

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

AB-9642

File: 21-477848; Reg: 16084338

GARFIELD BEACH CVS, LLC,
dba CVS Pharmacy Store #9332
1700 Mission Street, Santa Cruz, CA 95060-4745,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: April 6, 2018
Sacramento, CA

ISSUED APRIL 19, 2018

Appearances: *Appellant:* Ralph Barat Saltsman and Donna J. Hooper, of
Solomon, Saltsman & Jamieson, as counsel for Garfield Beach
CVS, LLC,

Respondent: Sean Klein, as counsel for Department of Alcoholic
Beverage Control.

OPINION

Garfield Beach CVS, LLC, doing business as CVS Pharmacy Store #9332,
appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending
its license for 15 days (with 10 days conditionally stayed for one year, conditioned upon
discipline-free operation during that period) because its clerk sold an alcoholic beverage
to a minor decoy, in violation of Business and Professions Code section 25658,
subdivision (a).

¹The decision of the Department, dated March 3, 2017, is set forth in the
appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on June 22, 2009. There is no record of prior discipline against the license.

On June 15, 2016, the Department filed an accusation charging that appellant's clerk, Ann Bridget Hargis (the clerk), sold an alcoholic beverage to 19-year-old Kassandra Sanchez on March 18, 2016. Although not noted in the accusation, Sanchez was working as a minor decoy for the Department of Alcoholic Beverage Control and the Santa Cruz Police Department at the time.

At the administrative hearing held on December 13, 2016, documentary evidence was received, and testimony concerning the sale was presented by Sanchez (the decoy) and by Department Agent Francis Gonzalez, Jr. Appellant presented no witnesses.

Testimony established that on March 18, 2016, the decoy entered the licensed premises and went to the coolers where she selected a six-pack of Bud Light beer. She took the beer to the counter and set the beer down. The clerk asked the decoy for her identification as she started to ring up the purchase. The decoy handed the clerk her California driver's license, which had a vertical orientation. The license contained her correct date of birth—showing her to be 19 years of age—and a red stripe indicating "AGE 21 IN 2017." (Exh. D-3.)

The clerk swiped the identification and the register made a buzzing sound. The clerk remarked that she did not know why it wasn't working. She then looked at the license, punched some buttons, and completed the sale without asking any age-related questions. The decoy exited the premises with the beer and joined two Department agents and a Santa Cruz Police officer who were waiting for her outside. She told

them what had occurred.

The decoy re-entered the premises with the officers. The clerk had moved away from her register to another customer service area next to a balloon display. One of the agents approached the clerk and got her attention. The agent asked the clerk if she had sold alcohol to the decoy and she said “yes.” Subsequently, one of the agents asked the decoy to identify the person who had sold her the beer. While standing approximately 7-7½ feet away, the decoy pointed out the clerk as the seller. The clerk was looking towards the decoy and peace officer next to her when the identification was made. The agents asked the decoy how old she was and she stated “nineteen.” A photo of the clerk and decoy was taken (exh. D-4) and the clerk was issued a citation. (See Findings of Face, ¶¶ 8-9.)

On December 19, 2016, the administrative law judge (ALJ) submitted his proposed decision, sustaining the accusation and suspending the license for a period of 15 days, with 10 days stayed for one year provided no further cause for discipline arises during that time. Thereafter, on December 29, 2016, the Department’s Administrative Hearing Office sent a letter from its Chief ALJ to both appellant and Department counsel, inviting the submission of comments on the proposed decision and stating that the proposed decision and any comments submitted would be submitted to the Director of ABC in 14 days.

Appellant submitted comments to the Director, arguing that neither the Administrative Procedure Act (APA) nor the ABC Act authorize the Department to permit the parties in a disciplinary procedure to comment on a proposed decision, and that by requesting submission of these comments, the Department exceeded the authority granted to it by the APA. The Department did not submit comments.

On January 30, 2017, the Department adopted the proposed decision in its entirety, and on March 3, 2017, the Department issued its Certificate of Decision.

Appellant then filed a timely appeal contending that the ALJ's finding that a proper face-to-face identification occurred, in compliance with rule 141(b)(5),² is not supported by substantial evidence.

DISCUSSION

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani) (2004)
118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all

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.

conflicts in the evidence must be resolved in favor of the Department's decision. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106 [28 Cal.Rptr.74].)

