

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

AB-9325

File: 21-477827 Reg: 12076237

GARFIELD BEACH CVS, LLC,
dba CVS Pharmacy Store 9995
1405 Foxworthy Avenue, San Jose, CA 95118,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: October 3, 2013
Sacramento, CA

ISSUED NOVEMBER 21, 2013

Garfield Beach CVS, LLC, dba CVS Pharmacy Store 9995 (appellants), appeals 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 appellant Garfield Beach CVS, LLC, appearing through its counsel, Ralph Barat Saltsman and Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kelly Vent.

¹The decision of the Department, dated October 22, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on June 22, 2009. Thereafter, the Department instituted an accusation against appellant charging that, on November 16, 2011, appellant's clerk sold an alcoholic beverage to 18-year-old Austin McComb. Although not noted in the accusation, McComb was working as a minor decoy for the Department at the time.

An administrative hearing was held on October 3, 2012, at which time documentary evidence was received, and testimony concerning the sale was presented by McComb (the decoy). Appellant presented no witnesses.

The decoy testified that he went to the alcoholic section of the store, grabbed a 24-ounce can of Budweiser (which he later corrected to a Bud Light), and took it to the counter, where he was asked for his identification. He presented his California driver's license (Exhibit 4) to the clerk, paid for the beer, and left the store. He did not recall that any questions were asked about his age.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense under rule 141(c) had been established.²

Appellant filed an appeal making the following contention: There was no compliance with rule 141(b)(2).

DISCUSSION

Appellant contends that the ALJ failed to consider evidence that the decoy was

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.

mature looking and appeared to be someone that could be of the age of majority.

(App.Br. at p. 4.)

This “evidence” is nothing more than appellant’s argument, while the ALJ addressed the only real evidence regarding the decoy’s appearance, the decoy himself.

(Findings of Fact V, VI, and VII, and Determination of Issues III).

FF V. The decoy was approximately 5' 7" / 5' 8" on the [sic] November 16, 2011. He was clean shaven. He had relatively thick hair which was combed over the right side of his forehead.

FF VI. The decoy was approximately 5' 7" / 5' 8" on the day of the hearing. His hair was shorter than what it was on the day of the decoy operation. There were sideburns and a “five o’clock shadow” on his face. Other than these differences, the decoy looked similar to the photograph of him taken with Respondents’ clerk.

FF VII. The decoy spoke softly when he testified. He sat with his hands folded, sometimes fidgeting with them. The Administrative Law Judge observed the decoy’s demeanor, mannerism, and poise as the decoy testified. There is nothing to suggest that he appeared older than the teenager that he was.

DI III. Probably the “most important piece of evidence” regarding the decoy’s physical appearance is the photograph of the decoy taken with the clerk on the day of the decoy operation. See *Department of Alcohol Beverage Control v. Alcoholic Beverage Control Appeals Board (The Southland Corporation Real Party in Interest)* (2002) 103 Cal.App.4th 1084, 1094, 127 Cal.Rptr.2d 652. Respondent has not shown, and the Administrative Law Judge does not see, how the decoy’s appearance on the photograph was not that of an eighteen-year old man.

Based on the testimony about the decoy’s appearance while in Respondent store, the photograph of the decoy, and the Administrative Law Judge’s observation of the decoy at the hearing, the Administrative Law Judge determines that the decoy did display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to Respondent’s clerk.

We have no hesitancy in affirming the Department’s decision. That said, we feel we should point out, in the interest of reducing the possibility of a reading of the

decision cited in Determination III by the ALJ³ for more than it says — that the photograph of the decoy was “*arguably* the most important piece of evidence in considering whether the decoy displayed the appearance of someone under 21 years of age” — or for less of what it says with its statement that “[w]hile 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.*” (Emphasis added.) The court made it plain with this language that the question confronting the ALJ on the issue of the decoy’s appearance is one of fact, not to be set aside in the absence of a showing an abuse of discretion.⁴ No abuse of discretion has been shown in this case.

The decision of the Department is affirmed.⁵

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

³ *Department of Alcohol Beverage Control v. Alcoholic Beverage Control Appeals Board Real Party in Interest* (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652] (*The Southland Corporation*).

⁴ Appellant’s counsel all too frequently challenge an ALJ’s factual findings on a 141(b)(2) issue as if it is simply a fact question which can be decided de novo by the Appeals Board. This case is an example.

⁵ This 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.