

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

AB-9708

File: 20-538155; Reg: 17085497

7-ELEVEN, INC. and GYTARI, INC.,
dba 7-Eleven Store #2365-27912D
2000 Lakeville Highway,
Petaluma, CA 94954-6710,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: David W. Sakamoto

Appeals Board Hearing: March 1, 2019
Sacramento, CA

ISSUED MARCH 6, 2019

Appearances: *Appellants:* Donna J. Hooper, of Solomon, Saltsman & Jamieson,
as counsel for 7-Eleven Inc and Gytari, Inc.,

Respondent: Joseph J. Scoleri III, as counsel for the Department
of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Gytari, Inc., doing business as 7-Eleven Store #2365-27912D,
appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending

¹The decision of the Department under Government Code section 11517,
subdivision (c), dated April 18, 2018, is set forth in the appendix.

Section 11517, subdivision (c)(2)(E) permits the Department to reject the
proposed decision—as it did here—and decide the case upon the record, including the
transcript of the hearing.

their license for 30 days because their clerk sold an alcoholic beverage to a Department minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 12, 2013. The president of co-licensee Gytari, Inc., Surinder Singh, has been a 7-Eleven franchisee at this store since 1993. She incorporated in 2013. There is one prior instance of discipline against the license for a previous 25658(a) violation.

On April 18, 2017, the Department filed a single-count accusation against appellants charging that, on December 16, 2016, appellants' clerk, Navneet Sangar (the clerk), sold an alcoholic beverage to 18-year-old Nicholas Mueller (the decoy). Although not noted in the accusation, the decoy was working for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on September 21, 2017, documentary evidence was received and testimony concerning the sale was presented by the decoy, by Department Agent Stefan Carlson, and by Surinder Singh, president and sole shareholder of co-licensee Gytari, Inc.

Testimony established that on December 16, 2016, the decoy entered the licensed premises and selected a three-pack of 25-ounce Budweiser beer in cans from the coolers. He took the beer to the counter and the clerk rang up the purchase without asking for identification and without asking any age-related questions. Agent Carlson witnessed the transaction from outside the store.

The decoy exited the premises and met with Agents Carlson and Clark. The

three of them then re-entered the premises. Carlson identified himself to the clerk as a Department Agent and informed him that he had sold alcohol to a minor. They all moved to a rear area of the store to talk further.

Agent Carlson asked the decoy who sold him the beer. The decoy pointed at the clerk and said that he was the one. The decoy and clerk were approximately three feet apart at the time, with a clear view of one another. The clerk stated that he made a mistake because he was in a hurry and that he usually checks identification. The clerk was subsequently cited and his employment was terminated.

The ALJ submitted his proposed decision on October 29, 2017, finding that a defense to the accusation had been established under rule 141(c). He noted that the decoy's height, weight, and dress gave him a "significant physical stature" and "imposing presence" which was not the appearance generally expected of a person under 21 years of age. (Proposed Decision at p. 5.) He recommended that the accusation be dismissed.

The Department declined to adopt the proposed decision on December 13, 2017. In its Notice Concerning Proposed Decision, dated December 18, 2017, the Department notified the parties that it would decide the case itself pursuant to section 11517(c)(2)(E).

On January 31, 2018, the Department issued a Notice Pursuant to Government Code Section 11517(c)(2)(E)(i), asking for written argument. Both parties submitted briefs. Appellants argued that the Department should not reject the ALJ's proposed decision, and that the ALJ had properly found that the accusation should be dismissed — on the basis that the decoy's appearance did not comport with the guidelines of rule

141(b)(2). Counsel for the Department argued that the ALJ's analysis was flawed, and that the decoy's appearance did meet the standard required by the rule.

On April 18, 2018, the Director issued a decision sustaining the accusation and ordering a 30-day suspension of the license.

Appellants then filed a timely appeal contending: (1) the Department improperly and arbitrarily reweighed the evidence and violated appellants' due process rights when the Director rejected the ALJ's decision and decided the case based on a review of the record, (2) the Department violated rules 141(a)² and 141(b)(2) by using a decoy who did not display the appearance generally expected of a person under the age of 21, and (3) the Department abused its discretion by ignoring mitigating evidence and using inappropriate aggravating factors to impose a punitive penalty.

