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

AB-9880
File: 21-477732; Reg: 19089470

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #9923
1005 East Bidwell Street
Folsom, CA 95630-5548,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: November 6, 2020
Telephonic

ISSUED NOVEMBER 12, 2020

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

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 #9923 (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 Department minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

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[1] The decision of the Department, dated April 30, 2020, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. There are two prior instances of departmental discipline against the license for violations of section 25658(a).

On November 8, 2019, the Department filed a single-count accusation against appellants charging that, on August 1, 2019, appellants' clerk, Richard Childs (the clerk), sold an alcoholic beverage to 17-year-old A.H. (the decoy). Although not noted in the accusation, the decoy was working for the Department at the time.

At the administrative hearing held on March 11, 2020, documentary evidence was received and testimony concerning the sale was presented by the decoy and by Department Agent Dustin Lee McLaughlin.[2] Appellants' operations supervisor, Sydney Brandin, testified on its behalf.

Testimony established that on August 1, 2019, the decoy entered the licensed premises and went to the coolers where he selected a 12-pack of Bud Light beer in cans. Separately, Agent McLaughlin entered the premises in a plain clothes capacity and observed the decoy from a distance.

The decoy took the beer to the checkout counter and waited in line. When it was his turn, he set the beer on the counter and the clerk asked for his identification. The decoy handed the clerk his California driver's license, which had a portrait orientation, contained his correct date of birth (showing him to be 17 years old), a blue stripe indicating "AGE 18 IN 2020," and a red stripe indicating "AGE 21 IN 2023."

[2] In the decision the ALJ spells the name "McLoughlin" but we use the agent's own spelling from the administrative hearing, i.e., "McLaughlin." (RT 29.)

The clerk looked at the license briefly, then completed the sale without asking any age-related questions. The decoy exited the premises with the beer and joined other Department agents waiting outside. Agent McLaughlin, having observed the transaction and seeing that the clerk was about to go on break or exit the premises, identified himself to the clerk as a Department agent and told him he had just sold alcohol to a minor.

The decoy re-entered the premises with the other agents and they approached the counter where Agent McLaughlin was speaking to the clerk. The decoy was asked to identify the person who sold him the beer and he identified the clerk while the two were looking at each other across the counter. The clerk was subsequently issued a citation.

The administrative law judge (ALJ) issued a proposed decision on March 12, 2020, sustaining the accusation and recommending a 15-day suspension. The Department adopted the proposed decision in its entirety on April 23, 2020 and a certificate of decision was issued seven days later.

Appellants then filed a timely appeal contending: (1) the fact-to-face identification of the clerk did not comply with rule 141(b)(5),[3] and (2) appellants did not "permit" their employee to make the sale.

[3] References 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.

DISCUSSION

I

FACE-TO-FACE IDENTIFICATION

Appellants contend that the ALJ's finding that the face-to-face identification complied with rule 141(b)(5) is not supported by substantial evidence. Appellants argue that the time noted on the citation preceded the timestamp on the receipt for the sale as evidence that the citation was issued prior to the face-to-face identification, in violation of rule 141(b)(5). (AOB at pp. 10-13.)

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 appellants 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. v. Alcoholic Beverage Control Appeals Board* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126] (*Acapulco*) [finding that no attempt, reasonable or otherwise, was made to identify the clerk in that case].)

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, 112, [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*, 212 Cal.App.2d 106, 114.)

Appellants maintain:

> [T]he ALJ found that the citation in this matter was issued after the face-to-face identification of the selling clerk by the minor decoy, despite there being no evidence in the record supporting this finding, and indeed contrary to the testimony of the officer who issued the citation.

(AOB at p. 2.) The ALJ made the following findings on this issue:

> 9. While standing directly across from the clerk, A.H. was asked to identify the clerk who sold him the beer. A.H. stated that the clerk who McLaughlin detained sold him the beer. A.H. and the clerk were directly across the counter from each other when A.H. said this. The clerk looked at McLaughlin and then A.H. while A.H. was saying this. The clerk was identified as Richard Childs (Childs) during McLaughlin's investigation of the sale to A.H. After the identification, A.H. went to the Department vehicle that was used to drive him there to wait for the agents.
>
> 10. Childs was photographed while seated in the Department vehicle while he held the Bud Light 12-pack. (Exhibit D-5) Prior to leaving, A.H. was in the immediate presence of Childs and the Department agents from when he walked up with the two agents until after his identification of Childs. Childs was subsequently issued a citation for the sale.[fn.]

