

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

AB-9289

File: 21-477577 Reg: 11074752

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store 9969
7850 Telegraph Road, Ventura, CA 93004-1503,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: June 6, 2013
Los Angeles, CA

ISSUED JULY 29, 2013

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store 9969 (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 Saltzman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

¹The decision of the Department, dated July 17, 2012, is set forth in the appendix.

PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. Thereafter, the Department instituted an accusation against appellants charging that, on September 24, 2010, appellants' clerk, Michael Foulke (the clerk), sold an alcoholic beverage to 18-year-old Taylor Bradley. Although not noted in the accusation, Bradley was working as a minor decoy for the Ventura Police Department at the time.

An administrative hearing was held on December 28, 2011, at which time documentary evidence was received, and testimony concerning the sale was presented by Bradley (the decoy) and by Derek Donswyk, a Ventura police officer.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellants filed an appeal making the following contentions: (1) There is no rational connection between the facts of the case and the Department's decision; and (2) the decoy lacked the appearance required by rule 141(b)(2).²

DISCUSSION

I

Appellants' brief contends that the ALJ did not consider "all relevant factors" adequately, and that the Department did not articulate a rational connection between those factors and the choices made by the Department when it adopted the decision. They suggest, without any analysis, that the decoy may have confused the transaction with a similar transaction in another Garfield/Longs pharmacy, and assert that the decoy was unable to remember "many basic details" of that evening.

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.

The decoy testified without contradiction that she selected a six-pack of Bud Light, took it to the register, where the clerk glanced at her ID and rang up the sale. She left the store with the beer, stood in front of the store until joined by Ventura police officer Donswyk, reentered the store with him, identified the clerk who sold her the beer, was photographed holding the beer, and then left the store.

While it is true that the decoy answered a number of questions with “I do not remember” or words to that effect, none of the examples the appellants cite in their brief bears on the only real issue - was there an unlawful sale to a minor? Moreover, appellants do mention that 15 months elapsed between the time of the sale transaction and the administrative hearing when the decoy testified. It certainly does not surprise us that a decoy might not recall how many stores she visited on the night in question, or that she might see similarities between purchases from two CVS pharmacies on the same evening.

The “rational connection” argument is specious, and appellants’ contention that the Department failed to prove a violation of section 25658, subdivision (a), is ludicrous.

The decoy’s testimony concerning what she purchased, and the events surrounding that purchase, such as the manner in which the clerk glanced at her driver’s license, or regarding her identification of the clerk as the seller, was clear and consistent. Not only that, her testimony was corroborated by the testimony of a Ventura police officer who watched her enter the store and saw her come back out carrying a six-pack of Bud Light beer. She was also photographed holding the beer. (See Exhibit 4.)

As is so often the case in these appeals, appellants’ brief contains a clutter of irrelevancies in what seems to be an effort to steer the Board away from the salient

facts. With unimpeached testimony from the minor who bought the beer, and no witnesses for appellants, we can only wonder why this appeal was taken.

II

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.” Appellants maintain the decoy “had a fully mature appearance on the date of the operation - standing at 5 feet and 7 inches tall and weighing 133 pounds while wearing makeup.” (App.Br. at p. 7.)

The ALJ found that the decoy appeared to be under the age of 21 in Findings of Fact ¶¶8 and Conclusions of Law ¶¶5. This Board has repeatedly declined to substitute its judgment for that of the ALJ on this question of fact. Minors come in all shapes and sizes, and we are reluctant to suggest, without more, that minor decoys of large stature (not that a young woman 5 feet 7 inches tall is of unusually large stature) automatically violate the rule, or that makeup necessarily makes one appear older.

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

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This 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.