DISCUSSION

I

Appellants contend that the Department improperly and arbitrarily reweighed the evidence and violated appellants' due process rights when the Director rejected the ALJ's decision and decided the case based on a review of the record. (AOB at p. 6.) They maintain the Department erred when it rejected the ALJ's findings on the decoy's appearance — which were based on his observation of the decoy at the hearing — and instead decided the matter based on the paper record alone. (*Id* at p. 7; ACB at 5.)

²References 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.

In the instant case, the Department rejected the ALJ's proposed decision and decided the case itself pursuant to Government Code section 11517, subdivision(c)(2), which provides, in pertinent part:

Within 100 days of receipt by the agency of the administrative law judge's proposed decision, the agency may act as prescribed in subparagraphs (A) to (E), inclusive. If the agency fails to act as prescribed in subparagraphs (A) to (E), inclusive, within 100 days of receipt of the proposed decision, the proposed decision shall be deemed adopted by the agency. The agency may do any of the following:

[¶ A . . . ¶ D]

(E) Reject the proposed decision, and decide the case upon the record, including the transcript, or upon an agreed statement of the parties, with or without taking additional evidence. By stipulation of the parties, the agency may decide the case upon the record without including the transcript. If the agency acts pursuant to this subparagraph, all of the following provisions apply: (i) A copy of the record shall be made available to the parties. The agency may require payment of fees covering direct costs of making the copy.(ii) The agency itself shall not decide any case provided for in this subdivision without affording the parties the opportunity to present either oral or written argument before the agency itself. If additional oral evidence is introduced before the agency itself, no agency member may vote unless the member heard the additional oral evidence.(iii) The authority of the agency itself to decide the case under this subdivision includes authority to decide some but not all issues in the case.[¶]

(Gov. Code, § 11517(c)(2), emphasis added.)

As an initial matter, it should be noted that when a case is decided under section 11517(c)(2)(E), the Appeals Board reviews only the Department's decision, *not* the ALJ's proposed (but rejected) decision. While the proposed decision plays a role in other subdivisions of section 11517(c)(2), under subparagraph (E), as the Department

notes in its brief, “the rejected proposed decision is a legal nullity, except for any portions that were adopted and incorporated by reference in the Department’s decision.” (RRB at p. 8.)

Government Code section 11517, subdivision (c)(2), provides that the Department may adopt a proposed decision in its entirety, adopt it with some modification, or reject it as it did here. If the Department rejects the decision, it may refer the matter back to the ALJ to take additional evidence or it may decide the matter itself, making its own findings, determinations, and order as it did here. When the Department issues its own decision, the rejected proposed decision “serves no identifiable function in the administrative adjudication process or, for that matter, in connection with the judicial review thereof.” (*Compton v. Bd. of Trustees* (1975) 49 Cal.App.3d 150, 158 [122 Cal.Rptr. 493].)

Therefore, the Board does not ask whether the Department’s decision is a better decision than the ALJ’s, but rather, whether the Department’s inferences and conclusions, standing alone, are reasonable, and whether its findings are supported by substantial evidence. The existence of a proposed but rejected decision reaching a different conclusion does not function as a evidentiary presumption bolstering appellant’s case.

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 questioned 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 [28 Cal.Rptr.74].*)

Appellants argue that the Department acted arbitrarily in according more weight to exhibit 6 — the Department's photos of the decoy — than to exhibits E, F, and G, offered by appellants. However, appellants ignore testimony in the record that the photos in exhibit 6 fairly depicted the decoy's appearance on the night of the decoy operation, as well as testimony that the photos were consistent with the decoy's appearance at the time he entered the licensed premises. (RT at pp. 29; 39.) Exhibits E, F, and G were not supported by any testimony, and the clerk did not appear at the administrative hearing to testify about how old the decoy appeared to him. The Department did not abuse its discretion in relying on the photographic evidence in

exhibit 6.

Similarly, appellants contend the Director erred because he decided the case on the written record and arguments of the parties, and failed to view the decoy in person. (AOB at p. 10.) Appellants have not cited a statute containing a requirement that the Director must personally observe the decoy. In their written argument to the Director, appellants argued entirely from the record of the proceedings. They did not request to present additional evidence nor did they request to have the Director view the decoy in person. Without such a request, and without reference to a statute compelling such an action, this contention is without merit.

In light of the whole record, the Director's inferences and conclusions are reasonable, and the decision is supported by substantial evidence.

