

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

AB-9347

File: 21-477781 Reg: 12076817

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store 9915
352 University Avenue, Palo Alto, CA 94301,
Appellants/Licensees

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 22, 2013

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store 9915 (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 Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kelly Vent.

¹The decision of the Department, dated January 31, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On April 13, 2012, the Department filed an accusation against appellants charging that, on March 23, 2012, appellants' clerk, Maria Carter (the clerk), sold an alcoholic beverage to 18-year-old Allison Bieber. Although not noted in the accusation, Bieber was working as a minor decoy for the Palo Alto Police and Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on December 18, 2012, documentary evidence was received and testimony concerning the sale was presented by Bieber (the decoy). Appellants presented no witnesses.

Testimony established on that on March 23, 2012, the decoy entered the licensed premises, selected a 24-ounce can of Coors Light beer, and took it to the sales counter. There, the clerk asked to see the decoy's identification. The decoy handed the clerk her California driver's license which contained her true date of birth, March 8, 1994, and a red stripe with the words "AGE 21 IN 2015." (Exhibit 2.) The clerk looked at the license for approximately ten seconds and then completed the sale. The decoy exited the premises with the beer and then re-entered with several police officers. One of the officers asked the decoy if the clerk standing in front of them was the person who had sold her the beer and she replied that she was. A few moments later, a photo of the decoy and clerk was taken. (Exhibit 3.)

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: (1) The face-to-face

identification of the clerk failed to comply with rule 141(b)(5),² and (2) the decoy's appearance failed to comply with rule 141(b)(2).

DISCUSSION

I

Appellants contend that the face-to-face identification failed to comply with rule 141(b)(5) "because there is no evidence that the clerk was aware, or should have been aware, that the minor decoy was identifying her . . ." and that the ALJ "applied an incorrect legal standard . . . when he concluded that there is no requirement that the clerk be aware that he or she is being pointed out as the seller of an alcoholic beverage to a minor." (App.Br. at pp. 1-2.)

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.

The ALJ made the following observations about the face-to-face identification in

Findings of Fact III and Determination of Issues III:

FF III. After purchasing the beer, the decoy exited the store with it. She then returned to the store, accompanied by two or three police officers, and walked toward Respondent's clerk. One of the officers asked the decoy whether the clerk standing in front of them was the person who sold the beer to her. While standing approximately five feet from the clerk, the decoy replied that she was. The decoy did not remember what the clerk was doing at the time of the identification, but did say that she was "just standing there."

DI III-4. In this case, it is undisputed that the decoy, while standing approximately five feet from Respondent's clerk, identified her as the

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.

seller of the beer. During this identification, Respondent's clerk had an opportunity to see the decoy again. The clerk saw the decoy yet again when they were photographed together.

In *Chun* (1999) AB-7287, the Board defined a face-to-face identification as:

. . . 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.

And in *Greer* (2000) AB-7403, the Board said it is not necessary that the clerk *actually* be aware that the identification is taking place. The only "acknowledgment" required is achieved by "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."

[Emphasis added.]

The court in *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126], said that there must be "strict adherence" to the provisions of rule 141. Appellants rely on this language for their contention that there must be evidence that the clerk knew she was being identified for the face-to-face identification to be valid. This misstates the rule.

The core objective of rule 141 is fairness to licensees when decoys are used to test their compliance with the law. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1687, 1698 [1 Cal.Rptr.3d 339].) Rule 141(b)(5) is concerned with both identifying the seller and providing an opportunity for the seller to look at the decoy again, soon after the sale. (*Ibid.*) It does not require a direct "face off" or any overt "acknowledgment" to accomplish these purposes.

There was no evidence of misidentification or even the possibility of misidentification of the clerk in this matter, and the clerk had the opportunity to look at the decoy again. The opportunity is all that needs to be provided.

The ALJ found that rule 141(b)(5) was satisfied and we agree that the clerk knew, or should have known, that she was being identified as the seller of the alcohol.

II

Appellants maintain that the decoy did not display the appearance which could generally be expected of a person under the age of 21, and therefore the decoy operation was unfair.

Rule 141(a) provides:

A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

Rule 141(b)(2) provides:

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.

Appellants contend the ALJ abused his discretion by disregarding their contention that the decoy appeared to be over the age of 21. They allege that the decoy appeared older because of her experience as a police Explorer, her law enforcement training, her experience on a prior tobacco decoy operation, her height, her weight, her wearing of jewelry, and the fact that at least one other store she visited as a decoy sold her alcohol. (App.Br. at p. 7.)

This Board is bound by the factual findings in the Department's decision as long

as they are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our judgment on the evidence, and we must accept as conclusive the Department's findings of fact. *CMPB Friends, [Inc. v. Alcoholic Bev. Control Appeals Bd.]* (2002) 100 Cal.4th [1250,] 1254 [122Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.4th 364, 367 [3 Cal.Rptr.2d 770; . . . 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. (See *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*)). 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 Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826] (*Masani*).)

The ALJ made the following findings about the decoy's appearance (Findings of Fact V-VIII):

FF V. On the day of the decoy operation, the decoy was approximately 5' 8 ½" tall and weighed approximately 140 pounds. She wore jeans and a sweatshirt, "a little mascara," earrings, a necklace, and a ring. Her hair was pulled back.

FF VI. On the day of the hearing, the decoy's height and weight were the same as they were on the day of the decoy operation. Her hair was not pulled back. Otherwise, the decoy looked similar to the photograph of her taken with Respondent's clerk.

FF VII. The decoy had been a police explorer for approximately a year. She previously participated in a tobacco decoy operation, but had never participated in an alcoholic beverage decoy operation.

FF V. The Administrative Law Judge observed the decoy's demeanor, mannerism, and poise as the decoy testified. There was nothing to suggest that she appeared at least twenty-one years old.

We are not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy lacked the appearance required by

the rule, and an equally partisan response that she did not. Appellants have given us no reason to depart from our general rule of deference to the ALJ's factual determination regarding the decoy's appearance. As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as she testifies, and making the determination whether the decoy's appearance met the requirements of rule 141.

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 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.