretion when he relied upon inconsistent testimony and failed to make a credibility determination about the face-to-face identification, and 2) the penalty is excessive because the ALJ failed to properly consider all factors in mitigation, improperly applied factors in aggravation, and penalized appellants for exercising their right to a hearing.

DISCUSSION

I

FACE-TO-FACE IDENTIFICATION

Appellants contend the ALJ abused his discretion when he relied upon what they characterize as inconsistent testimony between the two decoys and Deputy Hunt. They maintain the ALJ erred by failing to make a credibility determination about the testimonies of these three individuals regarding the face-to-face identification of the clerk. (Appellants' Opening Brief (AOB), at pp. 8-9.)

Rule 141(b)(5)[4] 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 in that case that no attempt, reasonable or otherwise, was made to identify the clerk in that case].)

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:

[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.

> 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.)

The ALJ made the following findings regarding the face-to-face identification:

> 9. . . . The deputies then went into the front entrance of the Licensed Premises with M.M. and J.G. While standing at the entrance, M.M. and J.G. identified the clerk who had sold to them to the KCSD officers. The clerk they pointed out was a female who was at a register assisting another customer. KCSD Deputy J. Hunt (Hunt) waited for the clerk to finish with the customer. When she was done, he approached her, identified himself as a law enforcement officer and told her she was being investigated for selling alcohol to minors. M.M. and J.G. stood with Hunt and the other deputies while this occurred.
>
> 10. While they were standing approximately six feet away from the clerk, M.M. and J.G. were asked to identify the clerk who sold them the beer. M.M. and J.G. both stated that the female clerk who Hunt detained sold them the beer. M.M., J.G. and the clerk were directly across from each other when M.M. and J.G. said this. The identifications occurred after Hunt told the clerk she was being investigated for selling beer to minors. The clerk appeared aware that M.M. and J.G. were identifying her. The clerk was identified as Arkeena Washington (Washington) during Hunt's investigation of the sale to M.M. and J.G. To afford Washington more privacy during the investigation, Hunt moved the detention of Washington to the outside of the Licensed Premises just to the right of the sliding door entrance. M.M., J.G. and the other officers walked outside with Hunt and Washington.

(Findings of Fact (FF), ¶¶ 9-10.) Based on these findings, the ALJ addressed the face-to-face identification issue, and reached the following conclusion regarding compliance with rule 141(b)(5):

> 10. None of the evidence presented by the Respondent rebutted the credible evidence presented by the Department that these were fully compliant identifications that allowed Washington to become aware that M.M. and J.G. were the decoys. 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. . . .

(Conclusions of Law, ¶ 10.)

Appellants nevertheless complain that:

> In the case at hand, the Department's three witnesses each offered a different story as to how the identification of the clerk occurred. Decoy M.M. testified that deputies identified themselves to the clerk first and then took everyone outside of the store where the decoys stood six feet away from Clerk Washington as they identified her the person that sold them alcohol. (R.T. 26-27). She provided no further testimony about a second identification. J.G. testified that he and Decoy M.M. identified Clerk Washington as the clerk who sold them alcohol before deputies engaged the clerk or identified themselves; immediately after this, the decoys were then instructed to return to patrol vehicles while the deputies spoke to the clerk. (RT 51-52). He provided no further testimony about a second identification.

(AOB at p. 8.) Appellants allege that the ALJ erred by not making a specific credibility determination about slight differences between the testimonies of the decoys and Deputy Hunt regarding the face-to-face identification of the clerk — thereby negating the ALJ's finding of compliance with rule 141(b)(5) and necessitating reversal of the decision. We disagree.

It is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]); *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].)

> Evidence of even one credible witness "is sufficient for proof of any fact." (Evid. Code, § 411.) And "questions as to the weight and sufficiency of the evidence, the construction to be put upon it, the inferences to be drawn therefrom, the credibility of witnesses . . . and the determination of [any] conflicts and inconsistencies in their testimony are matters for the trial court to resolve." [Citation.]

(*Sav-On Drug Stores, Inc. v. Superior Ct.* (2004) 34 Cal.4th 319, 334 [17 Cal.Rptr.3d 906].)

Here, the ALJ listened to the testimonies of the three percipient witnesses to the face-to-face identification and appears to have adopted Deputy Hunt's version of the

events, which varied only slightly from the testimonies of the decoys. This is the province of the trier of fact, and no explicit credibility determination is required to be made by the ALJ in determining that the identification complied with rule141(b)(5). That rule has been discussed at length by many Board opinions and Court of Appeal cases.

