

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

AB-9884

File: 21-479433; Reg: 19089094

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #9666
2419 Workman Street
Los Angeles, CA 90031-2319,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: November 6, 2020
Telephonic

ISSUED NOVEMBER 12, 2020

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

Respondent: Lisa Wong, 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 #9666 (appellants), appeal from a decision of the
Department of Alcoholic Beverage Control (Department)¹ suspending their license for 5
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 Under Government Code section 11517(c),
dated May 19, 2020, is set forth in the appendix as is the proposed decision dated
November 20, 2019 which was considered and rejected by the Department.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 3, 2009. There is no record of prior departmental discipline against the license.

On July 18, 2019, the Department filed an accusation against appellants charging that, on March 13, 2019, appellants' clerk, Eric Rascon (the clerk), sold an alcoholic beverage to 19-year-old Gissella Guzman (the decoy). Although not noted in the accusation, the decoy was working for the Los Angeles Police Department (LAPD) at the time.

At the administrative hearing held on October 15, 2019, documentary evidence was received and testimony concerning the sale was presented by the decoy and by LAPD Officer Geraldine Ruiz.

Testimony established that on March 13, 2019, Officer Ruiz entered the licensed premises in an undercover capacity followed shortly thereafter by the decoy. The decoy went to the coolers where she selected a three-pack of Bud Light beer in cans. She took the beer to the sales counter and waited in line. When it was her turn, the clerk scanned the beer, glanced at the decoy, then completed the sale without asking for identification and without asking any age-related questions. Officer Ruiz observed the transaction from inside the store.

The decoy exited the premises with the beer, then re-entered with LAPD officers. She was asked to identify the person who sold her the beer, and she identified the clerk by pointing at him and saying he was the one who sold her the beer. A photograph of the decoy and clerk was taken (exh. 4) and the clerk was issued a citation.

The administrative law judge (ALJ) issued a proposed decision on November 20, 2019, sustaining the accusation and recommending a 10-day suspension. The

Department considered and rejected the proposed decision and notified the parties, on January 7, 2020, that it would decide the matter itself pursuant to Government Code section 11517(c) and invited the parties to submit briefs addressing the following issues:

What mitigating or aggravating factors should affect the penalty imposed in this case? Specifically address the Respondent's length of discipline-free history.

What Penalty is appropriate for the violations found by the ALJ in the Proposed Decision?

It is appropriate for the department to set generalized guidelines as to mitigating weight of various lengths of discipline-free history?

Should the department set the above framework through the adoption of precedential decisions?

(Notice Pursuant To Government Code § 11517(c)(2)(E)(i).) Both parties submitted briefs. Thereafter, the Department issued its decision, sustaining the accusation and instituting a 5-day suspension.

Appellants then filed a timely appeal contending the decoy did not display the appearance generally expected of a person under the age of 21 as required by rule 141(b)(2).²

DISCUSSION

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.

² 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.

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 contend that the decoy's large stature, wearing of jewelry and mascara, training and experience as a LAPD cadet, and extensive participation in decoy operations, gave her a mature appearance not in accordance with the rule.

(AOB at pp. 2-7.)

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 at p. 114.)

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

5. Decoy Guzman appeared and testified at the hearing. On March 13, 2019, she was 5'4 ½" tall and weighed approximately 172 pounds. She wore a grey, long-sleeved shirt, light colored denim jeans, and Nike SB tennis shoes. Her hair was worn down, running to the length of her waist. She had acne on her face. She wore mascara, stud earrings, a necklace with her name thereon, and two rings, one on her left middle finger and the second on her left ring finger. (Exhibits 3 and 4.) Her appearance at the hearing was the same, except that her jeans were ripped at both knees and her right thigh, her stud earrings were smaller, and she wore additional ear piercings on the top of her ear lobes.^[fn.]

¶ . . . ¶

10. Decoy Guzman appeared her age 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 front of clerk Rascon at

the Licensed Premises on March 13, 2019, decoy Guzman displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk. In-person, decoy Guzman has a youthful appearance and looks her age. On March 13, 2019, decoy Guzman appeared to Officer Ruiz to be 19 years old.