II

Appellants contend that the Department violated rules 141(a) and 141(b)(2) by using a decoy who did not display the appearance generally expected of a person under the age of 21 and by rendering a decision without viewing the decoy in person. (AOB at pp. 8-10.)

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.)

Appellant maintains the Department used a decoy in this case that failed to comply with standards set forth in rule 141(b)(2). They argue that substantial evidence supports the rejected proposed decision of the ALJ, that the decoy possessed a “mature persona” at the hearing due to his height, weight, and attire. They further argue that the Director erred by rendering a decision without viewing the decoy in person.

Appellants maintain that these factors indicate unfairness, in violation of rule 141(a) which provides:

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.

The question of whether the decision is supported by substantial evidence 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*, at 114.)

This Board has stated many times that, in the absence of compelling reasons, it will ordinarily defer to the findings in the underlying decision on the issue of whether there was compliance with rule 141(b)(2). The Director made the following findings of

fact regarding the decoy's appearance:

6. When the decoy was at Respondent's premises on December 16, 2016, he was 6' 4" tall and weighed 235 pounds. He was wearing a white t-shirt, blue jeans, dark colored boots, and a light brown jacket. His hair was approximately a half-inch long. He appeared as depicted in photos taken of him that night and reflected in exhibits 5, 6a and 6b. Store video surveillance and still shots taken from such video showed high angles of the decoy in the premises (Exhibits E, F, and G).

(Findings of Fact, ¶ 6.) Based on his findings, the Director addressed appellant's rule

141(b)(2) defense:

2. In defense to the accusation, Respondent argued that the decoy did not meet the appearance standard set out in Rule 141(b)(2), which 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." Respondent focused on the physical aspects of the decoy's appearance, asserting that the decoy did not have the appearance that would be expected of an 18-year old because his height and weight were much greater than "average", and that the jacket he was wearing made him appear even larger.

[¶ . . . ¶]

5. Following rejection of the Administrative Law Judge's ("ALJ") proposed decision, Respondent argued that the ABC Appeals Board has consistently held that ALJ's should not focus their analysis solely on the physical characteristics of the decoy, but should also consider non-physical attributes, such as poise, demeanor, maturity, and mannerisms, as the ALJ here did. Respondent contends the ALJ had a unique perspective of the decoy's poise, mannerisms, and maturity, because the ALJ had the opportunity to observe the decoy on the stand during both direct and cross examination. In addition, because the decoy was wearing the same clothing on the night of the operation, Respondent further contends the ALJ was also able to observe the decoy testify much as he appeared when the alleged violation occurred.

6. Respondent further argued that the Department should defer to the ALJ's judgment as to the appearance of the decoy. In support of this, Respondent cites Government Code section 11425.50, which provides, "if the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any

specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it.” It thus follows, Respondent asserts, that since the ALJ was the only finder of fact to observe the decoy testify, deference should be given to his determination that the decoy did not meet the required characteristics.

7. Respondent is mistaken in its arguments, both at hearing and on review. The two key provisions of Rule 141(b)(2) are: first, the decoy’s appearance *could generally be expected* of a person under the age of 21 (not “average” or “usual”); and second, that the decoy’s appearance is determined based upon *the actual circumstances* presented to the seller *at the time* of the alleged offense. Since there is no over-arching principle of “fairness” beyond the five specific criteria listed in subdivision (b) (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (Garfield Beach CVS)* (2017) 7 Cal.App.5th 628, 638), a licensee seeking to meet its burden of establishing the affirmative defense under subdivision (c) may only rest on the language of Rule 141(b)(2). In doing so, if a decoy is actually under 20 years old at the time of the offense (as required by Rule 141(b)(1)), there is a rebuttable presumption that he or she had an appearance that could *generally* be expected of a person under the age of 21. Therefore, the licensee must provide actual, substantial evidence of indicia of appearance over the age of 21, under the *actual circumstances* presented to the seller at the time of the violation, to overcome such a presumption.

(Determination of Issues, ¶¶ 2-7.) The Director then goes on at great length, in paragraphs 8 through 15, to detail all of the factors considered in reaching the conclusion that there was compliance with both rule 141(b)(2) and rule 141(a) in this case. The Board agrees with both his reasoning and conclusions.

As we have said in countless decisions, the Board is prohibited from reweighing the evidence to reach a contrary conclusion. We must accept the conclusions in the Department’s decision where, as here, they are supported by substantial evidence. 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." In the decision, the Director found that the decoy met the requisite standard. As noted previously, there is no requirement that the Director view the decoy in person.

