

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

AB-9844

File: 21-479385; Reg: 19088937

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #8858
7101 Atlantic Avenue
Bell, CA 90201-3650,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: July 2, 2020
Telephonic

ISSUED JULY 6, 2020

Appearances: *Appellants:* Adam N. Koslin, of Solomon, Saltsman & Jamieson, as
counsel for Garfield Beach CVS, LLC and Longs Drug Stores
California, LLC,

Respondent: Alanna K. Ormiston, 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 #8858 (appellants), appeal from a decision of the
Department of Alcoholic Beverage Control (Department)¹ suspending their license for
15 days because their clerk sold an alcoholic beverage to a police minor decoy, in
violation of Business and Professions Code section 25658, subdivision (a).

¹ The decision of the Department, dated November 4, 2019, is set forth in the
appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 2, 2009. There is no record of prior departmental discipline against the license.

On June 6, 2019, the Department filed a single-count accusation against appellants charging that, on January 11, 2019, appellants' clerk, Johanna Orellana-Pena (the clerk), sold an alcoholic beverage to 16-year-old Breanna S. (the decoy).² Although not noted in the accusation, the decoy was part of a joint operation between the Bell Police Department and the Department at the time.

At the administrative hearing held on September 18, 2019, documentary evidence was received and testimony concerning the sale was presented by the decoy and by Department Supervising Agent Benjamin Delarosa.

Testimony established that on January 11, 2019, Agent Delarosa entered the licensed premises, followed shortly thereafter by the decoy. The decoy selected a six-pack of Budweiser beer and took it to the counter. The clerk scanned the beer and asked to see the decoy's identification.

The decoy handed the clerk her California driver's license which had a portrait orientation and contained her correct date of birth, showing her to be 16 years of age. The license also contained a notation stating, "PROVISIONAL UNTIL AGE 18 IN 2020" as well as a red stripe indicating, "AGE 21 IN 2023." (Exh. 3.) The clerk looked at the license, looked around the premises, then entered something into the register to complete the sale while telling the decoy to "be careful."

² The decoy is identified by her first name only because she is a juvenile.

The decoy exited the premises. The clerk was contacted by Agent Delarosa, and he explained the violation to her. The decoy re-entered the premises with other officers to make a face-to-face identification of the clerk. A photo of the clerk and decoy together was taken (exh. 4), and the clerk was issued a citation.

The administrative law judge (ALJ) issued his proposed decision on September 23, 2019, recommending that the accusation be sustained and recommending a 15-day suspension. The Department adopted the proposed decision in its entirety on October 30, 2019 and a certificate of decision was issued on November 4, 2019.

Appellants then filed a timely appeal contending the decoy did not display the appearance required by rule 141(b)(2),³ as evidenced by her high rate of success in purchasing alcohol.

DISCUSSION

Appellants contend that the decoy operation violated rules 141(a) and 141(b)(2), and failed to promote fairness, by utilizing a decoy who was wearing acrylic nails and multiple rings (including a ring on fourth finger of her left hand), who testified that she was not nervous, and who had a high success rate — successfully purchasing alcohol at five of the nine premises she visited. (AOB at p. 2.)

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.

³References 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.

This rule provides an affirmative defense, and the burden of proof lies with appellants.

(*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

Appellants maintain the Department used a decoy in this case that failed to comply with standards set forth in rule 141(b)(2). They argue that the decoy's high success rate (successfully purchasing alcohol at five out of nine licensed premises) was the result of her overall appearance, including acrylic nails and the wearing of several rings, including one on the fourth finger of her left hand—which they contend made it appear as if she were a married woman. They maintain she displayed the appearance of a person over 21 years of age and that the use of such a decoy was unfair, in violation of rule 141(a). (AOB at pp. 7-9.)

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.

On the issue of fairness, the Court of Appeals has opined on whether the Board is empowered to impose additional fairness criteria beyond those enumerated in rule 141, and determined that it cannot. The Court found:

Contrary to the Appeals Board's contention, Rule 141 provides specific guidance regarding how to preserve fairness in minor decoy operations. Subdivision (b) of Rule 141 implements the goal of fairness by imposing five specific requirements for every minor decoy operation. Decoys must be under the age of 20; have the appearance of a person under 21; carry their own actual identification and present that identification upon request; truthfully answer any questions about their ages; and make face-to-face identifications of the persons who sold the alcoholic beverages. (Rule 141, subd. (b)(1)–(5).) Fairness under Rule 141 is assured by a set of five expressly defined safeguards, all of which must be fulfilled during a minor decoy operation. [Citation.] Consequently, Rule 141's use of the word “fairness” does not render the rule ambiguous or confusing.