11. March 13, 2019, was the 11th day of decoy operations in which decoy Guzman participated. She had never been to the Licensed Premises prior to March 13, 2019. Decoy Guzman learned about the decoy program through her service as a police cadet with the LAPD's Hollenbeck station. She has been a police cadet since 2014. Her cadet training includes physical training and teaches her police skills and procedures. She also learns how to interact with the public, such as how to greet people and what situations to expect. As a cadet she assists in community events at Dodger Stadium, giveaways, and marathons. Decoy Guzman believes her five years' cadet experience has made her a more confident person.

(Findings of Fact, ¶¶ 5-11.) Based on these findings, the Department addressed appellants' rule 141(b)(2) arguments:

6. With respect to rule 141(b)(2), Respondents argued decoy Guzman did not have the appearance of someone under the age of 21, because: (1) she has a matronly figure, (2) wore a lot of jewelry, including a ring on her left ring finger, which more commonly denotes engagement or marriage status, (3) Officer Ruiz testified the decoy had a clearer complexion on March 13, 2019, (4) the decoy testified she has been a cadet for five years, which experience has made her feel more confident, (5) she had previously participated in approximately 10 prior minor decoy operations, which level of experience tends to give a person a more calm, poised and mature demeanor.

7. This rule 141(b)(2) argument is rejected. The Respondents presented no evidence as to why clerk Rascon allegedly believed decoy Guzman to be over 21 years of age. Clerk Rascon did not testify. There was nothing about decoy Guzman's stature, complexion,^[fn.] demeanor, jewelry, cadet or minor decoy experience that made her appear older than her actual age or old enough to legally purchase alcoholic beverages. There was no evidence any of the cited factors had an impact on clerk Rascon in discerning the decoy's appearance or performing his duties. When viewing decoy Guzman in-person, she has a youthful appearance and looks her age. In fact, Officer Ruiz credibly testified that decoy Guzman appeared her age, that of a 19-year old, during the decoy operation. In other words, decoy Guzman had the appearance generally expected of a person under the age of 21.

(Conclusions of Law, ¶¶ 6-7.) We agree.

As this Board has said many times, minors come in all shapes and sizes and we are reluctant to suggest that a minor decoy automatically violates the rule based on his or her physical characteristics. (See, e.g., *7-Eleven/ NRG Convenience Stores* (2015) AB-9477; *7-Eleven Inc./Lobana* (2012) AB-9164.) 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." (Rule 141(b)(2).) In Findings of Fact paragraphs 5 through 11, and Conclusions of Law paragraphs 6 and 7, the Department found that the decoy met this standard, notwithstanding the details of the decoy's physical appearance highlighted by appellants such as her stature, jewelry, and mascara. We agree.

Appellants also argue that the decoy displayed a demeanor which was more mature and confident because of her experience as a LAPD cadet and as a decoy. They maintain this experience gave the decoy a confident demeanor which made her appear more mature. The Board has, however, rejected the "experienced decoy" argument many times. As the Board previously observed:

A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. . . . There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.

(*Azzam* (2001) AB-7631, at p. 5, emphasis in original.) This case is no different.

In a similar minor decoy case, where the Court of Appeal was tasked with determining whether an ALJ's assessment of the decoy's appearance was correct, the Court said that under the facts before them, while:

[O]ne could reasonably look at the photograph [of the decoy] and reasonably conclude that the decoy appeared to be older than 21 years of age, we cannot say that, as a matter of law, a trier of fact could not reasonably have concluded otherwise.

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (2002) 103

Cal.App.4th 1084, 1087 [127 Cal.Rptr.2d 652].) The instant case is no different. We do not believe the evidence supports a finding that the ALJ "could not reasonably have concluded otherwise." (*Ibid.*) As stated above, case law instructs us that when, as here, "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, supra*, 25 Cal.App.3d at p. 335.)

