

**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  
Dbas: CVS Pharmacy 7141  
291 S. Coombs St.  
Napa, CA 94559-4528

Licensee(s).

**File No.: 21-543010**

**Reg. No.: 22092061**

**PRECEDENTIAL DECISION**

**No. 23-01-E**

**DESIGNATION AS PRECEDENTIAL DECISION**

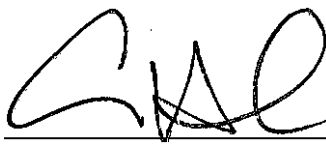
Pursuant to Government Code Section 11425.60, the Department of Alcoholic Beverage Control hereby designates, in part, as precedential its decision, dated January 13, 2023, in the above-referenced action.

The entirety of the decision, except for the portions of paragraph 19 and footnote 5 in the section entitled "Determination of Issues" identified by ~~strikeout~~ below, is designated as precedential.

19. While the Department presented some evidence related to the identification element of rule 141(b)(5), it was not the Department's burden to establish compliance with such requirements. ~~Rather, given that non-compliance is an affirmative defense, respondent had the burden to present substantial evidence establishing non-compliance.~~ Notably, respondent did not ask a single question of the decoy regarding the identification of Panetta as the seller of the alcohol, did not call Panetta as a witness, and did not present any independent evidence related to the identification process, instead relying exclusively on the limited testimony of the minor decoy in this regard. Simply because the Department presented some evidence while describing the sequence of events does not mean that the Department then assumed the burden to prove compliance with the rule. ~~In any event, the limited evidence the Department presented was not substantial evidence of non-compliance. The Department is not under an obligation to present any evidence of compliance absent respondent meeting its burden of presenting substantial evidence of non-compliance.~~ The evidence in the record here paints an incomplete picture of what did, or did not, happen, and it is not appropriate to simply fill in the gaps with speculation or to improperly shift the burden of proof to the Department. Absent sufficient evidence respondent has not met its burden to prove non-compliance with rule 141(b)(5) [Footnote 5].

[FN 5] To be clear, the determination here is not a consequence of which party introduced the evidence. ~~Rather, regardless of whether the evidence was presented by the Department or by respondent, it was not substantial evidence of non-compliance.~~

This decision is designated precedential effective May 26, 2023.

A handwritten signature in black ink, appearing to read 'Eric Hirata', written over a horizontal line. The signature is stylized and cursive.

ERIC HIRATA, Director  
Department of Alcoholic Beverage Control

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**DECISION UNDER GOVERNMENT CODE SECTION 11517(c)**

The above-entitled matter having regularly come before the Department on January 13, 2023, for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held via video on July 12, 2022, before Administrative Law Judge David W. Sakamoto, and good cause appearing, the following decision is hereby adopted:

Sean Klein, Attorney III, Office of Legal Services, Department of Alcoholic Beverage Control, represented the Department of Alcoholic Beverage Control (hereafter the Department).

Jade Quintero, attorney at law, of Solomon, Saltsman, and Jamieson, represented co-licensee respondents Garfield Beach CVS, LLC and Longs Drug Stores California, LLC (hereafter collectively respondent).

On July 12, 2022, after oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the video hearing regarding this accusation, the matter was argued by the parties and submitted to the ALJ for decision. The ALJ issued a proposed decision on August 3, 2022. The proposed decision was rejected by the Director pursuant to Government Code section 11517 by Notice dated September 20, 2022.

In this matter, the Department's accusation alleged cause for suspension or revocation of respondent's license exists under California Constitution, article XX, section 22, and California Business and Professions Code section 24200, subdivision (a) and (b), based on the following ground:<sup>1</sup>

Count 1: "On or about February 26, 2022, respondent-licensee's agent or employee, Anna Panetta, at said premises, sold, furnished, gave or caused to be sold, furnished, or given, an alcoholic beverage, to-

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<sup>1</sup> All further section references are to the California Business and Professions Code unless noted otherwise.

wit: beer, to Dylan Hirschensohn, a person under the age of 21 years, in violation of Business and Professions Code Section 25658(a)." (Exhibit 1: pre-hearing pleadings, Accusation)

