

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

AB-9311

File: 21-479607 Reg: 12076794

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #8894
101 Redlands Mall, Redlands, CA 92373,
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 #8894 (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 Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing

¹The decision of the Department, dated September 19, 2012, is set forth in the appendix.

through its counsel, Kerry K. Winters.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 10, 2009. On April 10, 2012, the Department filed an accusation against appellants charging that, on February 15, 2012, appellants' clerk, Winona Lawson (the clerk), sold an alcoholic beverage to 19-year-old Nancy Torres. Although not noted in the accusation, Torres was working as a minor decoy at the time, in an operation conducted jointly by the Redlands Police Department and the Department of Alcoholic Beverage Control.

At the administrative hearing held on July 31, 2012, documentary evidence was received and testimony concerning the sale was presented by Torres (the decoy) and by Matthias Knudsen, a Redlands Police officer.

Testimony established that on February 15, 2012, the decoy entered the licensed premises and went to the cooler where she selected a 6-pack of Bud Light beer in bottles. The decoy went to the counter where the clerk scanned the beer and asked the decoy for her identification. The clerk looked at the decoy's identification for a second or two and handed it back to the decoy. She asked no age-related questions or any questions about the information on the identification. The clerk entered something on the cash register's keyboard and completed the sale. Officer Knudsen was inside the licensed premises posing as a customer and he witnessed the transaction. The decoy subsequently made a face-to-face identification of the clerk who sold her the alcohol and the clerk was issued a citation.

The Department's decision determined that the violation charged had been proven and that no defense had been established.

Appellants then filed a timely appeal contending rule 141(b)(2)² was violated.

DISCUSSION

Appellants contend that the Department failed to proceed in a manner required by law, and that the decoy operation did not comply with the fairness standard set forth in rule 141(a), because the decoy's appearance did not comply with rule 141(b)(2).

Rule 141(a) provides:

A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

Rule 141(b)(2) provides:

The 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 that the decoy did not display the appearance which could generally be expected of a person under the age of 21, and therefore the decoy operation was unfair. Appellants describe the decoy's appearance as follows:

Here, the decoy was an experienced Police Explorer, was wearing baggy clothes that hid her small frame and a leather jacket, displaying her i-Phone in her front right pocket, and displaying her keychain for her keys. Additionally, she testified that she was less nervous during this particular decoy operation at this licensed premise than she had been earlier in the evening at other licensed premises. Her dress and lack of nerves contributed to her overall appearance as an individual who was over the age of 21.

(App.Br. at p. 4.) They allege that the decoy's "attempts to make herself look older" run contrary to the promotion of fairness, but they fail to explain how any of these elements

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.

might have made the decoy appear to be over the age of 21.

By contrast, the ALJ made the following findings (FF ¶¶ 5, 9-10):

FF 5. Decoy Torres appeared and testified at the hearing. She stood about 5 feet, 1 inch tall and weighed approximately 95 pounds. When she visited Respondents' store on February 15, 2012, she wore blue jeans, white tennis shoes, a dark gray Dodgers sweat shirt, a scarf, and a black leather jacket. (See Exhibits 2 and 4). She wore the same clothing to the hearing. Decoy Torres' height and weight have remained about the same since the date of the operation. At Respondents' Licensed Premises on the date of the decoy operation, Decoy Torres looked substantially the same as she did at the hearing.

FF 9. Decoy Torres appears her age, 19 years of age at the time of the decoy operation. Based on her overall appearance, *i.e.*, her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance/conduct in front of Clerk Lawson at the Licensed Premises on February 15, 2012, Torres displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to Lawson. Decoy Torres appeared her true age.

FF 10. This was the first time that Torres had operated as a decoy. She appeared to be a bit nervous during her testimony. Torres attempted to purchase beer at four stores on February 15, 2012. This was the only store that sold beer to Torres.

The ALJ was aware of the factors that appellants assert show that the decoy's appearance violated the rule, and yet his conclusion is diametrically opposed to that of appellants. 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.

Appellants have given us no reason to depart from our general rule of deference to the ALJ's determination regarding the decoy's appearance. 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.

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 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.