

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

AB-9694

File: 21-484600 Reg: 17085834

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #4952
909 Grand Avenue,
San Rafael, CA 94901-3505,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: December 6, 2018
Sacramento, CA

ISSUED JANUARY 29, 2019

Appearances: *Appellants*: Donna Hooper, of Solomon Saltsman & Jamieson, as counsel for Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #4952.

Respondent: Matthew Gaughan as counsel for the Department of Alcoholic Beverage Control.

OPINION

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #4952 (appellant), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 10 days because their clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on August 11, 2010. On August 17, 2017, the Department filed an accusation charging that appellants' clerk, Ashley Jones (the

1. The decision of the Department, dated February 22, 2018, is set forth in the appendix.

clerk), sold an alcoholic beverage to 19-year-old Elisa Delatorre on January 14, 2017. Although not noted in the accusation, Delatorre was working as a minor decoy for the San Rafael Police Department at the time.

At the administrative hearing held on December 27, 2017, documentary evidence was received and testimony concerning the sale was presented by Delatorre (the decoy) and by Officer Joseph Camins of the San Rafael Police Department. Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy was brought to the licensed premises by officers of the San Rafael Police Department for the purpose of attempting to purchase alcohol. Prior to entering, she was instructed to make an attempt at purchasing an alcoholic beverage. The decoy was told to carry her identification, to show it if requested, and to be truthful regarding her age if asked.

The decoy went into the licensed premises and proceeded to where the refrigerated beer was. She selected a "tall boy" style Coors Light beer can as depicted in a later image taken of her and the clerk she interacted with. The decoy took her selection to the line for the multiple registers that were open. Approximately two people were in front of her. After they were assisted, the decoy went to the next available clerk. The decoy presented the Coors Light beer can to the clerk for purchase by placing it on the counter next to the register.

This clerk was the same person in the photo that was later taken of the decoy standing next to the clerk that served her.

The clerk said "hi," and the decoy responded with a greeting. The clerk then asked for the decoy's identification. The decoy immediately took her California driver's license out of her pocket and presented it to the clerk. The clerk took the identification and appeared to examine it.

Because she was still under 21, the license the decoy presented was a portrait rather than landscape configuration. The license also indicated in a red band under her date of birth

that she was under 21 years of age until 2018. Despite this information, the clerk asked the decoy no questions about her age. The clerk then rang up the beer and told the decoy the cost. The decoy paid for the beer. The clerk handed the decoy change along with the beer purchase in a bag.

The decoy exited the licensed premises with the Coors Light beer. She went to the vehicle where law enforcement officers were waiting. The decoy was met by the officers as they exited upon her approach. The officers returned to the licensed premises with the decoy. Upon entering, the decoy pointed out the clerk to the officers when one of them asked who had sold the beer to her. They were approximately 10 feet away from the clerk when this occurred. After the identification, at least one of the officers approached the clerk and explained why they were present.

After one of the law enforcement officers told the clerk they were there because she had sold alcohol to a minor, the law enforcement team and the decoy walked with the clerk to the employee locker room to talk with her further. At some point after her initial identification and prior to her departure from the employee locker room, the decoy recalled again identifying the clerk as the seller while the clerk was present. The clerk was identified as Ashley Jones after she stated her name and presented identification during the investigation.

While they were in the employee locker room, the clerk was asked why she sold beer to her. The clerk confirmed that she did sell beer to the decoy after she presented identification. The clerk stated she had misread the identification as saying 1987 rather than 1997. The clerk stated she was "frazzled" by her first day at the register. The clerk was subsequently photographed next to the decoy. The decoy held the Coors Light beer can in one hand and the identification she had presented to the clerk in the other hand while standing next to the clerk in the employee locker room.

From the initial law enforcement contact with the clerk until after the photograph was taken, the decoy was in the immediate presence of the clerk and the officers. The clerk was

subsequently issued a citation for the sale. The exchanges with law enforcement where the clerk spoke about the sale were captured on the body camera worn by Officer Camins. Camins did not turn on his body camera until the group walked into the employee locker room in the back of the licensed premises. This was after the initial contact by law enforcement that occurred at the clerk's register.

After the hearing, the Department issued a decision determining that the violation charged was proved and no defense was established.

