

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on November 15, 2001. On February 15, 2018, the Department filed a single-count accusation charging that appellant's bartender, Chana Marie Pugh (the bartender), sold an alcoholic beverage to 19-year-old Matthew Regan (the decoy) on June 8, 2017. Although not noted in the accusation, the decoy was working for the Los Angeles Police Department (LAPD) at the time.

At the administrative hearing held on May 24, 2018, documentary evidence was received, and testimony concerning the sale was presented by the decoy; by LAPD Officer Evelyn Diab and Sergeant Jeffrey R. Beck; by Department Agent David Duran; by the bartender; and by Jon Valenti of Laurel Concepts, an entity providing HR support for appellant, and ensuring compliance with alcoholic beverage laws.

Testimony established that on June 8, 2017, the decoy entered the licensed premises and went to the bar. A security guard was supposed to be stationed at the front door to check identification, but this person had stepped away for a few minutes at the time the decoy arrived. (RT at pp. 56-57.) The decoy waited for a spot to open at the bar, and when it did he ordered a beer from the bartender. She asked what kind he wanted. He looked at the taps and picked one with a large and easy to read handle — Bug Sur beer. (Exh. 4.) The bartender served him the beer and told him the price. The decoy paid for the beer and sat down at a table with the beer.

Officer Diab observed the transaction from outside the licensed premises through a window. After the decoy sat down, she notified her partners about the violation. She then entered the premises to keep an eye on the decoy for his safety. Sgt. Beck and other officers entered the premises and asked the decoy who sold him the beer. He pointed out the bartender who was behind the counter.

The officers contacted the bartender and escorted her to the back of the premises. Sgt. Beck informed the bartender she had sold alcohol to a minor. He then asked the decoy to identify the person who sold him the beer. The decoy pointed at the bartender and said that she had. The decoy and bartender were two feet apart and facing each other at the time. The bartender admitted that she sold alcohol to the minor. A photo of the two of them was taken (exh. 5) and the bartender was cited.

The bartender testified that the decoy seemed impatient and that she thought he was 26 years old because he ordered a beer she believed to be a connoisseur-type of drink. (RT at pp. 50-51.) The bartender also testified that it was her belief that everyone at the bar had been carded by the security guard at the entrance to make sure they were over the age of 21. (*Id.* at p. 54.) She testified that the decoy's broad shoulders and athletic appearance, coupled with these other factors, gave her the impression that he was over the age of 21.

The administrative law judge (ALJ) issued his proposed decision on July 17, 2018, sustaining the accusation and recommending a 10-day suspension, conditionally stayed for one year. The Department adopted the proposed decision in its entirety on August 23, 2018, and a Certificate of Decision was issued on September 11, 2018.

Appellant then filed a timely appeal contending the ALJ's finding, that the decoy displayed the appearance which would generally be expected of a person under the age of 21, was not supported by substantial evidence, thereby violating rule 141(b)(2).²

DISCUSSION

Appellant contends the ALJ's finding that there was compliance with rule

²References to Rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

141(b)(2) was not supported by substantial evidence because the decoy was three weeks shy of his 20th birthday and he displayed the appearance of a person over the age of 21 due to his athletic build and impatient demeanor. Appellant argues that the bartender relied on the fact that a doorman was checking identification at the door, leading her to believe no one under 21 would be in the bar. In addition, the fact that the decoy ordered an obscure craft beer that only a more sophisticated individual would order led the bartender to believe the decoy was over 21. (AOB at pp. 2-8.)

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.)

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. Regan appeared and testified at the hearing. On June 8, 2017, he was 5' 11" tall and weighed 170 pounds. We wore a gray shirt with a red and white design symbolizing Ohio's flag, blue jeans, and white Converse tennis shoes. His hair was very short. He had a blue wrist band on his right wrist and an Ohio State Buckeyes' lanyard hanging from his pocket. (Exhibits 5 & 6.) At the hearing his appearance was the same except that

he was five pounds heavier and his hair was longer and brushed to one side.

¶ . . . ¶

14. Regan appeared his age—19—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 June 8, 2017, Regan displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Pugh.

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

5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)^[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondent argued that Regan was a well-built young man who picked a sophisticated beer and had an impatient demeanor. As such, the Respondent argued that Regan had the appearance of a person who was 24 or 25 years old as Pugh opined. This argument is rejected—Regan's appearance was consistent with that generally expected of a person under the age of 21. (Finding of Fact ¶ 14.) It is clear that Pugh's opinion was colored by the fact that she believed Regan's ID had been checked at the door and, therefore, expected him to be over the age of 21. There was nothing about Regan's appearance or behavior which might indicated [sic] that he was over the age of 21.

(Conclusions of Law, ¶ 5.)

