

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

AB-9685

File: 21-479395 Reg: 17085767

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #6705
316 South Pacific Coast Highway,
Redondo Beach, CA 90277-3729,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: D. Huebel

Appeals Board Hearing: November 1, 2018
Ontario, CA

ISSUED NOVEMBER 28, 2018

Appearances: *Appellants:* Alexa L. Halloran, of Solomon Saltsman & Jamieson, as counsel for Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #6705.
Respondent: Kerry K. Winters and Colleen R. Villarreal as counsel for the Department of Alcoholic Beverage Control.

OPINION

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #6705 (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 January 19, 2018, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 9, 2009. On July 24, 2017, the Department filed an accusation charging that appellants' clerk, Ali Zabir Mirza (the clerk), sold an alcoholic beverage to 19-year-old Gonzalo Humberto Lopez Valencia on February 23, 2017. Although not noted in the accusation, Lopez was working as a minor decoy in a joint operation between the Redondo Beach Police Department and the Department of Alcoholic Beverage Control at the time.

On October 3, 2017, appellants submitted a Motion to Compel Discovery.

At the administrative hearing held on November 7, 2017, documentary evidence was received and testimony concerning the sale was presented by Lopez (the decoy); by Detective Blake Nimmons of the Redondo Beach Police Department; and by Agent Danny Vergara of the Department of Alcoholic Beverage Control. Appellants presented no witnesses.

Appellants do not dispute the fact of the violation. Testimony established that on the date of the operation, the decoy approached the clerk with a three-pack of 25-ounce cans of Bud Light beer. The clerk asked for, and was provided, the decoy's California driver's license, which had a vertical orientation, showed his correct date of birth, and included a red stripe which read "AGE 21 in 2018." The clerk entered his own date of birth into the register and completed the sale.

At the commencement of the administrative hearing, the Department claimed it had not received appellants' Motion to Compel Discovery and therefore did not submit a written opposition. The ALJ found the Department provided no reasonable explanation as to why the Department would not have received the Motion to Compel despite

appellants' proof of service and argument that it was properly addressed and mailed to the Department's current mailing address. The ALJ noted that a letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail. The ALJ held that the Department had failed to rebut the presumption that it received the Motion to Compel Discovery, and allowed both parties to argue the Motion on the record.

In their Motion, appellants acknowledged they were provided with contact information for the minor decoy volunteer, to wit, the contact information for the Redondo Beach Police Department, the law enforcement agency that utilizes the services of the minor decoy volunteer and at which the minor decoy is employed as a police cadet. The decoy works part-time at the Redondo Beach Police Department, where he has an inbox and receives mail and telephone messages. The address and telephone number provided by the Department was the decoy's work address and work telephone number at the Redondo Beach Police Department, where he can be reached. Appellants were unable to make contact with the minor decoy despite mailing a letter to the decoy at the address provided and leaving a voice message for the decoy at the telephone number provided by the Department.

Testimony elicited from the decoy revealed that the decoy received, in his inbox at the Redondo Beach police Department, the telephone message left for him by appellants' counsel. The decoy spoke with Sergeant Snakenborg at the Redondo Beach Police Department about the message. Sergeant Snakenborg told the decoy he did not have to talk to appellants' counsel, but if he wanted to speak with them he could. Sergeant Snakenborg told the decoy that if he did talk to appellants' counsel, he would

advise the decoy to have the district attorney present. The decoy testified that he did not want to talk to appellants' counsel.

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

Regarding the Motion to Compel, the ALJ noted that appellants sought to compel the disclosure of some other address or contact information for the minor decoy beyond the contact information for the Redondo Beach Police Department. The ALJ found the Department was under no obligation to provide the minor decoy's home address or personal contact information. The ALJ held the Department had fulfilled its obligation and complied with Government Code section 11507.6 by providing the contact information for the minor decoy, which is the decoy's employment address at which it was proven he could be reached.

The ALJ held that the minor decoy was under no legal obligation to meet or speak with appellants' counsel prior to the hearing, and has a legal right to refuse to do so. Moreover, the ALJ found the minor decoy was under no legal obligation to contact appellants' counsel. The Motion to Compel was therefore denied.

Appellants then filed this appeal contending (1) the Department, through the actions of the Redondo Beach Police Department, interfered with appellants' attempts to interview the minor decoy by requesting an attorney be present; and (2) the provision of the Redondo Police Department's contact information, rather than the decoy's home address, was improper and effectively allowed the Department to interfere.

