

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

AB-9652

File: 21-477605; Reg: 16084901

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store #7910
1794 Ashlan Avenue, Clovis, CA 93611-5190,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: June 7, 2018
Los Angeles, CA

ISSUED JULY 13, 2018

Appearances: *Appellants:* Ralph Barat Saltzman, of Solomon, Saltzman &
Jamieson, as counsel for Garfield Beach CVS, LLC and Longs
Drug Stores California, LLC,

Respondent: Colleen R. Villarreal, as counsel for Department of
Alcoholic Beverage Control.

OPINION

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing
business as CVS Pharmacy Store #7910, appeal from a decision of the Department of
Alcoholic Beverage Control¹ suspending their license for 15 days (with 5 days stayed for
a period of one year, provided no further cause for discipline arises during that time)
because their clerk sold an alcoholic beverage to a police minor decoy, in violation of
Business and Professions Code section 25658, subdivision (a).

¹The decision of the Department, dated May 12, 2017, is set forth in the
appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. There is no prior record of disciplinary action on the license.

On November 7, 2016, the Department filed an accusation against appellants charging that, on August 30, 2016, appellants' clerk, Dino Cota (the clerk), sold an alcoholic beverage to 19-year-old Ranvir Singh Bisla. Although not noted in the accusation, Bisla was working as a minor decoy for the Clovis Police Department at the time.

Appellants filed and served on the Department a Special Notice of Defense, demanding, inter alia, the names and addresses of all witnesses. The Department responded by providing the address and phone number of the Clovis Police Department, in lieu of the decoy's personal contact information. Thereafter, appellants filed a Motion to Compel Discovery. The motion was opposed by the Department, and it was denied. In his decision, the administrative law judge (ALJ) found: "After considering the Respondent's motion and the Department's opposition to the motion, an order denying the motion to compel discovery was issued on March 10, 2017 based on the finding that the Department had complied with its discovery obligation by providing contact information for the law enforcement agency that had used the decoy. (Exhibits L-2, D-2, and D-3)" (Findings of Fact, ¶ 1.)

An administrative hearing was held on March 15, 2017. Documentary evidence was received and testimony concerning the sale was presented at the hearing by Bisla (the decoy) and by Anthony Puentes, a Clovis Police officer.

Testimony established that on August 30, 2016, the decoy entered the license premises and selected a 12-pack of Coors Light beer. He took the beer to the register

and waited behind one other customer. When it was his turn, he said “hi” to the clerk and the clerk asked for his identification. The decoy handed the clerk his California driver’s license which had a portrait format, showed his correct date of birth—indicating that he was 19 years of age, and contained a red stripe indicating “AGE 21 IN 2018.” The clerk took the license and entered something into the register. He then completed the sale without asking any age-related questions.

The decoy exited the premises with the beer and went over to the vehicle where the law enforcement officers were waiting. He confirmed what had transpired, then re-entered the premises with the officers. The clerk who had waited on the decoy was on a break, so the officers notified an assistant manager of their investigation. The clerk was called back from his break. As the clerk was approaching them, the decoy was asked by one of the officers who sold him the beer. The decoy pointed at the clerk and said “that’s him right there.” The two were approximately 5 feet apart at the time. A photo of the decoy and clerk was taken (exh. D-6), and the clerk was issued a citation.

Following the hearing, on March 23, 2017, the ALJ submitted a proposed decision, sustaining the accusation and suspending the license for a period of 15 days — with 5 days stayed for one year, provided no further cause for discipline arises during that time. Thereafter, on March 30, 2017, the Department’s Administrative Hearing Office sent a letter from its Chief ALJ to both appellant and Department counsel, inviting the submission of comments on the proposed decision and stating that the proposed decision and any comments submitted would be submitted to the Director of ABC in 14 days.

Appellant submitted comments to the Director, arguing that neither the Administrative Procedure Act (APA) nor the ABC Act authorize the Department to

permit the parties in a disciplinary procedure to comment on a proposed decision, and that by requesting submission of these comments, the Department exceeded the authority granted to it by the APA. The Department did not submit comments.

