

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

AB-9646

File: 21-548433 Reg: 16084534

GARFIELD BEACH CVS, LLC and LONGS DRUGS STORES CALIFORNIA, LLC,
dba CVS Pharmacy #10005
6401 Mack Road,
Sacramento, CA 95823-4656,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Rodan

Appeals Board Hearing: April 6, 2018
Sacramento

ISSUED APRIL 19, 2018

Appearances: *Appellants:* Donna Hooper, of Solomon Saltsman & Jamieson, as counsel for Garfield Beach CVS, LLC and Longs Drugs Stores California, LLC, doing business as CVS Pharmacy #10005.
Respondent: Kerry K. Winters and Sean Klein as counsel for the Department of Alcoholic Beverage Control.

OPINION

Garfield Beach CVS, LLC and Longs Drugs Stores California, LLC, doing business as CVS Pharmacy #10005 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 15 days because their clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

1. The decision of the Department, dated March 3, 2017, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on April 3, 2015. On June 28, 2016, the Department filed an accusation charging that appellants' clerk, identified only as "Charles" (the clerk), sold an alcoholic beverage to 19-year-old Calica Moore on May 19, 2016. Although not noted in the accusation, Moore was working as a minor decoy in a joint operation between the Department of Alcoholic Beverage Control and the Sacramento Police Department at the time.

At the administrative hearing held on January 5, 2017, documentary evidence was received, and testimony concerning the sale was presented by Moore (the decoy). Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises, went to the coolers, and selected a six-pack of Bud Light beer, which she then took to the checkout area and stood in line. After the customers before her were done, the decoy placed the beer on the counter next to the register, greeted the clerk, and waited to be checked out. The beer was the only item the decoy presented for purchase. The decoy noted the clerk's nametag said "Charles" and he was a black male wearing "Minecraft" type glasses.

The clerk asked to see the decoy's identification as he began the transaction for the Bud Light. The decoy responded "of course" and then handed her California Driver's License to the clerk. The decoy's license was the portrait type. It had a red bar under the date of birth that specifically said she would not be 21 until 2017 and a blue bar that said she turned 18 in 2014. The clerk took possession of the license and looked at it for

a few seconds after the decoy handed it to him. While holding the license, the clerk keyed information into the register.

Despite the information on the face of the license, the clerk made no comments regarding the decoy's age or appearance before he handed the identification back to Moore. The clerk rang up the cost of the beer after looking at the license. He completed the sale after the decoy gave him cash to pay for the six-pack. The decoy received change from the clerk. The decoy then exited the licensed premises with the six-pack. At no point during the transaction did the clerk ask about or make any comments regarding the decoy's age or appearance.

The decoy spoke with Sacramento Police Officer Yul Alameda, a second law enforcement officer, and Department Agent Bickel about what occurred. The decoy then re-entered the premises with law enforcement officers. From approximately 20 feet away, the decoy pointed out to the law enforcement officers the clerk who had sold the alcohol to her. The clerk was ringing up customers at the time. One of the officers approached the clerk's register and informed the clerk that they needed to talk with him regarding the investigation.

The clerk and the officers moved to a side area away from the register to talk with him. During the investigation and while the clerk was present, one of the law enforcement officers asked the decoy to identify the person who sold her the beer. The clerk was facing the decoy and looking at her when this occurred. The distance between the decoy and the clerk during the identification was approximately one to two feet. This identification occurred in the area where one of the officers brought the clerk after he was told about the investigation.

After she made the identification, the decoy stood directly next to the clerk while holding her license and the six-pack she had purchased, and one of the officers photographed them.

After the hearing, the ALJ issued a proposed decision determining that the violation charged was proved and no defense was established.

On January 12, 2017, following submission of the proposed decision, the Department's Administrative Hearing Office sent a letter to appellants and to Department counsel offering both parties the opportunity to comment on the proposed decision. That letter stated:

Administrative Records Secretary and Concerned Parties:

Enclosed is the Proposed Decision resulting from the hearing before Department of Alcoholic Beverage Control, Administrative Hearing Office in the above entitled matter.

All concerned parties and their attorneys of record are being sent a copy of this Proposed Decision. All concerned parties and attorneys of record are hereby informed that you may submit comments regarding this Proposed Decision to the Director for consideration prior to any action being taken by the Director. Comments to the Director regarding this Proposed Decision shall be mailed to the Administrative Records Secretary. Additional comments submitted for review by the Director, if any, must also be submitted to all parties and their attorneys. For the convenience of all concerned, a list of those parties and their addresses is attached.

Pursuant to General Order 2016-02, the Administrative Records Secretary will hold this Proposed Decision until 14 days after the date of this letter. After that the Administrative Records Secretary will submit this Proposed Decision along with any comments received from concerned parties to the Director for consideration.

(Letter from John W. Lewis, Chief Admin. Law Judge, Dept. of Alcoholic Bev. Control, Jan. 12, 2017 [hereinafter "Comment Letter"].) As suggested in the final paragraph, the Comment Letter reflected a comment procedure adopted by the Department pursuant to

its General Order 2016-02. (Dept. of Alcoholic Bev. Control, "GO-Ex Parte and Decision Review," Gen. Order 2016-02, at § 3, ¶¶ 5-6 (eff. Mar. 1, 2016) [hereinafter "General Order"].)

On February 1, 2017, appellants submitted a comment letter reasserting all arguments raised at the administrative hearing, and further contending "the ALJ was incorrect with respect to [his] conclusions related to violation of Rule 141(b)(2) as the subsection of Rule 141 was violated in this case through the use of a mature, experienced, and confident minor decoy." (Letter from Melissa H. Gelbart, counsel for appellants, to Ramona Prieto, Acting Dir., Dept. of Alcoholic Bev. Control, Feb. 1, 2017.) Additionally, appellants appended "Comments to the Director re Proposed Decision," which challenged the legality of the comment procedure itself. The Department submitted no comments.

Ultimately, the Department adopted the proposed decision without changes.

Appellants then filed this appeal contending the Department's comment procedure is an underground regulation, violates the APA, and encourages illegal ex parte communications.

DISCUSSION

Appellants contend the Department's comment procedure, implemented pursuant to its General Order 2016-02, violates the hearing and review procedures set forth in the APA, constitutes an underground regulation prohibited by the APA, and encourages illegal ex parte communications. (App.Br., at pp. 3-12.)

This Board recently addressed an identical argument in *7-Eleven, Inc./Gupta* (2017) AB-9583. In that case, we concluded the Department's comment procedure, as

outlined in the General Order, constitutes an unenforceable underground regulation. The comment procedure was identical in this case. We therefore reach the same legal conclusion here, and refer the parties to *Gupta* for our complete reasoning. (*Id.* at pp. 12-25.)

However, we also find that the sole comment, submitted by appellants, had no effect on the outcome of the case, and that the comment procedure did not materially affect appellants' due process rights. (See *id.* at pp. 26-29.) Appellants suffered no prejudice; we therefore offer no relief.

ORDER

The decision of the Department is affirmed.²

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
JUAN PEDRO GAFFNEY RIVERA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

2. This 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.