DISCUSSION

I

Appellants argue the Department improperly interfered with their attempts to interview the minor decoy before the administrative hearing. (App.Br., at pp. 4-5.) They direct this Board to the decoy's testimony, in which the decoy described a conversation with Sergeant Snakenborg of the Redondo Beach Police Department. (*Id.*, at p. 6.) Appellants describe this conversation as "improper and inappropriate," and claim it "violated the Appellant's [*sic*] equal access to interview potential witnesses." (*Ibid.*) According to appellants, "Direct statements made to a potential witness by an authority figure and the witnesses' superior officer unequivocally influence the witness to be uncooperative in communicating to defense counsel." (*Ibid.*)

Appellants rely on two criminal cases for support. The first, *Gregory v. United States*, issued by the D.C. Circuit, dealt with a capital-murder trial in which the prosecutor instructed witnesses not to speak to anyone—including defense counsel—unless he was present. (*Gregory v. U.S.* (1966) 369 F.2d 185, 188.) In light of this and numerous other errors, the court overturned the defendant's conviction. (*Id.* at p. 192.)

Gregory, however, interpreted a federal criminal-law discovery statute, and not a provision of California's Administrative Procedure Act. (See *Gregory, supra*, at p. 187.) Apart from the fact that *Gregory* involved capital murder and, therefore, much higher stakes, the federal law cited in *Gregory* has no application to the present case. Moreover, *Gregory* involved contact between the prosecutor and the witness, not a third party.

The second case, *United States v. Ebrahimi*, while not a capital murder case, is factually similar to *Gregory*. (See generally *U.S. v. Ebrahimi* (2015) 137 F.Supp.3d 886.) While interviewing witnesses, the criminal prosecutor "made several 'requests' of the witnesses." (*Id.*, at p. 887, quotation marks in original.) These "requests" included "ask[ing] the witnesses to notify the Government if they were contacted by another party and asked to make a statement about the case," and "that if such a notification took place, the Government would request an agent to be present during the interview to memorialize any statement the witness provided."² (*Ibid.*) The prosecution argued these were merely "requests" and not directives. (*Id.*, at p. 889.) Citing *Gregory*, the court found that "the Government's communications with potential witnesses, taken in context, could reasonably have been interpreted by the witnesses as an instruction or could have otherwise impermissibly influenced the witnesses." (*Ibid.*)

As in *Gregory*, *Ebrahimi* took place in the federal criminal context and did not interpret any provision of California's Administrative Procedure Act. (Compare *Ebrahimi, supra*, with *Gregory, supra*.) Moreover, as in *Gregory*, *Ebrahimi* involved contact between the prosecutor and a witness, and not a third party.

Notably, appellant's opening brief lacks any reference to *Cimarusti*, a California case interpreting the extent to which parties to administrative actions are guaranteed access to witnesses, and whether a parties' due process rights are violated when there is alleged witness interference. (See generally *Cimarusti* (2000) 79 Cal.App.4th 799 [94 Cal.Rptr.2d 336].) In that case, several youth correctional guards appealed disciplinary actions taken against them by the California Youth Authority. (*Id.* at pp. 801-802.)

2. In the criminal context "the Government" refers to the prosecution.

Counsel for the guards sought to interview several witnesses, all wards of the Youth Authority. (*Id.*, at p. 807.) All but one of the wards "signed written forms stating that they [did] *not* desire to talk to petitioners' counsel." (*Id.* at pp. 807-808, emphasis in original.)

While the guards "impliedly concede[d]" that the wards were not required to speak with the guards' counsel, the guards nevertheless contended that they "ha[d] the right to speak with the wards *in person* and have the wards tell them, or their counsel, that they do not wish to speak with them about this matter." (*Id.*, at p. 808, emphasis in original.) The guards further alleged that "the Youth Authority had given suggestive information to the wards predisposing them to refuse to talk to petitioners' counsel," and that "the Youth Authority's prior suggestiveness and refusal of face-to-face access 'interfered' with the asserted 'right' to ask the wards in person for an interview." (*Ibid.*, quotation marks in original.)