On May 3, 2017, the Department adopted the proposed decision in its entirety, and on May 12, 2017, the Department issued its Certificate of Decision.

Appellants then filed a timely appeal contending that the ALJ's finding that a face-to-face identification took place, in compliance with rule 141(b)(5),² is not supported by substantial evidence.

DISCUSSION

Appellants contend that the ALJ's finding that a face-to-face identification took place, in compliance with rule 141(b)(5), is not supported by substantial evidence.

(AOB at pp. 4-8.)

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.

This rule provides an affirmative defense. The burden is, therefore, on appellant to show non-compliance. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.) The rule requires "strict adherence." (See *Acapulco Restaurants, Inc.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126] [finding that no attempt, reasonable or otherwise, was made to identify the clerk in that case].)

In *Chun* (1999) AB-7287, this Board made the following observation about 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.

purpose of face-to-face identifications:

The phrase "face to face" means that the two, 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.

(*Id.* at p. 5.)

In *7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983, the Board clarified application of the rule in cases where an officer initiates contact with the clerk following the sale:

As long as the decoy makes a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error, we do not believe that the officer's contact with the clerk before the identification takes place causes the rule to be violated.

(*Id.* at pp. 7-8; see also *7-Eleven, Inc./Morales* (2014) AB-9312; *7-Eleven, Inc./Paintal Corp.* (2013) AB-9310; *7-Eleven, Inc./Dars Corp.* (2007) AB-8590; *West Coasts Products LLC* (2005) AB-8270; *Chevron Stations, Inc.* (2004) AB-8187.)

The court of appeals has found compliance with rule 141(b)(5) even where police escorted a clerk outside the premises in order to complete the identification. (See *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Keller)* (2003) 109 Cal.App.4th 1687, 1697 [3 Cal.Rptr.3d 339] [finding that the rule leaves the location of the identification to the discretion of the peace officer].)

More recently, the court found rule 41(b)(5) was not violated when:

the decoy made a face-to-face identification by pointing out the clerk to the officer inside the store while approximately 10 feet from her, standing next to her when the officer informed her she had sold alcohol to a minor, and taking a photograph with her as the minor held the can of beer he purchased from her. She had ample opportunity to observe the minor and to object to any perceived misidentification. The rule requires identification, not confrontation.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (CVS)* (2017) 18 Cal.App.5th 541, 547 [226 Cal.Rptr.3d 527, 531].) The court explained that the exact moment of the identification could not be severed from the entire identification procedure, which included the decoy pointing out the clerk to the police, the decoy accompanying the police officer to the counter, the officer informing the clerk she had sold beer to the minor at his side, and the clerk and decoy being photographed together. (*Id.* at p. 532.) The court said. "The clerk in these circumstances certainly knew or reasonably ought to have known that she was being identified" because of the totality of the circumstances. (*Ibid.*)

The ALJ made the following findings on the face-to-face identification in this case:

9. Bisla immediately went to the vehicle where the law enforcement officers were waiting and confirmed what had just occurred. Bisla then re-entered with the law enforcement officers. They did not find the clerk initially and notified an assistant manager of their investigation. Bisla continued to hold the 12 pack of Coors Light beer. Once inside the Licensed Premises, Bisla stood with the officers on each side of him while the clerk was called back from a break by another employee. The officers were in tactical clothing but had their badges displayed.