(Findings of Fact, ¶¶ 9-10.) In the footnote to Finding of Fact paragraph 10, the ALJ explains:

> In this matter, evidence was received that the citation referenced 1530 hours (Exhibit L-1) and the receipt for the sale referenced 3 :31 pm. Licensee later argued that this established that the citation was prepared prior to the violation. On its face, Exhibit L-1 clearly notes that the date and time indicated references the time of the alleged violation, not the time of issuance of the citation.

(Decision, fn. 4.)

Based on these findings, the ALJ reached the following conclusions regarding the face-to-face identification and the issuance of the citation:

> 5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141 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 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. There is no credible evidence supporting the assertions by the Respondent that there was a failure to comply with rule 141. Regarding the rule 14l(b)(5) violation, *Acapulco Restaurants, Inc. v. Alcoholic Beverages Control Appeals Board* (1998) 67 Cal.App.4th 575 confirmed that a face to face must occur for compliance, but that case never established a baseline standard for what was a compliant face to face identification. The subsequent decision in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1687 held 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. This decision confirmed that the purpose of the face to face was to give the seller notice of who the decoy was.

7. Further clarification of what constituted a compliant face to face occurred in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2017) 18 Cal.App.5th 541. This case is particularly helpful since the identification by Childs of A.H. in this matter was substantively similar to the identification that was found to be compliant with rule 141 (c) in that case. In finding that 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* (2017) 18 Cal.App.5th 541, 547

While, general due process considerations demand a fair identification be facilitated by law enforcement, these cases make clear that this particular regulation is focused on the narrower 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. When McLaughlin became concerned that Childs would leave, he approached Childs at the counter, got his attention and identified himself as a Department agent investigating the sale of alcohol to a minor. While the sale to A.H. was discussed between McLaughlin and Childs at the counter, A.H. entered the Licensed Premises with the other agents. A.H. and the two other agents then approached McLaughlin and Childs. In the immediate presence of Childs, A.H. was asked to identify the seller. A.H. verbally identified Childs as the seller while standing directly across the counter from him. Childs was clearly aware that the decoy was A.H. because he looked at him and McLaughlin during the verbal identification. Childs clearly came face to face with A.H. under circumstances that made it clear that Childs had been identified as the person who sold A.H. beer and that A.H. was the minor at issue. (Findings of Fact, ¶¶ 3-12)
>
> 10. None of the evidence presented by the Respondent rebutted the credible evidence presented by the Department that this was a fully compliant identification that allowed Childs to become aware that A.H. 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)(5), the Respondent's assertions that compliance did not occur are unsupported. (Findings of Fact, ¶¶ 3- 12)

(Conclusions of Law, ¶¶ 5-10.) We agree with the ALJ's assessment.

As noted in the decision, appellants argue that the citation (exh. L-1) was "issued" at 1530 hours (or 3:30 p.m.) and that the receipt for the sale (exh. L-2) shows the sale occurring at 3:31 p.m. Appellants assert this supports their argument that the citation was issued prior to the face-to-face identification. When appellants questioned Agent McLaughlin at the administrative hearing, they asked him if the citation was issued at the time indicated, but never clarified this question by asking whether the time noted was the time of the violation or the time it was written. (RT 38-40.) It is unclear whether Agent McLaughlin realized that his answer was being interpreted by appellants as evidence that the citation was written prior to the face-to-face identification.

We agree with the ALJ that this argument must fail. Clearly the agent did not understand the significance of the question's wording when he agreed that the citation

was "issued" at 3:30. He may just as easily have understood the work "issued" to mean the time of the violation, which is what any reasonable person would understand from looking at the citation.

Most importantly, as a practical matter, it is simply impossible for the citation to have been issued a full minute prior to the actual sale. This fact alone causes appellants' argument to fail.