### **FINDINGS OF FACT**

1. The Department filed the accusation on April 13, 2022. Thereafter, it received respondent's Notice of Defense and Special Notice of Defense requesting a video hearing on the accusation and the matter was set for a hearing. (Exhibit 1: pre-hearing pleadings.)
2. On April 23, 2014, the Department issued respondent a type-21 off-sale general retail license for their premises doing business as CVS Pharmacy #7141 at 291 Coombs Street, Napa, California (hereafter the licensed premises).<sup>2</sup>
3. Since being licensed, respondent has not suffered any prior disciplinary action.
4. Dylan Hirshenshon (hereafter the decoy) was born on February 2, 2004. On February 26, 2022, he, then 18 years old, assisted the Department of Alcoholic Beverage Control (hereafter ABC) with a minor decoy operation at the licensed premises. The decoy's role was to see if he could purchase an alcoholic beverage at the licensed premises despite being under 21 years of age. On that day, he was working with Alcoholic Beverage Control Agent Harkness (hereafter Agent Harkness) and a second ABC agent.
5. Upon the decoy's entrance to the licensed premises on February 26, 2022, he stood approximately 5' 10" tall and weighed approximately 220 pounds. He had dark shoulder length hair. He wore a blue jacket over a blue shirt. He wore long dark blue or black pants, resembling jogging suit pants. He was also wearing a dark blue or black face mask.<sup>3</sup>
6. The decoy entered the licensed premises alone while the two ABC agents remained outside the licensed premises.
7. Once inside the licensed premises, the decoy retrieved a single blue colored can of Bud Light beer that he took to the sales counter.
8. After a few minutes, respondent's employee, Anna Panetta (hereafter Panetta), came to the sales counter. She sold the single can beer to the decoy. The can of beer was the only item sold. Panetta

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<sup>2</sup> A type-21 license primarily permits the license-holder to retail beer, wine, and distilled spirits to the public for consumption off the licensed premises and minors are permitted to be on the licensed premises.

<sup>3</sup> During this time frame, people commonly wore facemasks due to the Covid-19 pandemic, especially in indoor public settings.

neither asked the decoy his age nor for him to produce any form of identification to confirm he was at least 21 years old.

9. Once the sale was completed, the decoy exited the licensed premises with his beer.

10. He joined the two ABC agents at their car and showed them the beer he just purchased. Approximately five minutes later, the decoy and the two ABC agents entered the licensed premises.

11. When the decoy was about three feet from the sales counter, he identified Panetta to the agents as the selling clerk. Panetta was at the counter ringing up another customer. Agent Harkness got her attention and identified themselves to her. The clerk looked surprised. Agent Harkness next told the clerk to look towards him and he took a photo that shows the decoy, who was holding the can of beer and standing on the customer side of the counter, and Panetta on the clerk's side of the counter. (Exhibit 5: photo) The decoy was taller than the clerk.<sup>4</sup> The decoy then exited the licensed premises.

12. Prior to this date, the decoy served as a decoy on approximately three other dates, visiting approximately no less than ten licensed premises each date. He received no training regarding decoy operations and volunteered to participate as a decoy. The decoy was the nephew of ABC Agent Harkness, but otherwise had no other law enforcement connections or law enforcement related training or experience, e.g., being a police explorer or police cadet.

13. The decoy did not feel nervous when acting as the decoy at the licensed premises. He visited approximately 10 licensed premises on February 26, 2022, and purchased an alcoholic beverage at four to six of them.

14. Anthony Aguilar-Short (hereafter Aguilar-Short) has been the manager at the licensed premises for the last six months. He is in charge of store operations, including the pharmacy.

15. He also oversees training of new employees, who receive three hours of training regarding respondent's rules and regulations. Also, employees receive annual training, which includes videos and assessment quizzes.

16. Respondent has a training handbook regarding sales practices at its store. (Exhibit A). It includes sections on procedures for retailing age-restricted products, such as alcoholic beverages and certain cough medicines. The licensed premises does not sell cigarettes. There is also training regarding detecting false identifications. The clerk herein was employed at the licensed premises for two or three years and should have been trained on the handbook's content.

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<sup>4</sup> The clerk's height, or estimate thereof, was never established.

17. After this incident, Aguilar-Short had one-on-one re-training sessions with all licensed premises employees. He informed his staff they must now check the identification of those purchasing age restricted products, such as alcoholic beverages, whether or not the customer appears old enough to make the purchase. This revised the former policy of checking identifications of those who did not appear at least 27 years old.

