

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

AB-9117

File: 21-477406 Reg: 10072399

GARFIELD BEACH CVS LLC, dba Longs Drug Store # 9533
19783 Rinaldi Street, Porter Ranch, CA 91326-4143,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: May 5, 2011
Los Angeles, CA

ISSUED JUNE 15, 2011

Garfield Beach CVS LLC, doing business as Longs Drug Store # 9533
(appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹
which suspended its license for 15 days for its 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 B. Saltsman and Soheyl Tahsildoost, and the Department of
Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

¹The decision of the Department, dated June 3, 2010, is set forth in the
appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on June 22, 2009. On January 27, 2010, the Department filed an accusation charging that appellant's clerk, Kelly Jo Mills (the clerk) sold an alcoholic beverage to 19-year-old Jennifer Martinez on September 11, 2009. Although not noted in the accusation, Martinez was working as a minor decoy for the Los Angeles Police Department (LAPD) at the time.

At the administrative hearing held on April 21, 2010, documentary evidence was received, and testimony concerning the sale was presented by Martinez (the decoy) and LAPD officer Ryan Smith. James Ingalls, the store manager, testified about company policy and employee training regarding the sale of alcoholic beverages.

On September 11, 2009, the decoy entered the licensed premises and selected a can of Budweiser beer from the cooler. She took the beer to the checkout counter and the clerk asked "Do you have ID?" The decoy answered "Yes" and held up her California driver's license for the clerk to look at, holding it by the edges. She testified that her fingers did not obscure anything on the face of the license and demonstrated how she held it. The clerk looked at the license for about five seconds, then turned to her cash register and "punched in" some information before completing the sale.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established.

Appellant filed an appeal contending: (1) The decoy operation did not comply with rules 141(a)² and 141(b)(3), and (2) the decision did not adequately account for all mitigating factors presented.

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.

DISCUSSION

I

Rule 141(a) provides that minor decoy operations must be conducted in a manner "that promotes fairness." Rule 141(b)(3) requires a decoy to carry only his or her own correct identification and to present it if asked to do so by a seller of alcoholic beverages. Failure to comply with rule 141 provides a defense to a sale-to-minor violation. (Cal. Code Regs., tit. 4, § 141, subd. (c).)

Appellant contends that the fairness requirement was not met because when the clerk asked "Do you have ID?" she was asking to determine whether the decoy had identification showing her to be old enough to purchase beer legally. The decoy's affirmative response to the question was misleading, appellant argues, and this was compounded by the decoy holding on to the ID while showing it to the clerk instead of handing it to the clerk.

The transaction was completed, appellant asserts, "[b]ased on the decoy's misleading response," and, therefore, violated the fairness requirement of rule 141(a). (App. Opening Br. at p. 6.) Appellant also argues that rule 141(b)(3) was violated because the decoy "failed to produce identification when requested to do so." (*Ibid.*) Appellant throws in, at the end of this section of its brief, the assertion that the decoy's training as an Explorer with LAPD caused her not to exhibit the appearance generally expected of a person under the age of 21, violating rule 141(b)(2).

Appellant made this argument at the administrative hearing and the ALJ rejected it, saying, in Conclusion of Law 5:

The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141(a)^[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the

Respondent argued that, when Mills asked to see Martinez's identification, she was actually asking if Martinez had any identification indicating that she was 21 years of age or older. The Respondent argued that it was inherently deceptive for Martinez to show her real identification under these circumstances. This argument is rejected. First, Mills' question is not susceptible to the interpretation suggested. Second, and more important, Rule 141(b)(3) explicitly required Martinez to show her actual identification. Martinez's actions, under the circumstances, were exactly those required by the rule. (Findings of Fact ¶¶ 4-9.)

A similar argument was made in *Trader Joes Company* (2001) AB-7644 (*Trader Joe's*). In that appeal, the 19-year-old decoy put a 6-pack of pale ale on the counter and the clerk said, "You got ID, right?" The decoy said "Yeah," and pulled out his California driver's license that bore his true date of birth and a red stripe with "AGE 21 in 2001." The clerk took the license, looked at it, gave it back, and completed the sale.

The licensee in *Trader Joe's* contended that the decoy's lack of hesitation in offering his identification when the clerk asked if he had any was unfair, because it indicated to the clerk that the ID would show that its owner was 21; the clerk's only concern then was whether the identification actually belonged to the decoy. The licensee also asserted that offering the identification when there was no request to see it violated rule 141(b)(3).

In *Trader Joe's* the Board rejected the licensee's argument, agreeing with the administrative law judge (ALJ) that the clerk's question is "commonly understood to be a request to produce the identification." The Board concluded that: "Therefore, the clerk made a request for identification, with which the decoy complied as the rule required."

We see no reason to depart from the Board's conclusion in *Trader Joe's, supra*. The question asked in the present appeal is essentially the same one asked there. Nothing in this case makes the question something other than a request to produce

identification. The decoy produced the requested identification, complying with rule 141(b)(3), as determined by the ALJ.

Nothing about the circumstances of this case made the decoy operation unfair. The seller did not testify, so there is no evidence that she was misled by anything the decoy said or did. We do know that the seller had the opportunity to determine the decoy's age by looking at the decoy's identification, but looked at it only momentarily, before turning away and completing the sale.

Appellant's cursory "argument" regarding the decoy's appearance does not need to be addressed, since appellant did not raise this issue at the administrative hearing.

II

Appellant contends that the Department failed to properly account for all the mitigating factors presented at the hearing. It asserts that the decision must be reversed because the Department did not proceed in the manner required by law.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

The extent to which the Department considers mitigating factors is a matter within its discretion, and the Board may not interfere with that discretion absent a clear showing of abuse of discretion. Appellant's belief that the penalty should have been less does not show that the Department abused its discretion in imposing the penalty.

The penalty was the standard penalty under the Department's Penalty Guidelines pursuant to rule 144. (Cal. Code Regs., tit. 4, § 144.) Appellants have not shown that the Department abused its discretion in imposing the standard penalty.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, 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.