Appellants presented no evidence that the decoy's physical appearance or demeanor *actually resulted* in her displaying the 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 his mind in the course of the transaction, why he failed to ask for identification, or why he made the sale. There is simply no evidence to establish that the decoy's physical appearance or demeanor were the *actual reason* the clerk made the sale.

Ultimately, appellants are simply asking this Board to second guess the ALJ and reach a different conclusion, despite substantial evidence to support the findings in the decision. This we cannot do.

ORDER

The decision of the Department is affirmed.³

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

³ 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, and Longs Drug
Stores California LLC
Dbas: CVS Pharmacy 9666
2419 Workman Street
Los Angeles, California 90031-2319

Respondents

Off-Sale General License

File No.: 21-479433

Reg. No.: 19089094

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department May 19, 2020, for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held on October 15, 2019, before Administrative Law Judge D. Huebel, and the written arguments of the parties, adopts the following decision.

The Department seeks to discipline the Respondents' license on the grounds that, on or about March 13, 2019, the Respondents-Licensees' agent or employee, Eric Rascon, at the licensed premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Gissella Guzman, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 1.)

FINDINGS OF FACT

1. The Department filed the accusation on or about July 18, 2019.
2. The Department issued a type 21, off-sale general license to the Respondents for the above-described location on September 3, 2009 (the Licensed Premises).

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

3. There is no record of prior departmental discipline against the Respondents' license.

4. Gissella Guzman (Decoy Guzman) was born on October 13, 1999. On March 13, 2019, she was 19 years old. On that date she served as a minor decoy in an operation conducted by the Los Angeles Police Department's (LAPD) Hollenbeck station.

5. Decoy Guzman appeared and testified at the hearing. On March 13, 2019, she was 5'4 ½" tall and weighed approximately 172 pounds. She wore a grey, long-sleeved shirt, light colored denim jeans, and Nike SB tennis shoes. Her hair was worn down, running to the length of her waist. She had acne on her face. She wore mascara, stud earrings, a necklace with her name thereon, and two rings, one on her left middle finger and the second on her left ring finger. (Exhibits 3 and 4.) Her appearance at the hearing was the same, except that her jeans were ripped at both knees and her right thigh, her stud earrings were smaller, and she wore additional ear piercings on the top of her ear lobes².

6. On March 13, 2019, LAPD Officer Ruiz entered the Licensed Premises, in a plain clothes capacity, followed shortly thereafter by decoy Guzman. Decoy Guzman walked straight to the alcoholic beverage refrigerators and selected a three-pack of Bud Light beer cans. She brought the three-pack of beer to the sales counter for purchase and waited in line. There were five customers in line, including decoy Guzman.

7. Decoy Guzman eventually reached the sales counter, upon which she placed the three-pack of Bud Light beer. Clerk Eric Rascon (hereinafter referred to as clerk Rascon) glanced at decoy Guzman, scanned the beer, and told the decoy the cost of the beer. Clerk Rascon made no other statements to the decoy. Clerk Rascon did not ask decoy Guzman for her age or identification (ID). Decoy Guzman gave \$20 to clerk Rascon, who provided the decoy with change. Decoy Guzman took the change and the three-pack of Bud Light beer, then exited the store. Officer Ruiz could hear the transaction and witnessed it with a clear, unobstructed view from approximately two feet away. Officer Ruiz exited the store soon after decoy Guzman. While decoy Guzman was inside the Licensed Premises she did not communicate with Officer Ruiz.

8. Decoy Guzman re-entered the Licensed Premises with LAPD officers. Decoy Guzman was asked to identify the person who sold her the alcohol. Decoy Guzman pointed at clerk Rascon and said that he was the person who sold her the beer. Decoy Guzman and clerk Rascon were standing approximately three feet apart, with nothing between them, at the time of this identification. A photograph of clerk Rascon and decoy Guzman was taken after the face-to-

² Decoy Guzman's said earrings and piercings were not visible at the hearing because her long hair covered her ears. The undersigned had the decoy pull aside her hair to make the earrings visible.

face identification, with decoy Guzman holding the three-pack of Bud Light beer in her hands, with her California ID in her left hand, while standing next to clerk Rascon. (Exhibit 4.)

