

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

AB-9123

File: 21-477377 Reg: 10072342

GARFIELD BEACH CVS LLC and LONGS DRUG STORES CALIFORNIA LLC,
dba Longs Drug Store 9398
9618 West Pico Boulevard, Suite 501, Los Angeles, CA 90035-1279,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: June 2, 2011
Los Angeles, CA

ISSUED JULY 19, 2011

Garfield Beach CVS LLC and Longs Drug Stores California LLC, doing business as CVS Pharmacy Store 9398 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for appellants' clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Garfield Beach CVS LLC and Longs Drug Stores California LLC, appearing through their counsel, Soheyl Tahsildoost, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

¹ The decision of the Department, dated July 9, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On January 6, 2010, the Department filed an accusation against co-licensee Garfield Beach CVS LLC charging that, on October 23, 2009, appellants' clerk, Maria Medrano (the clerk), sold an alcoholic beverage to 19-year-old Salvador Sanchez. Although not noted in the accusation, Sanchez was working as a minor decoy for the Los Angeles Police Department (LAPD) at the time.

At the administrative hearing held on May 27, 2010, documentary evidence was received, and testimony concerning the sale was presented by Sanchez (the decoy) and by Wesley Ikeda and Todd Schmitz, LAPD police officers.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellants have filed an appeal making the following contentions: (1) the Department failed to meet its burden of proving that a sale to a minor occurred at appellants' licensed premises; and (2) there was no compliance with Rule 141(b)(2).

DISCUSSION

I

Juliet: "What's in a name? That which we call a rose
By any other name would smell as sweet."

Romeo and Juliet (II, ii, 1-2)

Two LAPD police officers (Ikeda [RT 9] and Schmitz [RT 18]) and the decoy [RT 23] testified that a sale to a minor took place at a Longs Drug Store located at 9618 *West Pico Boulevard* in Los Angeles. In the face of this testimony, appellants argue that the Department failed to prove that a sale to a minor occurred at the CVS licensed

premises at that address because the three Department witnesses referred to the premises as a “Longs Drug Store.”

The accusation in this matter was captioned “In the Matter of the Accusation Against GARFIELD BEACH CVS LLC, DBA: Longs Drug Store 9398,” at premises located at 9618 West Pico Boulevard, Suite 501, Los Angeles, CA 90035-1279. Appellants voiced no objection in their responsive pleadings to the manner in which the accusation was captioned. Their special notice of defense, their request for discovery, and their response to the Department’s request for discovery all used the same caption as had the accusation. It was not until appellants filed their appeal to this Board that they amended their pleading caption to more accurately identify the ownership of CVS Pharmacy Store 9398.²

At the administrative hearing, appellants’ counsel stated [RT 38]:

Mr. Evans: The other issue in this case is Ms. Wortham started off questioning, relating to the store as being CVS. And somewhere along the lines of questioning, she had changed to Long’s. I’ve driven by this location and my best recollection is that it is not a Long’s; it is a CVS. I called my office, I asked them to check the ABC website. Check if I’m right.

I ask that Your Honor take judicial notice and doing business as in the Department’s website indicated the location as CVS, not doing business as Long’s. So the testimony of the decoy and the officers about Long’s goes to the relevancy in this case.

²The caption to appellants’ Notice of Appeal states, in pertinent part:

Garfield Beach CVS LLC
Longs Drug Stores California LLC
DBA: CVS Pharmacy Store #9398

Appellants do not dispute that the sale to a minor decoy took place at the premises located at 9618 West Pico Boulevard in the city of Los Angeles, saying only that Department witnesses' testimony concerning the address was elicited by leading questions, to which, we should add, there were no objections. It follows, we think, that the licensees of the establishment at that location must be held responsible for that sale. Appellants assert in their brief (App. Br., p. 5), that "[t]he *store in question* operates as a CVS, not as a Longs ..." (italics added).

The fact that the police officers and the decoy referred to the store as a Longs Drug Store did not alter the fact that the illegal sale occurred at a premises operated by co-licensees Garfield Beach CVS LLC and Longs Drug Store California LLC. The violation was properly charged against one of the licensees operating the premises on the date of the sale, and there is no evidence that appellants were prejudiced in any way.

Given the rather obvious and compelling inference to be drawn concerning involvement of the Longs entity in the ownership and/or operation of the premises in question, we can only wonder why appellants bothered to raise an issue so lacking in merit.

II

Appellants contend that the 19-year-old decoy in this case did not display the appearance required by Rule 141(b)(2), i.e., that "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."

Appellants point to the decoy's physical build, his short haircut, and his experience as a police Explorer, arguing that his demeanor and poise would have contributed to an appearance not typical of somebody under 21.

We have said, many times, that we will not substitute our judgment for that of the administrative law judge (ALJ) in the absence of extraordinary circumstances, none of which are present here. The ALJ is in a far better position than we are to determine whether the decoy's appearance is within the parameters set by the rule.

We find little persuasive merit in the fact that the decoy might be physically well built or have a short hair cut, or that he had been an Explorer. The ALJ, who observed and heard the decoy as he testified, was not persuaded that those factors resulted in the decoy displaying an appearance of a person 21 years of age or older. Why, then, should we, who have not seen or heard him?

Our decisions defer to the trier of fact, and we will interfere only if the ALJ has applied clearly erroneous standards or ignored facts and circumstances which compel a contrary determination as a matter of law. This is not such a case.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³ This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.