

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

AB-9714

File: 20-408288 Reg: 17086024

7-ELEVEN, INC. and SSR MARKETING, INC.,
dba 7-Eleven Store #2173-23944C
454 Pacific Coast Highway,
Hermosa Beach, CA 90254,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: D. Huebel

Appeals Board Hearing: January 10, 2019
Ontario, CA

ISSUED FEBRUARY 13, 2019

Appearances: *Appellants:* David Brian Washburn, of Solomon Saltsman & Jamieson, as counsel for 7-Eleven, Inc. and SSR Marketing, Inc., doing business as 7-Eleven Store #2173-23944C.
Respondent: Matthew Gaughan as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and SSR Marketing, Inc. (appellants), doing business as 7-Eleven Store #2173-23944C, appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 10 days because their clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

1. The decision of the Department, dated June 1, 2018, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 2, 2004. On October 13, 2017, the Department filed an accusation charging that appellants' clerk, Carlos Adalberto Funes (the clerk), sold an alcoholic beverage to 19-year-old Nicole Reppucci on December 9, 2016. Although not noted in the accusation, Reppucci was working as a minor decoy for the Hermosa Beach Police Department at the time.

Testimony established that on the date of the operation, the decoy entered the licensed premises, walked straight to the alcoholic beverage section, and selected a six-pack of Bud Light beer bottles. The decoy took the six-pack of beer to the front sales counter for purchase. She did not have to wait in line and there were no customers behind her.

At the counter, the decoy approached the only clerk behind the sales counter (later identified as Funes), said "Hello," and placed the six-pack of Bud Light beer upon the counter. The clerk replied "Hello," scanned the beer, asked the decoy for her identification, and apologized for asking for her identification. The decoy handed the clerk her valid California driver's license, which had a vertical orientation, showed her correct date of birth, and included a red stripe that read "AGE 21 in 2018" and a blue stripe that read "Provisional Until Age 18 in 2015." The clerk retrieved the identification, looked at it for approximately three seconds, and handed it back to the decoy. The clerk did not ask the decoy any questions about the identification, her age, date of birth, or any age-related questions. The decoy and the clerk exchanged greetings of "how are you" and "good." The clerk proceeded with the sale of the alcohol. The decoy paid for the beer by giving the clerk money, which he accepted. The clerk provided change back

to the decoy and bagged the six-pack of Bud Light beer bottles. The decoy took the change and the bagged six-pack of beer, and exited the store.

While the decoy was inside the licensed premises, Officer Dove of the Hermosa Beach Police Department had a clear view and witnessed the decoy's actions inside the store, including the sales transaction, from his position outside of the licensed premises while looking through the large front glass windows. Officer Dove could see inside the entire store from his vantage point, including the cash register area and down each aisle.

After the decoy walked outside the store she said to Officer Dove, "That's the guy who sold me the beer," while pointing at clerk Funes from outside the large store front windows. The clerk was behind the cash register at the time. Detective Danowitz and Officer Dove entered the licensed premises and made contact with the clerk. Officer Dove asked the clerk to exit the store so that Officer Dove could speak with the clerk in private, to save the clerk any potential embarrassment and to communicate with him without customers approaching them at the register. The clerk walked outside with Officer Dove and stood three feet from the decoy. Officer Dove asked the decoy to identify the person who sold her the beer. The decoy pointed at the clerk and replied, "He sold me the beer." The decoy and the clerk were standing three feet apart and looking at each other at the time of this identification. A photo of the clerk and the decoy was taken after the face-to-face identification, with the decoy holding the six-pack of Bud Light beer while standing next to the clerk. The photograph was taken by Detective Danowitz.

At the administrative hearing held on February 6, 2018, documentary evidence was received, and testimony concerning the sale was presented by Reppucci (the decoy) and by Detective Guy Dove² of the Hermosa Beach Police Department. Appellants presented no witnesses.

After the hearing, the Department issued a decision determining the violation charged was proved and no defense was established.

Appellants then filed this appeal contending (1) the ALJ improperly sustained the Department's objections to questions regarding the minor's appearance, demeanor, and mannerisms, and (2) the decoy's appearance did not comply with rule 141(b)(2).