As here, the guards relied on criminal cases as support. The court wrote, "Petitioners' analogy to criminal cases is inapt. Generally, there is no due process right to prehearing discovery in administrative hearing cases." (*Ibid.*, rejecting application of *Reid v. Superior Ct.* (1997) 55 Cal.App.4th 1326 [64 Cal.Rptr.2d 714] [criminal rape case in which court ordered release of witness' personal contact information to defendant's counsel].) The court also rejected the guards' contention that their due process rights had been violated:

Petitioners have been provided with the wards' prior statements. At the hearing, which will be conducted in accordance with the Administrative Procedure Act (Gov. Code, § 19578, adopting the procedure in Gov. Code, § 11513), petitioners can call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any relevant matter even if not covered on direct examination, impeach witnesses, and rebut evidence. (Gov. Code, § 11513, subd. (b).) The statutory prehearing

discovery and hearing procedures are sufficient to satisfy petitioners' due process rights.

(*Cimarusti, supra*, at p. 809.)

Finally—and most significantly for purposes of the case at hand—the court found that the alleged witness interference by the Youth Authority was irrelevant where the wards had refused an interview: "Whether or not the wards were influenced by the Youth Authority, they have the absolute right to decline an interview." (*Ibid.*)

Here, appellants allege that a conversation with a third party—Sergeant Snakenborg of the Redondo Beach Police Department—"unequivocally influence[d] the witness to be uncooperative."³ (App.Br., at p. 6.) The decoy described the conversation twice in response to cross-examination by appellants' counsel. The two descriptions differed slightly:

[BY MS. HOOPER:] So when you talked to your sergeant about this note that you got to call Darlene [Chacon], what exactly did he say?

[THE DECOY:] He told me that I didn't have to give them a call back. And if I did, I would have to have our DA present, District Attorney.

(RT at p. 73.)

[BY MS. HOOPER:] So Sergeant Snakenborg told you that if you wanted to talk to us, you should have a District Attorney with you?

[THE DECOY:] He said that I could have called you guys, but he recommended to have, like, a District Attorney next to me.

(*Ibid.*)

3. At times, appellants conflate the Department of Alcoholic Beverage Control, the prosecuting agency, with the Redondo Police Department. (See, e.g., App.Br., at p. 5 ["The Department's statements to the minor witness requesting that an attorney be present . . . directly violated the defendant's due process right to equal access."].) To be clear, Sergeant Snakenborg is neither an employee nor an agent of the Department of Alcoholic Beverage Control.

Notably, the District Attorney is not the prosecutor in this case. Appellants faced disciplinary action before the Department of Alcoholic Beverage Control, not criminal charges. What appellants allege to be "interference" is little more than the decoy's supervisor recommending that he have an attorney present if he chose to engage with appellants' counsel.

Ultimately, however, that fact is irrelevant, as the decoy unequivocally stated that it was his decision to not speak with appellants' counsel:

[BY MS. HOOPER:] And is that why you decided you didn't want to talk to us?

[THE DECOY:] I just didn't want to talk to no one.

(RT at pp. 73-74.) Under *Cimarusti*, the decoy had "the absolute right to decline an interview" regardless of whether he was influenced by his conversation with Sergeant Snakenborg. (*Cimarusti, supra*, at p. 809.) No due process violation occurred where, as here, the decoy simply chose not to return appellants' calls.

II

Appellants object to provision of the Redondo Beach Police Department address and phone number as the decoy's contact information. Appellants acknowledge that "the Board has previously ruled that only providing the address of [the] police station is not a violation of Government Code section 11507.6," but nevertheless insist the practice is "a purposeful attempt to make it difficult to contact minor decoy witnesses." (App.Br., at p. 8.)

In *7-Eleven, Inc./Joe*, this Board held that minor decoys assisting law enforcement in decoy operations qualify as "peace officers" whose private information is protected under Penal Code section 832.7. (*7-Eleven, Inc./Joe* (2016) AB-9544, at

pp. 4-15.) Appellants give this Board no cause to reconsider that holding—particularly where, as here, the decoy is in fact a police cadet employed by the Redondo Beach Police Department. (See RT at p. 31.) Provision of the Redondo Beach Police Department address was therefore proper.

ORDER

The decision of the Department is affirmed.⁴

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
MEGAN MCGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

4. 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.

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 6705
316 S PACIFIC COAST HWY
REDONDO BEACH, CA 90277-3729

LB/LAKEWOOD DISTRICT OFFICE

File: 21-479395

Reg: 17085767

AB: 9685

OFF-SALE GENERAL - LICENSE

Respondent(s)/Licensee(s)
under the Alcoholic Beverage Control Act.

