

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

AB-9309

File: 21-477840 Reg: 12076340

GARFIELD BEACH CVS LLC and LONGS DRUG STORES CALIFORNIA LLC,
dba CVS Pharmacy Store 9506
1140 South Main Street, Salinas, CA 93901,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: July 11, 2013
Sacramento, CA

ISSUED JULY 30, 2013

Garfield Beach CVS LLC and Longs Drug Stores California LLC, doing business as CVS Pharmacy Store 9506 (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 Saltsman and D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Sean Klein.

¹The decision of the Department, dated September 19, 2012, is set forth in the appendix.

PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. Thereafter, the Department instituted an accusation against appellants charging that, on December 19, 2011, appellants' clerk sold an alcoholic beverage to 16-year-old Angela N. Although not noted in the accusation, Angela N. was working as a minor decoy for the Department at the time.

An administrative hearing was held on June 19, 2012, at which time documentary evidence was received, and testimony concerning the sale was presented by Angela N.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellants filed an appeal contending that the absence of an intelligible photograph taken of the decoy prior to the decoy operation rendered it impossible for the ALJ to determine whether she displayed the appearance of a person under the age of 21.

DISCUSSION

The only issue on this appeal is whether the ALJ lacked sufficient evidence upon which to conclude that the decoy displayed the appearance of a person under the age of 21, which is required by rule 141(b)(2).² Appellants argue that the quality of the photograph taken of the decoy prior to the transaction was so poor as to render it

²Rule 141(b)(2) 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.

useless as evidence of the decoy's appearance at the time of the sale.

We agree with appellants that the photograph of the decoy taken prior to the decoy operation is useless as providing the ALJ or this Board information regarding the decoy's appearance at the time of the sale.

Rule 141(b)(2) by its terms calls for an examination of the circumstances presented to the seller at the time of the sale. Those circumstances, in this case, included the clerk's examination of the decoy's California identification card at the time of the sale, which showed the decoy's true age, 16, and the decoy's testimony that the clerk said, while making the sale, that she "shouldn't be doing it and it would be the only time she would be doing it." There is only one way the clerk's statement can be understood, and that is that she was intentionally selling an alcoholic beverage to a minor.

Appellants cite and quote a statement from the decision in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr. 652], that "the photograph of the decoy taken immediately after the sale ... is arguably the most important piece of evidence in considering whether the decoy displayed the physical appearance of someone under the age of 21." That may well be that court's view, but appellants' brief errs in attributing that view to the Appeals Board. And even there, the court acknowledged that "while one could look at the photograph 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," upholding the ALJ's finding to the contrary.

We said, in *7-Eleven, Inc./Ali* (2013) AB-9242, that "appellants' entire argument

is patently disingenuous in light of the fact that their clerk examined the minor decoy's driver's license and completed the sale anyway. [...] Where a decoy has provided her valid identification at the clerk's request, in compliance with rule 141(b)(3), it will necessarily influence whether the clerk is justified in relying on the decoy's physical appearance."

We see far too often appeals which dispute an ALJ's finding that a decoy displayed the appearance of a person under the age of 21 even though the clerk was shown valid identification establishing that the decoy was, in fact, under 21 years of age. Rule 141(b)(3) is part of rule 141 for a reason - to provide an seller the opportunity to comply with the law. It serves no useful purpose to excuse a seller who has sold to a minor decoy after being furnished all the information and protection he or she needed to avoid a citation.

ORDER

The decision of the Department is affirmed.³

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by § 23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code § 23090 et seq.