Appellants then filed this appeal contending the ALJ's conclusion that a face-to-face identification took place as required by rule 141(b)(5) is not supported by evidence in the record.

DISCUSSION

Appellants contend that certain findings of fact in the Department's decision are contradicted by video evidence in the record. (App.Br., at pp. 4-9.) Appellants insist that because these findings were unsupported by the evidence, the Department failed to proceed in the manner required by law and its decision must be reversed. (App.Br., at p. 9.)

This Board may not grant relief without a showing of prejudice. The California Constitution provides:

No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

(Cal. Const., art. VI, § 13; see also *Reimel v. House* (1969) 268 Cal.App.2d 780, 787 [74 Cal.Rptr. 345].)

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 an appellant contends that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, 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. (Bus. & Prof. Code, § 23804; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) "Substantial evidence" is relevant evidence which reasonable minds would accept as support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Ct.* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

Rule 141, subdivision (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.

(Code Regs., tit. 4, § 141(b)(5).) Each subdivision of rule 141 provides an affirmative defense, and the burden of proof lies with the party asserting it. (See *Chevron Stations, Inc.* (2015) AB-9445, at pp. 3-16 [defense raised under subdivision (b)(2)]; *7-Eleven, Inc./Lo* (2006) AB-8384, at pp. 8-11 [defense raised under subdivision (b)(5)].)

Recently, in *Garfield Beach CVS*, the court of appeals reversed this Board and found, based on the totality of the circumstances, that a "face-to-face identification" had indeed taken

place. (*Dept. of Alcoholic Bev. Control. v. Alcoholic Bev. Control Appeals Bd.* (2017) 18 Cal.App.5th 541, 547 [226 Cal.Rptr.3d 527].) The court did not focus on one specific instant during which the identification occurred; instead, it examined the sequence of events following the sale and wrote:

[T]he 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. [The clerk] had ample opportunity to observe the minor and to object to any perceived misidentification. *The rule requires identification, not confrontation.* The identification here meets the letter and the spirit of Rule 141.

¶ . . . ¶

[W]e conclude that *the identification made in [the clerk's] physical presence followed by a confirming implied identification at even closer range satisfied the rule.*

(*Ibid.*, emphasis added.)

In the past, this Board has held that for a face-to-face identification to comply with rule 141(b)(5), there must be evidence that the clerk knew, or should have known, he was being identified as the seller at the moment the decoy identified him to officers. (See, e.g., *Chun* (1999) AB-7287, at p. 5 ["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."]; but see *Greer* (2000) AB-7403, at p. 4 ["The minor decoy must identify the seller; there is no requirement that the seller identify the minor, nor is it necessary for the clerk to actually be aware that the identification is taking place."]) *Garfield Beach CVS* overrules that holding insofar as the clerk need only be aware he is being identified *at some point* during his interactions with the decoy and officers. (See *Garfield Beach CVS, supra*, at p. 547.) The clerk's awareness need not occur at the precise moment of the decoy's identification. (*Ibid.*) According to the *Garfield Beach CVS* court, what matters is that, under the totality of the circumstances, the clerk be given "ample opportunity to observe the minor and to object to any perceived misidentification." (*Ibid.*)

First, appellants object that the ALJ's finding that the decoy "recalled again identifying the clerk as the seller while the clerk was present" is contradicted by the video evidence, which, they contend, "depicts the entire time [the decoy] was in the employee room and at no time does she point to or identify" the clerk. (App.Br., at p. 6, citing Findings of Fact, ¶¶ 10; Exh. 4.) Appellants, however, misread the finding; the ALJ found only that the decoy "*recalled* again identifying the clerk." (Findings of Fact, ¶¶ 10, emphasis added.) He made no finding as to whether that recollection was an accurate reflection of the facts.

More importantly, no such finding was necessary. Under the *Garfield Beach CVS* standard, a second formal identification of the seller was unnecessary provided there was an initial identification "followed by a confirming implied identification at even closer range." (*Garfield Beach CVS, supra*, at p. 547.) It is undisputed that the decoy identified the clerk to officers as they reentered the store. (RT at pp. 20-22, 30-31, 40-44; see generally App.Br.; Dept. Reply Br.) As the Department correctly points out, "Officer Camins' body camera was not activated until sometime after the first identification. The footage did not capture the first identification and was not started until some portion of time after that identification." (Dept. Reply Br., at p. 7, citing RT at pp. 57-58.) The subsequent body-camera video evidence includes footage of the clerk examining the decoy's identification after being approached by law enforcement; the clerk posing for a photograph with the decoy, who is holding the beer and her identification; and the clerk explaining her alleged misreading of the decoy's identification—with specific references to the decoy's birthdate. It is undeniable, based on the totality of the circumstances, that the clerk knew or should have known that she had been pointed out as the seller. Whether a second identification took place in the employee locker room is therefore immaterial.

