

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

AB-9628

File: 21-477917 Reg: 16084230

GARFIELD BEACH CVS and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store 9930
6800 Skyway, Paradise, CA 95969,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Rodan

Appeals Board Hearing: November 2, 2017
Los Angeles, CA

ISSUED NOVEMBER 28, 2017

Appearances: *Appellants*: Donna J. Hooper, of Solomon Saltsman & Jamieson, as counsel for Garfield Beach CVS, LLC and Longs Drug Stores California, LLC.
Respondent: Jonathan Nguyen as counsel for the Department of Alcoholic Beverage Control.

OPINION

Garfield Beach CVS and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store 9930 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 15 days, with 10 days conditionally stayed, because their clerk sold an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

1. The decision of the Department, dated December 27, 2016, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On May 31, 2016, the Department filed an accusation against appellants charging that, on April 21, 2016, appellants' clerk, Cassandra Ramirez (the clerk), sold an alcoholic beverage to 17-year-old Emily C.² Although not noted in the accusation, Emily was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on September 27, 2016, documentary evidence was received and testimony concerning the sale was presented by Emily (the decoy) and by Agent Ashley Guizar of the Department of Alcoholic Beverage Control. Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises as part of a decoy operation. Department Agents Ashley Guizar and Daniel Sumida entered approximately one minute later to monitor the decoy. The decoy initially went to the candy section in order to avoid other minors who were present from seeing her select an alcoholic beverage. After they departed, the decoy went to the cooler and selected a 25-ounce can of Budweiser beer, which she took to the checkout line. She set the beer down and waited to be checked out.

Agent Guizar positioned herself approximately seven feet behind the decoy and was within earshot of her. The clerk greeted the decoy and asked her how her day was. The decoy responded that she was "having a rough day." The clerk responded that she was having a rough day, too. She then asked to see the decoy's identification as she

2. Decoy Emily C. was a minor on the date of the operation. Her surname is therefore withheld.

started to ring up the beer purchase by scanning the beer. The decoy handed her California driver's license to the clerk. The decoy's license was the portrait type that had a red bar under the date of birth that specifically said she would not be 21 until 2019 and a blue bar that said she would not be 18 until 2016. The clerk looked at the license for approximately 30 seconds after the decoy handed it to her.

Despite the information on the face of the license, the clerk remarked, "you're 27, you look like you're in high school." This occurred just before she handed the identification back to the decoy, told the decoy the cost of the beer, and completed the sale after the decoy gave her cash to pay for the beer. The decoy made no remark in response to the clerk's statement. Agent Guizar overheard the remark and understood it to be a declaration, not a question. The clerk did not testify during this hearing. The decoy paid for the beer and received some change from the clerk. The decoy exited the licensed premises, and Agent Guizar exited immediately after.

The decoy spoke with Agents Guizar and Sumida about what occurred, then gave them the Budweiser beer she had purchased along with the change from the \$20 bill she had been given to make the purchase. She then immediately reentered with the agents, who approached the clerk. Agent Guizar identified herself and explained that the clerk had sold beer to a minor. The decoy was then asked to identify the person who sold her the Budweiser beer. The decoy pointed at the clerk and said that she had. The decoy and the clerk were approximately three feet apart at the time of the identification and visible to each other. The clerk directed questions toward the decoy but was told by Agent Guizar that she could not question the decoy. The decoy left after she made the identification and was photographed standing alongside the clerk while holding the

purchased Budweiser beer. Agent Guizar confirmed the clerk's identification with a driver's license during the investigation. The clerk acknowledged making the sale but stated the decoy was born in 1988. The clerk was issued a citation after the identification by the decoy and the discussion with Agent Guizar.

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

On October 18, 2016, following submission of the proposed decision, the Department's Administrative Hearing Office sent a letter to appellant and to Department counsel offering both parties the opportunity to comment on the proposed decision. That letter stated:

Administrative Records Secretary and Concerned Parties:

Enclosed is the Proposed Decision resulting from the hearing before Department of Alcoholic Beverage Control, Administrative Hearing Office in the above entitled matter.

All concerned parties and their attorneys of record are being sent a copy of this Proposed Decision. All concerned parties and attorneys of record are hereby informed that you may submit comments regarding this Proposed Decision to the Director for consideration prior to any action being taken by the Director. Comments to the Director regarding this Proposed Decision shall be mailed to the Administrative Records Secretary. Additional comments submitted for review by the Director, if any, must also be submitted to all parties and their attorneys. For the convenience of all concerned, a list of those parties and their addresses is attached.

Pursuant to General Order 2016-02, the Administrative Records Secretary will hold this Proposed Decision until 14 days after the date of this letter. After that the Administrative Records Secretary will submit this Proposed Decision along with any comments received from concerned parties to the Director for consideration.

(Letter from John W. Lewis, Chief Admin. Law Judge, Dept. of Alcoholic Bev. Control, Oct. 18, 2016 [hereinafter "Comment Letter"].) As suggested in the final paragraph, the

Comment Letter reflected a comment procedure adopted by the Department pursuant to its General Order 2016-02. (Dept. of Alcoholic Bev. Control, "GO-Ex Parte and Decision Review," Gen. Order 2016-02, at § 3, ¶¶ 5-6 (eff. Mar. 1, 2016) [hereinafter "General Order"].)

Neither party submitted comments.

Ultimately, the Department adopted the decision without changes.

Appellants then filed this appeal contending the Department's comment procedure violates the Administrative Procedure Act (APA) and the Administrative Adjudication Bill of Rights, and constitutes an underground regulation.

DISCUSSION

Appellants contend the Department's comment procedure, implemented pursuant to its General Order 2016-02, violates the hearing and review procedures set forth in the APA, constitutes an underground regulation prohibited by the APA, and encourages illegal ex parte communications. (App.Br., at pp. 13-22.)

We recently addressed an identical argument in *7-Eleven, Inc./Gupta* (2017) AB-9583. In that case, we concluded the Department's comment procedure, as outlined in the General Order, constitutes an unenforceable underground regulation. The comment procedure was identical in this case. We therefore reach the same legal conclusion here, and refer the parties to *Gupta* for our complete reasoning. (*Id.* at pp. 12-25.)

Furthermore, neither party submitted comments in this case. The comment procedure therefore had no effect on the outcome, and did not materially affect appellants' due process rights. (See *id.* at pp. 26-29.)

As we have noted elsewhere, however, the Department's comment procedure creates a minefield of potential due process issues. (See *id.* at p. 29 ["The Department's decision to bypass the rulemaking process deprived it of the opportunity to review public comments that might have alerted it to potential pitfalls in the comment procedure."].) We remind the parties that "we shall remain particularly vigilant in future cases, and will not hesitate to reverse where the Department's improperly adopted comment procedure materially infringes on an appellant's due process rights." (*Ibid.*)

ORDER

The decision of the Department is affirmed.³

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
JUAN PEDRO GAFFNEY RIVERA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

3. This 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.