

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

AB-9159

File: 21-477697 Reg: 10073610

GARFIELD BEACH CVS LLC and LONGS DRUG STORES CALIFORNIA LLC,
dba CVS Pharmacy Store #9991
3158 Danville Boulevard, Alamo, CA 94507-1540,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: April 5, 2012
San Francisco, CA

ISSUED MAY 2, 2012

Garfield Beach CVS LLC and Longs Drug Stores California LLC, doing business as CVS Pharmacy Store #9991 (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 Saltsman and

¹The decision of the Department, dated February 22, 2011, is set forth in the appendix.

Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Sean Klein.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On October 20, 2010, the Department filed an accusation against appellants charging that, on September 21, 2010, appellants' clerk, Julia Ellerson (the clerk), sold an alcoholic beverage to 18-year-old Paige Babbitt. Although not noted in the accusation, Babbitt was working as a minor decoy for the Contra Costa Sheriff's Department and the Department of Alcoholic Beverage Control.

At the administrative hearing held on January 13, 2011, documentary evidence was received and testimony concerning the sale was presented by Babbitt (the decoy) and by Connie Cook, an ABC Investigator. The testimony revealed that the decoy entered the premises and retrieved a six-pack of Corona Light beer which she took to the cash register area. The clerk asked for identification, and the decoy produced her California Driver's License which had a red stripe with white letters stating: AGE 21 IN 2013. The clerk observed the license for approximately 50 seconds and then sold the beer to the decoy. (Findings of Fact II-B.)

The Department's decision determined that the violation charged was proven and no defense to the charge was established.

Appellants then filed an appeal contending the decoy did not display the appearance required by rule 141(b)(2).²

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

Appellants contend that the decoy did not display the appearance required by rule 141(b)(2), which dictates: “[t]he 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.”

The administrative law judge (ALJ) made the following findings about the decoy’s appearance in Findings of Fact (FF) II-D:

D. The decoy’s overall appearance including her demeanor, her poise, her mannerisms, her size and her physical appearance were consistent with that of a person under the age of twenty one years and her appearance at the time of the hearing was substantially the same as her appearance on the day of the decoy operation.

1. On the day of the sale and at the hearing, the decoy had platinum blonde hair, weighed approximately 140 pounds, and was 5 feet 5 inches tall. In addition, the decoy wore no make-up, lip gloss, or mascara. She has freckles on the bridge of her nose. Babbitt did not wear any earrings or rings, and she did not have fake fingernails. However, during the decoy operation she had a small, clear nose stone on one side of her nose. Babbitt’s clothing consisted of jeans, a tank top covered by a zip-up jacket, and tennis shoes. The photograph in State’s Exhibit 2 (page 4) accurately depicts what the decoy looked like and what she was wearing at the premises on the day of the sale.

2. The decoy seemed a bit nervous at the hearing, which was manifested by her fidgety movements and immature actions on the witness stand. There was nothing else remarkable about her nonphysical appearance. Babbitt testified that she did not feel nervous during the decoy operation.

3. The decoy participated in approximately 2 or 3 decoy operations prior to this incident. She became an Explorer with the Livermore Police Department about 2 or 3 months prior to September 2010. As a cadet, she received no training, but participated in one ride-along where she helped the police officer with his duties. She wore a uniform during the ride-along. There was no evidence presented that Babbitt’s prior experience as a decoy or an Explorer caused or contributed to the clerk selling an alcoholic beverage to her.

4. After considering Exhibit 2 (page 4), the decoy's overall appearance when she testified, and the way she conducted herself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under the age of twenty-one years under the actual circumstances presented to the seller at the time of the sale.

Appellants maintain that the decoy's physical appearance was that of a mature woman, with a fully developed body and mature face, and that she appeared self-assured because of her experience. Appellants' bald assertions, however, that the decoy's appearance made her appear to be over 21 are baseless and unsupported by any evidence in the record, and appellant's insistence that the decoy's experience caused her to appear to be over 21 is likewise unsupported. The decoy participated in only two or three previous decoy operations, so her experience was not extensive, and she had participated as an Explorer with the Livermore Police Department for only two to three months.

The ALJ made detailed findings regarding the appearance of the decoy at the hearing, the photographs taken of her on the day of the decoy operation, and her experience as a decoy (FF II-D, *supra*) and concluded that her appearance complied with rule 141(b)(2). Appellants have given us no reason to think the ALJ abused his discretion in making that determination.

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 requirement of rule 141, that she possessed 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. 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.

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.