

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

AB-9756

File: 20-530276; Reg: 18086920

7-ELEVEN, INC. and JACOS & COMPANY, INC.,
dba 7-Eleven Store #39682A
9472 Valley View Street, Cypress, CA 90630,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: June 6, 2019
Ontario, CA

ISSUED JUNE 21, 2019

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

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

OPINION

7-Eleven, Inc. and Jacos & Company, Inc., doing business as 7-Eleven Store #39682A, appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 20 days because their clerk sold alcoholic beverages to two individuals under the age of 21 — a police minor decoy and a non-decoy minor — in violation of Business and Professions Code section 25658, subdivision (a).

¹The decision of the Department, dated October 10, 2018, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 26, 2015.

There is no record of departmental discipline against the license.

On May 11, 2018, the Department filed a two-count accusation against appellants charging that, on October 12, 2017, appellants' clerk, Samantha Palazzolo (the clerk), sold an alcoholic beverage to 18-year-old Vanessa Tavarez (the decoy), who was working with the Cypress Police Department (CPD) at the time. (Count 1). In addition, on October 12, 2017, the clerk sold an alcoholic beverage to 18-year-old Brandon Kwon (the minor), who was in the premises on his own — not part of the decoy operation. (Count 2.)

At the administrative hearing held on July 31, 2018, documentary evidence was received and testimony concerning the two sales was presented by the decoy; by CPD Detective Christopher McShane; by the minor; and by Christine Duggan, a senior sales associate at the licensed premises.

Testimony established that on October 12, 2017, the decoy entered the licensed premises and went to the coolers where she selected a three-pack of Bud Light beer. (Exh. 3.) She took the beer to the register and stood in line behind one person. Behind her, in line, was a person the decoy recognized as a high school classmate — the minor. The minor was holding a box containing 18 12-ounce cans of Rolling Rock Extra Pale Premium Beer. (Exh. 7.) The decoy did not speak to the minor.

Two clerks were assisting customers — one male, one female. The decoy was assisted by the female clerk, who scanned the beer and asked the decoy for her identification. The decoy handed the clerk her California driver's license, which had a vertical orientation, and which showed her correct date of birth — showing her to be 18

years of age. The driver's license also contained a red stripe indicating "AGE 21 IN 2020." (Exh. 2.) The clerk looked at the ID for approximately 10 seconds then completed the sale, by pressing a "VISUAL ID OK" button on the register. The clerk did not ask the decoy any age-related questions. Det. McShane witnessed the transaction from outside the store through the window. The decoy exited the premises.

The minor then placed the 18-pack of Rolling Rock beer on the counter. The clerk scanned the beer and asked for his identification. The minor held up his California driver's license. The clerk looked at the ID quickly but did not take it from the minor. It had a vertical orientation, showed his correct date of birth — showing him to be 18 years of age — and contained a red stripe indicating "AGE 21 IN 2020." The clerk completed the transaction without asking any age-related questions. Det. McShane again witnessed the transaction from outside the store through the window. The minor exited the premises.

Outside, Det. McShane detained the minor and asked him how old he was. The minor admitted that he was 18 years old. When asked if he had a fake ID he said no. Another CPD officer and a Department agent entered the premises and contacted the female clerk and brought her outside. The minor identified the clerk as the person who sold him the beer and the clerk confirmed this — although she said she thought that he was 21. A photograph was taken of the minor (exhs. 5 and 6) and he was issued a citation.

The decoy was brought over to the clerk and a CPD officer asked the decoy to identify the person who sold her the beer. The decoy pointed at the clerk from a distance of about three feet while they were facing each other. A photo of the decoy and clerk was taken (exh. 3). The clerk confirmed selling the beer to the decoy and

said she thought the decoy was 21 years old. The clerk's employment was placed on suspension and she subsequently quit.

The administrative law judge (ALJ) submitted her proposed decision on August 10, 2018, sustaining the accusation and recommending a 20-day suspension of the license. The Department adopted the proposed decision in its entirety on September 20, 2018, and a Certificate of Decision was issued on October 10, 2018.

Appellants then filed a timely appeal contending: (1) the ALJ failed to proceed in a manner required by law when she considered non-final alleged violations as constituting aggravating evidence; and (2) the penalty fails to properly address mitigating factors and therefore constitutes an abuse of discretion. These issues will be discussed together.