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd./ Garfield Beach (2017) 7 Cal.App.5th 628, 638 [213 Cal.Rptr.3d 130].) In other words, the Court made it very clear that the word “fairness” in rule 141(a) is not subject to enlargement by this Board, allowing it to add “fairness requirements” to decoy operations — such as the success rate argument made by appellants. The five factors enumerated in rule 141(b)(1) through (5) lay out specifically what is required to make a decoy operation “fair.”

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 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.)

This Board has stated many times that, in the absence of compelling reasons, it will ordinarily defer to the ALJ's findings on the issue of whether there was compliance with rule 141(b)(2). The ALJ made the following findings of fact regarding the decoy's appearance and success rate:

5. Breanna appeared and testified at the hearing. On January 11, 2019, she was 4'10" tall and weighed 115 pounds. She wore a Nike hoodie, a jean jacket, jeans which were ripped at the knee, and white and pink tennis shoes. Her hair was parted in the middle and hung down to the middle of her back. She had rings on some of her fingers and wore earrings. (Exhibits 2 & 4.) At the hearing, she was two pounds heavier, her hair was slightly longer, and she was wearing acrylic nails.

[¶ . . . ¶]

9. Breanna participated in one shoulder tap operation before January 11, 2019. On January 11, 2019, she visited nine locations, of which five sold alcohol to her. Six of the nine clerks asked to see her ID.

10. Breanna appeared to be 16 or 17 years old 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 and conduct in the Licensed Premises on January 11, 2019, Breanna displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Orellanopena.

(Findings of Fact, ¶¶ 5-10.) Based on these findings, the ALJ addressed appellant's rule 141(b)(2) defense:

5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141 (b)(2)^[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that Breanna had the appearance of a person who was old enough to purchase alcohol based on her lack of nervousness, her jewelry (including one ring which she was wearing on the ring finger of her left hand), and her use of acrylic nails. This argument is rejected. Breanna looked quite young, consistent with that of a person about 16 or 17 years old. Phrased another way, Breanna had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 10.)

In her testimony, Breanna credibly testified that she was not wearing acrylic nails while inside the Licensed Premises. In questioning Breanna, the Respondents pointed out that one of her nails in the photo taken before the operation commenced (exhibit 2) and one or two of her nails in the photo taken after the sale (exhibit 4) appeared to be white. Breanna responded that she was not wearing acrylic nails during the operation. The photos are of poor quality and it is impossible to see the nails clearly. Interestingly, the Respondents never asked Breanna if she was wearing nail polish (even clear nail polish might catch the light in a photo). In rejecting the Respondents' rule 141(b)(2) argument, it is specifically found that Breanna was not wearing acrylic nails while inside the Licensed Premises.

(Determination of Issues, ¶ 5.) We concur.

This Board has noted that:

[a]n ALJ's task to evaluate the appearance of decoys is not an easy one, nor is it precise. To a large extent, application of such standards as the

rule provides is, of necessity, subjective; all that can be required is reasonableness in the application. As long as the determinations of the ALJs are reasonable and not arbitrary or capricious, we will uphold them.

(*O'Brien* (2001) AB-7751, at pp. 6-7.) Notably, the standard is not that the decoy must display the appearance of a "childlike teenager" but "the appearance which could generally be expected of a person under 21 years of age." In Findings of Fact paragraphs 5 through 10, and Determination of Issues paragraph 5, the ALJ found that the decoy met this standard. We cannot make contrary findings.

Appellants contend:

This Board has repeatedly held that where a decoy's record of purchases indicates that the decoy is unusually successful at purchasing alcohol from licensed premises, Rule 141(b)(2) concerns are raised. (See e.g., *7-Eleven and Williams* (2001) AB-7951; "[w]e do not ignore the evidence in this case that the decoy was able to purchase alcoholic beverages in more than half - seven of thirteen - of the establishments he visited [T]his suggests that he presented a more mature appearance to some sellers ... ").

(AOB at p. 7.)⁴ While the Board did discuss the success rate of the decoy in *7-Eleven/Williams*, it affirmed the Department's decision in that matter as to compliance with rule 141(b)(2). However, this Board has at times found that an unusually high success rate may trigger suspicion that the decoy's appearance does not comply with rule 141(b)(2).

