

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

AB-9130

File: 21-479341 Reg: 10073164

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #9780
101 West Foothill Boulevard, Azusa, CA 91702,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: August 4, 2011
Los Angeles, CA

ISSUED AUGUST 29, 2011

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #9780 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, appearing through their counsel, Jessica L. Cohen, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated September 2, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 1, 2009. On June 23, 2010, the Department filed a first amended accusation against appellants charging that, on January 29, 2010, appellants' clerk, Guadalupe Chavarin (the clerk), sold an alcoholic beverage to 18-year-old Jorge Arias. Although not noted in the accusation, Arias was working as a minor decoy for the Azusa Police Department at the time.

At the administrative hearing held on July 21, 2010, documentary evidence was received and testimony concerning the sale was presented by Arias (the decoy) and by John Wachowski, an Azusa Police Department officer.

The Department's decision determined that the violation charged was proven and no defense to the charge was established.

Appellants then filed a timely appeal in which they contend there was not compliance with Rule 141(b)(5).²

DISCUSSION

Appellants contend that rule 141(b)(5) was violated because the Department failed to establish that the face-to-face identification of the clerk took place prior to the issuance of the citation.

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.

If any of the requirements of rule 141 are violated, subdivision (c) of the rule provides that the licensee has a complete defense to a sale-to-minor charge.

²References 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 this decoy operation did not strictly comply with rule 141(b)(5) as required by *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126] (*Acapulco*), because, they allege, the face-to-face identification occurred simultaneously with the issuance of the citation. (AOB at p. 5.)

The facts establish that the decoy entered the licensed premises on January 29, 2010, and selected a six-pack of Corona beer which he took to the counter. The clerk asked to see the decoy's identification, which he provided, after which the sale was completed and the decoy exited the premises. Officer Wachowski entered the premises and took the clerk aside, where he explained the violation to her. The decoy then re-entered the premises, and made a face-to-face identification of the clerk. A photograph was taken of the clerk and the decoy, and the officer subsequently issued a citation to the clerk. (Findings of Fact ¶¶ 6 - 12.)

The testimony of Officer Wachowski established that the citation was issued after the face-to-face identification was made and a photo was taken of the clerk and decoy. [RT-43.] His testimony also established that portions of the citation paperwork were filled out by another officer, and then given to him for actual issuance. [RT-45.] It is this sequence of events that forms the basis of appellants' argument: ". . . at some point an identification loses its meaning when the paperwork is underway at the time the identification takes place." [RT-56.]

Strict adherence to the requirements of rule 141(b)(5) must take into account the realities of the identification process. The Board does not believe that having a fellow officer complete a portion of the citation paperwork, prior to the actual issuance of the citation, is in violation of the strict compliance with rule 141(b)(5) contemplated by the

court in *Acapulco*. In that case, no face-to-face identification took place, and in this case, there is no debate that a face-to-face identification occurred. The fact that paperwork happened to be underway at the same time is not a violation of rule 141(b)(5).

During oral argument, counsel for appellants also argued that it was overly suggestive to ask the decoy to identify a clerk who was “already being held” by the officers. This issue was not raised previously. Numerous cases have held that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; *Hooks v. California Personnel Board* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].) The Board is entitled to consider this issue waived. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §400, p. 458.)

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This 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.