18. Aguilar-Short was at the licensed premises the day of the violation herein. He spoke briefly with the agent who informed him Panetta sold to a minor. He recalled they asked Panetta to sign a paper, possibly an admission or a citation of some kind, but he never learned for sure what she signed. Ultimately, he dismissed Panetta for selling beer to the decoy.

### **DETERMINATION OF ISSUES**

1. Article XX, section 22, of the California Constitution and section 24200, subdivision (a), provide 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, subdivision (b), provides that a licensee's violation of or causing or permitting 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, subdivision (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. Section 25658, subdivision (f), permits law enforcement officials to use persons under 21 years old to apprehend licensees, employees or agents or other persons who sell or furnish alcoholic beverages to minors.

5. The Department adopted and published a rule regarding the use of underage decoys. Under California Code of Regulations, title 4, section 141 (hereafter rule 141):

(a) A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

(b) The following minimum standards shall apply to actions filed pursuant to Business and Professions Code Section 25658 in which it is alleged that a minor decoy has purchased an alcoholic beverage:

(1) At the time of the operation, the decoy shall be less than 20 years of age;

(2) 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;

(3) A decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages;

(4) A decoy shall answer truthfully any questions about his or her age;

(5) 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.

(c) Failure to comply with this rule shall be a defense to any action brought pursuant to Business and Professions Code Section 25658.

6. Cause for suspension or revocation of respondent's license exists under California Constitution, article XX, section 22 and section 24200, subdivision (a) and (b). On February 26, 2022, respondent's agent or employee, Anna Panetta, upon the licensed premises, sold an alcoholic beverage, to wit: a can of Budweiser Light beer, to Dylan Hirschensohn, a person under the age of 21, in violation of section 25658, subdivision (a).

7. The evidence established respondent's employee, Panetta, sold beer, an alcoholic beverage, to the 18-year-old decoy. Panetta neither asked the decoy his age nor asked to view his identification to confirm he was at least 21 years of age.

8. Respondent contended the decoy did not meet the appearance standard described under rule 141(b)(2) that states: "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."

9. Non-compliance with the requirements of rule -141 is an affirmative defense. The burden of establishing such non-compliance is on respondent.

10. In this instance, the decoy was approximately 5' 10" tall and weighed approximately 220 pounds. He had shoulder length dark or black hair and was casually dressed in what resembled a jogging suit. His appearance as seen in Exhibits 3, 4, and 5 show an overall youthful appearing teenager that was consistent with his appearance and demeanor when he testified at the hearing. As this operation

occurred during the COVID-19 pandemic, the wearing of face mask by persons in enclosed public businesses to help control the spread of that disease was a common practice, if not legally required. There was no evidence the decoy wore his mask at the licensed premises for the purpose of concealing his appearance from Panetta. Panetta never asked the decoy to remove his mask so that she could view his face. Panetta did not testify at the hearing. There was no evidence Panetta, at any time, asserted to anyone she sold beer to the decoy because he appeared at least 21 years old.

11. While the decoy purchased alcoholic beverages on prior decoy operations and felt comfortable performing the decoy role at the licensed premises, it was not established that made him appear any older than his actual age, 18.

12. Based on the decoy's overall appearance, i.e., his physical appearance, persona, dress, poise, demeanor, maturity, and conduct, the decoy displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Panetta at the time she sold the decoy beer. Therefore, respondent failed to prove that the decoy did not meet the appearance standard for decoys specified in rule 141(b)(2).

13. Respondent also contended there was non-compliance with rule 141(b)(5), which states: "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."

14. In *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (Garfield Beach CVS, Real Parties in Interest)* (2017) 18 Cal. App. 5th 541 the court upheld the Department's decision that determined there was a sufficient face to face identification within the meaning of rule 141(b)(5) and it was not otherwise unfair wherein: the decoy identified the selling clerk to the officer when approximately 10 feet from the clerk; the officer informed the clerk she sold to a minor while the decoy was standing next to the officer; the clerk had ample opportunity to see the decoy and object to any perceived misidentification and did not so object; the clerk said she was sorry and, as described by the minor, she "freaked out"; and the clerk stood next to the decoy while the decoy was holding the beer and they were photographed together.

15. According to the decoy's testimony here, after the agents and decoy re-entered the licensed premises, and when the decoy was about three feet from the sales counter, he identified Panetta to the agents as the seller. At that time, Panetta was at the counter assisting another customer.