Appellants presented no evidence that the decoy's stature *actually resulted* in him displaying an 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 — except that he told the detective that he failed to ask for identification because he was in a hurry. Appellants rely entirely on a difference of opinion — theirs versus that of the Director — as to what conclusion the evidence in the record supports. Absent an evidentiary showing, this argument must fail.

III

Appellants contend that the Department abused its discretion by ignoring mitigating evidence and using inappropriate aggravating factors to impose a punitive penalty. (AOB at pp. 10-13.)

The Board will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) "Abuse of discretion" in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.] (*Brown v. Gordon*, 240 Cal.App.2d 659, 666-667 (1966) [49 Cal.Rptr. 901].)

If the penalty imposed is reasonable, the Board must uphold it, even if

another penalty would be equally, or even more, reasonable. “If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion.”

(*Harris v. Alcoholic Beverage Control Appeals Board* (1965) 62 Cal. 2d 589, 594 [400 P.2d 745].)

Rule 144 provides:

In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act (Bus. and Prof. Code Sections 23000, et seq.), and the Administrative Procedures Act (Govt. Code Sections 11400, et seq.), the Department shall consider the disciplinary guidelines entitled “Penalty Guidelines” (dated 12/17/2003) which are hereby incorporated by reference. **Deviation from these guidelines is appropriate where the Department in its sole discretion determines that the facts of the particular case warrant such a deviation** - such as where facts in aggravation or mitigation exist.

(Cal. Code Regs., tit. 4, § 144, emphasis added.)

Among the mitigating factors provided by the rule are the length of licensure without prior discipline, positive actions taken by the licensee to correct the problem, cooperation by the licensee in the investigation, and documented training of the licensee and employees. Aggravating factors include, *inter alia*, prior disciplinary history, licensee involvement, lack of cooperation by the licensee in the investigation, and a continuing course or pattern of conduct. (*Ibid.*)

The Penalty Policy Guidelines further address the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

Penalty Policy Guidelines:

The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if

it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

(Ibid.)

Appellants argue that it was error for the Director to discount its training efforts, use of a secret shopper program, and length of licensure — offered by appellants as evidence of mitigation — by determining that this evidence of mitigation was outweighed by factors in aggravation. (See Decision, at pp. 8-9.) Appellants maintain that, at most, the penalty should have been the standard 25-day suspension listed in the penalty guidelines for a second violation occurring within a three-year period. Furthermore, they object to two factors used as aggravating factors: the clerk's entering of a random birthdate in the register to allow the sale to proceed, and the fact that only 11 months transpired between the first and second violations at the premises.

As the Board has said many times over the years, the extent to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion — pursuant to rule 144 — and the Board may not interfere with that discretion absent a clear showing of abuse of discretion. Appellants have not demonstrated an abuse of discretion in this case.

ORDER

The decision of the Department is affirmed.³

BAXTER RICE, CHAIRMAN
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This 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:**

7-ELEVEN INC AND GYTARI INC
7-ELEVEN STORE 2365-27912D
2000 LAKEVILLE HIGHWAY
PETALUMA, CA 94954-6710

OFF-SALE BEER AND WINE - LICENSE

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

SANTA ROSA OFFICE

File: 20-538155

Reg: 17085497

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: December 18, 2017



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

7-Eleven, Inc. and Gytari, Inc.
Dbas: 7-Eleven Store 2365-27912D
2000 Lakeville Highway
Petaluma, CA 94954-6710

Respondent

Regarding Their Type 20 Off-Sale Beer and Wine
License Under the State Constitution and the Alcoholic
Beverage Control Act

} File: 20-538155
}
} Reg.: 17085497
}
} License Type: 20
}
} Word Count Estimate: 27,041
}
} Rptr: Kim Y. Rotherham, CSR 7397
} California Reporters
} **PROPOSED DECISION**
}

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter in Santa Rosa, California, on September 21, 2017.

