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

AB-9709
File: 20-463419; Reg: 17086026

7-ELEVEN, INC. and SANDHU BUSINESS INVESTMENTS, INC.,
dba 7-Eleven Store #2133-25132C
2543 Royal Avenue, Simi Valley, CA 93065-4763,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: November 1, 2018
Ontario, CA

ISSUED NOVEMBER 21, 2018

Appearances: *Appellants:* Brian Washburn, of Solomon, Saltsman & Jamieson, as counsel for 7-Eleven, Inc. and Sandhu Business Investments, Inc.,

Respondent: Jonathan V. Nguyen, as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Sandhu Business Investments, Inc., doing business as 7-Eleven Store #2133-25132C, appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 15 days because their clerk sold an alcoholic beverage to a police 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 March 19, 2008. The licensees have been in this location since 1988, with a new license being issued in 2008 to

[1]The decision of the Department, dated April 23, 2018, is set forth in the appendix.

reflect the incorporation of one of the co-licensees. There are two prior instances of discipline at this location during 30 years of operation.

On October 13, 2017, the Department filed a single-count accusation against appellants charging that, on May 12, 2017, appellants' clerk, Upendra Patel (the clerk), sold an alcoholic beverage to 17-year-old Daniel McCarter. Although not noted in the accusation, McCarter was working as a minor decoy for the Simi Valley Police Department at the time.

At the administrative hearing held on January 30, 2018, documentary evidence was received and testimony concerning the sale was presented by McCarter (the decoy); by Christopher Mulligan and Frank Mika, Simi Valley Police Department officers; and by the franchisee, Sukhi Sanhu.

Testimony established that on May 12, 2017, the decoy entered the licensed premises and went to the coolers. He was followed by Officer Mulligan, in an undercover capacity. The decoy selected a 3-pack of Coors Light beer and took it to the register. When it was his turn, the clerk rang up the beer and completed the sale without asking for any identification. The decoy exited the premises, followed shortly thereafter by Mulligan.

The decoy joined officers waiting in a vehicle outside. Officer Mulligan spoke to Detective Frank Mika and gave him a description of the clerk. Det. Mika contacted the clerk and explained the violation to him. The decoy re-entered the premises and joined the officers talking to the clerk. Det. Mika asked the decoy, “Is this the person who sold you the beer?” The decoy said it was. The decoy and clerk were approximately two feet apart at the time and facing each other. A photo of the two of them was taken (exh. 3) and the clerk was issued a citation. Later, the clerk’s employment was terminated.

On February 13, 2018, the administrative law judge (ALJ) submitted a proposed decision, recommending that the license be suspended for 15 days. The Department adopted the proposed decision in its entirety on April 2, 2018, and issued its Certificate of Decision on

April 23, 2018.

Appellants then filed a timely appeal contending: (1) the face-to-face identification of the clerk failed to comply with rule 141(b)(5),[2] and (2) the ALJ disregarded mitigating circumstances when determining the penalty and failed to articulate his reasoning to support the penalty decision.

DISCUSSION

I

Appellants contend that the face-to-face identification of the clerk failed to comply with rule 141(b)(5). (AOB at pp. 12-15.)

Rule 141(b)(5) provides:

> 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.

This rule provides an affirmative defense. The burden is, therefore, on appellants to show non-compliance. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.) The rule requires "strict adherence." (See *Acapulco Restaurants, Inc.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126] [finding that no attempt, reasonable or otherwise, was made to identify the clerk in that case].) The plain language of the rule in no way forbids the officers to first make contact with the suspected seller.

In *Chun* (1999) AB-7287, this Board made the following observation about the purpose of face-to-face identifications:

> The phrase "face to face" means that the two, the decoy and the seller, in

[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.

> some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

(*Id.* at p. 5.)

In *7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983, the Board clarified application of the rule in cases where, as here, an officer initiates contact with the clerk following the sale:

> As long as the decoy makes a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error, we do not believe that the officer's contact with the clerk before the identification takes place causes the rule to be violated.