Therefore the issue of substantial evidence, when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; *Harris, supra*, at 114.)

In the instant case, appellant maintains the ALJ's finding that a proper face-to-face identification occurred, in compliance with rule 141(b)(5), is not supported by substantial evidence. Rule 141(b)(5) provides:

Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

This rule provides an affirmative defense. The burden is, therefore, on appellant to show non-compliance. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.) The rule requires "strict adherence." (See *Acapulco Restaurants, Inc.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126] [finding that no attempt, reasonable or otherwise, was made to identify the clerk in that case].) The plain

language of the rule in no way forbids the officers to first make contact with the suspected seller.

The rule itself does not define what a face-to-face identification should entail. This Board and various courts of appeal have addressed numerous cases over the years regarding what is required to establish that an appropriate face-to-face identification took place. In *Chun* (1999) AB-7287, this Board made the following observation:

The phrase “face to face” means that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other’s presence, by the decoy’s identification, and the seller’s presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

(*Id.* at p. 5.)

In *7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983, the Board clarified application of the rule in cases where, as here, an officer initiates contact with the clerk following the sale:

As long as the decoy makes a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error, we do not believe that the officer’s contact with the clerk before the identification takes place causes the rule to be violated.

(*Id.* at pp. 7-8; see also *7-Eleven, Inc./Morales* (2014) AB-9312; *7-Eleven, Inc./Paintal Corp.* (2013) AB-9310; *7-Eleven, Inc./Dars Corp.* (2007) AB-8590; *West Coasts*

Products LLC (2005) AB-8270; *Chevron Stations, Inc.* (2004) AB-8187.)

The court of appeals has found compliance with rule 141(b)(5) even where police escorted a clerk outside the premises in order to complete the identification. (See *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Keller)* (2003) 109 Cal.App.4th 1687, 1697 [3 Cal.Rptr.3d 339] [finding that the rule leaves the location of the identification to the discretion of the peace officer].)

More recently, the court found rule 141(b)(5) was not violated when:

the decoy made a face-to-face identification by pointing out the clerk to the officer inside the store while approximately 10 feet from her, standing next to her when the officer informed her she had sold alcohol to a minor, and taking a photograph with her as the minor held the can of beer he purchased from her. She had ample opportunity to observe the minor and to object to any perceived misidentification. The rule requires identification, not confrontation.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (CVS)* (2017) 18 Cal.App.5th 541, 547 [226 Cal.Rptr.3d 527, 531].) The court explained that the exact moment of the identification could not be severed from the entire collective identification procedure. That procedure included: the decoy pointing out the clerk to the police, the decoy accompanying the police officer to the counter, the officer informing the clerk she had sold beer to the minor at his side, and the clerk and decoy being photographed together. (*Id.* at p. 532.) The court said. “The clerk in these circumstances certainly knew or reasonably ought to have known that she was being identified” because of the totality of the circumstances. (*Ibid.*)

Appellant argues that CVS is not the applicable law, since it was decided in 2017 and this matter was decided in 2016. We disagree. CVS did not change the law, it simply explained to the Board why it was wrong in that case to have reversed on the

ground that compliance with rule 141(b)(5) was not supported by substantial evidence. In this matter—as in CVS—when taken as a whole, the facts establish a face-to-face identification of the clerk which complies with rule 141(b)(5).

The ALJ made the following findings on the face-to-face identification:

8. Sanchez exited the Licensed Premises with the beer and approached the Department agents and a Santa Cruz police officer who were waiting for her outside. She told the peace officers what occurred. Sanchez then re-entered the License Premises and approached the clerk along with the Department agents and the officer. The clerk had moved from the register where she sold the beer to Sanchez and was working in another customer service area next to a balloon display. One of the agents approached the clerk and got her attention.

9. After this, while standing about 7-7½ feet away and directly across from the clerk, one of the Department agents asked Sanchez to identify the person who sold her the six-pack. While facing her, Sanchez pointed at the clerk and said that she had. Sanchez also stated that she was nineteen. The clerk was looking towards Sanchez and the peace officer next to her when the identification was made. After the identification, Sanchez briefly remained in the area with the clerk to pose for a photograph. In the photo taken by one of the peace officers, Sanchez was standing with the purchased beer on a counter while standing directly in front of and to the right of the clerk who sold her the beer. During the hearing in this matter, Sanchez identified the woman in the beige blouse in this image as the person who sold her the beer. (Exhibit D-4.) The clerk was identified as Ann Bridget Hargis (Hargis) after one of the Department agents had Hargis retrieve her driver's license from her locker before issuing a citation.

