

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

AB-9745

File: 20-510207; Reg: 18086318

SF MARKETS, LLC,
dba Sprouts Farmers Market
4230 Pacific Coast Highway,
Torrance, CA 90503,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: May 2, 2019
Ontario, CA

ISSUED MAY 16, 2019

Appearances: *Appellant:* Donna J. Hooper, of Solomon, Saltsman & Jamieson, as
counsel for SF Markets, LLC,

Respondent: Alanna K. Ormiston, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

SF Markets, LLC, doing business as Sprouts Farmers Market, appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 25 days because its clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

¹The decision of the Department, dated September 11, 2018, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on July 7, 2011. There is one prior instance of departmental discipline against the license.

On January 16, 2018, the Department filed a single-count accusation charging that appellant's clerk, David Corona (the clerk), sold an alcoholic beverage to 17-year-old Vanessa C. (the decoy) on June 29, 2017. Although not noted in the accusation, the decoy was working for the Torrance Police Department (TPD) at the time.

At the administrative hearing held on June 14, 2018, documentary evidence was received, and testimony concerning the sale was presented by the decoy, and by TPD Detective Andrew Lee.

Testimony established that on June 29, 2017, the decoy entered the licensed premises and went to the alcohol section where she selected a six-pack of Bud Light beer in bottles. She took the beer to the register, the clerk scanned it, and asked for her identification. The decoy handed the clerk her California Identification card, which had a portrait orientation, and contained her correct date of birth — showing her to be 17 years old. The ID also contained a blue stripe indicating “AGE 17 IN 2017” and a red stripe indicating “AGE 21 IN 2020.” (Exh. 3.) The clerk swiped the ID in the register, but the register failed to read the magnetic strip on the back of the ID. The decoy then observed that the clerk entered a birthdate into the register which was not hers. The clerk completed the transaction and handed the decoy a receipt which indicated “Age Confirmed - 2/15/67.” (Exh. 6.)

The decoy exited the store with the beer. She met with three TPD detectives and showed them the receipt. The decoy re-entered the premises with two of the detectives. She approached the register and pointed out the clerk to the officers.

Detective Lee identified himself as a police officer to the clerk and asked him to step away from the register when he was done with his customers. One of the detectives asked to speak with the store manager.

The store manager, the decoy, the clerk, Detective Lee, and Detective Schmitz went to a small office. Det. Lee advised the clerk of the violation, then asked the decoy to identify the person who sold her the alcohol. The decoy pointed at the clerk and said “it was him” while standing approximately 3 feet away from him. Det. Lee showed the clerk the decoy’s ID and pointed out the red stripe indicating “AGE 21 IN 2020.” When asked why he input February 15, 1967 into the register, the clerk replied that the line was long and he was trying to get the line moving. (RT at p. 41.) A photo of the decoy and clerk was taken (exh. 4) and the clerk was issued a citation.

The administrative law judge (ALJ) issued her proposed decision on July 18, 2018, sustaining the accusation and recommending a 25-day suspension. The Department adopted the proposed decision in its entirety on August 22, 2018, and a Certificate of Decision was issued on September 11, 2018.

Appellant then filed a timely appeal contending the ALJ’s findings, that the decoy displayed the appearance generally expected of a person under the age of 21, are not supported by substantial evidence — in violation of rule 141(b)(2).²

DISCUSSION

Appellant contends that the ALJ’s findings, that the decoy displayed the appearance generally expected of a person under the age of 21, are not supported by substantial evidence — because of the decoy’s extensive experience, her confident

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.

demeanor, her large stature, and “middle-aged features.” Appellant maintains these factors contributed to the decoy's high success rate in purchasing alcohol. (AOB at pp. 5-9.)

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 appellant. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

Appellant maintains the police used a decoy in this case that failed to comply with standards set forth in rule 141(b)(2). It argues that the decoy's appearance violated this rule because her physical stature — at 5' 5" and 225 pounds — was much larger than that of a typical teenager. It contends her excess weight gave her a double chin — characteristic of someone much older. In addition, appellant contends the decoy's extensive experience purchasing alcohol as a decoy gave her a confident and practiced demeanor. It maintains that when the decoy handed the clerk her ID with confidence it reinforced the impression that she was over 21 years of age. It contends all these factors contributed to her high rate of success in purchasing alcohol, and to her presenting an appearance which did not comply with rule 141(b)(2).