DISCUSSION

Appellants contend the Department failed to proceed in a manner required by law when it considered non-final alleged violations as constituting aggravating evidence, and failed to consider evidence of mitigation when determining the penalty.

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

If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion."

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

Rule 144 provides:

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

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

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

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

Penalty Policy Guidelines:

The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or

complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

(Ibid.)

In the decision, the ALJ notes:

The Department requested the Respondents' license be suspended for a period of 20 days, based on the aggravating factor that clerk Palazzo sold to two youthful appearing minors, one after the other, who presented their valid California Driver Licenses, which had the glaring red flags of a minor's ID, including the vertical format and red stripe which said they would not be 21 until the year 2020. The Department further argued there is evidence of prior alcohol sales to Brandon Kwon based on his testimony. . . .

(Decision, at p. 10.)

The penalty section of the decision then goes on to explain why the ALJ did not find that the evidence presented in mitigation carried the same weight as the factors noted in aggravation. This type of discretion is the sole province of the ALJ and the Board is not permitted to second-guess the ALJ's determinations unless it is shown that they constitute an abuse of discretion. The balancing of factors in mitigation and aggravation by the ALJ in this case was entirely within the scope of her discretion.

Appellants argue that the Department erred when it treated a "pending disciplinary matter" as a factor in aggravation. They contend that neither of the two counts in the accusation had yet resulted in a final decision by the Department, so neither could be viewed as a "prior violation" for purposes of aggravating the penalty. Appellants further argue that it was error for the Department to discount its training efforts, use of a secret shopper program, and length of licensure — offered by appellants as evidence of mitigation — by determining that this evidence of mitigation

was outweighed by factors in aggravation. (See Decision, at pp. 10-11.) Appellants believe that, at most, the penalty should have been 15-days' suspension, with a stay of any additional days of suspension in excess of 15 days. This is their opinion, and is not mandated by the guidelines of rule 144.

Appellants cite the Board's recent decision in *99 Cents Only Stores, LLC* (2019) AB-9732, and argue that the Board should decide the instant case in the same way. The Department, on the other hand, maintains it would be improper for the Board to rely on the *99 Cents Only Stores* decision as precedent. Technically, the Department is correct. The ABC Appeals Board is not one of the agencies empowered under the APA to designate its decisions as precedential. However, we consider our past decisions to be persuasive authority, and have said so many times. It would simply make no sense if the Board decided every case in a vacuum, as if no other case had ever been decided on that issue. Our decisions, therefore, rely on past decisions for guidance, even though technically they are not legally binding precedent.

In *99 Cents Only Stores*, cited by appellant, two separate matters were consolidated for an administrative hearing, but a decision was issued by the ALJ in only one of them. That decision cited the other, unresolved accusation as an aggravating factor. On appeal, the Board found that “[a] pending accusation is simply not the equivalent of prior disciplinary history, or a continuing course of conduct, and cannot be relied on as such until and unless there is a final decision in that matter.” (*Id.* at p. 13.) Accordingly, the Board reversed the Department's decision and remanded the matter for reconsideration of the penalty — without reliance on a non-final pending accusation. In this case, by contrast, unlike the case cited by appellant, the so-called “pending disciplinary matter” is not a separate, unresolved matter. Instead, it is one of the two

counts in the underlying accusation in this matter.

The Department argues, however, that its own Precedential Decision No. 19-03-E is controlling. In that decision the Director states:

. . . Nothing in section 25658.1, or elsewhere, precludes the use of prior actual notice of an alleged violation of section 25658(a), whether by way of verbal or written warning, or of a pending accusation, as an aggravating factor in determining the appropriate level of discipline following a determination that the licensee has subsequently violated the same law.

(*Cal. Dept of ABC v. 7-Eleven and Yi*, Precedential Decision No. 19-03-E (April 18, 2019) at p. 5, ¶ 5.) In short, the Department's position is that it would be contrary to its statutory purpose — to protect the public welfare and morals, as set forth in the California Constitution — for it to disregard evidence that other non-final sales of alcohol had occurred at a licensed premises. For future cases the Department is correct that it may argue that this 2019 decision is controlling precedent. However, in the instant case, it is entirely irrelevant to a discussion of a decision issued six months prior to that precedential decision.

