

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

AB-9263

File: 21-479629 Reg: 11075222

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #9627
22050 Ventura Boulevard, Woodland Hills, CA 91364-1645,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: March 7, 2013
Los Angeles, CA

ISSUED APRIL 10, 2013

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #9627 (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, Ralph Barat Saltzman and D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

¹The decision of the Department, dated April 18, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 8, 2009. On June 10, 2011, the Department filed an accusation against appellants charging that, on January 28, 2011, appellants' clerk, Eliseo Garcia (the clerk), sold an alcoholic beverage to 19-year-old Nelson Alegria, Jr. Although not noted in the accusation, Alegria, Jr. was working as a minor decoy for the Los Angeles Police Department (LAPD) at the time.

At the administrative hearing held on February 8, 2012, documentary evidence was received and testimony concerning the sale was presented by Alegria, Jr. (the decoy); Victoria Wood, a Department investigator; and by Jimmy Woo, an LAPD officer.

Testimony established that on January 28, 2011, the decoy entered the licensed premises and went to the alcohol section where he selected a 24-ounce can of Steel Reserve Lager. He took the beer to the counter where the clerk scanned it. The computer screen prompted the clerk to ask for identification, and the decoy handed the clerk his California Driver's License (Exh. 4) which contained a red stripe stating "AGE 21 IN 2012". The clerk examined the identification and completed the sale. [RT 30-33.]

After the decoy operation, the can of Steel Reserve was destroyed by the LAPD. On February 1, 2012, an ABC investigator went to the premises and purchased a 24-ounce can of Steel Reserve Lager, which stated on the label that it contained 8.1 percent alcohol by volume. [RT 24-25.] The can purchased by the investigator was entered into evidence as Exhibit 6 without objection by appellants' counsel. [RT 50-51.]

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

Appellants then filed a timely appeal contending the Department failed to prove

that the product sold to the minor decoy was an alcoholic beverage, and the ALJ's findings to the contrary constitute an abuse of discretion. This issue was not raised at the administrative hearing.

DISCUSSION

The Board is not required to address these arguments because appellants did not raise and argue them at the administrative hearing. 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]; *Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].) Nevertheless, appellants' arguments are without merit.

At the administrative hearing, the decoy testified that he went to the liquor section and selected a can of Steel Reserve. [RT 30.] When asked how he knew it was an alcoholic beverage, he replied, "it says alcoholic beverage on it." [RT 31.] No objection was raised during this testimony, and no evidence was submitted that the beverage was not an alcoholic beverage. Exhibit 6, the can of Steel Reserve Lager purchased by the Department investigator, was entered into evidence without objection, and the label on it indicates that it is an alcoholic beverage containing 8.1% alcohol by volume. The word "beer" was used six times during the administrative hearing, without objection, to refer to the beverage purchased.

We believe that substantial evidence exists to establish that the decoy

purchased an alcoholic beverage, and appellants have not presented any evidence to the contrary.

ORDER

The decision of the Department is affirmed.²

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This 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.