Appellants next object to the ALJ's finding that the decoy was in the employee locker room while the clerk explained her mistake. (App.Br., at p. 7.) Appellants argue the decoy "had already left the room when this conversation happened." (*Ibid.*) Appellants claim "[t]his is not a

matter subject to interpretation as it is clearly depicted in the video." (*Ibid.*, citing Findings of Fact, ¶ 11; Exh. 4.)

It is true that the video appears to show the events in the reverse order—a photograph is taken with the clerk and the decoy, the decoy leaves the employee locker room, and the clerk proceeds to explain to Officer Camins that she misread the date of birth. (See exh. 4.) Appellants, however, cite no law requiring the decoy to be present while the clerk attempts to explain the violation. There is no such requirement. Even if the ALJ's findings of fact on this point are chronologically inaccurate, the error is immaterial for purposes of determining whether a face-to-face identification took place. Appellants have suffered no prejudice and therefore shown no grounds for relief.

Finally, appellants object to the ALJ's conclusion that the decoy "credibly testified to identifying [the clerk] sometime as they walked with her as a group to the employee locker room." (App.Br., at p. 6, citing Conclusions of Law, ¶ 9.) Appellant is correct insofar as the decoy did not testify with any certainty that a second identification took place on the walk back to the locker room; instead, she testified it took place at some point in the employee locker room, although she stated at one point she "might have been walking with the officer at the time." (RT at p. 31; see also RT at pp. 20-22, 30-31, 40-44.)

As noted above, however, in light of the totality of the circumstances, the fact of the second identification is immaterial. The *location* of the second identification is therefore even less relevant. Even if no second identification took place at all, the testimony is clear that the decoy identified the clerk to officers as she reentered the licensed premises, and both the testimony and the evidence—including the video evidence—unequivocally establish that the clerk was aware she had been pointed out as having illegally sold an alcoholic beverage to this particular decoy. As the ALJ observed:

Jones clearly came face to face with [the decoy] under circumstances that made it clear that she had been identified as the person who sold her beer even though she was underage. Though Jones did not testify in this matter, her statements in

the video captured by [Officer] Camins made it clear that she understood the decoy was Delatorre.

(Conclusions of Law, ¶ 9.) This conclusion, based as it is on the totality of the circumstances, is sufficient to meet the *Garfield Beach CVS* standard. There can be no question whatsoever that the clerk "had ample opportunity to observe the minor and to object to any perceived misidentification." (See *Garfield Beach CVS, supra*, at p. 547.) Appellants have failed to show otherwise.

ORDER

The decision of the Department is affirmed.²

BAXTER RICE, CHAIRMAN
MEGAN MCGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

2. 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.

APPENDIX

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION
AGAINST:

GARFIELD BEACH CVS LLC, LONGS DRUG
STORES CALIFORNIA LLC, LONGS DRUG
STORES CALIFORNIA LLC
CVS PHARMACY 4952
909 GRAND AVE
SAN RAFAEL, CA 94901-3505

SANTA ROSA DISTRICT OFFICE

File: 21-484600

Reg: 17085834

AB: 9694

OFF-SALE GENERAL - LICENSE

Respondent(s)/Licensee(s)
under the Alcoholic Beverage Control Act.

CERTIFICATION

I, Dominique Williams, do hereby certify that I am a Senior Legal Analyst for the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that annexed hereto is a true, correct and complete record (not including the Hearing Reporter's transcript) of the proceedings held under Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code concerning the petition, protest, or discipline of the above-listed license heretofore issued or applied for under the provisions of Division 9 of the Business and Professions Code,

IN WITNESS WHEREOF, I hereunto affix my signature on April 5, 2018, in the City of Sacramento, County of Sacramento, State of California.