(*Id.* at pp. 7-8; see also *7-Eleven,* Inc*./Morales* (*2014) AB-9312; 7-Eleven, Inc./Paintal Corp.* (2013) AB-9310; *7-Eleven, Inc./Dars Corp.* (2007) AB-8590; *West Coasts Products LLC* (2005) AB-8270; *Chevron Stations, Inc.* (2004) AB-8187.)

The court of appeals has found compliance with rule 141(b)(5) even where police escorted a clerk outside the premises in order to complete the identification. (See *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Keller*) (2003) 109 Cal.App.4th 1687, 1697 [3 Cal.Rptr.3d 339] [finding that the rule leaves the location of the identification to the discretion of the peace officer].)

More recently, the court found rule 41(b)(5) was not violated when:

> the decoy made a face-to-face identification by pointing out the clerk to the officer inside the store while approximately 10 feet from her, standing next to her when the officer informed her she had sold alcohol to a minor, and taking a photograph with her as the minor held the can of beer he purchased from her. She had ample opportunity to observe the minor and to object to any perceived misidentification. The rule requires identification, not confrontation.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*CVS*) (2017) 18 Cal.App.5th 541, 547 [226 Cal.Rptr.3d 527, 531].) The court explained that the exact moment of the identification could not be severed from the entire identification procedure, which included the decoy pointing out the clerk to the police, the decoy accompanying the police officer to the counter, the officer informing the clerk she had sold beer to the minor at his side, and the clerk and decoy being photographed together. (*Id*. at p. 532.) The court said. "The clerk in these circumstances certainly knew or reasonably ought to have known that she was being identified" because of the totality of the circumstances. (*Ibid.*)

The ALJ made the following findings on the face-to-face identification in this case:

> 7. McCarter went to the vehicle in which he had arrived. Det. Frank Mika obtained a description of the clerk from Ofcr. Mulligan, then entered the Licensed Premises with other officers. Det. Mika contacted Patel, identifed himself, and explained the violation. McCarter re-entered the Licensed Premises and walked over to the area where the officers were speaking to Patel. Det. Mika asked McCarter, "Is this the person who sold you the beer?" McCarter said that it was. McCarter and Patel were approximately two feet apart at the time, facing each other. A photo of the two of them was taken (exhibit 3), after which Patel was cited.

(Finding of Fact, ¶ 7.) Based on these findings, the ALJ reached the following conclusions:

> 5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(5)[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that the form of the question used by the officers in conducting the face-to-face identificaiton was unduly suggestive. This argument is rejected. The evidence is clear that Det. Frank Mika asked McCarter, "Is this the person who sold you the beer?" McCarter was free to respond, "Yes, it is," or "No, it is not." There is no evidence that McCarter was pressured into a particular answer. Given a quesion with two possible answers, McCarter truthfully answered in the affirmative, i.e., that Patel was the person who sold him the beer. (Finding of Fact ¶ 7.)

(Conclusions of Law, ¶ 5.)

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].)

Furthermore, the officers' testimony supports a finding that a proper face-to-face identification occurred. It is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Contro*l (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) The Appeals Board will not interfere with those credibility determinations in the absence of a clear showing of an abuse of discretion. The ALJ here found the officers' testimony to be credible, as reflected in the findings and conclusions in the decision. The Board may not make its own credibility determinations.

Appellants maintains, "it is evident that Mr. McCarter only identified the clerk because Detective Mika suggestively pressured Mr. McCarter into identifying the clerk in the presence of the officers once Mr. McCarter re-entered the store." (AOB at p. 13.) However, this bare assertion is not supported by any evidence to show that the decoy was "pressured." We are not persuaded that the record supports this contention, nor was the ALJ persuaded by this argument at the administrative hearing.

The Board is prohibited from reweighing the evidence or exercising its independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (*Masani, supra*.) Looking at the entire identification procedure —

including Detective Mika informing the clerk he had sold beer to a minor; the decoy identifying the clerk by responding: yes, this is the person who sold me the beer; and the clerk and decoy being photographed together — the clerk knew, or reasonably should have known, that he was being identified as the person who sold alcohol to a minor. As in *CVS*, the clerk here "had ample opportunity to observe the minor and to object to any perceived misidentification." (*CVS, supra*, at p. 547.)