On the subject of compliance with rule 141(b)(2), 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 through 14, and Conclusions of Law paragraph 5, the ALJ found that the

decoy met this standard.

As the Court noted in *Garfield Beach*, specific elements are required to make a decoy operation fair:

Subdivision (b) of Rule 141 implements the goal of fairness by imposing five specific requirements for every minor decoy operation. Decoys must be under the age of 20; have the appearance of a person under 21; carry their own actual identification and present that identification upon request; truthfully answer any questions about their ages; and make face-to-face identifications of the persons who sold the alcoholic beverages. (Rule 141, subd. (b)(1)-(5).) Fairness under Rule 141 is assured by a set of five expressly defined safeguards, all of which must be fulfilled during a minor decoy operation. [Citation.]

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd./ Garfield Beach* (2017) 7 Cal.App.5th 628, 638 [213 Cal.Rptr.3d 130].) In this matter, the decoy operation complied with all five elements required under the rule — the Board can require nothing further, such as asking that the decoy not be too close to the age of 20, or that he not order an obscure type of beer.

We have reviewed the entire record and agree with the ALJ's determination that there was compliance with rule 141(b)(2). As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity to observe the decoy as he testifies and to make the determination whether the decoy's appearance met the requirement of rule 141 that he possess 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.

The evidence presented at the hearing, including the presence of the decoy himself, provided substantial evidence for finding that the decoy's appearance complied with the requirements of rule 141(b)(2). Ultimately, appellants are asking this Board to consider the same set of facts and reach a different conclusion, despite substantial

evidence to support those findings. This we cannot do.

ORDER

The decision of the Department is affirmed.³

MEGAN Mc GUINNESS, 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:**

11 VENTURA, LLC
LAUREL TAVERN
11938 VENTURA BLVD.
STUDIO CITY, CA 91604-2606

ON-SALE GENERAL EATING PLACE - LICENSE

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

RECEIVED

SEP 11 2018

Alcoholic Beverage Control
Office of Legal Services

VAN NUYS DISTRICT OFFICE

AB - 9752
File: 47-391882

Reg: 18086528

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 23, 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:

11 Ventura LLC
dba Laurel Tavern
11938 Ventura Blvd.
Studio City, California 91604-2606

Respondent

} File: 47-391882

} Reg.: 18086528

} License Type: 47

} Word Count: 20,000

} Reporter:

} Samantha Ruiz

} Kennedy Court Reporter

On-Sale General Eating Place License

} **PROPOSED DECISION**

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Van Nuys, California, on May 24, 2018.

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

Donna J. Hooper, attorney-at-law, represented respondent 11 Ventura LLC.

The Department seeks to discipline the Respondent's license on the grounds that, on or about June 8, 2017, the Respondent, through its agent or employee, sold, furnished, or gave alcoholic beverages to Matthew Regan, 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 May 24, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on February 15, 2018.

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

2. The Department issued a type 47, on-sale general eating place license to the Respondent for the above-described location on November 15, 2001 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondent's license.
4. Matthew Regan was born on July 1, 1997. He served as a minor decoy during an operation conducted by LAPD on June 8, 2017. On that date he was 19 years old.
5. Regan appeared and testified at the hearing. On June 8, 2017, he was 5'11" tall and weighed 170 pounds. He wore a gray shirt with a red and white design symbolizing Ohio's flag, blue jeans, and white Converse tennis shoes. His hair was very short. He had a blue wrist band on his right wrist and an Ohio State Buckeyes' lanyard hanging from his pocket. (Exhibits 5 & 6.) At the hearing his appearance was the same except that he was five pounds heavier and his hair was longer and brushed to one side.
6. On June 8, 2017, Regan entered the Licensed Premises and went to the bar counter. He waited for a spot to open and ordered a beer from Chana Pugh, the bartender. She asked him what kind of beer he wanted; he looked at the taps and ordered a Big Sur beer. He chose Big Sur because the sign on the tap was large and easy to read. (Exhibit 4.) Pugh served him a glass of beer and told him the price. Regan paid, received some change, then sat down at a table with the glass of beer.
7. Ofcr. Evelyn Diab waited outside the Licensed Premises and watched Regan through a window. After Regan sat down, she notified her partners of the violation. Ofcr. Diab entered the Licensed Premises to keep an eye on Regan until the other officers arrived. She had to speak to a doorman when she entered.
8. Sgt. Jeffrey Beck and other officers entered the Licensed Premises. Sgt. Beck asked Regan to point out the person who sold him the beer. Regan pointed to Pugh, who was still behind the counter. The officers contacted Pugh and escorted her to a spot near the back of the Licensed Premises. Sgt. Beck informed Pugh of the violation, then asked Regan to identify the person who sold him the beer. He pointed to Pugh and said that she had. Regan and Pugh were no more than two feet apart and facing each other at the time. Pugh stated that she had sold alcohol to Regan. A photo of the two of them was taken (exhibit 5) and Pugh was cited.
9. Regan learned of the decoy program through school. He contacted Sgt. Beck and indicated that he was interested in being a decoy. June 8, 2017 was his second time acting as a decoy. He visited 13 licensed locations,² of which six sold to him.