As the Board has said previously, appellants bear the burden of proof to establish that the face-to-face identification did not comply with rule 141(b)(5) once the Department presents sufficient evidence to establish its prima facie case. In two such cases we said:

> Rule 141 is an affirmative defense, and the burden of proof is on the licensee. Since the record is silent as to when the citation was issued, appellants have not satisfied their burden. It should be noted that appellants could have resolved the issue by simply asking their witness about the sequence of events.

(*7-Eleven, Inc. & Mandania* (2002) AB-7828 at p. 6.) Likewise in this case, appellants might have resolved the issue if counsel had asked the agent about the sequence of events. As this Board stated previously:

> Once there is affirmative testimony that the face-to-face identification occurred, the burden shifts to appellants to demonstrate non-compliance, i.e., that the normal procedure of issuing a citation after identification of the clerk, was not followed. We are unwilling to read our decision in *The Southland Corporation/R.A.N.* as expanding the affirmative defense created by rule 141 to the point where appellants need produce no evidence whatsoever to support a contention that there was a violation of that rule.

(7-Eleven, Inc. & Azzam (2001) AB-7631 at p. 4.)

We find that the face-to-face identification in this matter fully complied with rule 141(b)(5) and its core purpose of ensuring that the seller of the alcohol is properly

identified by the decoy before the conclusion of the decoy operation. 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,* 118 Cal.App.4th at 1437) when, as here, appellants failed to satisfy their burden of proof to establish an affirmative defense.

II

"PERMITTING" THE SALE

Appellants contend it was error for the ALJ and Department to fail to consider one of appellants' arguments, to wit: that it did not "permit" the violation because it did not know of the sale, had taken significant prophylactic steps to avoid such sales, and was tricked by a rogue employee. Appellants maintain it was an abuse of discretion to fail to address this argument in the decision. (AOB at pp. 14-15.)

Both this Board and the courts have consistently found that a licensee may be held liable for the actions of his agents or employees.

> The owner of a liquor license has the responsibility to see to it that the license is not used in violation of law and as a matter of general law the knowledge and acts of the employee or agent are imputable to the licensee. [Citation.]

(*Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 172, 180 [17 Cal.Rptr. 315].) The *Laube* court noted:

> A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly.

(*Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779].) Similarly, in *Reimel* the court stated:

> [A] licensee can draw no protection from his lack of knowledge of violations committed by his employees or from the fact that he has taken reasonable precautions to prevent such violations. There is no requirement . . . that the licensee have knowledge or notice of the facts constituting its violation. [Citations.]

(*Reimel v. Alcoholic Bev. Control Appeals Bd.* (1967) 252 Cal.App.2d 520, 522 [60 Cal.Rptr. 641], internal quotations omitted.)

The doctrine of *respondeat superior* provides that an employer or principal is vicariously liable for the wrongful conduct of his or her employees or agents committed within the scope of the employment or agency. (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967 [227 Cal.Rptr. 106].) And, it is well-settled in alcoholic beverage case law that an agent or employee's on-premises knowledge and misconduct is imputed to the licensee/employer. (See *Yu v. Alcoholic Bev. Control Appeals Bd.* (1992) 3 Cal.App.4th 286, 295 [4 Cal.Rptr.2d 280]; *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291].)

In the seminal case of *Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Board* (1999) 76 Cal.App.4th 570 [90 Cal.Rptr.2d 523] (*Santa Ana*) the argument was made that the acts of an agent or employee should not be imputed to his or her employer when the employer has instituted extensive measures to prevent the unlawful acts.

In *Santa Ana*, a clerk surreptitiously purchased food stamps at one-half their face value from a confidential informant working for the United States Department of Agriculture. The clerk was arrested moments after the sale and was immediately fired by her on-duty manager. The court found that the Department had abused its discretion when it suspended appellant's license, holding that a single criminal act of an

employee unrelated to the sale of alcohol, would not be imputed to an employer who had taken extensive measures to protect against criminal acts of its employees. (*Santa Ana, supra* at 76 Cal.App.4th at 575.)