Appellants maintain that the decoy's success rate in this matter is evidence that her appearance did not comply with the rule. However this Board has clarified that a decoy's success rate alone cannot establish a rule 141(b)(2) violation:

Appellants rely on the Board's decision in *7-Eleven, Inc./Dianne Corporation* (2002) AB-7835 (*Dianne*), in which the Board said that the decoy's 80-percent purchase rate was a "strong indication" that the

⁴ The case cited should read: AB-7591 rather than AB-7951.

decoy's appearance did not comply with rule 141(b)(2). However, they neglect to consider the Board's more recent decision in *7-Eleven/Jain* (2004) AB-8082, in which the Board made clear that *Dianne, supra*, did not signify that an 80-percent purchase rate would inevitably result in finding non-compliance with rule 141(b)(2). "Such a per se rule would be inappropriate, since the sales could be attributable to a number of reasons other than a belief that the decoy appeared over the age of 21." (*Ibid.*)

(*7-Eleven, Inc./Aziz* (2010) AB-8980.)

This Board has reversed a handful of cases in which the decoy's success rate was notably high; in all of them, however, the success rate merely supplemented other indicia of error. In *Southland Corporation*, for example, the decoy's success rate was approximately 38 per cent, with five of thirteen stores selling alcohol to the decoy, and this Board gave weight to that fact. (*Southland Corporation* (2001) AB-7603 at p. 7.)

The ALJ's findings in that case, however, were found to be facially inconsistent: he had expressed concern that the decoy's "large stature" had "lulled the clerk into a belief" that he was over 21, but nonetheless held that he met the appearance requirements of rule 141(b)(2). (*Id.* at p. 6.) This Board noted that it was "persuaded that *the ALJ's own concern* over the appearance of the decoy reflects an element of possible unfairness." (*Id.* at p. 7., emphasis added.)

Appellants would have this Board draw a parallel between *7-Eleven/Dianne Corporation* (2002) AB-7835 (*Dianne*) and the present facts. In that case, the decoy successfully purchased alcohol at eight of ten establishments, and none of the clerks who sold him alcohol asked for ID. (*Id.* at p. 3.) *Dianne*, however, presented inconsistent findings similar to those addressed in *Southland Corporation*. In *Dianne*, the ALJ found that:

If, while at [appellants'] store, the decoy wore the uniform, badge and sidearm which he wore at the hearing, he clearly would not have displayed the appearance which could generally be expected of someone under twenty-one years old. However, he did not wear these items at appellants' store.

(*Ibid.*) With this statement, the ALJ made "an implicit finding that, at the hearing, the decoy, who was still just 19 years old, clearly had the appearance of a person over 21 years of age." (*Ibid.*) Nevertheless, the ALJ relied on photographs of the decoy taken just before the decoy operation as "the best evidence of how he appeared that day," and concluded that the decoy's appearance at the time of the sale was that of a person under the age of 21. (*Ibid.*)

On appeal, this Board reasoned that:

the ALJ based his finding that the decoy appeared to be under 21 at the time of the sale on photographs of the decoy and on the decoy's mannerisms and demeanor at the hearing. He did so even though the physical and non-physical appearance of the decoy at the hearing was not comparable to his physical and non-physical appearance at the time of the sale. We cannot say that this finding has a reasonable basis.

(*Dianne, supra*, at p. 8.) This Board reversed based on "[t]he highly suggestive 'success rate' of this decoy and the unreliable basis used to find the decoy's apparent age." (*7-Eleven/Dianne Corporation (2002) AB-7835* at p. 8, emphasis added.)

In the present case, the decoy visited nine stores on the date of the sale, and five of the stores sold to her. (Finding of Fact, ¶ 9.) Unlike *Dianne* and *Southland*, however, there are no inconsistencies in the ALJ's findings in this matter, and we see no cause to question the ALJ's determination that the decoy's appearance complied with rule 141(b)(2). Furthermore, the clerk in this case asked for and was shown identification which clearly showed the decoy to be 16 years of age.

Appellants presented no evidence that the decoy's lack of nervousness, or her wearing of jewelry *actually resulted* in her displaying an appearance of a person 21 years old or older on the date of the operation in this case. The clerk did not testify. We cannot know what went through her mind in the course of the transaction, or why she made the sale in spite of the clear information on the driver's license that the decoy was a juvenile. Appellants rely entirely on a difference of opinion — theirs versus that of the ALJ — as to what conclusion the evidence in the record supports. Absent an evidentiary showing, this argument must fail. Ultimately, appellants are asking this Board to consider the same set of facts and reach a different conclusion, despite substantial evidence to support those findings. This, as we have said countless times, the Board cannot do.

