

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

AB-9194

File: 21-479632 Reg: 10074003

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #9630
6201 Sepulveda Avenue, Van Nuys, CA 91411-1111,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: March 7, 2013
Los Angeles, CA

ISSUED APRIL 10, 2013

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #9630 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk having sold an alcoholic beverage to a person under the age of 21, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Garfield Beach CVS, LLC and Longs

¹The decision of the Department, dated August 31, 2011, is set forth in the appendix.

Drug Stores California, LLC, appearing through their counsel, Ralph Barat Saltsman and D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on December 21, 2009. On December 21, 2010, the Department instituted an accusation against appellants charging that appellants' clerk, April Rosa Caravez, sold an alcoholic beverage (beer) to Blanca Rodriguez, a person under the age of 21. Although not stated in the accusation, Rodriguez was working as a minor decoy for the Los Angeles Police Department.

An administrative hearing was held on July 21, 2011. Documentary evidence was received and testimony concerning the violation charged was presented by Los Angeles police officers Sylvia Corral and Thomas Andreas, and by Blanca Rodriguez, the minor decoy. April Rosa Caravez, the clerk, testified on behalf of appellants.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and no affirmative defenses had been proved.

Appellants have filed an appeal making the following contentions: (1) the Department failed to establish a valid chain of custody concerning the product in question; (2) the Department's decision fails to make the requisite analysis of why the clerk's testimony was not credible; (3) the Department violated appellants' due process rights by permitting the ALJ to make arbitrary and capricious findings based upon unattainable standards as to whether there was substantial evidence to support findings as to compliance with rules 141(b)(2) and 141(b)(5); and (4) the Department has failed to establish the existence of a standard to ensure that, at the time of the hearing, the

ALJ has the ability to fairly and judicially decide and determine compliance issues without violating a respondent's due process rights.²

DISCUSSION

I

Appellants contend gaps in the chain of custody should have barred the admission into evidence of Department Exhibit 3, a 24-oz. can of Bud Light beer. They suggest that the beer produced at the hearing was not the product actually purchased.

LAPD officer Silvia Corral testified that, while at appellants' premises, she seized the can of Budweiser Light beer that had been purchased by the decoy, and placed it in a bag labeled CVS. The bag was transported to the Van Nuys station that same evening by one of her supervisors. Officer Corral there completed an evidence tag with the selling clerk's name on the tag, and booked it into evidence. She removed it from the Van Nuys property the morning of the administrative hearing, and it remained in her possession until it was marked as Exhibit 3 at the hearing.

Appellants argue that Officer Corral's inability to identify the supervisor who transported the beer to the Van Nuys station, or to identify the whereabouts of the beer during the intervening 19 months amounted to gaps in the chain of custody of such nature and moment as to bar its admission into evidence. Appellants argument ignores the real facts.

The decoy, Blanca Rodriguez, testified that she purchased a can of Bud Light

²Issues 3 and 4 concern the constitutionality of Department rules 141(b)(2) and 141(b)(5), which appellants attack as vague. The Board has recently addressed these issues at length. (See *7-Eleven, Inc. and NRG Convenience Stores, Inc.* (2013) AB-9848 and *Circle K Stores, Inc.* (2013) AB-9274.) Appellants' briefs in this matter have not persuaded us that the views expressed in those decisions need to be revisited.

beer. The clerk, April Rosa Caravez, testified on direct examination that she sold an alcoholic beverage to decoy Rodriguez; on cross-examination she identified the alcoholic beverage she sold as Bud Light beer. Officer Corral testified that the bag in which she placed the beer when it was seized was labeled CVS. She testified that only one CVS store was visited the night of the decoy operation. A supervisor took possession of the beer. Officer Corral tagged the beer and placed it in Van Nuys property storage, from which she retrieved it the day of the hearing. There is absolutely no evidence that the bagged exhibit 3 was disturbed or moved at any time during the nineteen months that elapsed between Corral's storage of the beer and its retrieval by her, and appellants' assertion that the Department offered no explanation how the beer got to the station ignores testimony their own attorney elicited.³

"It is not incumbent on the prosecution to negate all possibility of tampering or

³ Officer Corral testified on that exact point during his cross-examination, so appellants may be technically correct that the Department did not provide that information. Nonetheless, the evidence is in the record:

A. [Officer Corral]: One of our supervisors took possession of it. We had two supervisors that date. The beer can remains in the vehicle until we get to the station. Once we arrive at the station, whoever is writing the report takes the beer, completes the report and books the beer. I booked the beer. I prepared the report.