The *Santa Ana* case teaches us that there is only one exception to the general rule that employee knowledge is imputed to a licensee. The exception only arises in cases where there is "no per se nexus" between the licensee's sale of alcoholic beverages and the unlawful employee action. (*Santa Ana, supra* at 76 Cal.App.4th at 575.) Even then, the narrow exception applies only when the circumstances meet four required elements: 1) the employee commits a single criminal act unrelated to alcohol sales, 2) the licensee has taken strong steps to prevent and deter such crime before the criminal action took place, 3) the licensee is unaware of the criminal act beforehand, and 4) license discipline has no rational effect on public welfare or morals. (*Santa Ana*, s*upra* at 76 Cal.App.4th at 576.)

In the instant case, the clerk's actions fail the *Santa Ana* test for an exception to the doctrine of *respondeat superior*. Here, in spite of appellant's laudable efforts to institute procedures to prevent the sale of alcohol to minors, we obviously cannot say this incident was unrelated to alcohol sales. Similarly, we cannot say that license discipline has no rational effect on public welfare or morals when the purpose of the ABC Act is clearly stated, in pertinent part, as being:

> . . . the protection of the safety, welfare, health, peace, and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages.

(Bus. and Prof. Code § 23001.)

Appellants maintain the ALJ erred by not addressing their arguments. However, the ALJ *did* address these points — he simply did so in the penalty section of the decision rather than as part of a discussion of whether appellants "permitted" the sale:

> The Respondent argued for a 10 day penalty, if the Accusation were sustained, based on the evidence that the Respondent has training protocols to prevent alcohol sales and that the Respondent enforces its rules as evidenced by the termination of Childs after the incident.
>
> Evidence was presented regarding the Respondent's policies to prevent sales of alcoholic beverages to underage individuals. The training and the register protocols used by the Respondent are aids in preventing unlawful alcohol sales to minors. The fact that a termination occurred also shows that the Licensee is taking steps to ensure that employees comply with its written policies.
>
> However, the Respondent has been licensed since June 2009 and this is now their third incident. It is noted that two incidents happened in close succession in 2014 and that it has been five years since any other incidents have occurred. While these priors are outside of the statutory period for use as enhancements, they are still appropriately considered as part of the history of non-compliance by the Respondent. The facts showing the Respondent's training and enforcement of policies do support some mitigation. However, the Department has also shown that repeated violations are still occurring and that a 17 year old was sold alcohol in the Licensed Premises.

(Decision at p. 7.)

An ALJ's failure to discuss every point raised during an appellant's argument does not constitute error, much less reversible error:

> [A]n opinion is not a brief in reply to counsel's arguments. (*Holmes v. Rogers* (1859)] 13 Cal. [191] at p. 202.) In order to state the reasons, grounds, or principles upon which a decision is based, the court need not discuss every case or fact raised by counsel in support of the parties' positions.

(*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1263 [970 P.2d 872; 82 Cal.Rptr.2d 85].)

Similarly, we do not believe the ALJ's failure to specifically address appellants' arguments regarding whether or not they "permitted" the sale violates the mandate of the California Supreme Court's holding in *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836] (*Topanga*), that the agency's decision must set forth findings to "bridge the analytic gap between the raw evidence and ultimate decision or order" as appellants argue. *Topanga* held that findings must be made, not that every argument raised by an appellant must be discussed.

In the instant case, the ALJ took note of the training and enforcement efforts of appellants and still found that substantial evidence supported the accusation. The Board cannot reweigh the evidence to reach a contrary conclusion nor can we require that the Department's decision discuss each and every point raised by an appellant when, as here, the decision is supported by substantial evidence.

ORDER

The decision of the Department is affirmed.[4]

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

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[4]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
CVS PHARMACY STORE 9923
1005 E. BIDWELL STREET
FOLSOM, CA 95630-5548

OFF-SALE GENERAL - LICENSE

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

SACRAMENTO DISTRICT OFFICE

File: 21-477732

Reg: 19089470

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 April 23, 2020. 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 June 10, 2020, a representative of the Department will contact you toarrange to pick up the license certificate.