CERTIFICATION

I, Dominique Williams, do hereby certify that I am a Senior Legal Analyst for the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that annexed hereto is a true, correct and complete record (not including the Hearing Reporter's transcript) of the proceedings held under Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code concerning the petition, protest, or discipline of the above-listed license heretofore issued or applied for under the provisions of Division 9 of the Business and Professions Code.

IN WITNESS WHEREOF, I hereunto affix my signature on March 13, 2018, in the City of Sacramento, County of Sacramento, State of California.


Office of Legal Services

2018 MAR 13 PM 2:45
RECEIVED
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 AND
LONGS DRUG STORES CALIFORNIA LLC
CVS PHARMACY 6705
316 SOUTH PACIFIC COAST HIGHWAY
REDONDO BEACH, CA 90277-3729**

OFF-SALE GENERAL - LICENSE

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

LAKESWOOD DISTRICT OFFICE

File: 21-479395

Reg: 17085767

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 December 14, 2017. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

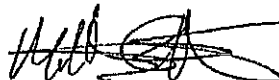
Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date 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, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after March 1, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: January 19, 2018



**Matthew D. Botting
General Counsel**

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Garfield Beach CVS LLC, and
Longs Drug Stores California LLC
Dbas: CVS Pharmacy 6705
316 South Pacific Coast Highway
Redondo Beach, California 90277-3729

Respondents

} File: 21-479395

} Reg.: 17085767

} License Type: 21

} Word Count: 25,279

} Reporter:

} Jennifer Dacus

} Kennedy Court Reporters

Off-Sale General License

PROPOSED DECISION

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Cerritos, California, on November 7, 2017.

Jacob Rambo, Attorney, represented the Department of Alcoholic Beverage Control.

Donna Hooper, Attorney, represented Respondents, Garfield Beach CVS LLC and Longs Drug Stores California LLC.

The Department seeks to discipline the Respondents' license on the grounds that, on or about February 23, 2017, the Respondents, through their agent or employee, sold, furnished, or gave alcoholic beverages to Gonzalo Humberto Lopez Valencia, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 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 November 7, 2017.

PRELIMINARY MATTERS

1. On October 3, 2017, Respondents submitted a Motion to Compel Discovery. (Exhibit A.) At the hearing on November 7, 2017, the Department claimed it did not receive the

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

motion and therefore did not submit a written opposition thereto. The Department provided no reasonable explanation as to why it would not have received the motion to compel despite Respondents proof of service and argument it was properly addressed and mailed to the Department's current mailing address. A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail. (Evidence Code section 641.) The Department failed to rebut the presumption that it received the said motion to compel discovery in the ordinary course of mail. The undersigned allowed both parties to present their arguments, on the record.²

2. The Department argued that pursuant to Government Code section 11507.7(a) the administrative law judge does not have jurisdiction to consider the motion to compel because the Respondents did not make a good faith attempt to contact the Department for an informal resolution since the Respondents relied upon a "meet and confer" letter it mailed on September 22, 2017, which the Department claimed it did not receive, rather than simply telephoning the Department. This argument is rejected. Department counsel acknowledged the facsimile number(s) to which the said "meet and confer" letter was faxed was correct. Respondents provided proof of facsimile delivery of the said letter by producing at the hearing both the Facsimile Transmittal Sheet and Communication Result Report reflecting such delivery. The Department provided no reasonable explanation as to why it would not have received the same. A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail. (Evidence Code section 641.) The Department failed to rebut the presumption that it received the said "meet and confer" letter by facsimile on September 22, 2017.

3. Department counsel then argued that pursuant to Government Code section 11507.7(b) Respondents' motion was untimely because the Department notified Respondents on September 14, 2017, that it would not provide any other address other than the decoy's professional address and the Respondents filed their motion on October 3, 2017. Based on the significant dates provided the undersigned finds the Respondents' motion is timely.

4. The Respondents acknowledge in their motion they were provided with contact information for the minor decoy volunteer, that being the Redondo Beach Police Department (Redondo Beach PD) - the law enforcement agency that utilizes the services of the minor decoy volunteer and at which the minor decoy is employed as a police cadet. The decoy works part-time at the Redondo Beach PD, at which he has an in-box where he receives mail and telephone messages. The address and telephone number provided

² There was no objection by the parties for the undersigned to issue a written order, relating to the Respondents' motion to compel, in the "Preliminary Matters" section of the Proposed Decision.