9. Clerk Rascon was issued a citation after the face-to-face identification. There was no evidence that clerk Rascon was distracted during the sales transaction or the face-to-face identification. Clerk Rascon did not appear at the hearing. There was no evidence that decoy Guzman's figure, complexion, demeanor, or jewelry had any effect on clerk Rascon's discernment of decoy Guzman's appearance or had any impact upon the clerk in the performance of his duties.

10. Decoy Guzman appeared her age 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 front of clerk Rascon at the Licensed Premises on March 13, 2019, decoy Guzman displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk. In-person, decoy Guzman has a youthful appearance and looks her age. On March 13, 2019, decoy Guzman appeared to Officer Ruiz to be 19 years old.

11. March 13, 2019, was the 11th day of decoy operations in which decoy Guzman participated. She had never been to the Licensed Premises prior to March 13, 2019. Decoy Guzman learned about the decoy program through her service as a police cadet with the LAPD's Hollenbeck station. She has been a police cadet since 2014. Her cadet training includes physical training and teaches her police skills and procedures. She also learns how to interact with the public, such as how to greet people and what situations to expect. As a cadet she assists in community events at Dodger Stadium, giveaways, and marathons. Decoy Guzman believes her five years' cadet experience has made her a more confident person.

12 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 March 13, 2019, the Respondents-Licensees' employee, clerk Eric Rascon, inside the Licensed Premises, sold alcoholic beverages, to-wit: a three-pack of Bud Light beer to Gissella Guzman, 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 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).
6. With respect to rule 141(b)(2), Respondents argued decoy Guzman did not have the appearance of someone under the age of 21, because: (1) she has a matronly figure, (2) wore a lot of jewelry, including a ring on her left ring finger, which more commonly denotes engagement or marriage status, (3) Officer Ruiz testified the decoy had a clearer complexion on March 13, 2019, (4) the decoy testified she has been a cadet for five years, which experience has made her feel more confident, (5) she had previously participated in approximately 10 prior minor decoy operations, which level of experience tends to give a person a more calm, poised and mature demeanor.
7. This rule 141(b)(2) argument is rejected. The Respondents presented no evidence as to why clerk Rascon allegedly believed decoy Guzman to be over 21 years of age. Clerk Rascon did not testify. There was nothing about decoy Guzman's stature, complexion⁴, demeanor, jewelry, cadet or minor decoy experience that made her appear older than her actual age or old enough to legally purchase alcoholic beverages. There was no evidence any of the cited factors had an impact on clerk Rascon in discerning the decoy's appearance or performing his duties. When viewing decoy Guzman in-person, she has a youthful appearance and looks her age. In fact, Officer Ruiz credibly testified that decoy Guzman appeared her age, that of a 19-year old,

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

⁴ Regarding Respondents' argument that Officer Ruiz testified the decoy had a clearer complexion on March 13, 2019, it is noted that while both witnesses testified credibly, decoy Guzman's testimony that she had the same level of acne at the hearing as on the day of the operation is given more credibility, since decoy Guzman knows her acne level better than anyone else. In looking at Exhibit 4 the decoy's acne is visible on her face. The minor difference in the testimony of these two witnesses do not call into question either's credibility.

during the decoy operation. In other words, decoy Guzman had the appearance generally expected of a person under the age of 21.