DISCUSSION

I

Appellants contend the ALJ abused her discretion by sustaining the Department's objections, on grounds of relevance, to "cross-examination related to the minor decoy's experience participating in official police training and activities that involve the public." (App.Br., at p. 4.) Appellants argue such questions are "wholly relevant" and "[go] directly to the minor decoy's appearance, demeanor and maturity participating with the public in an official capacity, much the same [as] she did in the minor decoy operation." (*Ibid.*) According to appellants, the exclusion of this testimony prevented them from "fully exploring all factors contributing to the minor decoy's appearance" and thus foreclosed a rule 141(b)(2) defense. (*Ibid.*) Appellants claim "[i]t is obvious that a person's poise, demeanor, maturity, and mannerism[s] are in large measure a product of their experiences and responsibilities." (*Id.* at p. 6.)

2. Officer Dove was promoted to Detective before offering testimony in this case.

The Board is authorized to review a decision of the Department to determine "[w]hether there is relevant evidence, which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department." (Bus. & Prof. Code, § 23084; see also Cal. Const, art. XX, § 22 [providing remand as remedy in such cases].)

Generally, evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Relevance cannot be established by speculative inferences, however. (See, e.g., *People v. Babbitt* (1988) 45 Cal.3d 660, 681 [248 Cal. Rptr. 69]; *People v. Brady* (2006) 129 Cal.App.4th 1314, 1337-1338 [29 Cal.Rptr.3d 286].) Relevant evidence may be excluded "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) Relevant evidence may therefore be excluded "where, though material, it would have been merely cumulative or corroborative of evidence properly in the record." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 431, at pp 486-487, citing *Silvey v. Harm* (1932) 120 Cal.App. 561 [8 P.2d 570] [excluding cross-examination regarding witness' sobriety, while error, was not prejudicial, since witness' testimony was corroborated by other witnesses whose sobriety was unquestioned].)

The Government Code substantially relaxes the rules of evidence for purposes of administrative proceedings:

The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant

evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

(Gov. Code, § 11513(c).) Nevertheless, the trier of fact in an administrative hearing "is vested with wide discretion in deciding relevancy, and its determination will not be disturbed on appeal unless there is a clear showing of abuse." (*McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1054 [228 Cal.Rptr. 567].)

Finally, the California Constitution provides:

No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, *or of the improper admission or rejection of evidence*, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

(Cal. Const., art. VI, § 13, emphasis added.) Thus "even where a trial court improperly excludes evidence, the error does not require reversal of the judgment unless such error resulted in a miscarriage of justice." (*Poniktera v. Seiler* (2010) 181 Cal.App.4th 121, 142 [104 Cal.Rptr.3d 291].) The burden falls on the complaining party "to demonstrate it is reasonably probable a more favorable result would have been reached absent the error." (*Ibid.*, citing *Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431–1432 [77 Cal.Rptr.2d 574]; see also *Estate of Thottham* (2008) 165 Cal.App.4th 1331, 1341-1342 [81 Cal.Rptr.3d 856] ["Error in excluding evidence is a ground for reversing a judgment only if the error resulted in a miscarriage of justice, and that a different result would have been probable if the error had not occurred."].)

Based on appellants' brief, one might believe they were prevented from inquiring *in any way* into the decoy's law enforcement experience. In fact, counsel for appellants

asked detailed questions regarding the decoy's experience, almost all of which were permitted:

[BY MS. HOOPER:]

Q How did you become a decoy?

A I work for El Segundo. I'm a police cadet.

Q Okay. And when you say you worked as a police cadet, is that paid or volunteer?

A Paid.

Q How long have you been a cadet, a paid cadet?

A Now, a year and a half.

Q Prior to this operation, how long had you been a cadet?

A Only two months.

Q Okay. Did you have any experience with law enforcement prior to being a cadet?

[Objection; question withdrawn.]

Q Before you were a cadet, did you participate in any kind of volunteer program with law enforcement, for instance, an explorer program?

A No.

Q Did you receive any training before you were a cadet, any law enforcement training?

A No.

Q Okay. Do you have a rank?

A No.

Q What are your responsibilities as a cadet?

A Administrative duties and parking enforcement.

Q Now, is parking enforcement, you deal with the public doing parking enforcement?

A Yes.

Q Do you hand out parking tickets? Is that part of the job?

A I—yeah, issue.

Q Sometimes you encounter people who are getting a parking ticket?

A Yes.

Q Did you receive any kind of training on how to behave around these people?

A Yes.

MS. CASEY: Objection. Relevance.

MS. HOOPER: It goes to her training and experience which would affect her demeanor, which is relevant to a 141(b)(2) defense.

MS. CASEY: Can I be heard, Your Honor?