Sacramento, California

Dated: April 30, 2020

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 California, LLC DBA: CVS Pharmacy Store 9923 1005 E. Bidwell Street Folsom, California 95630-5548	}	File: 21-477732 Registration: 19089470 License Type: 21
Respondent	}	Page Count: 55
	}	Reporter: Brianna Rudd-CSR # 13668 Atkinson Baker
Off-Sale General License	}	**PROPOSED DECISION**

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Sacramento, California, on March 11, 2020.

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

Adam Koslin, Attorney, represented Respondents 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 August 1, 2019 the Respondent, through their agent or employee, Richard Childs, sold, furnished, or gave alcoholic beverages to A.H.[1], an individual under the age of 21 in violation of Business and Professions Code section 25658(a)[2] (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 March 11, 2020.

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[1] In this matter, the Decoy used by the Department was under 18 years of age at the time of the hearing. He is referred to by his initials in this proposed decision to protect his privacy.
[2] All statutory references are to the Business and Professions Code unless otherwise noted.

FINDINGS OF FACT

1. The Department filed the accusation on November 8, 2019. (Exhibit D-1)

2. On June 22, 2009 the Department issued a type 21, off-sale general license to the Respondent for the above-described location (the Licensed Premises). The following is the record of prior Department discipline against the Respondents' license as established by official records introduced by the Department (Exhibits D-2 and D-3):

Violation Date	Violation	Registration Date	Registration Number	Penalty
10/17/2014	25658(a)	01/15/2015	15081853	10 day suspension
05/7/2014	25658(a)	07/16/2014	14080809	15 day suspension

3. A.H. was born on June 2, 2002 and was 17 years old on August 1, 2019. On that date, A.H. served as a minor decoy in an operation conducted by the Department at various locations, including the Licensed Premises.

4. A.H. appeared and testified at the hearing. On March 11, 2020 his appearance was generally as depicted in an image that was taken during the operation on August 1, 2019. (Exhibit D-5) His face was also as depicted in an image of his California driver's license that was submitted into evidence. (Exhibit D-4) During the operation on August 1, 2019, A.H. wore a navy blue t-shirt, with no logos or graphics, and light grey khaki trousers. He was not wearing any visible jewelry. A.H.'s face was fully exposed, and his hair was combed to the side in a neat haircut. A.H. was clean shaven during the operation. (Exhibit D-5) A.H. was approximately 5 feet, 10 inches tall and 155 pounds at the hearing. A.H. credibly testified that his size and appearance on the date of the operation were essentially the same.

5. On August 1, 2019 A.H. went to the Licensed Premises with three agents from the Department for the purpose of trying to buy alcohol. A.H. was instructed about the requirements of 141[3]. He was told to carry his identification, show it if requested, and to be truthful regarding his age if asked. A.H. carried his California driver's license to produce if asked. A.H. was briefed prior to his attempt to purchase alcohol.

6. A.H. entered the Licensed Premises during the afternoon hours of August 1, 2019. Department Agent D. McLaughlin (McLaughlin) entered the Licensed Premises separate from A.H. and observed A.H. from a distance inside of the Licensed Premises. After entering, he searched for the beer coolers. After finding them, A.H. selected a 12-pack case of 8 ounce Bud Light beer cans. A.H. took the beer to the line for the registers. There were customers in line, so

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

A.H. waited behind them for the next available clerk. After one of the registers opened, A.H. approached the male clerk working that register. A.H. presented the 12-pack of Bud Light beer to the clerk for purchase.

7. The clerk took the beer and scanned it for purchase. The clerk then asked A.H. for his identification. A.H. handed his California Driver's license to the clerk. Because A.H. was only 17 years old, his license was in a portrait orientation. In addition, it had a red bar next to his picture that said he would not be 21 until 2023 and a blue bar directly under the red bar that said he was turning 18 years old in 2020. The clerk took this license and looked at it for approximately two seconds. The clerk then handed the license back to A.H. Despite the information on the license, the clerk did not stop the transaction or refuse the sale. The clerk told A.H. the total cost of the beer. A.H. then paid the clerk for the beer in cash. A.H. took possession of the beer and the change the clerk handed to him. A.H. then left the Licensed Premises with these items and stood outside. McLoughlin watched the entire sale to A.H. by the clerk. After the clerk sold A.H. the 12 pack of beer, he appeared to be going on a break or potentially leaving the Licensed Premises. To prevent the clerk from leaving, McLoughlin approached the clerk, identified himself as a Department agent, and told him that he had just sold beer to a minor.