Office of Legal Services

2018 APR 18 AM 9:20
RECEIVED
ABC APPEALS BOARD

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

GARFIELD BEACH CVS, LLC AND
LONGS DRUG STORES CALIFORNIA, LLC
CVS PHARMACY #4952
909 GRAND AVE
SAN RAFAEL, CA 94901-3505

OFF-SALE GENERAL - LICENSE

Respondent(s)/Licensee(s)
Under the Alcoholic Beverage Control Act

SANTA ROSA DISTRICT OFFICE

File: 21-484600

Reg: 17085834

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on February 6, 2018. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4105, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after April 4, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: February 22, 2018



Matthew D. Botting
General Counsel

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION AGAINST:

Garfield Beach CVS, LLC and
Longs Drug Stores California, LLC
dba CVS Pharmacy #4952
909 Grand Avenue
San Rafael, California 94901-3505

Respondent

Off-Sale General License

} File: 21-484600
}
} Registration: 17085834
}
} License Type: 21
}
} Word Count: 12,042
}
} Reporter:
} Deborah Brooks-CSR # 5223
} Emerick & Finch
}
} **PROPOSED DECISION**

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at San Rafael, California, on December 27, 2017.

Matthew Gaughan, Attorney, represented the Department of Alcoholic Beverage Control (Department).

Donna Hooper, Attorney, represented Respondent Garfield Beach CVS, LLC and Longs Drug Stores California, LLC (Respondent).

The Department seeks to discipline the Respondent's license on the grounds that, on or about January 14, 2017 the Respondent, through their agent or employee, Ashley Jones, sold, furnished, or gave alcoholic beverages to Elisa Delatorre, an individual under the age of 21 in violation of Business and Professions Code section 25658(a)¹ (Exhibit D-1).

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on December 27, 2017.

¹ All statutory references are to the Business and Professions Code unless otherwise noted.

FINDINGS OF FACT

1. The Department filed the accusation on August 17, 2017 (Exhibit D-1).
2. On August 11, 2010 the Department issued a type 21, off-sale general license to the Respondent for the above-described location (the Licensed Premises). There is no record of prior Department discipline against the Respondent's license.
3. Elisa Delatorre (Delatorre) was born on September 16, 1997 and was 19 years of age at the time of the investigation conducted on January 14, 2017 that led to the accusation in this matter. On that date, Delatorre served as a minor decoy in an operation conducted by the San Rafael Police Department (SRPD) at multiple locations, including at the Licensed Premises.
4. Delatorre appeared and testified at the hearing. On January 14, 2017 her appearance was as depicted in an image that was taken during the operation (Exhibit D-2). Delatorre wore blue jeans and sneakers on her lower body. She wore a plain pink t-shirt on her upper body. Delatorre wore a blue, hooded sweatshirt over the t-shirt with the hood down. Her face was fully exposed with minimal makeup and her hair was down in a straight, shoulder length cut. She had no visible tattoos or jewelry during the operation. Delatorre was approximately 5 feet, 5 inches tall and 130 pounds at the hearing. Delatorre credibly testified that her size and physical appearance on the date of the operation were essentially the same.
5. On January 14, 2017 Delatorre was brought to the Licensed Premises by officers of the SRPD for the purpose of attempting to purchase alcohol. Prior to entering, she was instructed to make an attempt at purchasing an alcoholic beverage. Delatorre was instructed to carry her identification, show it if requested, and to be truthful regarding her age if asked.
6. Delatorre went into the Licensed Premises and proceeded to where the refrigerated beer was. She selected a "tall boy" style Coors Light beer can as depicted in a later in age taken of Delatorre and the clerk she interacted with (Exhibit D-2). Delatorre took her selection to the cue line for the multiple registers that were open. Approximately two people were in front of her. After they were assisted, Delatorre went to the next available clerk. Delatorre presented the Coors Light beer can to the clerk for purchase by placing it on the counter next to the register.
7. This clerk was the same person in the photo that was later taken of Delatorre standing next to the clerk that served her (Exhibit D-2). The clerk said "hi" and Delatorre responded with a greeting. The clerk then asked for Delatorre's identification.

Immediately after the request, Delatorre took out her California driver's license from her pocket and presented it to the clerk. The clerk took the identification and appeared to examine it.