THE COURT: Yes.

MS. CASEY: The clerk is not here, so we don't know what, if anything, he saw or didn't see or what he thought regarding his interaction with [the decoy].

And we haven't established from these questions that this training was received before or after the decoy operation, and I still don't think the answer is relevant as to what kind of training this particular witness received in how to deal with the public when she is issuing parking tickets. That is not the situation that occurred inside the 7-Eleven on December 9th, 2016.

THE COURT: Anything else before I rule, Ms. Hooper?

A No.

THE COURT: Sustained.

BY MS. HOOPER:

Q Okay. Now, when I ask you questions, unless I indicate otherwise, I'm going to be referring to your experiences before this decoy operation. Okay?

A Okay.

Q All right. How many decoy operations had you participated in?

A I don't know.

Q You had been a cadet for two months?

A Yeah.

Q Did you participate as a decoy prior to being a cadet?

A No.

Q And had you participated in any decoy operations prior to this one?

A No.

Q So this was your first decoy operation?

A Yes.

(RT at pp. 21-25.)

There are several flaws in appellants' argument. First, appellants misrepresent the breadth of the excluded testimony. They were not, as they contend, precluded from "ask[ing] about [the decoy's] training with the public and any experience she might have regarding participating in police activities where the public participates." (App.Br., at p. 5.) Instead, appellants were prevented from asking the decoy a single, narrow question regarding a specific circumstance, to wit, whether she had "receive[d] any kind of training on how to behave" when she encountered "people who are getting a parking ticket." (See RT at p. 23.) Appellants were permitted to ask—and did ask—the decoy about her law enforcement training in general. (See RT at p. 21-25.)

Second, appellants have not explained why the decoy's training for such circumstances would be relevant to this case. This is not a parking enforcement case. Moreover, the skills and demeanor required to defuse a confrontation with a member of the public who has just received a parking ticket are markedly different than the skills

and demeanor required to act as a minor decoy. It was not an abuse of discretion for the ALJ to exclude testimony that bore little relation to the facts at hand.

Third, appellants have not shown how the exclusion of this single question resulted in a miscarriage of justice. Indeed, the question appears to be merely cumulative—one of many questions aimed at the decoy's law enforcement employment, training, and experience. Appellants were not deprived of the opportunity to present a rule 141(b)(2) defense based on the decoy's demeanor and experience, and there is nothing in the record to suggest that admission of this one question could have changed the outcome of appellants' case.

In sum, we see no abuse of discretion. Appellants' claim lacks merit.

II

Appellants contend the decoy's "physical appearance and clothing, coupled with her experience and training as a paid police cadet for the El Segundo Police Department gave her the appearance of an adult female of at least 21 years of age." (App.Br., at p. 8.) Appellants note that the decoy "not only had dyed hair" but also wore a jacket with a University of Southern California logo. (*Ibid.*) Appellants also argue that the decoy's "experience as a paid cadet" and her "past experience interacting with the public in official police activities" allowed her "to carry herself more maturely" and thus made her appear over 21. (*Ibid.*)

Appellants object that the ALJ based her determinations solely on the decoy's appearance at the administrative hearing and "summarily rejected" and "quickly dismissed" appellants' evidence and arguments regarding any of the decoy's non-physical attributes. (*Id.* at p. 9.)

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].)

Rule 141 states, in relevant part,

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.

(Code Regs., tit. 4, § 141(a).) Additionally, subdivision (b)(2) requires a decoy "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." (Code Regs., tit. 4, § 141(b)(2).) The rule provides an affirmative defense, and the burden of proof lies with the party asserting it. (*Chevron Stations, Inc.* (2015) AB-9445, at pp. 3-16; *7-Eleven, Inc./Lo* (2006) AB-8384, at pp. 8-11.)

The ALJ made the following findings of fact related to the decoy's appearance:

5. Decoy Reppucci appeared and testified at the hearing. On December 9, 2016, she was approximately 5'6" tall and weighed 150 pounds. She wore blue jeans, a black t-shirt, over which she wore a red and yellow windbreaker with a USC logo (the windbreaker was opened at the front), and white Converse sneakers. Her hair was blond, straightened, below shoulder length, pushed back behind her ears (away from her face), and she had a side part. (Exhibits 4 and 5.) Her appearance at the hearing was the same, except that her hair was not straightened, but slightly curled, and it was brownish-red in color.

