

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

AB-9303

File: 21-479384 Reg: 12076451

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #8871
13171 Mindanao Way, Marina Del Rey, CA 90292,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: September 5, 2013
Los Angeles, CA

ISSUED OCTOBER 1, 2013

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #8871 (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, D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer Casey.

¹The decision of the Department, dated August 23, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 2, 2009. On February 8, 2012, the Department filed an accusation against appellants charging that, on December 29, 2011, appellants' clerk, Karmin Williams (the clerk), sold an alcoholic beverage to 17-year-old Alexx J. Although not noted in the accusation, Alexx was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on July 10, 2012, documentary evidence was received and testimony concerning the sale was presented by Alexx (the decoy) and by Andrea Florentinus, a Department of Alcoholic Beverage Control investigator. Earle Robinson, a store manager, testified for the appellants.

Testimony established that on the date of the violation, the decoy entered the licensed premises, proceeded to the cooler, and selected a three-pack of Bud Light beer. The decoy took the beer to the counter area, where a single line, consisting of several customers, fed into two cash registers. The decoy waited his turn, then approached one of the registers. The clerk asked the decoy for his identification. The decoy handed his identification to the clerk. The clerk appeared to look at it for a second or two, then handed it back. The clerk did not ask any age-related questions. Instead, she entered something in the register's keyboard and proceeded with the sale. The decoy paid for the beer, received some change, and left the premises.

The Department's decision determined that the violation charged was proved and no defense was established. The ALJ did not find the evidence of mitigation persuasive, and assigned a penalty of 15 days' suspension.

Appellants then filed an appeal contending the penalty is excessive and constitutes an abuse of discretion.

DISCUSSION

Appellants contend that the penalty is excessive and constitutes an abuse of discretion. Appellants argue that the ALJ ought to have considered evidence of mitigation.

The Appeals Board may examine the issue of an excessive penalty if it is raised by an appellant, (*Joseph's of California v. Alcoholic Beverage Control Appeals Board* (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 Board & 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 Board* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Appellants argue that the ALJ should have mitigated the penalty in light of the actions of their store manager, Earle Robinson, the actions of the manager on duty, Joe Calo, and appellants' 27-month discipline-free history. (App.Br. at pp. 5-7.) Appellants argue that manager Robinson took positive action to correct the problem by terminating the clerk and by requiring all 65 employees to review and sign the clerk's affidavit. (App.Br. at p. 6.) They argue that Robinson enforces alcohol training requirements, including training for all new hires as well as continuing biannual training sessions. (*Ibid.*) Finally, appellants argue that manager Calo cooperated in the investigation by agreeing to move the identification to a private office. (*Ibid.*)

The Department, on the other hand, argues that 27 months is not a particularly

long discipline-free period; that Robinson's decision to terminate the clerk says nothing about appellants' preventative measures; and that manager Calo's decision to move the identification out of public sight may have been equally motivated by a desire to save appellants the embarrassment of having their clerk questioned, arrested, and cited in front of store patrons. (Reply Br. at p. 10.) Additionally, the Department points out that the clerk checked the decoy's identification and nevertheless proceeded with the sale – a fact that calls into question the efficacy of appellants' preventative training measures. (Reply Br. at pp. 9-10.)

We need not consider which position is correct. Whether appellants' evidence of mitigation is persuasive and sufficient to merit a reduced penalty is a discretionary determination entrusted solely to the ALJ. Provided the penalty is reasonable, this Board may not second-guess it.

A 15-day suspension is reasonable and well within the penalty guidelines. We find no abuse of discretion.

ORDER

The decision of the Department is affirmed.²

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

²This 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.