The face-to-face identification in this matter fully complies with rule 141(b)(5).

II

Appellants contend that the ALJ failed to proceed in a manner required by law by failing to consider mitigating circumstances when determining the penalty, and by failing to articulate the reasoning supporting his penalty decision. As a result, appellants argue the decision must be reversed. (AOB at pp. 7-12.)

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 its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

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.)

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*.)

In the decision, the ALJ devotes a separate section to the issue of penalty and explains the factors he considered which contributed to the recommendation of a 15-day suspension:

> The Department requested that the Respondents license be suspended for a period of 15 days. The Department noted that this was the Respondents' second sale-to-a-minor violation in just over three years. As such, even though the sale in question was not a second strike (being four months outside the

> three-year period set forth in section 25658.1), an aggravated penalty was warranted. In the Department's view, such aggravation offsets any mitigation warranted by the Respondent's length of licensure and policies and practices. The Respondents argued that a mitigated penalty was warranted based on the Respondent's length of licensure (nearly 30 years with only two violations), training practices, policies, and remedial actions. (Findings of Fact ¶¶ 9-13.) The penalty recommended herein complies with rule 144.

(Decision, at p. 5.)

Appellants argue that additional evidence of mitigation was presented at the hearing but was not considered: namely, (1) the length of licensure at the premises without discipline; (2) positive actions by the licensee to correct the problem — the licensee testified that he disabled the visual ID button that allowed the clerk to make the sale without entering a date of birth; and (3) documented training of licensees and employees. Appellants contend that these efforts should have been considered as additional positive actions by the licensee to correct the problem — meriting additional mitigation of the penalty.

The decision itself debunks appellants' assertion that that these factors were ignored — the ALJ specifically states: "The Respondents argued that a mitigated penalty was warranted based on the Respondent's length of licensure (nearly 30 years with only two violations), training practices, policies, and remedial actions." (*Ibid.*) The fact that appellants disagree with the ALJ's determination that mitigation was not warranted — because the factors in mitigation were offset by the fact that this was appellants' second sale-to-a-minor violation in just over three years — does not mean the Department abused its discretion. As we have said time and again, this Board's review of a penalty looks only to see whether it can be considered reasonable, and, if it is reasonable, the Board's inquiry ends there. 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.

Finally, appellants complain that the ALJ failed to construct an "analytical bridge"

connecting the evidence and the penalty assigned, in violation of *Topanga* which states: "[I]mplicit in [the law] is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga Assn. for a Scenic Community v. Co. of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836].)

Unless some statute requires it, an administrative agency's decision need not include findings with regard to mitigation. (*Vienna v. Cal. Horse Racing Bd.* (1982) 133 Cal.App.3d 387, 400 [184 Cal.Rptr. 64]; *Otash v. Bureau of Private Investigators* (1964) 230 Cal.App.2d 568, 574-575 [41 Cal.Rptr. 263].) Appellants have not pointed out a statute with such requirements. Findings regarding the penalty imposed are not necessary as long as specific findings are made that support the decision to impose disciplinary action. (*Williamson v. Bd. of Med. Quality Assurance* (1990) 217 Cal.App.3d 1343, 1346-1347 [266 Cal.Rptr. 520].)

This Board has repeatedly rejected the very same interpretation of *Topanga* that appellants now advocate. (See, e.g., *Mtanos Hawara & Susan Issa Hawara* (2015) AB-9512 at pp. 7-9; *Garfied Beach CVS, LLC/Longs Drug Store Cal., LLC* (2013) AB-9236, at pp. 3-4.) With regard to factual findings supporting the actual charges — *not* the penalty imposed — this Board has said:

> If this Board observes that the evidence appears to contradict the findings of fact, it will review the ALJ's analysis — assuming some reasoning is provided — to determine whether the ALJ's findings were nevertheless proper. Should this Board be faced with evidence clearly at odds with the findings and no explanation from the ALJ as to how he or she reached those findings, this Board will not hesitate to reverse. . . . . While an ALJ may better shield himself against reversal by thoroughly explaining his reasoning, he is not required to do so. The omission of analysis alone is not grounds for reversal, provided findings have been made.

