

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

AB-9874

File: 21-477846; Reg: 19089188

GARFIELD BEACH CVS, LLC and
LONGS DRUGS STORES CALIFORNIA, LLC,
dba CVS Pharmacy #3039
1966 Main Street
Watsonville, CA 95076,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: October 1, 2020
Telephonic

ISSUED OCTOBER 5, 2020

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

Respondent: Patrice Huber, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

Garfield Beach CVS, LLC and Longs Drugs Stores California, LLC, doing
business as CVS Pharmacy #3039 (appellants), appeal from a decision of the
Department of Alcoholic Beverage Control¹ suspending their license for ten days

¹ The decision of the Department, dated April 10, 2020, is set forth in the
appendix.

because their clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code² section 25658(a).

FACTS AND PROCEDURAL HISTORY

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

On September 6, 2019, the Department filed a single-count accusation against appellants charging that, on April 6, 2019, appellants' clerk, Brandy Silva-Valencia (the clerk), sold an alcoholic beverage to 18-year-old Samuel Fernandez Vasquez (the decoy). Although not noted in the accusation, the decoy was working for the Watsonville Police Department (WPD) at the time.

At the administrative hearing held on January 7, 2020, documentary evidence was received, and testimony concerning the sale was presented by the decoy and WPD Officer Fernando Lopez. Appellant did not present any witnesses.

Evidence established that on April 6, 2019, the decoy entered the licensed premises and went to the cooler where beer was on display. The decoy selected a three-pack of Modelo beer cans, took the beer to the register and waited in line. When one of the registers became available, the decoy presented the beer to the clerk for purchase.

After exchanging pleasantries with the decoy, the clerk took the beer and began to process the purchase. The clerk rang up the beer for sale and asked the decoy for identification. The decoy produced his valid California driver's license and handed it to

² All statutory references are to the Business and Professions Code unless otherwise stated.

the clerk. The clerk did not ask the decoy any age-related questions, even though the decoy's license was in a portrait format and it showed that he would not be 21 until 2021. (Exh. D-4.)

The clerk told the decoy the amount for the beer and the decoy paid in cash. The decoy took possession of the beer and his change from the clerk, then exited the licensed premises. Once outside, the decoy approached an unmarked vehicle where WPD officers were waiting.

The decoy re-entered the licensed premises with WPD officers. Officer Lopez was already inside the licensed premises at this time, as he had entered prior to the sale to the decoy and watched the transaction from inside. One of the officers asked the decoy who made the sale, and the decoy pointed to the clerk. This was the same clerk who Officer Lopez had watched make the sale to the decoy a few minutes earlier. The officers approached the clerk, identified themselves, and told her about the decoy operation. Officers asked the clerk for her identification, but she indicated it was in the employee locker room of the licensed premises. Officer accompanied her to the locker room so she could retrieve it.

After the clerk retrieved her identification, a photograph of her and the decoy was taken. (Exh. D-5.) The clerk was subsequently cited for the sale.

The administrative law judge (ALJ) issued a proposed decision on February 3, 2020 sustaining the accusation and recommended a 10-day suspension. The Department adopted the proposed decision in its entirety on April 6, 2020 and issued a certificate of decision four days later. Appellants filed a timely appeal contending that the Department's decision is not supported by substantial evidence.

DISCUSSION

Appellants contend that the Department's finding that the decoy displayed an appearance "which could generally be expected of a person under 21" is not supported by substantial evidence. (AOB, at pp. 5-8.) Specifically, appellants argue that the Department's finding was improper because it was "based on the appearance of the decoy at the hearing, rather than how the decoy appeared before the seller, or even how he appeared on the day of the operation." (*Id.* at p. 6.) Appellants further maintain that the decoy did not comply with the appearance requirements of rule 141(b)(2)³ because of his prior decoy involvement, experience as a police cadet, and "tall bearing and athletic build." (*Id.* at p. 8.)

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.

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.)

Here, the Department found that the decoy's appearance complied with rule 141(b)(2). (Conclusions of Law ¶¶ 11.) Therefore, this Board is required to defer to those findings so long as they are supported by substantial evidence. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Southland)* (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652, 659] [citing *Kirby v. Alcoholic Beverage Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67

³ All references to rule 141 and its subdivisions are to title 4 of the California Code of Regulations section 141.