In *Chun* (1999) AB-7287, this Board made the following observation about the purpose of face-to-face identifications:

> The phrase "face to face" means that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

(*Id.* at p. 5.)

In *7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983, the Board clarified application of the rule in cases where, as here, an officer initiates contact with the seller following the sale:

> As long as the decoy makes a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error, we do not believe that the officer's contact with the clerk before the identification takes place causes the rule to be violated.

(*Id.* at pp. 7-8; see also *7-Eleven,* Inc*./Morales* (*2014) AB-9312; 7-Eleven, Inc./Paintal Corp.* (2013) AB-9310; *7-Eleven, Inc./Dars Corp.* (2007) AB-8590; *West Coasts Products LLC* (2005) AB-8270; *Chevron Stations, Inc.* (2004) AB-8187.)

The Court of Appeal has found compliance with rule 141(b)(5) even where police escorted a clerk outside the premises in order to complete the identification. (See *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Keller*) (2003) 109 Cal.App.4th 1687, 1697 [3 Cal.Rptr.3d 339] [finding that the rule leaves the location of the identification to the discretion of the peace officer].)

More recently, the court found rule 141(b)(5) was not violated when:

> [T]he 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.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*CVS*) (2017) 18 Cal.App.5th 541, 547 [226 Cal.Rptr.3d 527, 531].) The court explained that the exact moment of the identification could not be severed from the entire identification procedure, which in that case included the decoy pointing out the clerk to the police, the decoy accompanying the police officer to the counter, the officer informing the clerk she had sold beer to the minor at his side, and the clerk and decoy being photographed together. (*Id*. at p. 532.) The court said, "[t]he clerk in these circumstances certainly knew or reasonably ought to have known that she was being identified" because of the totality of the circumstances. (*Ibid.*)

Looking at the *entire identification procedure* — including the deputy asking the decoys who sold them the beer, the decoys pointing out the clerk from the doorway, the decoys subsequently being asked who sold them the beer and identifying the clerk, and the decoys and clerk being photographed together — it seems clear that the clerk knew, or reasonably should have known, that she was being identified as the person who sold alcohol to the minor decoys. That is all that is required. No credibility determination is required as to whose testimony supports compliance with rule 141(b)5). As in *CVS*, the clerk here "had ample opportunity to observe the minor and to object to any perceived misidentification." (*CVS, supra*, at 547.) As the Court said, "the rule requires identification, not confrontation." (*Ibid*.)

The ALJ's findings are supported by substantial evidence and no credibility determination is necessary to validate those findings. Furthermore, the face-to-face identification in this matter fully complies with rule 141(b)(5). 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,* at 1437.)

II

PENALTY

Appellants complain that the penalty is excessive and maintain:

> The facts and evidence taken at the administrative hearing on August 24, 2021 do not support an aggravated penalty in this case. Without supporting aggravating factors, the Department's request for an aggravated 20-day penalty at the hearing plainly penalized Appellants for exercising Appellants' right to a hearing. By imposing this unsupported 20-day suspension, the ALJ sanctioned the Department's punitive behavior and abused discretion.

(AOB, at p. 2.)

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*.)

The ALJ recommended a penalty of 20-days' suspension, and made the following findings in support of that recommendation in his decision:

> PENALTY
>
> The standard penalty in this matter would be a 15 day suspension.
>
> The Department recommended that the Respondent's license be suspended for 20 days. This is an upward departure from the presumptive standard penalty. The Department cited two factors in aggravation. The appearances and actual ages of the decoys was one cited aggravating factor. The existence of a prior 2017 violation of the same section was the other factor.
>
> The Respondent argued for a mitigated penalty, if the Accusations were sustained, based on the evidence that the Respondent has training protocols to prevent alcohol sales and that the Respondent enforces its rules as evidenced by the termination of Washington after the incident. Evidence was presented regarding the Respondent's policies to prevent sales of alcoholic beverages to underage individuals. The training and the register protocols used by the Respondent are aids in preventing unlawful alcohol sales to minors. The fact that a termination occurred also shows that the Licensee is taking steps to ensure that employees comply with its written policies.
>
> However, the Respondent has been licensed since October 2014 and this is now their second incident. It is noted that the first prior incident happened just outside of the three year period that would have made this a second violation with a presumptive 25 day penalty. While this prior is outside of the statutory period for use as an enhancement, it is still appropriately considered as part of the history of non-compliance by the Respondent. The facts showing the Respondent's training and enforcement of policies do support some mitigation. However, the Department has also shown that repeated violations are still occurring and that a 15 and 16 year old were sold alcohol in the Licensed Premises.
>
> Aggravation in this matter does outweigh the mitigation. The penalty recommended herein complies with rule 144.