¶ . . . ¶

11. Decoy Reppucci appeared her age at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of clerk Funes at the Licensed Premises on December 9, 2016, decoy Reppucci displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to clerk Funes. Decoy Reppucci appeared her true age.

12. Prior to December 9, 2016, decoy Reppucci had never visited the Licensed Premises and never purchased beer from clerk Funes. December 9, 2016, was decoy Reppucci's first day of decoy operations. Decoy Reppucci learned about the decoy program through her paid service as a police cadet with the Hermosa Beach PD. As of December 9, 2016, she had been a cadet for two months. Her cadet responsibilities include administrative duties and parking enforcement, the latter of which includes her issuing parking tickets to the public. She has no rank as a cadet.

(Findings of Fact, ¶¶ 5, 11-12.) Based on these findings, the ALJ reached the following conclusions of law:

6. With respect to rule 141(b)(2), specifically, the Respondents argued decoy Reppucci did not have the appearance generally expected of a person under the age of 21. Respondents' counsel opined that decoy Reppucci "looks around her mid-20's, especially with the blond hair she had at the time. I think that makes her look more mature." Respondents further argued the video depicts decoy Reppucci with blond hair, that makes her look "rather mature. She was very relaxed, open, friendly and poised during the transaction." Respondents further argued the decoy did not "appear at all nervous or that this was something she was trying to get away with at all. She looked like an adult purchasing alcohol. She had the demeanor of someone who regularly purchases alcohol."

This rule 141(b)(2) argument is rejected. The Respondents presented no evidence that these factors actually resulted in decoy Reppucci appearing 21 or older to clerk Funes. Regardless, there is nothing about these factors which made her appear older than her actual age. Decoy Reppucci appears her true age, no matter what her hair color and demeanor. In other words, decoy Reppucci had the appearance generally expected of a person under the age of 21.

(Conclusions of Law, ¶ 6.)

This Board has repeatedly declined to substitute its judgment for that of the ALJ on this issue, and has on innumerable occasions rejected the "experienced decoy" argument. We have previously observed:

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

(*Azzam* (2001) AB-7631, at p. 5, emphasis in original.) As in past cases, appellants presented no evidence that the decoy's experience had any outwardly visible effect on her appearance. Ultimately, appellants rely on nothing more than the broad generalization that any individual with law enforcement experience will necessarily appear mature. Generalizations are not evidence. The ALJ properly rejected this defense, and we find no error.

Finally, appellants imply that the use of a decoy with law enforcement experience is unfair per se. (See App.Br., at p. 8 [arguing decoy's appearance is not the only factor that should be considered in assessing fairness].) There is no rule prohibiting the use of a decoy with extensive past experience. (See generally Code Regs., tit. 4, § 141(b).) Nor does the use of an experienced decoy violate rule 141(a). As the court of appeal observed in *Garfield Beach CVS*, fairness in minor decoy operations is ensured by the

five safeguards outlined in rule 141, subdivision (b). (See *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Garfield Beach CVS) (2017) 7 Cal.App.5th 628, 638 [213 Cal.Rptr.3d 130].*) This Board cannot and will not "add a new defense to Rule 141" based on the extent of a decoy's experience. (*Id.* at p. 640.) Indeed, such a rule would be foolish. Experienced decoys are more likely to execute an operation safely and fairly, since they are familiar with the procedures and requirements of a decoy operation and are comfortable communicating with law enforcement officials.

ORDER

The decision of the Department is affirmed.³

MEGAN MCGUINNESS, ACTING CHAIR
PETER J. RODDY, 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, SSR MARKETING INC
7 ELEVEN STORE 2173 23944C
454 PACIFIC COAST HWY
HERMOSA BEACH, CA 90254

LB/LAKEWOOD DISTRICT OFFICE

File: 20-408288

Reg: 17086024

AB: 9714

OFF-SALE BEER AND WINE - LICENSE

Respondent(s)/Licensee(s)
under the Alcoholic Beverage Control Act.

CERTIFICATION

I, Dominique Williams, do hereby certify that I am a Senior Legal Analyst for the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that annexed hereto is a true, correct and complete record (not including the Hearing Reporter's transcript) of the proceedings held under Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code concerning the petition, protest, or discipline of the above-listed license heretofore issued or applied for under the provisions of Division 9 of the Business and Professions Code.

IN WITNESS WHEREOF, I hereunto affix my signature on July 25, 2018, in the City of Sacramento, County of Sacramento, State of California.