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].)

When findings are attacked 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].*)

Therefore the issue of substantial evidence, when raised by an appellant, 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 ALJ's findings on the issue of whether there was compliance with rule 141(b)(2). The ALJ made the following findings regarding the decoy's appearance:

5. Decoy Vanessa appeared and testified at the hearing. On June 29, 2017, she was approximately 5' 5" tall and weighed 225 pounds. She wore a black top with lace, denim capris and black flip-flop sandals. She wore only mascara for make-up. She wore her hair down, past her shoulders. (Exhibits 4 and 5.) Her appearance at the hearing was the same except that she wore black heels, black slacks, and a light pink sweater over a floral blouse.

[¶ . . . ¶]

13. Decoy Vanessa 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 the clerk Corona at the Licensed Premises on June 29, 2017, decoy Vanessa displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to clerk Corona. Decoy Vanessa appeared youthful, and her true age.

14. On June 29, 2017, decoy Vanessa visited five location, with three of those locations selling alcohol to her, including the Licensed Premises. Decoy Vanessa had been on approximately five minor decoy operations prior to the said operation on June 29, 2017.

(Findings of Fact, ¶¶ 5-14.) Based on these findings, the ALJ addressed appellant's rule 141(b)(2) arguments:

6. With respect to rule 141(b)(2), specifically, the Respondent argued decoy Vanessa did not have the appearance generally expected of a person under the age of 21. Respondent's counsel opined that decoy Vanessa was wearing clothing that one would not necessarily anticipate a child under the age of 21 to wear.

7. This rule 141(b)(2) argument is rejected. The Respondent presented no evidence that decoy Vanessa's clothing attire actually resulted in decoy Vanessa appearing 21 or older to clerk Corona. Decoy Vanessa appears her age, wearing the typical attire of a teenage girl in Southern California. Decoy Vanessa looked her age at the time of the sales transaction, 17, and at the time of the hearing, 18. In other words, decoy Vanessa had the appearance generally expected of a person under the age of 21.

(Findings of Fact ¶ 13.)

(Conclusions of Law, ¶¶ 6-7.) We agree.

As this Board has said many times, minors come in all shapes and sizes and we are reluctant to suggest, without more, that minor decoys of large stature automatically violate the rule. (See, e.g., *7-Eleven/NRG Convenience Stores* (2015) AB-9477; *7-Eleven Inc./Lobana* (2012) AB-9164.) This Board has noted that:

[a]n ALJ's task to evaluate the appearance of decoys is not an easy one, nor is it precise. To a large extent, application of such standards as the rule provides is, of necessity, subjective; all that can be required is reasonableness in the application. As long as the determinations of the ALJs are reasonable and not arbitrary or capricious, we will uphold them.

(*O'Brien* (2001) AB-7751, at pp. 6-7.) 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 Findings of Fact paragraphs 5-13, and Conclusions of Law paragraphs 6-7, the ALJ found that the decoy met this standard.

The Board has also, on innumerable occasions, rejected the "experienced decoy" argument. As the Board 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.) This case is no different.

Appellant argues that the decoy's success rate — being able to purchase alcohol at three out of five premises — is evidence that most of the employees she interacted with did not think she was under 21, and implies that this should be a defense. (Citing

7-Eleven/Dianne Corp. (2002) AB-7835.) However, this Board has never held that a high success rate constitutes a complete defense. Instead, it has observed that “[w]hile [the Board] has reversed a handful of cases in which the decoy’s success rate was notably high, in all of those cases the success rate merely supplemented other indicia of error.” (*7-Eleven, Inc./NRG Convenience Stores, Inc.* (2015) AB-9477, at p. 6.) In other words, a decoy’s success rate is best characterized as supplementary evidence of a rule 141(b)(2) violation. Without other, more tangible evidence that the decoy appeared over 21, there is nothing to prompt either an ALJ or this Board to favor the inference that the success rate was somehow connected to the decoy’s apparent age — let alone substitute such an unsupported inference for a firsthand assessment of the physical appearance of the decoy. Without additional direct evidence that a decoy’s appearance violated the rule, her success rate is irrelevant.