(Decision, at p. 8.)

Appellants assert that they were penalized for asking for a hearing after declining a 15-day suspension offered as part of pre-hearing settlement proceedings. However, the Court of Appeal has held that the offering of one penalty before hearing and the request of another (higher) penalty at hearing is both appropriate and acceptable, saying:

> [T]here is a public policy in favor of negotiations for compromise . . .
>
> The licensee who rejects a proffered settlement hopes that the hearing will clear -- or at least partially excuse -- him and he hopes that, even if he is not found innocent, he will be dealt with less harshly than the department proposes. But if the department can never, no matter what a hearing may develop, assess a penalty greater than that proposed in its offer, a licensee has little to lose by rejection. Only the cost of a hearing is risked; he could not be otherwise harmed. In that situation, licensees would be induced to gamble on the chance of prevailing at the trial, while the department would lose much of its inducement to attempt settlement. The law should not permit that kind of tactic by an accused.
>
> It follows that the mere fact -- if it be a fact -- that the department had once offered a settlement more favorable than the discipline ultimately imposed, is not, in and of itself, a ground for setting aside the penalty ultimately adopted.

(*Kirby v. Alcoholic Beverage Control Appeals Bd.* (1971) 17 Cal.App.3d 255, 260-261 [94 Cal.Rptr. 514, 518].)

Appellants' disagreement with the penalty imposed, and their belief that factors in mitigation should have received greater weight, does not mean the Department abused its discretion. Nor does recommending a higher penalty at the administrative hearing than that offered during settlement negotiations constitute an abuse of discretion.

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.

Appellants have not established that the Department abused its discretion in imposing a 20-day suspension in this matter.

ORDER

The decision of the Department is affirmed.[5]

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

[5] 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*. Service on the Board pursuant to California Rules of Court (Rule 8.25) should be directed to: 400 R Street, Ste. 320, Sacramento, CA 95811 and/or electronically to: abcboard@abcappeals.ca.gov

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 9828
574 W. LACEY BLVD.
HANFORD, CA 93230

OFF-SALE GENERAL - LICENSE

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

FRESNO DISTRICT OFFICE

File: 21-541762

Reg: 21091213

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 November 24, 2021. 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. The appeal must be filed within 40 calendar days from the date of the decision, unless the decision states it is to be "effective immediately" in which case an appeal must be filed within 10 calendar days after the date of the decision. Mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814. For further information, and detailed instructions on filing an appeal with the Alcoholic Beverage Control Appeals Board, see: https://abcab.ca.gov or call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

On or after January 10, 2022, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: November 30, 2021

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 9828 574 W. Lacey Blvd. Hanford, California 93230	}	File: 21-541762 Registration: 21091213 License Type: 21
Respondent	}	Word Count: 17,982
	}	Reporter: Valerie Nunenmacher-CSR # 10783 iDepo Reporters
Off-Sale General License	}	**PROPOSED DECISION**

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter, via videoconference, on August 24, 2021.

Lisa Wong, Attorney, represented the Department of Alcoholic Beverage Control (Department).

Jade Quintero, Attorney, represented Respondents Garfield Beach CVS, LLC and Longs Drug Stores California, LLC. (Respondent)

In a two count Accusation, the Department seeks to discipline the Respondent's license on the grounds that:

Count 1

On or about March 20, 2021 the Respondent, through their agent or employee, Arkeena Washington, sold, furnished, or gave alcoholic beverages to M.M.[1], an individual under the age of 21 in violation of Business and Professions Code section 25658(a).[2] (Exhibit D-1)

[1] In this matter, the Decoys used by the Department were both under 18 years of age at the time of the hearing. They are both referred to by initials in this proposed decision to protect their privacy.