10. As the clerk was walking up to them, Bisla was asked by one of the officers about who sold him the beer. Reese [*sic*] pointed at the clerk who had sold the alcohol to him and said "that's him right there". This occurred from a distance of approximately 5 feet between Bisla and the clerk. (Exhibit D-6) CPD Officer Anthony Puente (Puente) identified the clerk as Dino Cota from his driver's license information during his contact with the clerk. After the identification by Bisla, a picture was taken of Bisla standing directly next to the clerk while holding the 12 pack he had purchased from him. (Exhibit D-5)

(Findings of Fact, ¶¶ 9-10.) Based on these findings, the ALJ reached the following conclusions:

8. The remaining argument of the Respondent that there was a failure of compliance with the face to face identification requirements of rule

141(b)(5) is also rejected. Bisla pointed at the clerk and said "that's him right there" in response to the question of who sold him the beer.³ This occurred from a distance of approximately 5 feet while the clerk was walking up to Bisla and the officers after he had been summoned from a break regarding the investigation. The clerk was engaged in the investigation at the time of the identification and continued to be aware of it as he was photographed with Bisla and questioned about the incident. His response about the date error confirmed he was aware of the investigation.

(Conclusions of Law, ¶ 8.)

Appellants maintain the decision regarding the face-to-face identification is unsupported by the record because the ALJ refers to the decoy as "Reese" in Finding of Fact paragraph 10. They contend "The entire sentence is unsupported by the record and may have come from a different decision entirely." (AOB at p. 6.) We find this argument for invalidating the face-to-face identification unpersuasive. This is clearly a clerical error when, in the balance of the decision, the ALJ refers to the decoy as "Bisla" no fewer than 34 times, including Conclusions of Law paragraph 10 where he found: "Bisla pointed at the clerk and said 'that's him right there' in response to the question of who sold him the beer." The fact that the ALJ accidentally used an incorrect name for the decoy one time out of 35 is not fatal, and does not indicate that his findings referred to some other decoy.

The ALJ's findings are supported by substantial evidence and the face-to-face identification in this matter fully complies with rule 141(b)(5). The Board is prohibited from reweighing the evidence or exercising its independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable,

³The ALJ found: "The clerk's only remark to law enforcement on the date he was issued the citation was that he had input "94" instead of "97" into the computer when he looked at the license." (Finding of Fact, ¶ 12.)

result. (*Masani, supra.*) Looking at the entire identification procedure — including the officers asking the decoy who sold him the beer, the decoy pointing out the clerk to the police from a distance of 5 feet, and the clerk and decoy being photographed together — the clerk knew, or reasonably should have known, that he was being identified as the person who sold alcohol to a minor. As in *CVS*, the clerk here “had ample opportunity to observe the minor and to object to any perceived misidentification.” (*CVS, supra*, at p. 547.)

ORDER

The decision of the Department is affirmed.⁴

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

⁴This 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.

APPENDIX

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

**GARFIELD BEACH CVS LLC
LONGS DRUG STORES CALIFORNIA LLC
CVS PHARMACY STORE 7910
1794 ASHLAN AVE
CLOVIS, CA 93611-5190**

OFF-SALE GENERAL - LICENSE

**Respondent(s)/Licensee(s)
Under the Alcoholic Beverage Control Act**

FRESNO DISTRICT OFFICE

File: 21-477605

Reg: 16084901

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on May 3, 2017. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 300 Capitol Mall, Suite 1245, Sacramento, CA 95814.

On or after June 22, 2017, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: May 12, 2017



Matthew D. Botting
General Counsel

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ABC APPEALS BOARD

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION AGAINST:

Garfield Beach CVS LLC,
Longs Drug Stores California LLC
dba CVS Pharmacy Store 7910
1794 Ashlan Avenue
Clovis, California 93611-5190

Respondent

Off-Sale General License

} File: 21-477605

} Reg.: 16084901

} License Type: 21

} Word Count: 11,428

} Reporter:

} Angela Rodriguez

} CSR # 14060

} California Reporting LLC

PROPOSED DECISION

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Fresno, California, on March 15, 2017.

Sean Klein, Attorney, represented the Department of Alcoholic Beverage Control (Department).

Melissa Gelbart, Attorney, represented Respondent Garfield Beach CVS, LLC and Longs Drug Stores California, LLC.

The Department seeks to discipline the Respondent's license on the grounds that, on or about August 30, 2016 the Respondent, through their agent or employee, Dino Cota, sold, furnished, or gave alcoholic beverages to Ranvir Bisla, an individual under the age of 21 in violation of Business and Professions Code section 25658(a).¹ (Exhibit D-1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on March 15, 2017.