ORDER

The decision of the Department is affirmed.⁵

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁵This 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 APPEAL BY:

GARFIELD BEACH CVS, LLC., LONGS
DRUG STORES CALIFORNIA, LLC.
DBA: CVS PHARMACY 8858
7101 ATLANTIC AVE
BELL, CA 90201-3650

CERRITOS ENFORCEMENT OFFICE (CEO)

File: 21-479385

Reg: 19088937

AB: 9844

OFF-SALE GENERAL - LICENSE

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

CERTIFICATION

I, Yuri Jafarinejad, 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 17, 2020, in the City of Sacramento, County of Sacramento, State of California.


Office of Legal Services

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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 & LONGS DRUG
STORES CALIFORNIA LLC
CVS PHARMACY #8858
7101 ATLANTIC AVE
BELL, CA 90201-3650**

OFF-SALE GENERAL - LICENSE

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

CERRITOS ENFORCEMENT OFFICE

File: 21-479385

Reg: 19088937

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 October 30, 2019. 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) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after December 16, 2019, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: November 4, 2019



**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 & Longs Drug Stores	}	File: 21-479385
California LLC	}	
dba CVS Pharmacy #8858	}	Reg.: 19088937
7101 Atlantic Ave	}	
Bell, California 90201-3650	}	License Type: 21
	}	
Respondents	}	Word Count: 10,000
	}	
	}	Reporter:
	}	Dalauna Cardoza
	}	California Reporting
	}	
<u>Off-Sale General License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Cerritos, California, on September 18, 2019.

Alanna K. Ormiston, Attorney, represented the Department of Alcoholic Beverage Control.

Adam N. Koslin, attorney-at-law, represented respondents Garfield Beach CVS LLC and Longs Drug Stores California LLC.

The Department seeks to discipline the Respondents' license on the grounds that, on or about January 11, 2019, the Respondents, through their agent or employee, sold, furnished, or gave alcoholic beverages to Breanna S., an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 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 September 18, 2019.

FINDINGS OF FACT

1. The Department filed the accusation on June 6, 2019.

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

2. The Department issued a type 21, off-sale general license to the Respondents for the above-described location on September 2, 2009 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Breanna S. was born on January 18, 2002. On January 11, 2019, she served as a minor decoy during an operation conducted by Bell P. D. and the Department. On that date she was 16 years old.²
5. Breanna appeared and testified at the hearing. On January 11, 2019, she was 4'10" tall and weighed 115 pounds. She wore a Nike hoodie, a jean jacket, jeans which were ripped at the knee, and white and pink tennis shoes. Her hair was parted in the middle and hung down to the middle of her back. She had rings on some of her fingers and wore earrings. (Exhibits 2 & 4.) At the hearing, she was two pounds heavier, her hair was slightly longer, and she was wearing acrylic nails.
6. On January 11, 2019, Supv. Agent B. Delarosa entered the Licensed Premises. Breanna entered a short time later and walked to the alcohol section. She grabbed a 6-pack of Budweiser beer and took it to the counter. The clerk, Johanna Orellanopena, scanned the beer and asked to see Breanna's ID. Breanna handed her California driver license (exhibit 3) to Orellanopena, who looked at it, then looked around. Orellanopena entered something into the register, handed the ID back to Breanna, and told Breanna to be careful. Breanna paid for the beer, then exited.
7. Supv. Agent Delarosa contacted Orellanopena, identified himself, and explained the violation to her. Breanna re-entered the Licensed Premises with some officers. Supv. Agent Delarosa asked her to identify the person who sold her the beer. At a distance of approximately three feet, Breanna pointed to the clerk and said that she had. Breanna also stated that she was only 16 years old. A photo of the two of them was taken (exhibit 4), after which Orellanopena was cited.
8. Ana Vital, a manager at the Licensed Premises, demonstrated the prompts which appear on the register when an alcoholic beverage is rung up. (Exhibits 5-6.) Agent Delarosa spoke to Orellanopena about the transaction. She stated that she had done something dumb. She also stated that, while she did not remember the month or day she entered into the register, she recalled entering a year which started with the digits "19" to clear the system.

² In light of the fact that Breanna was not simply a minor, but a juvenile (i.e., under the age of 18), only her first name and the first initial of her last name will be used in this proposed decision.

9. Breanna participated in one shoulder tap operation before January 11, 2019. On January 11, 2019, she visited nine locations, of which five sold alcohol to her. Six of the nine clerks asked to see her ID.

10. Breanna appeared to be 16 or 17 years old 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 and conduct in the Licensed Premises on January 11, 2019, Breanna displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Orellanopena.