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

Count 2

On or about March 20, 2021 the Respondent, through their agent or employee, Arkeena Washington, sold, furnished, or gave alcoholic beverages to J.G., an individual under the age of 21 in violation of section 25658(a) (Exhibit D-1)

The Department further alleged in both counts of the Accusation that there is cause for suspension or revocation of the license of the Respondent in accordance with section 24200 and sections 24200(a) and (b). The Department further alleged that the continuance of the license of the Respondent would be contrary to public welfare and/or morals as set forth in Article XX, Section 22 of the California State Constitution, and sections 24200(a) and (b). (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 24, 2021.

FINDINGS OF FACT

1. The Department filed the Accusation on June 1, 2021. (Exhibit D-1)

2. On October 1, 2014 the Department issued a type 21, off-sale general license to the Respondent for the above-described location (the Licensed Premises). The following is the record of prior Department discipline against the Respondent's license as established by official records introduced by the Department (Exhibit D-2):

Violation Date	Violation	Registration Date	Registration Number	Penalty
12/14/2017	25658(a)	04/05/2018	18086741	15 day suspension

3. On March 20, 2021 the Kings County Sheriff's Department (KCSD) conducted a minor decoy operation using two underage decoys. One of the decoys was female and the other decoy was male. M.M. was the female decoy, and she was 16 years old on the date of the operation. Her birthdate was March 27, 2004. J.G. was the male decoy, and he was 15 years old on the date of the operation. His birthdate was May 20, 2005.

4. M.M. appeared via videoconference and testified at the hearing. On August 24, 2021 her appearance was generally as depicted in an image that was taken during the operation on March 20, 2021 except that her hair was shortened to just below her shoulders. (Exhibit D-3) During the operation on March 20, 2021, M.M. wore a grey hooded sweatshirt with a faded American flag logo, blue jeans, and sneakers. She was not wearing any visible jewelry. M.M.'s face was exposed; with the exception of the maroon mask she was wearing because of pandemic safety protocols. Her hair was parted down the middle. (Exhibit D-3) M.M. was approximately 5 feet, 8

inches tall and 105 pounds at the hearing. M.M. credibly testified that her size and appearance on the date of the operation were the same except for the shortening of her hair.

5. J.G. also appeared via videoconference and testified at the hearing. On August 24, 2021 his appearance was generally as depicted in an image that was taken during the operation on March 20, 2021. (Exhibit D-4) During the operation, J.G. wore a Raiders hooded sweatshirt, black jeans, and sneakers. His only visible jewelry was a necklace that appeared to be a rosary. J.G.'s face was exposed with the exception of the black mask he wore for pandemic safety protocols. His hair was combed back in a neat haircut. J.G. was clean shaven during the operation. (Exhibit D-4) J.G. had a medium to slightly thick build and was approximately the same height as M.M. on the date of the operation.

6. On March 20, 2021 M.M. and J.G. went to the Licensed Premises with deputies from the KCSD for the purpose of trying to buy alcohol. M.M. and J.G. were instructed about the requirements of 141[3]. They were told to carry their identifications, show them if requested, and to be truthful regarding their age if asked. M.M. and J.G. carried their identifications to produce if asked. M.M. and J.G. were briefed prior to their attempt to purchase alcohol in the Licensed Premises.

7. M.M. and J.G. entered the Licensed Premises together during the early afternoon hours of March 20, 2021. After entering, they searched for the alcoholic beverage section. After finding it, M.M. and J.G. selected a 3-pack of Modelo beer cans. M.M. carried the beer to the registers. J.G. accompanied her. M.M. and J.G. walked up to the register of the next available clerk. M.M. presented the 3-pack of Modelo beer to the clerk for purchase. J.G. stood directly next to M.M. while this occurred.

8. The clerk took the beer and scanned it for purchase. The clerk then asked M.M. to pay. The cost of the beer was more than M.M. had from the buy funds that were provided by the deputies. M.M. turned to J.G. and asked him to provide more money for the purchase. J.G. gave M.M. three additional dollar bills to cover the cost of the transaction. This was done while they were both standing directly in front of the clerk. M.M. combined her money with the money provided by J.G. and gave it to the clerk to pay. M.M. took possession of the beer and the change the clerk handed to her. At no point during any of the transaction did the clerk ask for identification or any age related questions. M.M. and J.G. wore their masks during the entire time they were in the Licensed Premises. At no point during the transaction did the clerk ask either of them to remove their masks.