Cal.Rptr. 628] [“In considering the sufficiency of the evidence issue the court is governed by the substantial evidence rule[;] any conflict in the evidence is resolved in favor of the decision; and every reasonably deducible inference in support thereof will be indulged. [Citations.]”; see also *Kirby v. Alcoholic Bev. etc. Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815] [“When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the department.”].) “Substantial evidence” is “evidence of ponderable legal significance, which is ‘reasonable in nature, credible and of solid value.’ ” (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 814 [38 Cal.Rptr.2d 304, 307–308], internal citations omitted.)

In its decision, the Department rejected appellants’ arguments that the decoy’s physical appearance did not comply with rule 141(b)(2). The Department found that:

[...] Silva did not testify in this matter to establish that her sale to Vasquez was the result of Vasquez’s appearance. Silva asked for, and was provided, identification that clearly showed Vasquez was underage. Vasquez and Silva only had a short exchange of pleasantries at the start of the transaction. After obtaining and returning Vasquez’ identification, Silva only stated the price of the beer, so the exchanges between her and Vasquez were minimal. Further, Vasquez testified in this matter and his appearance matched the appearance he presented to Silva on the date of the operation. Vasquez 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 Vasquez’s actions, manner, or appearance that led Silva to reasonably conclude that Vasquez 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.)

(Conclusions of Law, ¶ 11.) As noted above, “we are bound to construe the evidence in the light most favorable to the ALJ’s decision” and will uphold the findings so long as

they are supported by substantial evidence. (*Southland, supra*, 103 Cal.App.4th at 1087.)

To support its findings, the Department relied on a photograph of the decoy from the day of the operation. (Exhs. D-3-D-5; Findings of Fact, ¶¶ 4, 7, 10.) Photographs of a decoy from the day of the operation are “arguably the most important piece of evidence in considering whether the decoy displayed the physical appearance of someone under 21 years of age.” (*Southland, supra*, 103 Cal.App.4th at 1094.) Further, the Department relied on the ALJ’s personal observations of the decoy’s appearance at the hearing. The evidence established that the decoy was approximately five feet, 11 inches tall and 180 pounds at the administrative hearing. (Findings of Fact, ¶ 4.) The ALJ found the decoy credibly testified “that his size and appearance on April 6, 2019 were essentially the same.” (*Id.* at ¶ 4; RT at pp. 16:2-3; 27:25-28:2; 61:1-5.)

The Department is entitled to rely on an ALJ’s personal observations of a decoy when the decoy testifies that his appearance and mannerisms were “the same on the stand as it was when he purchased the beer.” (*Southland, supra*, 103 Cal.App.4th at 1094.) The Board sees no error with the Department’s findings regarding the decoy’s appearance, which are supported by the photographs of the decoy from the date of the operation, as well as the ALJ’s personal observations of the decoy at the hearing. Both sources are “reasonable in nature, credible and of solid value.” (*County of Los Angeles, supra*, 32 Cal.App.4th at 814.)

Appellants also contend that certain non-physical factors, such as the decoy’s law enforcement experience and prior decoy operations made him appear older than 21 years old. (AOB at p. 8.) However, as noted by the Department, there is no evidence

in the record that the clerk sold alcohol to the decoy based on his experience or demeanor. As the Department noted, the clerk did not testify. Thus, there is no evidence as to why the clerk sold beer to the decoy and rejected the decoy's true identification which showed him to be underage.

Based on the above, the Department's findings regarding the decoy's appearance must stand. Ultimately, appellants are asking this Board to second-guess the Department and reach a different result. Extensive legal authority prohibits this Board from doing so. (*Southland, supra*, 103 Cal.App.4th at 1094.)

ORDER

The decision of the Department is affirmed.⁴

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

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.

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 STORE 3039
1966 MAIN ST
WATSONVILLE, CA 95076-3066

SALINAS DISTRICT OFFICE

File: 21-477846

Reg: 19089188

AB: 9874

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 July 16, 2020, in the City of Sacramento, County of Sacramento, State of California.



Office of Legal Services

**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 3039
1966 MAIN STREET
WATSONVILLE, CA 95076-3066

OFF-SALE GENERAL - LICENSE

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

SALINAS DISTRICT OFFICE

File: 21-477846

Reg: 19089188

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 6, 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 May 21, 2020, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: April 10, 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,	}	File: 21-477846
Long Drug Stores California, LLC	}	
DBA: CVS Pharmacy Store 3039	}	Registration: 19089188
1966 Main Street	}	
Watsonville, California 95076-3066	}	License Type: 21
	}	
Respondent	}	Page Count: 58
	}	
	}	Reporter:
	}	Brooke Meyer-CSR # 13886
	}	Atkinson Baker
	}	
<u>Off-Sale General License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Capitola, California, on January 7, 2020.