(*Garfield Beach CVS, LLC/Longs Drug Stores Cal., LLC* (2015) AB-9514, at pp. 6-7.) However, the Board has firmly clarified that it will not widen this holding to include the penalty:

> We emphasize that this above language does *not* extend to the penalty. No

> "analytical bridge" of any sort is required in imposing a penalty. Provided the penalty is reasonable, this Board will have no cause to retrace the ALJ's reasoning.

(*Hawara, supra* at p. 9.)

Appellants have not established that the Department abused its discretion by imposing a 15-day penalty in this matter.

ORDER

The decision of the Department is affirmed.[3]

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
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:

7-ELEVEN, INC. AND SANDHU BUSINESS INVESTMENTS, INC.
7-ELEVEN STORE #2133-25132C
2543 ROYAL AVENUE
SIMI VALLEY, CA 93065-4763

OFF-SALE BEER AND WINE - LICENSE

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

VENTURA DISTRICT OFFICE

File: 20-463419

Reg: 17086026

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on April 2, 2018. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

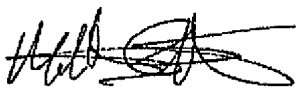
Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after June 4, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: April 23, 2018



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. & Sandhu Business Investments Inc. dba 7-Eleven #2133-25132C 2543 Royal Ave. Simi Valley, California 93065-4763 Respondents	File: 20-463419 Reg.: 17086026 License Type: 20 Word Count: 10,500 Reporter: Justyne Johnson Kennedy Court Reporters
Off-Sale Beer and Wine License	**PROPOSED DECISION**

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Ventura, California, on January 30, 2018.

Jonathan V. Nguyen, Attorney, represented the Department of Alcoholic Beverage Control.

Donna J. Hooper, attorney-at-law, represented respondents 7-Eleven Inc. and Sandhu Business Investments Inc. Sukhi Sandhu, President of Sandhu Business Investments, was present.

The Department seeks to discipline the Respondent's license on the grounds that, on or about May 12, 2017, the Respondents, through their agent or employee, sold, furnished, or gave alcoholic beverages to Daniel McCarter, 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 January 30, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on October 13, 2017.

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

2. The Department issued a type 20, off-sale beer and wine license to the Respondents for the above-described location on March 19, 2008 (the Licensed Premises).

3. The Respondent's license has been the subject of the following discipline:

Date Filed	Reg. No.	Violation	Penalty
2/20/2014	14079982	B&P § 25658(a)	5-day susp. w/5 days stayed for 1 year

The foregoing disciplinary matter is final. (Exhibit 2.)

4. Daniel McCarter was born on August 25, 1999. He served as a minor decoy during an operation conducted by the Simi Valley Police Department on May 12, 2017. On that date he was 17 years old.

5. McCarter appeared and testified at the hearing. On May 12, 2017, he was 5'11" tall and weighed 140 pounds. He wore a maroon V-neck sweater, cargo pants, and glasses. His hair was combed up and had gel in it. (Exhibits 3-4). His appearance at the hearing was the same.

6. On May 12, 2017, McCarter entered the Licensed Premises and walked to the refrigerated section. Ofcr. Chris Mulligan entered separately. McCarter selected a 3-pack of Coors Light beer and took it to the register, where he had to wait in a short line. When it was his turn, the clerk, Upendra Patel, rang up the beer. McCarter paid with a $20 bill and received some change. McCarter exited with the beer. Ofcr. Mulligan exited shortly thereafter.

7. McCarter went to the vehicle in which he had arrived. Det. Frank Mika obtained a description of the clerk from Ofcr. Mulligan, then entered the Licensed Premises with other officers. Det. Mika contacted Patel, identified himself, and explained the violation. McCarter re-entered the Licensed Premises and walked over to the area where the officers were speaking to Patel. Det. Mika asked McCarter, "Is this the person who sold you the beer?" McCarter said that it was. McCarter and Patel were approximately two feet apart at the time, facing each other. A photo of the two of them was taken (exhibit 3), after which Patel was cited.