Finally, appellant contends that the “simple act of handing over identification for a clerk to check is in and of itself a signal that the person offering the identification is of age.” (AOB at p. 7.) It contends that a typical teenage would not readily hand over his or her identification to purchase beer. We must reject appellant’s contention that the decoy’s confidence in handing her license to the clerk created the appearance that she was over 21. The clerk did not testify — we have no way of knowing if her confidence *actually resulted* in the clerk making the sale. Further, there is nothing in the record indicating that the decoy’s presentation of the driver’s license was done “confidently,” as appellant contends. Appellant seems to suggest that the mere presentation of any driver’s license, when asked, would give a decoy the appearance of someone older than 21. However, by that logic, everything a decoy does could be seen as “confident” — from presenting an alcoholic beverage to a clerk to volunteering to be a decoy in the

first place. Under those circumstances, all decoys would appear over 21 years of age and the criteria of 141(b)(2) would lose all meaning. Accordingly, we reject appellant's argument.

Appellant presented no evidence that the decoy's experience, physical appearance, or demeanor *actually resulted* in her displaying the appearance of a person 21 years old or older on the date of the operation in this case. As noted previously, the clerk did not testify. We cannot know what went through the clerk's mind in the course of the transaction, or why he made the sale — in spite of looking directly at evidence to the contrary, showing her to be 17 years of age — except that we know he told the police officers that the line was long and he was trying to get it moving. There is simply no evidence to establish that the decoy's stature, experience, or demeanor was the *actual reason* the clerk made the sale. On the contrary, in the interest of expediency, the clerk in this matter entered a birthdate that he knew to be false — that indicated that the decoy was 50 years of age. This completely undermines appellant's 141(b)(2) defense.

Ultimately, appellant is simply asking this Board to second guess the ALJ and reach a different conclusion, despite substantial evidence to support the findings in the decision. This the Board cannot do.

ORDER

The decision of the Department is affirmed.³

MEGAN McGUINNESS, ACTING CHAIR
SUSAN A. BONILLA, 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:**

SF MARKETS, LLC
SPROUTS FARMERS MARKET
4230 PACIFIC COAST HIGHWAY
TORRANCE, CA 90503

OFF-SALE BEER AND WINE - LICENSE

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

LAKELAND DISTRICT OFFICE

AB-9745
File: 20-510207

Reg: 18086318

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 August 22, 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 October 22, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: September 11, 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:

| | | |
|---------------------------------------|---|---------------------------------|
| SF Markets, LLC | } | File: 20-510207 |
| Dbas: Sprouts Farmers Market | } | |
| 4230 Pacific Coast Highway | } | Reg.: 18086318 |
| Torrance, California 90503 | } | |
| | } | License Type: 20 |
| Respondent | } | Word Count: 8,997 |
| | } | Reporter: |
| | } | Tracy Terkeurst |
| | } | California Reporting |
| <u>Off-Sale Beer and Wine License</u> | } | <u>PROPOSED DECISION</u> |

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Cerritos, California, on June 14, 2018.

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

Ralph Saltsman, Attorney, represented Respondent, SF Markets, LLC.

The Department seeks to discipline the Respondent's license on the grounds that, on or about June 29, 2017, the Respondent, through their agent or employee, David Corona, at said premises, sold, furnished, gave or caused to be sold, furnished or given, alcoholic beverages to Vanessa C., an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 1A.)

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 June 14, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on January 16, 2018.

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 Respondent for the above-described location on July 7, 2011 (the Licensed Premises).

3. Respondent has been the subject of the following discipline, which is final (Exhibit 2):

| <u>Date of Violation</u> | <u>Reg. No.</u> | <u>Violation</u> | <u>Penalty</u> |
|--------------------------|-----------------|------------------|-----------------------------------|
| October 25, 2016 | 17085318 | BP §25658(a) | POIC in lieu of 15-day suspension |

4. Vanessa C. (hereinafter referred to as decoy Vanessa) was born on September 11, 1999. On June 29, 2017, she was 17 years old. On that date she served as a minor decoy in an operation conducted by the Torrance Police Department (Torrance PD).