Office of Legal Services

2018 JUL 27 PM 3:10
RECEIVED
ABC APPEALS BOARD

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

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

7-ELEVEN, INC. SSR MARKETING, INC.
7-ELEVEN STORE 2173 23944C
454 PACIFIC COAST HWY
HERMOSA BEACH, CA 90254

OFF-SALE BEER AND WINE - LICENSE

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

LAKWOOD DISTRICT OFFICE

File: 20-408288

Reg: 17086024

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 May 9, 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 July 12, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: June 1, 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., and SSR Marketing, Inc.
Dbas: 7 Eleven Store 2173 23944C
454 Pacific Coast Highway
Hermosa Beach, California 90254

Respondents

} File: 20-408288

} Reg.: 17086024

} License Type: 20

} Word Count: 7,826

} Reporter:

} Tracy Terkeurst

} California Reporting

Off-Sale Beer and Wine License

PROPOSED DECISION

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Cerritos, California, on February 6, 2018.

Jennifer Casey, Attorney, represented the Department of Alcoholic Beverage Control.

Donna Hooper, Attorney, represented Respondents, 7 Eleven, Inc., and SSR Marketing, Inc.

The Department seeks to discipline the Respondents' license on the grounds that, on or about December 9, 2016, the Respondents, through their agent or employee, at said premises, sold, furnished, or gave alcoholic beverages to Nicole Anne Reppucci, 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 February 6, 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 2, 2004 (the Licensed Premises).

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

4. Nicole Anne Reppucci (hereinafter referred to as decoy Reppucci) was born on January 10, 1997. On December 9, 2016, she was 19 years old. On that date she served as a minor decoy in an operation conducted by the Hermosa Beach Police Department (Hermosa Beach PD).

5. Decoy Reppucci appeared and testified at the hearing. On December 9, 2016, she was approximately 5'6" tall and weighed 150 pounds. She wore blue jeans, a black t-shirt, over which she wore a red and yellow windbreaker with a USC logo (the windbreaker was opened at the front), and white Converse sneakers. Her hair was blond, straightened, below shoulder length, pushed back behind her ears (away from her face), and she had a side part. (Exhibits 4 and 5.) Her appearance at the hearing was the same, except that her hair was not straightened, but slightly curled, and it was brownish-red in color.

6. On December 9, 2016, decoy Reppucci entered the Licensed Premises. She walked straight to the alcoholic beverage section and selected a six-pack of Bud Light beer bottles (Exhibit 4). Beer is an alcoholic beverage. Decoy Reppucci took the six-pack of beer to the front sales counter for purchase. She did not have to wait in line and there were no customers behind her.

7. At the counter, decoy Reppucci approached the only clerk behind the sales counter, clerk Carlos Adalberto Funes (hereinafter referred to as clerk Funes), said "Hello," and placed the six-pack of Bud Light beer upon the counter. Clerk Funes, replied "Hello," scanned the beer and asked decoy Reppucci for her identification (ID), and apologized for asking for her ID. Decoy Reppucci handed to clerk Funes her valid California Driver License, which had a vertical orientation, showed her correct date of birth and included a red stripe which read, "AGE 21 in 2018," and a blue stripe which read, "Provisional Until Age 18 in 2015." (Exhibit 2.)² Clerk Funes retrieved the ID, looked at it for approximately three seconds, and handed it back to the decoy. Clerk Funes did not ask decoy Reppucci any questions about the ID, her age, date of birth, or any age-related questions. The decoy and clerk Funes exchanged greetings of "how are you" and "good." Clerk Funes proceeded with the sale of alcohol. Decoy Reppucci paid for the beer, by giving clerk Funes money, which he accepted. Clerk Funes provided change back to the

² At the hearing the Department entered Exhibit 3, which was a black and white photograph of Decoy Reppucci's current California Driver License, which was issued January 18, 2017. Decoy Reppucci testified that both Exhibit 2 and Exhibit 3 have the same photograph, date of birth, address, identifiable information, and a red stripe which reads, "Age 21 in 2018," with the only difference that Exhibit 2 had the additional blue stripe, which read, "Provisional Until Age 18 in 2015." One other difference is the issue dates.

decoy and bagged the six-pack of Bud Light beer bottles. Decoy Reppucci took the change, the bagged six-pack of beer, and exited the store.

8. While decoy Reppucci was inside the Licensed Premises Hermosa Beach PD Officer Guy Dove had a clear view and witnessed the decoy's actions inside the store, including the sales transaction, from his position outside of the Licensed Premises while looking through the large, front glass windows. Officer Dove could see inside the entire store from his vantage point, including the cash register area, and down each aisle.