Q. So somebody else took possession of it?

A. A supervisor took possession of it after the incident, yes.

Q. And it was then transported to the station?

A. To the station.

Q. And at that point you then saw it and then you filled out the card and whatever other booking information you had to fill out?

A. Yes.

substitution. ... [W]hen it is the barest speculation, it is proper to admit the evidence and let what doubts remain go to its weight." (*People v. Lozano* (1976) 57 Cal.App.3d 490, 495 [127 Cal.Rptr. 204].) Appellants have offered nothing to support their claim of "[t]his glaring void" (App. Br., p. 2) but speculation most bare.

II

The ALJ concluded that the clerk's testimony was not credible (Conclusion of Law 6):

There was a direct conflict between the testimony of Rodriguez, Ofcr. Corral, and Ofcr. Thomas Andreas, on the one hand, and that of Caravez on the other. The foregoing conclusions (Conclusions of Law ¶¶ 4-5)⁴ are based on the testimony of the former, while Caravez's testimony (Finding of Fact ¶ 13) is specifically rejected. Although she admitted the sale, Caravez disputed almost everything else. These denials are self-serving and unsupported by any other evidence. For example, Caravez claimed that the register accepted Rodriguez's date of birth and, further, did not beep. In order for this testimony to be true, it follows that the register's age-identification system (Finding of Fact ¶ 12) must have failed. There was no evidence of such a failure -- to the contrary, Rodriguez testified that the register beeped when Caravez swiped her ID. (Finding of Fact ¶ 7.)

Appellants claim that the ALJ's failure to analyze why the clerk's testimony was not credible was error, citing Government Code section 11425.50, subdivision (b),⁵ and the court's discussion of that section in *California Youth Authority v. State Personnel*

⁴Conclusions of Law 4 and 5 found there had been compliance with rules 141(b)(2) and 141(b)(5).

⁵Section 11425.50, subdivision (b), provides, in pertinent part:

If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it.

Bd. (2002) 104 Cal.App.3d 575, 596 [128 Cal.Rptr.2d 514].

This argument is not new to this Board. The issue was raised, and rejected, in *Chuenmeesri* (2002) AB-7856 and other Board cases. In *Chuenmeesri*, the Board said:

Section 11425.50 is silent as to the consequences which flow from a ALJ's failure to articulate the factors mentioned. However, we do not think that any failure to comply with the statute means the decision must be reversed. It is more reasonable to construe this provision as saying simply that a reviewing court may give greater weight to a credibility determination in which the ALJ discussed the evidence upon which he or she based the determination. We do not think it means the determination is entitled to no weight at all. Similarly, the court's refusal in *California Youth Authority, supra*, 104 Cal.App.3d 575, 596, to give *special* weight to findings made without reference to the factors contained in section 11450 does not support appellants' claim that reversal must follow.

Having said this, we are compelled to ask: what determination did the ALJ make that constitutes a predicate for the application of section 11425.50? The ALJ's determination that the decoy's appearance complied with rule 141(b)(2) does not appear to rest on the clerk's credibility, but instead on the ALJ's observation of the decoy photos and his observation of her as she testified. As to the face-to-face identification, as to which the clerk recalled nothing, appellants have not even raised as an issue whether there was actual compliance with the rule. We are unwilling to treat appellants' insertion of a reference to rule 141(b)(5) into its constitutional challenge as a substantive challenge to the ALJ's conclusion that such an identification took place. And we certainly do not believe anything the clerk may have said, credibly or not, has any bearing on the constitutional issues appellants have raised.⁶

⁶See fn. 2, p. 3.

ORDER

The decision of the Department is affirmed.⁷

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁷ This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.