11. 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 Respondents' license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that, on January 11, 2019, the Respondents' employee, Johanna Orellanopena, inside the Licensed Premises, sold an alcoholic beverage to Breanna S., a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-10.)

5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)³ and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that Breanna had the appearance of a person who was old enough to purchase alcohol based on her lack of nervousness, her jewelry (including one ring which she was wearing on the ring finger of her left hand),

³ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

and her use of acrylic nails. This argument is rejected. Breanna looked quite young, consistent with that of a person about 16 or 17 years old. Phrased another way, Breanna had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 10.)

In her testimony, Breanna credibly testified that she was not wearing acrylic nails while inside the Licensed Premises. In questioning Breanna, the Respondents pointed out that one of her nails in the photo taken before the operation commenced (exhibit 2) and one or two of her nails in the photo taken after the sale (exhibit 4) appeared to be white. Breanna responded that she was not wearing acrylic nails during the operation. The photos are of poor quality and it is impossible to see the nails clearly. Interestingly, the Respondents never asked Breanna if she was wearing nail polish (even clear nail polish might catch the light in a photo). In rejecting the Respondents' rule 141(b)(2) argument, it is specifically found that Breanna was not wearing acrylic nails while inside the Licensed Premises.

PENALTY

The Department requested that the Respondents' license be suspended for a period of 15 days, arguing that the sale appeared to be intentional and that Breanna was not only a minor, but a juvenile. In the Department's view, this aggravation offset any mitigation based on the Respondents' 9-1/3 years of discipline-free operation. The Respondents argued that their discipline-free operation warranted some mitigation. Accordingly, the Respondents recommended a 10-day suspension.

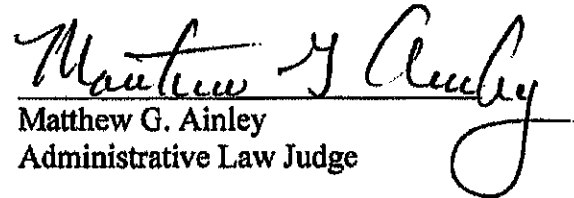
The Department and the Respondents are both correct, at least in part. Ten years of discipline-free operation warrants some mitigation. On the other hand, the clerk's actions in this case (i.e., overriding the register to complete the sale, looking around before doing so, and telling the decoy to be careful) indicate that the sale was intentional. Had the minor not been a decoy, some aggravation may have been warranted given that she was a juvenile. Since the Department or Bell P. D. selected Breanna to be a decoy, if an aggravated penalty is imposed based on her age, it creates the appearance that the two agencies have created their own aggravating factor. The penalty recommended herein complies with rule 144.

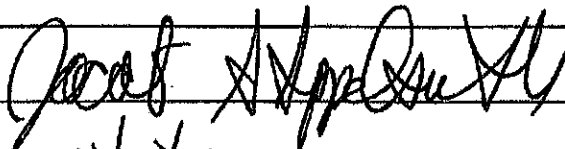
Garfield Beach CVS LLC & Longs Drug Stores California LLC
File #21-479385
Reg. #19088937
Page 5

ORDER

The Respondents' off-sale general license is hereby suspended for a period of 15 days.

Dated: September 23, 2019


Matthew G. Ainley
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: 10/30/19

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

GARFIELD BEACH CVS, LLC and
LONGS DRUGS STORES
CALIFORNIA, LLC,
dba CVS Pharmacy #8858
7101 Atlantic Avenue
Bell, CA 90201,
Appellants/Licensees,

v.

DEPARTMENT OF ALCOHOLIC
BEVERAGE CONTROL,
Respondent.

AB-9844

File: 21-479385
Reg: 19088937

**DECLARATION OF SERVICE
BY MAIL**

I, MARIA SEVILLA, declare that I am over the age of eighteen (18) years, and not a party to the within action; that my place of employment and business is 1325 J Street, Suite 1560, Sacramento, CA; that on the 6th day of July, 2020, I served a true copy of the attached **Decision** of the Alcoholic Beverage Control Appeals Board in the above-entitled proceeding on each of the persons named below:

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent to the person(s) at the e-mail address(es) listed below:

Ralph Barat Saltsman
Solomon, Saltsman & Jamieson
426 Culver Boulevard
Playa Del Rey, CA 90203
rsaltsman@ssjlaw.com

Department of ABC
Office of Legal Services
3927 Lennane Drive, Suite 100
Sacramento, CA 95834
yuri.jafarinejad@abc.ca.gov

I declare under penalty of perjury that the foregoing is true and correct.
Executed at Sacramento, California, on the 6th day of July, 2020.

Maria Sevilla

MARIA SEVILLA