8. Because she was still under 21, the license Delatorre presented was a portrait rather than landscape configuration. The license also indicated in a red band under her date of birth that she was under 21 years of age until 2018 (Exhibit D-3). Despite this information, the clerk asked no questions of Delatorre about her age. The clerk then rang up the beer and presented Delatorre the cost. Delatorre paid for the beer. Delatorre was handed change by the clerk along with the beer purchase in a bag.

9. Delatorre exited the Licensed Premises with the Coors Light beer. She went to the vehicle where the law enforcement officers were waiting. Delatorre was met by the officers as they exited upon her approach. They returned to the Licensed Premises with Delatorre. Another decoy also accompanied Delatorre and the law enforcement officers as an observer. Upon entering, Delatorre pointed out the clerk to the officers when one of them asked who had sold the beer to her. They were approximately 10 feet away from the clerk when this occurred. After the identification, at least one of the officers approached the clerk and explained why they were present.

10. After one of the law enforcement officers told the clerk they were there because she had sold alcohol to a minor, the law enforcement team and Delatorre walked with the clerk to the employee locker room to talk with her further. At some point after her initial identification and prior to her departure from the employee locker room, Delatorre recalled again identifying the clerk as the seller while the clerk was present. The clerk was identified as Ashley Jones (Jones) after she stated her name and presented identification during the investigation.

11. While they were in the employee locker room, Jones was asked, in Delatorre's immediate presence, why she sold beer to her. Jones confirmed that she did sell beer to Delatorre after she presented identification. Jones then stated that she had misread the identification as saying 1987 rather than 1997. Jones stated she was "frazzled" by her first day at the register. Jones was subsequently photographed next to Delatorre. Delatorre held the Coors Light beer can in one hand and the identification she had presented to Jones in the other hand while standing next to Jones in the employee locker room (Exhibit D-2).

12. From the initial law enforcement contact with Jones until after this photograph was taken; Delatorre was in the immediate presence of Jones and the officers. Jones was subsequently issued a citation for the sale. The exchanges with law enforcement where Jones spoke about the transaction while Delatorre was present in the employee locker

room were captured on the body camera worn by SRPD Officer Joseph Camins (Camins) (Exhibit D-4). Camins did not turn on his body camera until the group had walked into the employee locker room in the back of the Licensed Premises. This was after the initial contact by law enforcement that occurred at Jones' register.

13. Delatorre had served as a decoy on one to two prior operations for SRPD since she started working for SRPD as a cadet. Delatorre appeared her chronological age at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, clothing, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of Jones at the Licensed Premises on January 14, 2017, Delatorre displayed the appearance which would generally be expected of a person less than 21 years of age during her interactions with Jones. Jones did not testify in this matter to explain her age related impressions of Delatorre or why she sold Delatorre alcohol after she presented a portrait style driver's license that clearly depicted her as being under 21 years of age.

14. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.
2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.
3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.
4. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on January 14, 2017 the Respondent's clerk, Ashley Jones inside the Licensed Premises, sold an alcoholic beverage to Elisa Delatorre, a person under the age of 21, in violation of Business and Professions Code section 25658(a) (Findings of Fact ¶¶ 2-13).

5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141² and, therefore, the accusation should be dismissed. Specifically, the Respondent argued that the face to face identification failed to comply with rule 141 (b)(5) and that the appearance of the decoy did not comply with rule 141 (b)(2). Either of these alleged violations, if established, would be affirmative defenses and require dismissal of the accusation pursuant to rule 141(c).

6. However, there is no credible evidence supporting this assertion by the Respondent that there was a failure to comply with rule 141. Respondent equated the investigation in this matter to the circumstances that occurred in *Acapulco Restaurants, Inc. v. Alcoholic Beverages Control Appeals Board* (1998) 67 Cal.App.4th 575. In that case, there was no face to face identification, whatsoever. The circumstances of that case never established a baseline standard for what was a compliant face to face identification as required by rule 141(b)(5). More helpful to this analysis is the decision in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App. 4th 1687 that holds that the regulation at “section 141, subdivision (b)(5), ensures-admittedly not as artfully as it might-that the seller will be given the opportunity, soon after the sale, to come “face-to-face” with the *decoy*. ” *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1687, 1698.