Patrice Huber, Attorney, represented the Department of Alcoholic Beverage Control (Department).

Adam Koslin, Attorney, represented Respondents Garfield Beach CVS, LLC and Long Drug Stores California, LLC. (Respondent)

The Department seeks to discipline the Respondent's license on the grounds that, on or about April 6, 2019 the Respondent-Licensee's agent or employee, Brandy Silva-Valencia, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Samuel Fernandez Vazquez (sic), an individual under the age of 21 years, 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 January 7, 2020.

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

FINDINGS OF FACT

1. The Department filed the accusation on September 6, 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). There is no record of prior Department discipline against the Respondent's license.
3. Samuel Fernandez Vasquez (Vasquez) was born on July 6, 2000 and was 18 years old on April 6, 2019. On that date, Vasquez served as a decoy in an operation conducted by the Watsonville Police Department (WPD) at various locations, including the Licensed Premises.
4. Vasquez appeared and testified at the hearing. On January 7, 2020 his appearance was generally as depicted in images that were taken during the operation on April 6, 2019. (Exhibits D-2 and D-3) His face was as depicted in an image of his California driver's license that was submitted into evidence. (Exhibit D-4) During the operation, Vasquez wore a waist length, black, cloth jacket with the zipper open. Vasquez wore a dark, collared, polo style shirt over a black t-shirt. He wore dark jeans and black and white athletic shoes. Vasquez had no visible jewelry. His face was fully exposed, and his hair was combed to the side in a short, military style haircut. Vasquez was clean shaven during the operation and he had visible acne. (Exhibit D-2) Vasquez was approximately 5 feet, 11 inches tall and 180 pounds at the hearing. Vasquez credibly testified that his size and appearance on April 6, 2019 were essentially the same.
5. On April 6, 2019 Vasquez went to the Licensed Premises with officers from the WPD for the purpose of trying to buy alcohol. They arrived in an unmarked vehicle. Vasquez was generally instructed about the requirements of 141². Vasquez was told to be truthful regarding his age if asked. Vasquez carried his California driver's license to produce if asked. Vasquez was briefed prior to his attempt to purchase alcohol.
6. Vasquez entered the Licensed Premises at approximately 3 p.m. on April 6, 2019. One of the WPD officers went into the Licensed Premises prior to Vasquez but they did not interact during his attempt to purchase alcohol. After entering, Vasquez went to the cooler where beer was on display. Vasquez selected a three-pack of Modelo beer cans. Vasquez took the beer to the line for the register. There was a single line for the two open registers, so Vasquez waited in line behind another customer for the next available clerk.

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

Vasquez approached one of the registers after it became available. Vasquez presented the three-pack of Modelo beer cans to the clerk at that register for purchase.

7. This clerk was the same individual in the image that was later taken of Vasquez standing next to the person who sold him beer. (Exhibit D-5) Vasquez and the clerk briefly exchanged pleasantries. The clerk then took the beer and began to process the purchase. After ringing up the beer, the clerk asked Vasquez for identification. Vasquez produced his California Driver's license and handed it to the clerk. After looking at the identification, the clerk did not ask Vasquez any age related questions even though his identification was in a portrait format and it showed that he would not be 21 until 2021. (Exhibit D-4) The clerk told Vasquez how much the beer was. Vasquez then paid the clerk for the beer in cash. Vasquez took possession of the beer and his change from the clerk. Vasquez left the Licensed Premises with the beer and his change. Vasquez approached the unmarked vehicle where some of the WPD officers were waiting.

8. Vasquez relayed to them what had just happened in the Licensed Premises. WPD Officer F. Lopez (Lopez) had also entered the Licensed Premises and watched the transaction from inside. Lopez was aware of the identity of the clerk who sold to Vasquez. Moments later, Vasquez, Lopez and these WPD officers met just inside the entrance to the Licensed Premises. Vasquez was asked about who made the sale. He pointed to the clerk working at the register where he made the beer purchase. This was the same clerk who Lopez had watched make the sale to Vasquez a few minutes earlier. One of the WPD officers approached this clerk, identified himself, and told her about the decoy operation. Vasquez and the other officers walked up to her register while this occurred. The clerk was asked for identification but did not have it with her at the register. She indicated it was in the employee locker room of the Licensed Premises. Vasquez, the WPD officers, and the clerk walked together back to the employee locker room so that the clerk could retrieve her license.