PENALTY

1. In assessing an appropriate measure of discipline, the Department's penalty guidelines are in California Code of Regulations, title 4, section 144. (Hereafter rule 144) Under rule 144, the presumptive penalty for a first violation of selling or furnishing an alcoholic beverage to a minor in violation of section 25658 is a 15-day license suspension.
2. Rule 144 also permits imposition of a modified penalty based on the presence of aggravating or mitigating factors. Rule 144 contains a non-exhaustive list of those factors. One of the aggravating factors listed is the: "Appearance and actual age of minor." One of the mitigating factors listed is: "Length of licensure at subject premises without prior discipline or problems."
3. At hearing, The Department requested the Respondents' license be suspended for a period of 15 days, based on the following factors: (1) the minor decoy's youthful appearance, (2) clerk Rascon's failure to ask for the decoy's ID or age to confirm whether the decoy was of majority, and (3) no evidence the Respondents took any steps to prevent future sales to minors.
4. Respondents recommended a 5-day mitigated penalty based on Respondents' nearly 10-year discipline-free history.
5. In assessing the proper penalty for this matter, rule 144 states that the "Appearance and actual age of minor" can be an aggravating factor. In this matter, the evidence established the decoy was 19 years old and met rule 141(b)(2)'s appearance standard. However, the decoy did not appear so youthful as to rise to be an aggravating factor in this case. The Department also argued that clerk Rascon did not ask for the decoy's identification or to disclose her age. There was no evidence presented as to why Rascon did not do so in this instance. Rascon's omission to do those things may have been caused by a myriad of factors. There is no evidence to point to the true cause. Therefore, Rascon's omission does not, in this matter, rise to the level of constituting an aggravating factor. In addition, while there was no evidence presented as to what training it gave its employees, including the clerk in this matter, absence of evidence of Respondents' actions to prevent future sales to minors is not an aggravating factor for penalty as argued by the Department.
6. Rule 144 lists length of licensure without disciplinary action as a factor in mitigation. Respondent's discipline-free operation for nearly ten years certainly merits mitigation. Rule 144

does not require it be shown how or why a lengthy term of discipline-free licensure occurred before it is deemed a mitigating factor, but only that such discipline-free term occurred.

7. Assessing the weight to be given to a length of licensure without discipline, absent other factors in aggravation or mitigation, can be difficult. However, in evaluating this factor, the Department generally considers a period of less the five years to offer no significant mitigation, resulting in no change to rule 144 recommendations. At the other end of the spectrum, in excess of ten years affords a licensee substantial mitigation, commonly resulting in an all-stayed suspension. The period between five years and ten years is more of a sliding scale between these two benchmarks, in which reasonable minds may differ as to relative weight to be applied, and how much is too great or too little. In the case at hand, almost ten years of discipline-free history is certainly closer to the ten-year end of the spectrum but does not in and of itself warrant an all-stayed suspension.

8. After weighing the aggravating and mitigating factors, some net reduction from the 15-day suspension called for in rule 144 is warranted. The penalty ordered below is a result of that assessment and complies with rule 144.

9. Except as set forth in this decision, all other arguments, contentions, and assertions raised by the parties with respect to the appropriate penalty are without merit.

ORDER

The Respondents' off-sale general license is hereby suspended for a period of 5 days.

Dated: May 19, 2020



Jacob A. Appelsmith
Director

Pursuant to Government Code section 11521(a), any party may petition for reconsideration of this decision. The Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or on the effective date of the decision, whichever is earlier.

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9, of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

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

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

GARFIELD BEACH CVS LLC, AND LONGS DRUG
STORES CALIFORNIA LLC
CVS PHARMACY 9666
2419 WORKMAN STREET
LOS ANGELES, CA 90031-2319

OFF-SALE GENERAL - LICENSE

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

CERRITOS ENFORCEMENT OFFICE

File: 21-479433

Reg: 19089094

CERTIFICATE OF DECISION

NOTICE CONCERNING PROPOSED DECISION


To the parties in the above-entitled proceedings:

You are hereby advised that the Department considered, but did not adopt, the Proposed Decision in the above titled matter and that the Department will itself decide the case pursuant to the provisions of Section 11517(c)(2)(E). A copy of the Proposed Decision has previously been sent to all parties.

The Department has requested that a transcript of the hearing be prepared. A copy of the record will be made available to you. Upon receipt of the hearing transcript, the Department will notify you of the cost of a copy of the record. At that time, you all also be advised of the date by which written argument if any, is to be submitted.