(Finding of Fact, ¶¶ 8-9.)

The ALJ reached no specific conclusion regarding compliance with rule 141(b)(5) in his Conclusions of Law, even though appellant argued at the administrative hearing that compliance with the rule was lacking. (See RT at pp. 66-67.) The elements necessary for finding adherence to rule 141(b)(5), however, are laid out in Findings of Fact, paragraphs 8 and 9. The ALJ simply fails to state specifically that the face-to-face identification satisfied the requirements of the rule. We do not believe this

rises to the level of a reversible omission.

Appellant maintains that the ALJ's Findings of Fact, paragraphs 8 and 9, are not supported by substantial evidence. (App.Op.Br. at p. 7.) It maintains:

Though there was an identification, without evidence that the cashier was aware and face to face with the decoy when she was identified, law enforcement failed in their affirmative duty to conduct the face to face identification required by Rule 141(b)(5) and under *Acapulco*.

(*Id.* at p. 8.) The clerk did not testify at the hearing. However, the decoy's testimony addressed whether the clerk was aware she was being identified:

[MR. KLEIN]

Q. Did you do a face-to-face identification?

[¶ . . . ¶]

[THE DECOY]

A. Yes.

Q. Could you describe what happened there.

A. Yes. I was asked who sold me the six-pack of beer, so I pointed her out. And then I stood on the other side of the counter from her. And - - Oh, I believe before that they asked - - They asked me for my age, and I clarified that I was underage.

[¶ . . . ¶]

A. Once I pointed her out, they talked to her and told her that - - They asked her if she sold to me. She said yes, and then they asked me for my age; and I said my age. And . . . Yeah.

(RT at pp. 13-14.) Later, during questioning by counsel for appellant about the face-to-face identification (see RT at pp. 28-33), the decoy further clarifies that the clerk was aware of what was going on:

[MS. GELBART]

Q. And after you answered how old you were, the agents told the clerk what your answer to that question was?

[THE DECOY]

A. No, I answered it loud enough for her to hear.

¶ . . . ¶

Q. So when you were asked how old you were she was still doing something with balloons?

A. No. She was - - I mean she didn't put it down, but she was already aware that they were talking to her. They had already gotten her attention.

(RT at p. 33.) Similarly, Agent Gonzalez testified about the face-to-face identification as follows:

A. In this particular case we walked in, identified the individual that was involved in the sale. Once we received - - or once I got her attention, I asked the decoy "Who sold you the alcohol?"

She pointed at the individual. And then I asked "How old are you?"

And she said "I was 19 years old." Or "I am 19 years old."

(RT at p. 44.) Appellant contends that even though Agent Gonzalez "testified to events that might constitute a face to face identification, his testimony conflicted with that of Sanchez and was not credible." (App.Op.Br. at p. 8.)

It is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) The Appeals Board will not interfere with those credibility determinations in the absence of a clear showing of an abuse of discretion. The ALJ here found both the decoy's and the agent's testimony to be credible, as reflected in the

findings in the decision, and the Board may not re-weigh the evidence to reach a contrary conclusion. Admittedly, the agent's testimony was less than clear—but, importantly, it does not conflict with the decoy's testimony. Taken together with the decoy's testimony, the evidence in total supports a finding that face-to-face identification took place.

The Board is prohibited from reweighing the evidence or exercising its independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (*Masani, supra.*) Looking at the entire identification procedure—including the agent asking the clerk if she had sold beer to the decoy, the clerk admitting that she had, the decoy pointing out the clerk as the seller of the alcohol, the decoy being asked her age and answering within earshot of the clerk, and the clerk and decoy being photographed together—we believe the clerk knew, or reasonably should have known, that she was being identified as the person who sold alcohol to a minor. Furthermore, there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error. As in *CVS*, the clerk here “had ample opportunity to observe the minor and to object to any perceived misidentification.” (*CVS, supra*, at p. 547.) The totality of the circumstances establishes that a face-to-face identification took place which satisfied the requirement of rule 141(b)(5).

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

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.