² Regan visited a total of 15 locations on June 8, 2017, but two did not have alcohol for sale.

10. Pugh testified that she believed Regan was 23 or 24 years old when she first saw him. In her experience as a bartender, Big Sur beer is typically ordered by more experienced drinkers because it is a double IPA and is very hoppy or bitter. Someone is supposed to check IDs at the door starting around sundown. Accordingly, she believed that Regan had been carded when he entered.

11. Pugh subsequently learned that Regan's ID had not been checked since the doorperson had stepped away for a few minutes. The Licensed Premises has since changed its policies—now, the doorperson must notify someone before stepping away and cannot leave the door unattended.

12. Jon Valenti is employed by a company which oversees the operation of the Licensed Premises. His responsibilities include human resources (e.g., hiring standards, training), kitchen and food programs, and compliance with alcoholic beverage laws. After the violation, he had all employees undergo LAPD's STAR training (exhibits B & C) and hired a new security team. Security personnel now wear a more recognizable uniform and have been trained to ask for ID from anyone who appears to be under the age of 30. Additionally, bartenders have been instructed to card at the bar counter as well.

13. New employees receive three to five days of training before they are placed on the floor, including attending STAR training. All security personnel and bar staff have been provided with ID checking guides. Security is required to identify all minors to bar staff and no minors are permitted in the Licensed Premises after 9:00 p.m. The Licensed Premises only lets patron order one drink at a time and the person consuming the drink must be present at the bar counter at the time of sale.

14. Regan appeared his age—19—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 June 8, 2017, Regan displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Pugh.

15. 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 8, 2017, the Respondent's bartender, Chandra Pugh, inside the Licensed Premises, sold an alcoholic beverage to Matthew Regan, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-11 & 14.)

5. The Respondent argued that 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). Specifically, the Respondent argued that Regan was a well-built young man who picked a sophisticated beer and had an impatient demeanor. As such, the Respondent argued that Regan had the appearance of a person who was 24 or 25 years old as Pugh opined. This argument is rejected—Regan's appearance was consistent with that generally expected of a person under the age of 21. (Finding of Fact ¶ 14.) It is clear that Pugh's opinion was colored by the fact that she believed Regan's ID had been checked at the door and, therefore, expected him to be over the age of 21. There was nothing about Regan's appearance or behavior which might indicated that he was over the age of 21.

PENALTY

The Department requested that the Respondent's license be suspended for 15 days. The Respondent argued that, if the accusation were sustained, a mitigated penalty was appropriate given its 15 years of discipline-free operation and the changes it made to its procedures after the sale. In the Respondent's opinion, a 5-day or 10-day suspension, all stayed, would be appropriate.

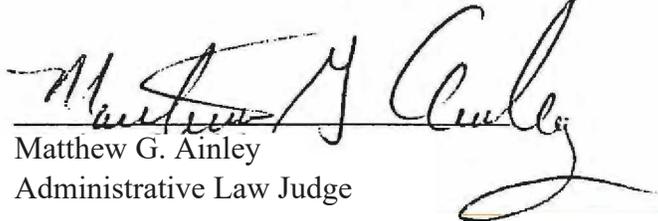
The Respondent is correct—15 years of discipline-free operation warrants a mitigated penalty. Moreover, it is clear that the sale in this case was accidental and that the Respondent has modified its practices to ensure that no such mistake occurs again. (Findings of Fact ¶¶ 11-13.) The penalty recommended herein complies with rule 144.

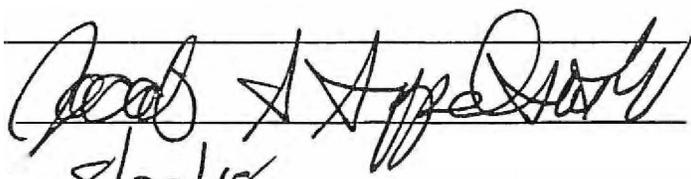
³ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

ORDER

The Respondent's on-sale general eating place license is hereby suspended for a period of 10 days, with execution of 10 days of the suspension stayed, upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within one year from the effective date of this decision; that should such determination be made, the Director of the Department of Alcoholic Beverage Control may, in his or her discretion and without further hearing, vacate this stay order and reimpose the stayed penalty; and that should no such determination be made, the stay shall become permanent.

Dated: July 17, 2018


Matthew G. Ainley
Administrative Law Judge

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By: 
Date: <u>8/23/18</u>