8. After A.H. stood outside, the other two agents approached him. A.H. told them what had just happened in the Licensed Premises. The agents then went into the Licensed Premises with A.H. and approached the counter where McLoughlin was speaking with the clerk about the sale to A.H.

9. While standing directly across from the clerk, A.H. was asked to identify the clerk who sold him the beer. A.H. stated that the clerk who McLaughlin detained sold him the beer. A.H. and the clerk were directly across the counter from each other when A.H. said this. The clerk looked at McLaughlin and then A.H. while A.H. was saying this. The clerk was identified as Richard Childs (Childs) during McLaughlin's investigation of the sale to A.H. After the identification, A.H. went to the Department vehicle that was used to drive him there to wait for the agents.

10. Childs was photographed while seated in the Department vehicle while he held the Bud Light 12-pack. (Exhibit D-5) Prior to leaving, A.H. was in the immediate presence of Childs and the Department agents from when he walked up with the two agents until after his identification of Childs. Childs was subsequently issued a citation for the sale.[4]

11. A.H. had served as a decoy on multiple occasions prior to August 1, 2019. A.H. became involved as a decoy as the result of a friend who had previously served as a decoy. Based on A.H.'s overall appearance, i.e., his physical appearance, clothing, poise, demeanor, maturity, and

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[4] In this matter, evidence was received that the citation referenced 1530 hours (Exhibit L-1) and the receipt for the sale referenced 3:31 pm. Licensee later argued that this established that the citation was prepared prior to the violation. On its face, Exhibit L-1 clearly notes that the date and time indicated references the time of the alleged violation, not the time of issuance of the citation.

mannerisms shown at the hearing, and his appearance and conduct in front of Childs at the Licensed Premises on August 1, 2019, A.H. displayed the appearance which would generally be expected of a person less than 21 years of age during his interactions with Childs. A.H.'s appearance was consistent with his chronological age. Childs did not testify in this matter to explain his age related impressions of A.H. or why he sold A.H. alcohol without asking age related questions, even though A.H. presented an identification that clearly showed he was 17 years old.

12. Sydney Brandon (Brandon) testified for the Respondent. She is the operations supervisor for the Licensed Premises. Brandon is familiar with the policies and procedures of the Licensed Premises and is actively involved in its operation. According to Brandon, the Licensed Premises requires all employees serving as clerks to comply with state law and check for identification when making alcohol sales in any situation where the customer appears to be less than 40 years of age. The scanning of an alcoholic beverage would have automatically triggered the requirement to enter the date of birth on the identification. No evidence was presented that the date of birth could be scanned from the presented license. The evidence received was that the clerk would enter a date manually. Had A.H.'s actual birthdate been entered; the sale would have been refused. Based on this, Brandon concluded that A.H. had to have entered an inaccurate birthdate that was old enough to allow the sale to go through. Brandon said that she became aware, just after the event, of the sale made by Childs to A.H. Brandon testified that Childs violated protocols he had been specifically trained in by making the sale to A.H. Records introduced by the Respondent showed that Childs had received the new employee and register training that covered alcohol sales protocols. (Exhibits L-3. L-4, and L-5) Consistent with the Respondent's policies, Childs was placed on leave on the date of the incident. Childs was subsequently terminated after the Respondent's investigation.

13. 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 August 1, 2019 the Respondent's clerk, Richard Childs inside the Licensed Premises, sold an alcoholic beverage to A.H., a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 2-12)

5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141 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 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. There is no credible evidence supporting the assertions by the Respondent that there was a failure to comply with rule 141. Regarding the rule 141(b)(5) violation, *Acapulco Restaurants, Inc. v. Alcoholic Beverages Control Appeals Board* (1998) 67 Cal.App.4th 575 confirmed that a face to face must occur for compliance, but that case never established a baseline standard for what was a compliant face to face identification. The subsequent decision in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1687 held 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. This decision confirmed that the purpose of the face to face was to give the seller notice of who the decoy was.