5. Decoy Vanessa appeared and testified at the hearing. On June 29, 2017, she was approximately 5'5" tall and weighed 225 pounds. She wore a black top with lace, denim capris and black flip-flop sandals. She wore only mascara for make-up. She wore her hair down, past her shoulders. (Exhibits 4 and 5.) Her appearance at the hearing was the same except that she wore, black heels, black slacks, and a light pink sweater over a floral blouse.

6. On June 29, 2017, decoy Vanessa entered the Licensed Premises. She walked to the alcoholic beverage section and selected a six-pack of Bud Light beer bottles. (Exhibit 4.) Beer is an alcoholic beverage. Decoy Vanessa took the six-pack of beer to a cash register to purchase it.

7. Decoy Vanessa approached clerk David Corona (hereinafter referred to as clerk Corona), who was working behind a cash register, and placed the six-pack of Bud Light beer upon the counter. Clerk Corona scanned the beer and asked for identification (ID). Decoy Vanessa handed to clerk Corona her valid California Identification Card, which had a vertical orientation, showed her correct date of birth and included a red stripe which read, "AGE 21 IN 2020," and a blue stripe which read, "AGE 18 IN 2017." (Exhibit 3.) Clerk Corona retrieved the ID, and swiped it along the cash register. The cash register did not read the black bar along the back of the ID card. Decoy Vanessa saw clerk Corona enter into the cash register a birthdate, which was not her own. Clerk Corona proceeded with the sales transaction of alcohol to the decoy and returned her ID. Decoy Vanessa gave money to clerk Corona, who provided the decoy with change and a receipt. The receipt depicted the six-pack Bud Light beer purchase and "Age Confirmed - 2/15/1967," the latter of which represented the date of birth clerk Corona had entered into the cash register to complete the sales transaction. (Exhibit 6.) Decoy Vanessa took the change, the six-pack of Bud Light beer, and exited the store.

8. After decoy Vanessa walked outside the store she met with Torrance PD Detectives Andrew Lee, Masone and Schmitz, and showed them the said receipt.

9. Decoy Vanessa re-entered the Licensed Premises with Detectives Lee and Schmitz. Once they were inside the store decoy Vanessa pointed out clerk Corona as the person who sold her the alcohol, by walking up to the cash register at which clerk Corona was working and directed Detective Lee toward clerk Corona. Detective Lee approached clerk Corona at the cash register, identified himself as a police officer, asked him to finish with his customers so he could speak with clerk Corona away from the customers. Clerk Corona complied. One of the detectives requested to see a manager. Decoy Vanessa and the two detectives then waited at the side of the store for the manager.

10. When the store manager arrived, the store manager, clerk Corona, decoy Vanessa and Detectives Lee and Schmitz all walked to the east side of the store and entered a small office. Detective Lee advised clerk Corona of the violation and then asked decoy Vanessa to identify the person who sold alcohol to her. Decoy Vanessa pointed at clerk Corona and said, "It was him." Decoy Vanessa and clerk Corona were standing within inches of each other, at the time of this identification. A photo of clerk Corona and decoy Vanessa was taken after the face-to-face identification inside the said office, with decoy Vanessa holding her ID and the six-pack of Bud Light beer while standing next to clerk Corona. (Exhibit 4.)

11. Detective Lee showed clerk Corona decoy Vanessa's CA ID Card, specifically showing him the red stripe which indicated she would be "AGE 21 IN 2020," (Exhibit 3.) Detective Lee asked clerk Corona why he input February 15, 1967, into the cash register during the sales transaction with decoy Vanessa. Clerk Corona explained that the line was long and he was trying to get the line moving.

12. Detective Lee issued a citation to clerk Corona after the face-to-face identification. Clerk Corona did not appear and did not testify at the hearing. There is no evidence clerk Corona was distracted, or that anyone interfered, during the sales transaction or the face-to-face identification.

13. Decoy Vanessa 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 Corona at the Licensed Premises on June 29, 2017, decoy Vanessa displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to clerk Corona. Decoy Vanessa appeared youthful, and her true age.