8. McCarter learned of the decoy program through one of his friends, whose father was a police officer. May 12, 2017 was the only time he volunteered to be decoy. Of the six locations he visited that day, only the Licensed Premises sold an alcoholic beverage to him.

9. Sukhi Sandhu, President of co-licensee Sandhu Business Investments, testified that he has owned the Licensed Premises since 1988. He also owns two other locations, one since 1987 and one for approximately one month. This is the second violation at this location; he believed he had one violation at the other location. He actively manages the Licensed Premises, visiting it four to five times a week, usually in the morning. When working, he handles paperwork, merchandising, and training. He also works the register.

10. He described the training all new employees receive, including computer-based training and hands-on training on the register. The computer-based training includes modules relating to age-restricted products and IDs. All employees must repeat this training once a year.

11. The Licensed Premises' policy is to check the ID of anyone who appears under the age of 30. The registers have a hard stop which prompts employees to verify a customer's age if the customer is purchasing an age-restricted product. The hard stop can be cleared (and the transaction completed) if the employee swipes an ID through a card reader, enters a date of birth, or presses a button labeled "Visual ID." The Visual ID button has since been disabled.

12. Sandhu reminds employees to check ID every day. After this incident, he had all of the employees undergo training again. Employees who undergo training receive certificates of completion, six of which were introduced into evidence. (Exhibit C.)

13. Sandhu has also engaged a secret shopper service to ensure that his employees are checking ID and following the Licensed Premises' policies. He rewards employees who pass a secret shopper test sale.

14. Sandhu spoke to Patel the day after the sale. Patel indicated that he had made a mistake. Sandhu took Patel off the register and, eventually, terminated him.

15. McCarter appeared his age—17—at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in the Licensed Premises on May 12, 2017, McCarter displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Patel.

16. 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 May 12, 2017, the Respondents' clerk, Upendra Patel, inside the Licensed Premises, sold an alcoholic beverage to Daniel McCarter, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-8 & 14-15.)

5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(5)[2] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that the form of the question used by the officers in conducting the face-to-face identification was unduly suggestive. This argument is rejected. The evidence is clear that Det. Frank Mika asked McCarter, "Is this the person who sold you the beer?" McCarter was free to respond, "Yes, it is," or "No, it is not." There is no evidence that McCarter was pressured into a particular answer. Given a question with two possible answers, McCarter truthfully answered in the affirmative, i.e., that Patel was the person who sold him the beer. (Finding of Fact ¶ 7.)

6. Unusually for a decoy case, the Respondents did not raise the decoy's appearance as an issue in their closing argument. The Appeals Board, in multiple cases, has indicated that ALJs should make findings about the decoy's appearance in their proposed decisions. Accordingly, the undersigned included Finding of Fact ¶ 15 in this decision. However, since the Respondents did not raise rule 141(b)(2) during the course of the hearing, McCarter's appearance is **not** at issue.

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

PENALTY

The Department requested that the Respondents license be suspended for a period of 15 days. The Department noted that this was the Respondents' second sale-to-a-minor violation in just over three years. As such, even though the sale in question was not a second strike (being four months outside the three-year period set forth in section 25658.1), an aggravated penalty was warranted. In the Department's view, such aggravation offsets any mitigation warranted by the Respondents' length of licensure and policies and practices. The Respondents argued that a mitigated penalty was warranted based on the Respondents' length of licensure (nearly 30 years with only two violations), training practices, policies, and remedial actions. (Findings of Fact ¶¶ 9-13.) The penalty recommended herein complies with rule 144.

ORDER

The Respondents' off-sale beer and wine license is hereby suspended for 15 days.

Dated: February 13, 2018

Matthew G. Ainley
Administrative Law Judge

☒ Adopt

☐ Non-Adopt: _____

By: _____

Date: 4/2/18