16. The decoy testified Agent Harkness then obtained Panetta's attention and identified "them" to her. The decoy testified she looked surprised but did not recall if she said anything at that time. There was no evidence presented establishing what Agent Harkness said to Panetta. Panetta did not testify in this



matter and there is no evidence of what she may or may not have known, perceived, or understood at the time this occurred.

17. The decoy testified Agent Harkness then told Panetta to look towards the agent who took a photo, Exhibit 5. That photograph shows the decoy standing on the customer side of the sales counter holding his can of beer. The decoy is facing away from the sales counter and towards the agent's camera. His back is towards Panetta. The photo shows Panetta standing on the clerk's side of the sales counter and somewhat looking in the direction of the agent's camera. No other customer(s) appear in the immediate area of the sales counter. At the hearing, the decoy also characterized the Exhibit 5 photo as his identifying Panetta as the selling clerk. Immediately after the photo was taken, the decoy testified he exited the licensed premises and never re-entered. The decoy had no information as to what, if anything, occurred or was said between the agents and Panetta after he exited the licensed premises.

18. There was no evidence presented what, if anything, was said between Agent Harkness or any other agent and Panetta other than the decoy's testimony that Agent Harkness identified himself/them to Panetta after the decoy had already identified her to the agents when Panetta was tending to a customer. There was no evidence of any statement made by any agent at any time informing Panetta she had just sold an alcoholic beverage to the decoy or that the decoy had identified her as one who sold him an alcoholic beverage. There was no evidence of any statement made by Panetta admitting or confirming she sold beer to the decoy. Similarly, there was no information that Panetta did not understand that she had been identified as the seller of alcohol to the decoy or that she was otherwise unaware of what was occurring.

19. While the Department presented some evidence related to the identification element of rule 141(b)(5), it was not the Department's burden to establish compliance with such requirements. Rather, given that non-compliance is an affirmative defense, respondent had the burden to present substantial evidence establishing non-compliance. Notably, respondent did not ask a single question of the decoy regarding the identification of Panetta as the seller of the alcohol, did not call Panetta as a witness, and did not present any independent evidence related to the identification process, instead relying exclusively on the limited testimony of the minor decoy in this regard. Simply because the Department presented some evidence while describing the sequence of events does not mean that the Department then assumed the burden to prove compliance with the rule. In any event, the limited evidence the Department presented was not substantial evidence of non-compliance. The Department is not under an obligation to present any evidence of compliance absent respondent meeting its burden of presenting substantial evidence of non-compliance. The evidence in the record here paints an incomplete picture of what did, or did not, happen, and it is not appropriate to simply fill in the gaps with speculation or to improperly shift the burden of proof to the Department. Absent sufficient evidence respondent has not met its burden to prove non-compliance with rule 141(b)(5) <sup>5</sup>.

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<sup>5</sup> To be clear, the determination here is not a consequence of which party introduced the evidence. Rather, regardless of whether the evidence was presented by the Department or by respondent, it was not substantial evidence of non-compliance.

20. Although respondent's manager testified that he recalled Panetta signing some document, possibly a confession or citation, he never saw or reviewed the actual document.<sup>6</sup> While an agent told him Panetta sold alcohol to the minor decoy, this does nothing to advance respondent's argument of non-compliance with the rule.
21. Based upon the totality of evidence presented at the hearing, there was insufficient evidence to establish that the face-to-face identification called for in rule 141(b)(5) was not conducted in a compliant manner. Therefore, a defense under rule 141(c) was not established.
22. In determining the appropriate level of discipline, consideration is given to respondent's almost eight years of licensure without prior discipline.
23. Except as set forth in this decision, all other allegations in the accusation and all other contentions made by the parties in the pleadings or at the hearing regarding those allegations lack merit.

**ORDER**

Count 1 of the accusation is sustained. Respondent's off-sale general license is suspended for a period of ten (10) days.

Sacramento, California Dated:

January 13, 2023



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Eric Hirata  
Director

Pursuant to Government Code section I 1521(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.

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<sup>6</sup> Exhibit 6, a copy of a purported citation issued to Panetta, was not admitted in evidence due to lack of authentication and foundation. Although arguments concerning this were requested upon review of the proposed decision, given the ultimate determination here it is unnecessary to consider whether this exhibit was properly excluded.