7. Even more on point, the identification by Delatorre of Jones in this matter was substantively identical to the identification that was found to be compliant with rule 141 in the recent decision by the Third District in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (Cat. Ct. App. 2017) 226 Cal.Rptr.3d 527. In finding the identification compliant, that court ruled:

“Here there is no violation of Rule 141, as explained above, because 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. The identification here meets the letter and the spirit of Rule 141.” *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (Cal. Ct. App. 2017) 226 Cal.Rptr.3d 527

8. While general due process considerations demand a fair identification be facilitated by law enforcement, these cases makes clear that this particular regulation is focused on he

² All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

more narrow concern of allowing the *seller* the opportunity to be aware of the identity of the decoy. It stands to reason that compliance with Rule 141, subdivision (b)(5) occurs if the clerk and the decoy, during the process of the investigation prior to the citation being issued or departure of the decoy, are brought in reasonable proximity to each other to assure that the seller knows (or reasonably ought to know) that he or she is being identified as the seller by the decoy.

9. Delatorre pointed out the clerk in this matter more than once. She testified to first identifying her to the officers at the entranceway but she also credibly testified to identifying her sometime as they walked with her as a group to the employee locker room. Delatorre then stood in the immediate presence of Jones while the sale to her was discussed by the law enforcement team with Jones in the employee locker room. Jones was clearly aware that the Decoy was Delatorre because she discussed making the sale to her extensively and referenced Delatorre's birth year and the mistake she made in reading the identification. Delatorre and Jones were then photographed directly next to each other (Findings of Fact ¶¶ 6-12 and Exhibit D-2). Jones clearly came face to face with Delatorre under circumstances that made it clear that she had been identified as the person who sold her beer even though she was underage. Though Jones did not testify in this matter, her statements in the video captured by Camins made it clear that she understood the decoy was Delatorre (Exhibit D-4).

10. Neither the clerk nor any other witnesses for the Respondent testified to rebut the credible evidence presented by the Department that this was a fully compliant identification that allowed Jones to become aware that Delatorré was the decoy. Respondent has offered no evidence or argument suggesting that the identification violated state or federal due process considerations. Given the totality of the evidence presented by the Department credibly establishing compliance with rule 141(b), the Respondent's assertions that compliance did not occur are unsupported.

11. Respondent also asserted that the appearance of the decoy did not comply with rule 141(b)(2). As noted above, the clerk did not testify in this matter to establish that her error was the result of Delatorre's appearance. Jones, in fact, asked for her identification which suggests that she had reason to believe that Delatorre might be underage. Jones did not ask any follow up questions so the exchanges between her and Delatorre were minimal. Further, Delatorre testified in this matter and her appearance matched the appearance she presented to the Jones on the date of the operation. Her appearance was consistent with a person under the age of 21. As previously noted, the clerk did not testify to establish facts suggesting an identification issue or whether there was anything in Delatorre's actions, manner, or appearance that led her to reasonably conclude that Delatorre was over 21. The Department has established compliance with rule 141 (b)(2) and the Respondent has failed to rebut this evidence.

Garfield Beach CVS, LLC and
Longs Drug Stores California, LLC
dba CVS Pharmacy #4952
File #21-484600
Reg. #17085834
Page 7

PENALTY

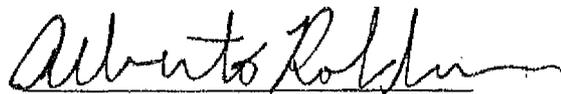
The Department recommended that the Respondent's license be suspended for a period of 10 days which is a downward departure from the standard penalty of 15 days. This recommendation for mitigation was based on the extended period of licensure since 2010 without prior discipline. The Respondent argued for a stayed penalty also based on the long period of licensure without prior incidents. No evidence was presented regarding the Respondent's policies to prevent sales of alcoholic beverages to underage individuals that were in place at this Licensed Premises.

There appear to be no factors in aggravation applicable to this violation. The penalty recommended herein complies with rule 144.

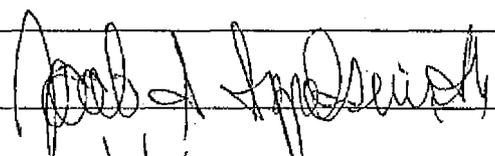
ORDER

The Respondents' off-sale general license is hereby suspended for a period of 10 days

Dated: January 9, 2018



Alberto Roldan
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>2/16/18</u>