7. Further clarification of what constituted a compliant face to face occurred in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2017) 18 Cal.App.5th 541. This case is particularly helpful since the identification by Childs of A.H. in this matter was substantively similar to the identification that was found to be compliant with rule 141(c) in that case. In finding that 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* (2017) 18 Cal.App.5th 541, 547

8. While, general due process considerations demand a fair identification be facilitated by law enforcement, these cases make clear that this particular regulation is focused on the narrower 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. When McLaughlin became concerned that Childs would leave, he approached Childs at the counter, got his attention and identified himself as a Department agent investigating the sale of alcohol to a minor. While the sale to A.H. was discussed between McLaughlin and Childs at the counter, A.H. entered the Licensed Premises with the other agents. A.H. and the two other agents then approached McLaughlin and Childs. In the immediate presence of Childs, A.H. was asked to identify the seller. A.H. verbally identified Childs as the seller while standing directly across the counter from him. Childs was clearly aware that the decoy was A.H. because he looked at him and McLaughlin during the verbal identification. Childs clearly came face to face with A.H. under circumstances that made it clear that Childs had been identified as the person who sold A.H. beer and that A.H. was the minor at issue. (Findings of Fact ¶¶ 3-12)

10. None of the evidence presented by the Respondent rebutted the credible evidence presented by the Department that this was a fully compliant identification that allowed Childs to become aware that A.H. 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)(5), the Respondent's assertions that compliance did not occur are unsupported. (Findings of Fact ¶¶ 3-12)

11. Respondent also asserted, without support, that the appearance of the decoy did not comply with rule 141(b)(2). As noted above, Childs did not testify in this matter to establish that his sale to A.H., without asking age related questions, was the result of A.H.'s appearance. Further, Childs had specific information that A.H. was 17 years old since A.H. had produced his California driver's license. A.H. testified in this matter and his appearance matched the appearance he presented to Childs on the date of the operation. A.H. had the appearance "which could generally be expected of a person under 21 years of age" which is the standard required by rule 141(b)(2). As previously noted, the clerk did not testify to establish facts suggesting an identification issue or whether there was anything in A.H.'s actions, manner, or appearance that led Childs to reasonably conclude that A.H. was over 21. The Department has established compliance with rule 141(b)(2) and the Respondent has failed to rebut this evidence. (Findings of Fact ¶¶ 3-12)

PENALTY

The standard penalty in this matter would be a 15 day suspension.

The Department recommended that the Respondent's license be suspended for 20 days. This is an upward departure from the presumptive standard penalty. The Department cited two factors in aggravation. The appearance and actual age of the Decoy was one cited aggravating factor. The existence of two prior 2014 violations of the same section was the other factor.

The Respondent argued for a 10 day penalty, if the Accusation were sustained, based on the evidence that the Respondent has training protocols to prevent alcohol sales and that the Respondent enforces its rules as evidenced by the termination of Childs after the incident.

Evidence was presented regarding the Respondent's policies to prevent sales of alcoholic beverages to underage individuals. The training and the register protocols used by the Respondent are aids in preventing unlawful alcohol sales to minors. The fact that a termination occurred also shows that the Licensee is taking steps to ensure that employees comply with its written policies.

However, the Respondent has been licensed since June 2009 and this is now their third incident. It is noted that two incidents happened in close succession in 2014 and that it has been five years since any other incidents have occurred. While these priors are outside of the statutory period for use as enhancements, they are still appropriately considered as part of the history of non-compliance by the Respondent. The facts showing the Respondent's training and enforcement of policies do support some mitigation. However, the Department has also shown that repeated violations are still occurring and that a 17 year old was sold alcohol in the Licensed Premises.

Mitigation is found to be in balance with the aggravation. The penalty recommended herein complies with rule 144.

ORDER

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

Dated: March 12, 2020

Alberto Roldan
Administrative Law Judge

☑ Adopt

☐ Non-Adopt: _____

_____

By: _____

Date: 4/23/20