Sacramento, California

Dated: January 7, 2020



Matthew D. Botting
General Counsel

RECEIVED

JAN 07 2020

Alcoholic Beverage Control
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, and Longs Drug	}	File: 21-479433
Stores California LLC	}	
Dbas: CVS Pharmacy 9666	}	Reg.: 19089094
2419 Workman Street	}	
Los Angeles, California 90031-2319	}	License Type: 21
	}	
Respondents	}	Word Count: 8,337
	}	
	}	Reporter:
	}	Miranda Perez
	}	Kennedy Court Reporters
	}	
<u>Off-Sale General License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Cerritos, California, on October 15, 2019.

Lisa Wong, Attorney, represented the Department of Alcoholic Beverage Control (the Department).

Brian Washburn, Attorney, 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 March 13, 2019, the Respondents-Licensees' agent or employee, Eric Rascon, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Gissella Guzman, 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 October 15, 2019.

FINDINGS OF FACT

1. The Department filed the accusation on or about July 18, 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 3, 2009 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Gissella Guzman (hereinafter referred to as decoy Guzman) was born on October 13, 1999. On March 13, 2019, she was 19 years old. On that date she served as a minor decoy in an operation conducted by the Los Angeles Police Department's (LAPD) Hollenbeck station.
5. Decoy Guzman appeared and testified at the hearing. On March 13, 2019, she was 5'4 ½" tall and weighed approximately 172 pounds. She wore a grey, long-sleeved shirt, light colored denim jeans and Nike SB tennis shoes. Her hair was worn down, running to the length of her waist. She had acne on her face. She wore mascara, stud earrings, a necklace with her name thereon, and two rings, one on her left middle finger and the second on her left ring finger. (Exhibits 3 and 4.) Her appearance at the hearing was the same, except that her jeans were ripped at both knees and her right thigh, her stud earrings were smaller, and she wore additional ear piercings on the top of her ear lobes².
6. On March 13, 2019, LAPD Officer Ruiz entered the Licensed Premises, in a plain clothes capacity, followed shortly thereafter by decoy Guzman. Decoy Guzman walked straight to the alcoholic beverage refrigerators and selected a three-pack of Bud Light beer cans. She brought the three-pack of beer to the sales counter for purchase and waited in line. There were five customers in line, including decoy Guzman.
7. Decoy Guzman eventually reached the sales counter, upon which she placed the three-pack of Bud Light beer. Clerk Eric Rascon (hereinafter referred to as clerk Rascon) glanced at decoy Guzman, scanned the beer and told the decoy the cost of the beer. Clerk Rascon made no other statements to the decoy. Clerk Rascon did not ask decoy Guzman for her age or identification (ID). Decoy Guzman gave \$20 to clerk Rascon, who provided the decoy with change. Decoy Guzman took the change, the three-pack of Bud Light beer and exited the store. Officer Ruiz could hear the transaction and witnessed it with a clear, unobstructed view from approximately two feet away. Officer Ruiz exited the store soon after decoy Guzman. While decoy Guzman was inside the Licensed Premises she did not communicate with Officer Ruiz.
8. Decoy Guzman re-entered the Licensed Premises with LAPD officers. Decoy Guzman was asked to identify the person who sold her the alcohol. Decoy Guzman

² Decoy Guzman's said earrings and piercings were not visible at the hearing because her long hair covered her ears. The undersigned had the decoy pull aside her hair to make the earrings visible.

pointed at clerk Rascon and said that he was the person who sold her the beer. Decoy Guzman and clerk Rascon were standing approximately three feet apart, with nothing between them, at the time of this identification. A photograph of clerk Rascon and decoy Guzman was taken after the face-to-face identification, with decoy Guzman holding the three-pack of Bud Light beer in her hands, with her California ID in her left hand, while standing next to clerk Rascon. (Exhibit 4.)

9. Clerk Rascon was issued a citation after the face-to-face identification. There was no evidence that clerk Rascon was distracted during the sales transaction or the face-to-face identification. Clerk Rascon did not appear at the hearing. There was no evidence that decoy Guzman's figure, complexion, demeanor, or jewelry had any effect on clerk Rascon's discernment of decoy Guzman's appearance or had any impact upon the clerk in the performance of his duties.