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by the Department to the Respondents is the decoy's work address and work telephone number at the Redondo Beach PD, where he can be reached. The Respondents were unable to make contact with the minor decoy despite mailing a letter to the decoy at the address provided and leaving a voice message for the decoy at the telephone number provided by the Department.

5. The testimony elicited from the decoy revealed that the decoy received, in his in-box at the Redondo Beach PD, the telephone message left for him by the law firm of Solomon, Saltsman & Jamieson (SSJ). (Exhibit 2.) The decoy spoke with Sergeant Snakenborg at the Redondo Beach PD about the said message. Sergeant Snakenborg told the decoy he did not have to talk to the SSJ law firm but if he wanted to speak with the SSJ law firm he could. Sergeant Snakenborg recommended to the decoy that if he did talk to the law firm he would advise the decoy to have the district attorney present. The decoy testified that he did not want to talk to the SSJ law firm. In fact, the decoy added, "I just did not want to talk to no one."

6. Respondents seek to compel the disclosure of some other address or contact information for the minor decoy volunteer, although Respondents avoid using the term "home address." The Department is under no such obligation to provide the minor decoy volunteer's "home address" or personal contact information. The Department has fulfilled its obligation and complied with Government Code section 11507.6, by providing the contact information for the minor decoy, which is the decoy's employment address at which it has been proven he can be reached.

7. The minor decoy volunteer is under no legal obligation to meet or speak with Respondents' counsel prior to the hearing and has a legal right to refuse to do so. The minor decoy volunteer is further under no legal obligation to contact Respondents' counsel. The motion to compel is denied.

FINDINGS OF FACT

1. The Department filed the accusation on July 24, 2017.
2. The Department issued a type 21, off-sale general license to the Respondents for the above-described location on September 9, 2009 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Gonzalo Humberto Lopez Valencia (hereinafter referred to as decoy Lopez) was born on June 26, 1997. On February 23, 2017, he was 19 years old. On that date he served as

a minor decoy in an operation conducted by the Redondo Beach PD in conjunction with the Department.

5. Decoy Lopez appeared and testified at the hearing. On February 23, 2017, he was approximately 5'10" tall and weighed 180 pounds. He wore khaki colored shorts, a black and white plaid, long-sleeved flannel shirt with a white t-shirt underneath, white socks, black tennis shoes, and a watch on his left wrist. (Exhibits 4, 5 and 6.) His appearance at the hearing was substantially the same, except that he did not wear the watch.

6. On February 23, 2017, Department Agent Danny Vergara and Detective Blake Nimmons with the Redondo Beach PD entered the Licensed Premises. Shortly thereafter decoy Lopez entered. Decoy Lopez went to the alcoholic beverage cooler and selected a three-pack of 25 ounce cans of Bud Light beer (Exhibit 6). Beer is an alcoholic beverage. Decoy Lopez took the three-pack of beer to the front sales counter for purchase and waited in line behind one customer.

7. At the counter, decoy Lopez approached clerk Ali Zahir Mirza (hereinafter referred to as clerk Mirza) and set down the three-pack of Bud Light beer. Clerk Mirza scanned the beer and asked decoy Lopez for his identification (ID). Decoy Lopez handed his valid California Driver License to clerk Mirza. Decoy Lopez' California Driver License has a vertical orientation, shows his correct date of birth and includes a red stripe which reads, "AGE 21 in 2018." (Exhibit 3.) Clerk Mirza retrieved the ID, looked at it briefly, and walked to the next register, at which stood the store manager. Clerk Mirza showed the store manager the ID and asked how he would complete the sale. The store manager instructed clerk Mirza to enter the date of birth from the driver license in the register, which would reveal whether it was okay to complete the sale of alcohol to the customer.

8. Clerk Mirza returned to the cash register at which decoy Lopez waited. Clerk Mirza entered his own date of birth into the cash register, which allowed him to proceed with the sale of alcohol to decoy Lopez. Clerk Mirza told decoy Lopez the cost of the three-pack of beer. Decoy Lopez handed \$20 to clerk Mirza, who gave decoy Lopez some change and a receipt. Clerk Mirza did not ask decoy Lopez his age. Decoy Lopez then exited the store with the three-pack of Bud Light beer. Agent Vergara and Detective Nimmons were inside the Licensed Premises during the entire sales transaction posing as customers and witnessed these afore-described events. Decoy Lopez did not interact with anyone else other than clerk Mirza while inside the Licensed Premises.