Joseph Scoleri III, Assistant Chief Counsel, Department of Alcoholic Beverage Control, appeared and represented the Department of Alcoholic Beverage Control. (hereafter, “the Department”)

The Law Firm of Strike and Techel represented co-licensee 7-Eleven, Incorporated. However, it expressly and voluntarily waived its opportunity to appear and participate at the hearing. (Exhibit 1, letter of representation)

Ms. Surinder Singh appeared at the hearing and represented co-licensee Gytari, Inc. as a self-represented litigant. (hereafter “Respondent”)

The Department seeks to discipline Respondent’s license on the grounds that, on or about December 16, 2016, Respondent, through its agent or employee, Navneet Sangar, sold, furnished, or gave away, or caused to be sold, furnished, or given away, an alcoholic beverage to Nicholas Mueller., a person under the age of 21, in violation of California Business and Professions Code section 25658(a).¹ (Exhibit 1-pre-hearing pleadings)

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

After oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing, the matter was argued by the parties and initially submitted for decision on September 21, 2017. However, it was thereafter discovered by the ALJ that the copy of Respondent's video exhibit, copied to a computer "thumb-drive," was not fully re-playable and/or did not contain the same video clips as that shown at the hearing. The ALJ and the parties had a conference call and a replacement copy of the video was received by the ALJ on October 24, 2017.² The matter was deemed submitted for decision as of that date.

FINDINGS OF FACT

1. The Department filed the accusation on April 18, 2017. On May 5, 2017, the Department received a Notice of Defense requesting a hearing on the accusation. Except as noted above, the hearing was heard to completion on September 21, 2017.
2. The Department issued 7-Eleven, Inc. and Gytari, Inc., as co-licensees, a Type 20 Off-Sale Beer and Wine license on November 12, 2013.³
3. Since these co-licensees have been licensed, they suffered one prior disciplinary action for a violation of section 25658(a) under registration 16083794. The matter was resolved by way of a Stipulation and Waiver for a penalty of a 10 day suspension, with all 10 days stayed from imposition so long as Respondent did not suffer any added disciplinary action within 12 months of the decision becoming final. (Exhibit 2-prior discipline pleadings)
4. On December 16, 2016, 18 year old Nicholas Mueller (hereafter, "the decoy") acted as a decoy for the Department of Alcoholic Beverage Control for the purpose of determining if he could purchase an alcoholic beverage at Respondent's premises at 2000 Lakeview Highway, Petaluma, California. The licensed premises operated as a 7-Eleven convenience store. This investigative activity is commonly referred to as a "decoy" operation. As described below, the decoy was able to purchase beer at Respondent's licensed premises that day.
5. The decoy was born on August 12, 1998 and was 18 years old as of December 16, 2016, the date he visited Respondent's licensed premises.
6. When the decoy was at Respondent's premises on December 16, 2016, he was 6' 4" tall and weighed 235 pounds. He was wearing a white t-shirt, blue jeans, dark colored boots, and a light brown jacket. His hair was approximately ½ long. He appeared as depicted in photos and store surveillance video taken of him that night and reflected Exhibits 5, 6a, 6b, E, F, and G.

² The replacement thumb-drive recording will be substituted for the thumb-drive recording submitted at the hearing as Respondent's Exhibit G.

³ A Type 20 license permits the licensee to retail in beer and wine for consumption off the licensed premises.

7. Prior to entering Respondent's premises, the ABC Agents with the decoy instructed him to present his true identification to the sales clerk if he asked to inspect it and to disclose his true age if the clerk asked for that. The decoy possessed his valid California driver license on him when he entered the store. (Exhibit 4, copy of the decoy's driver license)

8. On December 16, 2016, the decoy entered Respondent's store and selected a pre-packaged three-pack of 25 ounce Budweiser beer cans from Respondent's coolers. He took the beer to the sales counter. The clerk, Mr. Navneet Sanger, sold the beer to the decoy. (hereafter "Sangar") Sangar neither asked to inspect the decoy's identification nor did Sangar ask the decoy for his age as part of the sales transaction. After the decoy paid for the beer, he exited the store with the three-pack of beer.

9. Once outside the store, the decoy met with ABC Agents Stefan Carlson and Derek Clark. The decoy told the agents he bought beer in the store and that, at the time of the sale, the clerk neither asked to inspect his identification nor asked his age.