10. Decoy Guzman appeared her age 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 front of clerk Rascon at the Licensed Premises on March 13, 2019, decoy Guzman displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk. In-person decoy Guzman has a youthful appearance and looks her age. On March 13, 2019, decoy Guzman appeared to Officer Ruiz to be 19 years old.

11. March 13, 2019, was the 11th day of decoy operations in which decoy Guzman participated. She had never been to the Licensed Premises prior to March 13, 2019. Decoy Guzman learned about the decoy program through her service as a police cadet with the LAPD's Hollenbeck station. She has been a police cadet since 2014. Her cadet training includes physical training and teaches her police skills and procedures. She also learns how to interact with the public, such as how to greet people and what situations to expect. As a cadet she assists in community events at Dodger Stadium, giveaways, and marathons. Decoy Guzman believes her five years' cadet experience has made her a more confident person.

12 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 March 13, 2019, the Respondents-Licensees' employee, clerk Eric Rascon, inside the Licensed Premises, sold alcoholic beverages, to-wit: a three-pack of Bud Light beer, to Gissella Guzman, 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 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).
6. With respect to rule 141(b)(2), Respondents argued decoy Guzman did not have the appearance of someone under the age of 21 because (1) she has a matronly figure, (2) wore a lot of jewelry, including a ring on her left ring finger, which more commonly denotes engagement or marriage status, (3) Officer Ruiz testified the decoy had a clearer complexion on March 13, 2019, (4) the decoy testified she has been a cadet for five years, which experience has made her feel more confident, (5) she had conducted approximately 10 prior minor decoy operations which level of experience tends to give a person a more calm, poised and mature demeanor.
7. This rule 141(b)(2) argument is rejected. The Respondents presented no evidence as to why clerk Rascon allegedly believed decoy Guzman to be over 21 years of age. Clerk Rascon did not testify. There was nothing about decoy Guzman's stature, complexion⁴,

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

⁴ Regarding Respondents' argument that Officer Ruiz testified the decoy had a clearer complexion on March 13, 2019, it is noted that while both witnesses testified credibly, decoy Guzman's testimony that she had the same level of acne at the hearing as on the day of the operation is given more credibility, since decoy Guzman knows her acne level better than anyone else. In looking at Exhibit 4 the decoy's acne is visible on her face. The minor difference in the testimony of these two witnesses do not call into question either's credibility.

demeanor, jewelry, cadet or minor decoy experience which made her appear older than her actual age; or appear old enough to legally purchase alcoholic beverages. There was no evidence any of the cited factors had an impact on clerk Rascon in discerning the decoy's appearance or performing his duties. When viewing decoy Guzman in-person she has a youthful appearance and looks her age. In fact, Officer Ruiz credibly testified that on said operation decoy Guzman appeared her age, that of a 19-year old. In other words, decoy Guzman had the appearance generally expected of a person under the age of 21.

PENALTY

The Department requested the Respondents' license be suspended for a period of 15 days, based on the following factors: (1) the minor decoy's youthful appearance, (2) clerk Rascon's failure to ask for the decoy's ID or age to confirm whether the decoy was of majority, and (3) no evidence the Respondents took any steps to prevent future sales to minors.


The Respondents recommended a 5-day mitigated penalty based on Respondents' nearly 10-year discipline-free history.

The Respondents are correct that their approximate nine-year, six-month discipline-free operation warrants some mitigation. The Respondents failed to show proof of documented training or positive action taken by the licensee to correct the problem. A question remains, just how clerk Rasco was able to sell alcohol to the minor decoy with the Respondents' cash register without requesting an ID. The penalty recommended herein complies with rule 144.

ORDER

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

Dated: November 20, 2019


D. Huebel
Administrative Law Judge

<input type="checkbox"/> Adopt
<input checked="" type="checkbox"/> Non-Adopt: _____
By: <u>James A. Applegate</u>
Date: <u>12/20/17</u>