9. M.M. and J.G. then left the Licensed Premises with these items and they went to where the KCSD officers were waiting. M.M. and J.G. told them what had just happened in the Licensed Premises. The deputies then went into the front entrance of the Licensed Premises with M.M. and J.G. While standing at the entrance, M.M. and J.G. identified the clerk who had sold to them

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

to the KCSD officers. The clerk they pointed out was a female who was at a register assisting another customer. KCSD Deputy J. Hunt (Hunt) waited for the clerk to finish with the customer. When she was done, he approached her, identified himself as a law enforcement officer and told her she was being investigated for selling alcohol to minors. M.M. and J.G. stood with Hunt and the other deputies while this occurred.

10. While they were standing approximately six feet away from the clerk, M.M. and J.G. were asked to identify the clerk who sold them the beer. M.M. and J.G. both stated that the female clerk who Hunt detained sold them the beer. M.M., J.G. and the clerk were directly across from each other when M.M. and J.G. said this. The identifications occurred after Hunt told the clerk she was being investigated for selling beer to minors. The clerk appeared aware that M.M. and J.G. were identifying her. The clerk was identified as Arkeena Washington (Washington) during Hunt's investigation of the sale to M.M. and J.G. To afford Washington more privacy during the investigation, Hunt moved the detention of Washington to the outside of the Licensed Premises just to the right of the sliding door entrance. M.M., J.G. and the other officers walked outside with Hunt and Washington.

11. Washington was then photographed while standing next to M.M. and J.G. (Exhibit D-5) After this photograph, M.M. and J.G. went to the KCSD vehicle that was used to drive them to the Licensed Premises. Prior to their leaving, M.M. and J.G. were in the immediate presence of Washington and the KCSD officers from when they reentered the Licensed Premises, after the sale, until after the photograph with Washington. During the investigation, Washington admitted to Hunt that she did process the transaction and that she entered a made up date of birth that would allow the transaction to go through. Washington was subsequently issued a citation for the sale.[4]

12. M.M. had served as a decoy on approximately three occasions prior to March 20, 2021. This date was the first time J.G. had served as a decoy. M.M. and J.G. became involved as decoys because of their participation as cadets in an Explorer program with the KCSD. Based on M.M. and J.G.'s overall appearance, i.e., their physical appearances, clothing, poise, demeanor, maturity, and mannerisms shown at the hearing, and their appearances and conduct in front of Washington at the Licensed Premises on March 20, 2021, M.M. and J.G. displayed the appearances which would generally be expected of persons less than 21 years of age during their interactions with Washington. M.M. and J.G.'s appearances were consistent with their chronological ages of 16 and 15. Washington did not testify in this matter to explain her age related impressions of M.M. and J.G. or why she sold alcohol to them without asking age related questions or for identification. While M.M. and J.G. both wore masks, their physical stature and

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[4] In this matter, evidence was received that the citation referenced 1400 hours (Exhibit L-1) and the testimony of the witnesses suggested a timeline that was inconsistent with the citation being issued at this time. Licensee later argued that this established that the citation was prepared prior to the violation. On its face, Exhibit L-1 clearly notes that the date and time indicated references the approximate time of the alleged violation, not the time of issuance of the citation.

the portions of their faces that were visible showed them to be youthful. M.M. and J.G. appeared consistent with being the 16 and 15 year old high school students that they were.

13. Julie Miller (Miller) testified for the Respondent. She is the district leader for the Licensed Premises. Miller is familiar with the policies and procedures of the Licensed Premises and is actively involved in supervising the management team that handles its operation. According to Miller, the Licensed Premises requires all employees serving as clerks to comply with state law. The Respondent teaches a best practice to check for identification when making alcohol sales in any situation where the customer appears to be less than 40 years of age. Employees go through extensive training during onboarding that includes modules on age restricted sales. Scanning alcoholic beverages will trigger the requirement to enter the date of birth on the identification. The Licensed Premises has a register that can scan a license, but the clerk can also enter a date of birth manually.

14. Miller testified that Washington violated protocols she had been trained on by making the sale to M.M. and J.G. Washington would have received the new employee training that covered alcohol sales protocols. (Exhibit L-2) Consistent with the Respondent's policies, Washington was placed on leave after the incident. Washington was subsequently terminated after the Respondent's investigation.