9. After decoy Reppucci walked outside the store she notified officer Dove, "That's the guy who sold me the beer," while pointing at clerk Funes from outside the large store front windows; clerk Funes was behind the cash register at the time. Detective Danowitz and Officer Dove entered the Licensed Premises and made contact with clerk Funes. Officer Dove asked clerk Funes to exit the store so that Officer Dove could speak with clerk Funes in private, to save clerk Funes any potential embarrassment and to communicate with him without customers approaching them at the register. Clerk Funes walked outside with Officer Dove and stood three feet from decoy Reppucci. Officer Dove asked decoy Reppucci to identify the person who sold her the beer. Decoy Reppucci pointed at clerk Funes and replied, "He sold me beer." Decoy Reppucci and clerk Funes were standing three feet apart, and looking at each other at the time of this identification. A photo of clerk Funes and decoy Reppucci was taken after the face-to-face identification, with decoy Reppucci holding the six-pack of Bud Light beer while standing next to clerk Funes. (Exhibit 4). The photograph was taken by Detective Danowitz.

10. Clerk Funes was issued a citation by Officer Dove after the face-to-face identification. Clerk Funes did not appear and did not testify at the hearing. There is no evidence clerk Funes was distracted, or that anyone interfered, during the sales transaction or the face-to-face identification.

11. Decoy Reppucci appeared her age at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of clerk Funes at the Licensed Premises on December 9, 2016, decoy Reppucci displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to clerk Funes. Decoy Reppucci appeared her true age.

12. Prior to December 9, 2016, decoy Reppucci had never visited the Licensed Premises and never purchased beer from clerk Funes. December 9, 2016, was decoy Reppucci's first day of decoy operations. Decoy Reppucci learned about the decoy program through her paid service as a police cadet with the Hermosa Beach PD. As of December 9, 2016,

she had been a cadet for two months. Her cadet responsibilities include administrative duties and parking enforcement, the latter of which includes her issuing parking tickets to the public. She has no rank as a cadet.

13. 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 December 9, 2016, the Respondents' clerk, Carlos Adalberto Funes, inside the Licensed Premises, sold alcoholic beverages, to-wit: beer, to Nicole Anne Reppucci, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-11.)

5. The Respondents argued the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)³, and therefore, the accusation should be dismissed pursuant to rule 141(c).

6. With respect to rule 141 (b)(2), specifically, the Respondents argued decoy Reppucci did not have the appearance generally expected of a person under the age of 21. Respondents' counsel opined that decoy Reppucci "looks around her mid-20's, especially with the blond hair she had at the time. I think that makes her look more mature." Respondents further argued the video depicts decoy Reppucci with blond hair, that makes her look "rather mature. She was very relaxed, open, friendly and poised during the transaction." Respondents further argued the decoy did not "appear at all nervous or that

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

this was something she was trying to get away with at all. She looked like an adult purchasing alcohol. She had the demeanor of someone who regularly purchases alcohol.”

This rule 141(b)(2) argument is rejected. The Respondents presented no evidence that these factors actually resulted in decoy Reppucci appearing 21 or older to clerk Funes. Regardless, there is nothing about these factors which made her appear older than her actual age. Decoy Reppucci appears her true age, no matter what her hair color and demeanor. In other words, decoy Reppucci had the appearance generally expected of a person under the age of 21. (Findings of Fact ¶ 11.)

PENALTY

The Department requested the Respondents’ license be suspended for a period of 10 days, based on a five-day mitigation for its length of licensure since 2004 with no prior discipline. The Respondents argued that, if the accusation were not dismissed, a mitigated penalty of a 10-day all-stayed suspension was appropriate since the Respondents have been discipline free for a substantial amount of time, 12 years. The parties are correct—the Respondents’ 12 years and nine months discipline-free history at the Licensed Premises warrants mitigation. The penalty recommended herein complies with rule 144.

ORDER

The Respondents’ off-sale beer and wine license is hereby suspended for a period of 10 days.

Dated: March 9, 2018



D. Huebel
Administrative Law Judge

7 Eleven, Inc., and SSR Marketing, Inc.
Dba: 7 Eleven Store 2173 23944C
File #20-408288
Reg. #17086024
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<input checked="" type="checkbox"/> Adopt
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By: <u>Jacob A. Applegate</u>
Date: <u>5/9/18</u>