9. During the walk to the locker room, the sale to Vasquez was further discussed. In the locker room, Vasquez was asked to recap the sale. The clerk was present while Vasquez did this. After getting her license, the clerk identified herself as Brandy Silva-Valencia (Silva). Vasquez was asked to stand with the clerk who sold him the beer. Vasquez then stood directly next to Silva, the clerk who sold him the beer.

10. Silva was then photographed while standing next to Vasquez while Vasquez held the Modelo three-pack. (Exhibit D-5) From the initial law enforcement contact with Silva until after this photograph was taken; Vasquez was in the immediate presence of Silva and the WPD officers. Silva was subsequently issued a citation for the sale.

11. Vasquez had served as a decoy for over 15 operations for law enforcement agencies prior to April 6, 2019. Each of those operations involved multiple separate visits to attempt purchases. Vasquez became involved as a decoy as the result of his participation in an Explorer program for approximately four years. Because of his time in the Explorer program and his experience in being a decoy, Vasquez was not particularly nervous or hesitant during the transaction on April 6, 2019. Vasquez had been in the Licensed Premises on prior occasions, but he had never tried to purchase alcoholic beverages at that location. Vasquez did not have a fake identification.

12. Based on Vasquez's overall appearance, i.e., his physical appearance, clothing, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of Silva at the Licensed Premises on April 6, 2019, Vasquez displayed the appearance which would generally be expected of a person less than 21 years of age during his interactions with Silva. Silva did not testify in this matter to explain her age related impressions of Vasquez. Silva did not testify as to why she sold Vasquez beer, without asking age related questions, even though she had been presented identification showing Vasquez was 18, and even though Vasquez's appearance was consistent with someone who was under 21 years of age.

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 April 6, 2019 the Respondent's clerk, Brandy Silva-Valencia inside the Licensed Premises, sold an alcoholic beverage to Samuel Fernandez Vasquez, 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 Vasquez of Silva 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 makes clear that this particular regulation is focused on the 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. One of the WPD officers approached Silva at the counter, got her attention, and identified himself as a law enforcement officer investigating a sale of alcohol to a minor. The sale to Vasquez was discussed with Silva while Vasquez, the WPD officers and Silva walked to the employee locker room as a group. After they relocated to the employee locker room, Vasquez was asked by one of the WPD officers to recap the sale to him in the immediate presence of Silva. Vasquez then did so. Based on this, Silva was clearly made aware that the decoy was Vasquez. Further, before Silva was cited on April 6, 2019, Vasquez and Silva were photographed next to each other. (Findings of Fact ¶ 10 and Exhibit D-5) Silva clearly came face to face with Vasquez under circumstances that made it clear that Silva had been identified as the person who sold Vasquez beer and that Vasquez 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 Silva to become aware that Vasquez 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 that the appearance of the decoy did not comply with rule 141(b)(2). As noted above, Silva did not testify in this matter to establish that her sale to Vasquez was the result of Vasquez's appearance. Silva asked for, and was provided, identification that clearly showed Vasquez was underage. Vasquez and Silva only had a short exchange of pleasantries at the start of the transaction. After obtaining and returning Vasquez' identification, Silva only stated the price of the beer, so the exchanges between her and Vasquez were minimal. Further, Vasquez testified in this matter and his appearance matched the appearance he presented to Silva on the date of the operation. Vasquez 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 Vasquez's actions, manner, or appearance that led Silva to reasonably

Garfield Beach CVS, LLC,
Long Drug Stores California, LLC
DBA: CVS Pharmacy Store 3039
File: 21-477846
Registration: 19089188
Page 7

conclude that Vasquez 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 Department recommended that the Respondent's license be suspended for a mitigated penalty of 10 days because of the long period of licensure without prior discipline.

The Respondent argued for a 10 day all stayed penalty or a 5 day suspension, if the Accusation were sustained, based on the long period of licensure without prior incidents.

The Respondent has been licensed since June 22, 2009 and this is their first incident. This fact does support some mitigation. However, the significant mitigation sought by the Respondent is unsupported by any other factors in mitigation. No evidence was presented regarding the Respondent's policies to prevent sales of alcoholic beverages to underage individuals. The Respondent did not present any evidence of documented training or subsequent positive actions by the Respondent to correct the problem that led to the underage sale that occurred here.

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

Garfield Beach CVS, LLC,
Long Drug Stores California, LLC
DBA: CVS Pharmacy Store 3039
File: 21-477846
Registration: 19089188
Page 8


ORDER

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

Dated: February 3, 2020



Alberto Roldan
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>4/6/20</u>