¹ All statutory references are to the Business and Professions Code unless otherwise noted.

FINDINGS OF FACT

1. The Department filed the accusation on November 7, 2016. Subsequent to the filing of the accusation, Respondent sought additional discovery from the Department. Via a motion to compel discovery, the Respondent sought the home address of the minor Decoy used in this case by the Department. The Department responded that it was in compliance with discovery by having provided the law enforcement contact information of the agency that utilized the Decoy. After considering the Respondent's motion and the Department's opposition to the motion, an order denying the motion to compel discovery was issued on March 10, 2017 based on the finding that the Department had complied with its discovery obligation by providing contact information for the law enforcement agency that had used the decoy. (Exhibits L-2, D-2, and D-3)
2. On June 22, 2009 the Department issued a type 21, off-sale general license to the Respondent for the above-described location (the Licensed Premises).
3. There is no record of prior Department discipline against the Respondent's license.
4. Ranvir Singh Bisla (Bisla) was born on January 26, 1997 and was 19 years old at the time of the investigation on August 30, 2016. On that date, Bisla served as a minor decoy in an operation conducted by the Clovis Police Department (CPD) in coordination with the Department at a series of locations.
5. Bisla appeared and testified at the hearing. On August 30, 2016 his appearance was as depicted in a photograph of him that was taken during the operation (Exhibit D-8) where he was wearing an untucked black "Under Armour" logoed t-shirt over a pair of loose fitting khaki shorts. He had short, black hair combed to one side. He was clean shaven and had no visible tattoos or jewelry. According to his license information, Bisla is 5'9" and 137 pounds. (Exhibit D-4) His appearance at the hearing was consistent with his license information and was also essentially the same as his appearance on the date of the decoy operation.
6. On August 30, 2016 at about 7:36 p.m. Bisla entered the Licensed Premises in furtherance of the operation. (Exhibit D-6) He looked for the cases with beer since he was unfamiliar with the Licensed Premises. After finding them, he selected a 12 pack of Coors Light beer. He took his selection to a cashier line and waited behind the one customer who was before him. After the clerk was done with the customer before him, Bisla presented for purchase the 12 pack of beer he had selected.
7. A male clerk was working at that register. This clerk was the same person in the photo that was later taken of Bisla standing next to the clerk that served him. (Exhibit D-5) The

clerk and Bisla said "hi" to each other. The clerk then asked Bisla for identification as he began the transaction for the beer. Bisla gave his driver's license (Exhibit D-4) to the clerk right after he asked for it. Bisla's license was the California Driver's License portrait type that had the red bar under the date of birth that specifically said he would not be 21 until 2018. The clerk took possession of and looked at the license after it was handed to him by Bisla.

8. The clerk then appeared to punch entries into the touchscreen on his register while holding the identification. Despite the information on the license, no questions were asked of Bisla about his age. The clerk rang up the beer, told Bisla the cost, and returned the license. He completed the transaction for the beer after Bisla gave him a \$20 bill to pay for the 12 pack of Coors Light beer. Bisla was given change by the clerk along with the beer purchase. He then exited the Licensed Premises with the 12 pack of Coors Light beer.

9. Bisla immediately went to the vehicle where the law enforcement officers were waiting and confirmed what had just occurred. Bisla then re-entered with the law enforcement officers. They did not find the clerk initially and notified an assistant manager of their investigation. Bisla continued to hold the 12 pack of Coors Light beer. Once inside the Licensed Premises, Bisla stood with the officers on each side of him while the clerk was called back from a break by another employee. The officers were in tactical clothing but had their badges displayed.