10. The decoy and the two agents reentered the store. Agent Carlson, who witnessed the sale from outside the store, detained the clerk. After Agent Carlson identified himself to the clerk as an ABC Agent, he told the clerk he just sold beer to an 18 year old. After the decoy, agents, and Sangar moved to a rear area of the store, Agent Carlson asked the decoy who sold beer to him. The decoy pointed at Sangar with his finger and told Agent Carlson that Sangar was the seller. At that point, the decoy and Sangar were about three feet apart and had a clear view of one another. Sangar told Agent Carlson he made a mistake due to being in a hurry and that he usually checks identifications. Sangar told Agent Carlson that he was to enter a birthdate in the cash register if an age restricted item was being sold. Sangar said he typed in a random birthdate when he sold beer to the decoy. Next, Agent Carlson issued Sangar a citation for selling an alcoholic beverage to a minor. Sangar signed the citation and was given a copy of it.⁴

11. That day, the decoy attempted to purchase alcoholic beverages at 7 locations. Of those, 5 asked for his identification and 2 asked for his age. Two of the 7 businesses sold an alcoholic beverage to the decoy.

12. Respondent herein, Ms. Surinder Singh, has been the 7-Eleven franchisee at this store since 1993. In 2013, she self-incorporated at this location as Gytari, Inc. and continued to be the franchisee to the present under that entity. She is a 7-Eleven franchisee at five added stores in northern California.

⁴ Sangar did not testify at the hearing regarding this transaction. He no longer works for Respondent.

She regularly trains her employees to follow all applicable rules and regulations and does not desire profit from the improper sale of age-restricted products, such as alcoholic beverages and cigarettes. She gives her employees computer based training provided by 7-Eleven and also trains her employees in proper sales practices. The sales clerk in this instance, Sangar, no longer works for her.

LEGAL BASIS OF DECISION

1. Article XX, section 22 of the California Constitution and Business and Professions 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. Business and Professions Code 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. Business and Professions Code 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. Business and Professions Code Section 25658(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. Under California Code of Regulations, Title 4, Division 1, Article 22, section 141, commonly referred to as 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.

DETERMINATION OF ISSUES

1. Cause for suspension or revocation of Respondent's license does not exist under Article XX, section 22 of the California State Constitution and Business and Professions Code sections 24200(a) and (b) because although on December 16, 2016, Respondent's employee, Navneet Sangar, inside the Licensed Premises, sold an alcoholic beverage to Nicholas Mueller, a person under the age of 21, in violation of Business and Professions Code section 25658(a), Nicholas Mueller, did not meet the appearance standard for decoys specified in Rule 141(b)(2). Therefore, a defense to the accusation was established under Rule 141(c).

2. In defense to the accusation, Respondent argued the decoy did not meet the appearance standard set out in 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." The Department argued the decoy met the appearance standard. It also argued the clerk never told the ABC Agents the decoy looked at least 21 years old. Also, the Department argued that of the seven licensed premises checked the same day by the decoy, only two sold an alcoholic beverage to the decoy, and five did not.

3. However, in this instance, the decoy was 6'4" tall and weighed 235 pounds. Dressed as he was, the combined result was that the decoy had a significant physical stature and imposing presence. While his face does appear more youthful in Exhibit 6a and 6b, in

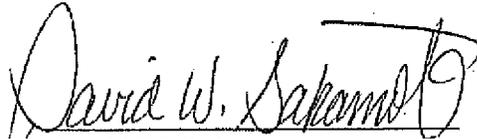
Exhibits 5, E, and F, photos taken of him at the store, he appeared older and more mature. The decoy also had a mature persona as he testified at the hearing about the events of the decoy operation. Therefore, based on the decoy's overall appearance, i.e., his physical appearance, dress, poise, demeanor, conduct, maturity, and mannerisms shown at the hearing, and his over-all appearance and conduct in front of the sales clerk, the decoy displayed the appearance which was not generally to be expected of a person under 21 years of age under the actual circumstances presented to the clerk. As the decoy did not meet the appearance standard in Rule 141(b)(2), a defense to the accusation was established under Rule 141(c).

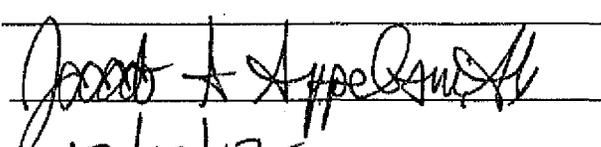
4. Except as set forth in this decision, all other allegations in the accusation and all other contentions the parties raised in the pleadings or at the hearing lack merit.

ORDER

Count 1 of the accusation is dismissed.

Dated: October 29, 2017


David W. Sakamoto
Administrative Law Judge

<input type="checkbox"/>	Adopt
<input checked="" type="checkbox"/>	Non-Adopt: _____
By:	
Date:	<u>12/13/17</u>