

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

AB-9652

File: 21-477605; Reg: 16084901

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store #7910
1794 Ashlan Avenue, Clovis, CA 93611-5190,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: June 7, 2018
Los Angeles, CA

ISSUED JULY 13, 2018

Appearances: *Appellants:* Ralph Barat Saltsman, of Solomon, Saltsman &
Jamieson, as counsel for Garfield Beach CVS, LLC and Longs
Drug Stores California, LLC,

Respondent: Colleen R. Villarreal, as counsel for Department of
Alcoholic Beverage Control.

OPINION

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing
business as CVS Pharmacy Store #7910, appeal from a decision of the Department of
Alcoholic Beverage Control¹ suspending their license for 15 days (with 5 days stayed
for a period of one year, provided no further cause for discipline arises during that time)

¹The decision of the Department, dated May 12, 2017, is set forth in the
appendix.

because their clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. There is no prior record of disciplinary action on the license.

On November 7, 2016, the Department filed an accusation against appellants charging that, on August 30, 2016, appellants' clerk, Dino Cota (the clerk), sold an alcoholic beverage to 19-year-old Ranvir Singh Bisla. Although not noted in the accusation, Bisla was working as a minor decoy for the Clovis Police Department at the time.

Appellants filed and served on the Department a Special Notice of Defense, demanding, inter alia, the names and addresses of all witnesses. The Department responded by providing the address and phone number of the Clovis Police Department, in lieu of the decoy's personal contact information. Thereafter, appellants filed a Motion to Compel Discovery. The motion was opposed by the Department, and it was denied. In his decision, the administrative law judge (ALJ) found: "After considering the Respondent's motion and the Department's opposition to the motion, an order denying the motion to compel discovery was issued on March 10, 2017 based on the finding that the Department had complied with its discovery obligation by providing contact information for the law enforcement agency that had used the decoy. (Exhibits L-2, D-2, and D-3)" (Findings of Fact, ¶ 1.)

An administrative hearing was held on March 15, 2017. Documentary evidence was received and testimony concerning the sale was presented at the hearing by Bisla (the decoy) and by Anthony Puente, a Clovis Police officer.

Testimony established that on August 30, 2016, the decoy entered the license premises and selected a 12-pack of Coors Light beer. He took the beer to the register and waited behind one other customer. When it was his turn, he said “hi” to the clerk and the clerk asked for his identification. The decoy handed the clerk his California driver’s license which had a portrait format, showed his correct date of birth—indicating that he was 19 years of age, and contained a red stripe indicating “AGE 21 IN 2018.” The clerk took the license and entered something into the register. He then completed the sale without asking any age-related questions.

The decoy exited the premises with the beer and went over to the vehicle where the law enforcement officers were waiting. He confirmed what had transpired, then re-entered the premises with the officers. The clerk who had waited on the decoy was on a break, so the officers notified an assistant manager of their investigation. The clerk was called back from his break. As the clerk was approaching them, the decoy was asked by one of the officers who sold him the beer. The decoy pointed at the clerk and said “that’s him right there.” The two were approximately 5 feet apart at the time. A photo of the decoy and clerk was taken (exh. D-6), and the clerk was issued a citation.

Following the hearing, on March 23, 2017, the ALJ submitted a proposed decision, sustaining the accusation and suspending the license for a period of 15 days — with 5 days stayed for one year, provided no further cause for discipline arises during that time. Thereafter, on March 30, 2017, 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 May 3, 2017, the Department adopted the proposed decision in its entirety, and on May 12, 2017, the Department issued its Certificate of Decision.

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

DISCUSSION

Appellants contend that the ALJ's finding that a face-to-face identification took place, in compliance with rule 141(b)(5), is not supported by substantial evidence.

(AOB at pp. 4-8.)

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

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.

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].)

In *Chun* (1999) AB-7287, this Board made the following observation about the purpose of face-to-face identifications:

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 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 41(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 identification procedure, which 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.*)

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

9. Bisla immediately went to the vehicle where the law enforcement officers were waiting and confirmed what had just occurred. Bisla then re-entered with the law enforcement officers. They did not find the clerk initially and notified an assistant manager of their investigation. Bisla

continued to hold the 12 pack of Coors Light beer. Once inside the Licensed Premises, Bisla stood with the officers on each side of him while the clerk was called back from a break by another employee. The officers were in tactical clothing but had their badges displayed.

10. As the clerk was walking up to them, Bisla was asked by one of the officers about who sold him the beer. Reese [*sic*] pointed at the clerk who had sold the alcohol to him and said “that’s him right there”. This occurred from a distance of approximately 5 feet between Bisla and the clerk. (Exhibit D-6) CPD Officer Anthony Puente (Puente) identified the clerk as Dino Cota from his driver’s license information during his contact with the clerk. After the identification by Bisla, a picture was taken of Bisla standing directly next to the clerk while holding the 12 pack he had purchased from him. (Exhibit D-5)

(Findings of Fact, ¶¶ 9-10.) Based on these findings, the ALJ reached the following conclusions:

8. The remaining argument of the Respondent that there was a failure of compliance with the face to face identification requirements of rule 141(b)(5) is also rejected. Bisla pointed at the clerk and said “that’s him right there” in response to the question of who sold him the beer.³ This occurred from a distance of approximately 5 feet while the clerk was walking up to Bisla and the officers after he had been summoned from a break regarding the investigation. The clerk was engaged in the investigation at the time of the identification and continued to be aware of it as he was photographed with Bisla and questioned about the incident. His response about the date error confirmed he was aware of the investigation.

(Conclusions of Law, ¶ 8.)

Appellants maintain the decision regarding the face-to-face identification is unsupported by the record because the ALJ refers to the decoy as “Reese” in Finding of Fact paragraph 10. They contend “The entire sentence is unsupported by the record

³The ALJ found: “The clerk’s only remark to law enforcement on the date he was issued the citation was that he had input “94” instead of “97” into the computer when he looked at the license.” (Finding of Fact, ¶ 12.)

and may have come from a different decision entirely.” (AOB at p. 6.) We find this argument for invalidating the face-to-face identification unpersuasive. This is clearly a clerical error when, in the balance of the decision, the ALJ refers to the decoy as “Bisla” no fewer than 34 times, including Conclusions of Law paragraph 10 where he found: “Bisla pointed at the clerk and said ‘that’s him right there’ in response to the question of who sold him the beer.” The fact that the ALJ accidentally used an incorrect name for the decoy one time out of 35 is not fatal, and does not indicate that his findings referred to some other decoy.

The ALJ’s findings are supported by substantial evidence and the face-to-face identification in this matter fully complies with rule 141(b)(5). 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 officers asking the decoy who sold him the beer, the decoy pointing out the clerk to the police from a distance of 5 feet, and the clerk and decoy being photographed together — the clerk knew, or reasonably should have known, that he was being identified as the person who sold alcohol to a minor. 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.)

ORDER

The decision of the Department is affirmed.⁴

⁴This 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.

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

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.