10. As the clerk was walking up to them, Bisla was asked by one of the officers about who sold him the beer. Reese pointed at the clerk who had sold the alcohol to him and said "that's him right there". This occurred from a distance of approximately 5 feet between Bisla and the clerk. (Exhibit D-6) CPD Officer Anthony Puente (Puente) identified the clerk as Dino Cota from his driver's license information during his contact with the clerk. After the identification by Bisla, a picture was taken of Bisla standing directly next to the clerk while holding the 12 pack he had purchased from him. (Exhibit D-5)

11. Bisla became involved with the decoy program through the CPD explorer program he had participated in since 2015. This sale occurred on the first day that Bisla had volunteered for the decoy program.

12. Bisla appeared his chronological age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, clothing, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of the clerk at the Licensed Premises on August 30, 2016, Bisla displayed the appearance which could generally be expected of a person less than 21 years of age during his interactions with

the clerk. The clerk did not testify in this matter to explain his age related impressions of Bisla or why he sold Bisla alcohol after being given a driver's license that showed him to be 19 years of age. The clerk's only remark to law enforcement on the date he was issued the citation was that he had input "94" instead of "97" into the computer when he looked at the license.

13. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.
2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.
3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.
4. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on August 30, 2016 the Respondent's clerk, inside the Licensed Premises, sold an alcoholic beverage to Ranvir Singh Bisla, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-12.)
5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141² and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondent argued that the appearance of Bisla failed to comply with rule 141(b)(2) because his appearance and his demeanor appeared older because of his explorer training. The Respondent also generally asserted that the face to face identification failed to comply with rule 141(b)(5).
6. There is no credible evidence supporting the assertion by the Respondent that there was a failure to comply with the requirements of rule 141(b)(2). Neither the clerk nor any other witnesses for the Respondent testified regarding the impact of Bisla's physical

² All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

appearance or his demeanor on his apparent age. Given the totality of the evidence presented by the Department credibly establishing compliance with rule 141(b)(2), the Respondent's unsupported assertions that compliance did not occur is found not credible.

7. Bisla testified in this matter and his appearance matched the appearance he presented to the clerk on the date of the operation. His appearance was consistent with a person under the age of 21. He presented identification to the clerk that clearly showed he was 19 years old. As previously noted, the clerk did not testify to establish whether there was anything in Bisla's manner or appearance that led him to reasonably conclude that he was over 21.

8. The remaining argument of the Respondent that there was a failure of compliance with the face to face identification requirements of rule 141(b)(5) is also rejected. Bisla pointed at the clerk and said "that's him right there" in response to the question of who sold him the beer. This occurred from a distance of approximately 5 feet while the clerk was walking up to Bisla and the officers after he had been summoned from a break regarding the investigation. The clerk was engaged in the investigation at the time of the identification and continued to be aware of it as he was photographed with Bisla and questioned about the incident. His response about the date error confirmed he was aware of the investigation.

PENALTY

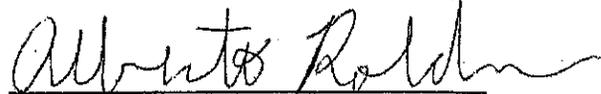
The Department recommended that the Respondent's license be suspended for a period of 15 days which is the standard penalty for a violation without mitigation or aggravation. The Respondent sought mitigation since the Licensed Premises had been in operation since June 2009 without prior discipline. No evidence of established and enforced policies to prevent sales of alcoholic beverages to underage individuals was presented by the Respondent. While the period of discipline free operation is an appropriate factor in mitigation, clear liability was established in this case and no other mitigating factors were presented. The Respondent has established no nexus between the period of discipline free operation and sound practices to prevent such occurrences.

There appear to be no factors in aggravation applicable to this violation. The penalty recommended herein complies with rule 144.

ORDER

The Respondents' off-sale general license is hereby suspended for a period of 15 days, with execution of 5 days of the suspension stayed upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within one year from the effective date of this decision; that should such determination be made, the Director of the Department of Alcoholic Beverage Control may, in the Director's discretion and without further hearing, vacate this stay order and reimpose the stayed penalty; and that should no such determination be made, the stay shall become permanent.

Dated: March 23, 2017


Alberto Roldan
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By:  _____
Date: <u>5/3/17</u> _____