9. Decoy Lopez re-entered the Licensed Premises with Officer Stephens of the Redondo Beach PD. The agents and other officers made contact with clerk Mirza, who stood behind the sales counter. Detective Nimmons explained the violation to clerk Mirza.

Agent Vergara asked clerk Mirza to step out from behind the cash register area. Clerk Mirza complied and stepped in front of the cash register area, on the customer side of the counter. Agent Vergara asked decoy Lopez how old he was, to which decoy Lopez replied, "19." Agent Vergara then asked decoy Lopez to identify the person who sold him the beer. Decoy Lopez extended his left arm out and with his index finger pointed at clerk Mirza and replied, "That was the person that sold me the beer." Decoy Lopez and clerk Mirza were standing approximately four feet apart, facing and looking at each other at the time of this identification. A photo of clerk Mirza and decoy Lopez was taken after the face-to-face identification, with decoy Lopez holding the three-pack of Bud Light beer while standing next to clerk Mirza. (Exhibit 6).

10. Clerk Mirza was issued a citation after the face-to-face identification. Clerk Mirza did not appear and did not testify at the hearing. There is no evidence clerk Mirza was distracted, or that anyone interfered, during the sales transaction or the face-to-face identification.

11. Decoy Lopez appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of clerk Mirza at the Licensed Premises on February 23, 2017, decoy Lopez displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to clerk Mirza. Decoy Lopez appeared his true age.

12. 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 Respondents' license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on February 23, 2017, the Respondents' clerk, Ali Zabir Mirza, inside the Licensed Premises, sold alcoholic beverages, to-wit: beer, to Gonzalo Humberto Lopez Valencia, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-11.)

5. The Respondents argued the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)³, and therefore, the accusation should be dismissed pursuant to rule 141(c).

6. With respect to rule 141(b)(2), specifically, the Respondents argued decoy Lopez did not have the appearance generally expected of a person under the age of 21. Respondents' counsel opined that decoy Lopez "looks extremely mature," "at least 25 years old" because of his weight and "deep set eyes that look like he's more tired than a young person," "And looking at him in these pictures [referring to the exhibits], he looks almost as old as the clerk looks in the picture." This rule 141(b)(2) argument is rejected. The Respondents presented no evidence that these factors actually resulted in decoy Lopez appearing 21 or older to clerk Mirza. In fact, clerk Mirza would not have been looking at the exhibit photographs, but had the opportunity to observe decoy Lopez in person on February 23, 2017. In person, decoy Lopez' appearance was consistent with that of a person who was 19 years old at the time of the decoy operation and 20 years old at the hearing. Even Agent Vergara, who saw decoy Lopez inside the Licensed Premises on February 23, 2017, credibly testified the decoy appeared 19 years old. In other words, decoy Lopez appears his age and had the appearance generally expected of a person under the age of 21. (Findings of Fact ¶ 11.)

PENALTY

The Department requested the Respondents' license be suspended for a period of 15 days. The Department argued there were aggravating factors which overcame any alleged mitigating factor of the length of licensure without discipline. The aggravating factors argued included that: (1) clerk Mirza input his own birth date into the register to allow the sale of alcohol to the minor, showing a purposeful intent to sell to a minor rather than a negligent intent; (2) clerk Mirza did not know how to process age-restrictive merchandise and was not aware of any preventative measures to take to avoid such sales, and (3) the store manager could have taken a more active role in monitoring the said sales

³ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

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Longs Drug Stores California LLC
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transaction, thereby preventing the said sale. The Department also argued there was no evidence the Respondents either took positive action to correct the problem or had documented training of the licensee and its employees concerning age-restrictive merchandise sales. The Respondents argued that, if the accusation were not dismissed, a mitigated all-stayed penalty was appropriate since the Respondents have been licensed since September 9, 2009, with no prior discipline. The penalty recommended herein complies with rule 144.

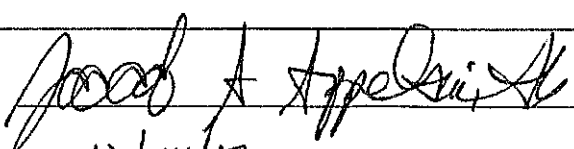
ORDER

The Respondents' off-sale general license is hereby suspended for a period of 15 days.

Dated: November 13, 2017



D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: 12/14/17