15. 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 March 20, 2021 the Respondent's clerk, Arkeena Washington, inside the Licensed Premises, sold an alcoholic beverage to M.M. and J.G., persons under the age of 21, in violation of Business and Professions Code section 25658(a) as alleged in counts 1 and 2 of the Accusation. (Findings of Fact ¶¶ 2-14)

5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141 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) and the appearance of the decoys did not comply with rule 141(b)(2). Either 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 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 Washington of M.M. and J.G. 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 make clear that this particular regulation is focused on the narrower concern of allowing the *seller* the opportunity to be aware of the identity of any decoys involved. It stands to reason that compliance with Rule 141, subdivision (b)(5) occurs if the clerk and the decoy (or decoys), during the process of the investigation, prior to the citation being issued or departure of the decoy(s), 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(s).

9. Prior to the face to face identification, Hunt approached Washington at the counter, got her attention and identified himself as a KCSD officer investigating the sale of alcohol to two minors. While the sale to M.M. and J.G. was discussed between Hunt and Washington at the counter, M.M. and J.G. and the other officers approached Hunt and Washington. In the immediate presence of Washington, M.M. and J.G. were asked to identify the seller. M.M. and J.G. verbally and physically identified Washington as the seller while standing six feet away from her. Washington was clearly aware that the decoys described by Hunt were M.M. and J.G. based on their interaction. Washington clearly came face to face with M.M. and J.G. under circumstances that made it clear that Washington had been identified as the person who sold M.M. and J.G. beer and that M.M. and J.G. were the minors at issue. (Findings of Fact ¶¶ 3-14)

10. None of the evidence presented by the Respondent rebutted the credible evidence presented by the Department that these were fully compliant identifications that allowed Washington to become aware that M.M. and J.G. were the decoys. 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. (Findings of Fact ¶¶ 3-14) Respondent's assertion that the citation was issued before the identifications is also unsupported. Both decoys and Hunt testified that the identification occurred prior to the decoys returning to the vehicle. Hunt testified that the citation was issued after the decoys departed. The identifications and subsequent photograph with the clerk happened prior to the departure of the decoys. None of the purported timeline information rebuts this order of events.

11. Respondent also asserted, without support, that the appearance of the decoys did not comply with rule 141(b)(2). As noted above, Washington did not testify in this matter to establish that her sale to M.M. and J.G., without asking for identification, without asking age related questions, and without asking them to remove their masks, was the result of M.M. and J.G.'s appearance and/or demeanor. M.M. and J.G. had appearances "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 M.M. and J.G.'s actions, manners, or appearances that led Washington to reasonably conclude that M.M. and J.G. were over 21. The Department has established compliance with rule 141(b)(2) and the Respondent has failed to rebut this evidence. (Findings of Fact ¶¶ 3-14)

PENALTY

The standard penalty in this matter would be a 15 day suspension.

The Department recommended that the Respondent's license be suspended for 20 days. This is an upward departure from the presumptive standard penalty. The Department cited two factors in aggravation. The appearances and actual ages of the decoys was one cited aggravating factor. The existence of a prior 2017 violation of the same section was the other factor.

The Respondent argued for a mitigated penalty, if the Accusations were sustained, based on the evidence that the Respondent has training protocols to prevent alcohol sales and that the Respondent enforces its rules as evidenced by the termination of Washington after the incident.

Evidence was presented regarding the Respondent's policies to prevent sales of alcoholic beverages to underage individuals. The training and the register protocols used by the Respondent are aids in preventing unlawful alcohol sales to minors. The fact that a termination occurred also shows that the Licensee is taking steps to ensure that employees comply with its written policies.

However, the Respondent has been licensed since October 2014 and this is now their second incident. It is noted that the first prior incident happened just outside of the three year period that would have made this a second violation with a presumptive 25 day penalty. While this prior is outside of the statutory period for use as an enhancement, it is still appropriately considered as part of the history of non-compliance by the Respondent. The facts showing the Respondent's training and enforcement of policies do support some mitigation. However, the Department has also shown that repeated violations are still occurring and that a 15 and 16 year old were sold alcohol in the Licensed Premises.

Aggravation in this matter does outweigh the mitigation. The penalty recommended herein complies with rule 144.

ORDER

The Respondents' off-sale general license is hereby suspended for a period of 20 days.

Dated: August 26, 2021

Alberto Roldan
Administrative Law Judge

☑ Adopt

☐ Non-Adopt: _____

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By: _____

Date: 11/24/21