14. On June 29, 2017, decoy Vanessa visited five locations, with three of those locations selling alcohol to her, including the Licensed Premises. Decoy Vanessa had been on approximately five minor decoy operations prior to the said operation on June 29, 2017.

15. The parties entered into a stipulation regarding the following facts: Leonard Collins is currently Respondent's store manager and was Respondent's store manager on the day of the minor decoy operation, June 29, 2017. Leonard Collins, if called to testify and placed under oath, would have testified to the following: (1) Exhibit A, entitled "Sprouts Farmers Market Academy - Business Protection and Safety Team," is a printed manifestation of Respondent's computer training program and related material, (2) Exhibit B, entitled "Alcohol Policy Acknowledgment Form," was signed on May 4, 2017, by Respondent's employee David Corona, who is the same David Corona named in the Accusation, and (3) Respondent's employee David Corona underwent the training represented in Exhibit A, and was terminated after the said sales to minor violation but on the same day of the said violation by store manager Leonard Collins.

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 Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on June 29, 2017, the Respondent's clerk, David Corona, inside the Licensed Premises, sold alcoholic beverages, to-wit: beer, to Vanessa C., a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-13.)

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

6. With respect to rule 141(b)(2), specifically, the Respondent argued decoy Vanessa did not have the appearance generally expected of a person under the age of 21. Respondent's counsel opined that decoy Vanessa was wearing clothing that one would not necessarily anticipate a child under the age of 21 to wear.

7. This rule 141(b)(2) argument is rejected. The Respondent presented no evidence that decoy Vanessa's clothing attire actually resulted in decoy Vanessa appearing 21 or older to clerk Corona. Decoy Vanessa appears her age, wearing the typical attire of a teenage girl in Southern California. Decoy Vanessa looked her age at the time of the sales transaction, 17, and at the time of the hearing, 18. In other words, decoy Vanessa had the appearance generally expected of a person under the age of 21. (Findings of Fact ¶¶ 13.)

PENALTY

The Department requested the Respondent's license be suspended for a period of 25 days, based on the fact the said violation was the "second strike" within 36 months, with the last sale to minor violation occurring on October 25, 2016. (Exhibit 2.)

The Respondent did not recommend a penalty in the event the accusation was sustained. The Respondent argued mitigating factors which included: (1) The Respondent exercised a good faith attempt to ensure its employees pay attention and obey the law with a computer based training program (Exhibit A), which clerk Corona acknowledged he read (Exhibit B) and, (2) clerk Corona was fired after the said violation pursuant to policy and as a warning to other employees.

While Respondent argued its training program was a mitigating factor, there was no evidence that Respondent re-trained any of its employees after the said violations, or adjusted the training in any way, since despite the training two sales to minor violations occurred within 36 months. Furthermore, although the training program requires Respondent's clerks ask for ID and enter the date of birth of customers appearing under 30 years of age, there is no evidence Respondent took any positive action to correct the problem of its clerks effectively overriding the system by randomly entering an age-appropriate birthdate into the cash register to complete sales of alcoholic beverages to a minor. It is quite alarming that in just a little over one month after clerk Corona received said training and signed the "Alcohol Policy Acknowledgment Form," that on

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

June 29, 2017, he proceeded with the sale of alcohol to a minor despite the minor's youthful appearance and the red flags of the minor's ID (decoy Vanessa's vertical ID plainly stated in red that she would not be 21 years old until the year 2020). Respondent's training program fails to include these simple red flags of recognizing minors' IDs. The only evidence of mitigation is that Respondent fired clerk Corona. In balancing the aggravating and mitigating factors, the former outweigh the latter. The penalty recommended herein complies with rule 144.

ORDER

The Respondent's off-sale beer and wine license is hereby suspended for a period of 25 days

Dated: July 18, 2018



D. Huebel
Administrative Law Judge

| |
|---|
| <input checked="" type="checkbox"/> Adopt |
| <input type="checkbox"/> Non-Adopt: _____ |
| By: <u>Jacob A. Applequist</u> |
| Date: <u>8/22/18</u> |