We need not reach the issue of whether our decisions are precedential because the *99 Cents Only Stores* case is distinguishable on its facts as involving two entirely separate accusations — not two counts of a single accusation. The evidence presented in this case established that a second sale of alcohol to a minor occurred immediately after the clerk in this matter sold alcohol to a minor decoy. The first and second sales are part of the same accusation. Accordingly, it was entirely proper for the ALJ to consider evidence of both violations to determine the proper penalty. We see no error.

As the Board has said many times, the extent to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion — pursuant to rule 144 — and the Board may not interfere with that discretion absent a clear showing

of abuse of discretion. Appellants have not demonstrated an abuse of discretion in this case.

ORDER

The decision of the Department is affirmed.¹

MEGAN McGUINNESS, ACTING CHAIR
SUSAN A. BONILLA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

¹This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.

APPENDIX

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

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

7 ELEVEN INC. AND JACOS & COMPANY, INC.
7 ELEVEN STORE 39682A
9472 VALLEY VIEW STREET
CYPRESS, CA 90630

OFF-SALE BEER AND WINE - LICENSE

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

SANTA ANA DISTRICT OFFICE

File: 20-530276

Reg: 18086920

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 September 20, 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 November 20, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: October 10, 2018



Matthew D. Botting
General Counsel

RECEIVED

OCT 11 2018

Alcoholic Beverage Control
Office of Legal Services

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

IN THE MATTER OF THE ACCUSATION AGAINST:

7 Eleven Inc., and Jacos & Company, Inc.	}	File: 20-530276
Dbas: 7 Eleven Store 39682A	}	
9472 Valley View Street	}	Reg.: 18086920
Cypress, California 90630	}	
	}	License Type: 20
Respondents	}	
	}	Word Count: 13,090
	}	
	}	Reporter:
	}	Judy Jacobs
	}	Kennedy Court Reporters
	}	
<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 Santa Ana, California, on July 31, 2018.

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

Donna Hooper, Attorney, represented Respondents, 7 Eleven Inc., and Jacos & Company, Inc.

The Department seeks to discipline the Respondents' license on the grounds that, on or about October 12, 2017, the Respondents-Licensee's agent or employee, Samantha Marie Palazzolo, at said premises, sold, furnished, gave or caused to be sold, furnished or given, alcoholic beverages, to-wit: beer, to Vanessa Denice Tavaréz and Brandon Hyun Jun Kwon, individuals under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 1.) (Counts 1 and 2.)

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 July 31, 2018.

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

FINDINGS OF FACT

1. The Department filed the accusation on May 11, 2018.
2. The Department issued a type 20, off-sale beer and wine license to the Respondents for the above-described location on August 26, 2015 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Vanessa Denice Tavaréz (hereinafter referred to as decoy Vanessa) was born on June 26, 1999. On October 12, 2017, she was 18 years old. On that date she served as a minor decoy in an operation conducted by the Cypress Police Department (Cypress PD) in conjunction with the Department.
5. Decoy Vanessa appeared and testified at the hearing. On October 12, 2017, she was 4'10" tall and weighed 115 pounds. She wore eye glasses, black shoes, blue jeans, and a black t-shirt, over which she wore a green jacket. She did not wear any jewelry. She wore mascara and eyeliner. She wore her hair down, past her shoulders. (Exhibits 3, 4A and 4B.) Her appearance at the hearing was the same.
6. On October 12, 2017, Cypress PD Detectives Christopher McShane and Sanchez parked their vehicle directly in front of the Licensed Premises at the gas station pump. Decoy Vanessa entered the Licensed Premises and walked straight to the back of the store to the alcoholic beverage refrigerated section and selected a three-pack of Bud Light beer. (Exhibit 3.) Beer is an alcoholic beverage.
7. After decoy Vanessa had entered the Licensed Premises and proceeded to the alcoholic beverage coolers Detective McShane's attention was caught by a youthful appearing person entering the Licensed Premises. That person was later identified as Brandon Hyun Jun Kwon (hereinafter referred to as Brandon). (Exhibits 5 and 6.) Detective McShane thought Brandon appeared young, younger than 21 years old.
8. Decoy Vanessa brought the three-pack of beer to the front where the cash registers were located and stood in line behind one customer, with another customer standing behind her. Decoy Vanessa recognized the customer who stood in line behind her, as Brandon, a high school classmate of hers. Decoy Vanessa did not speak with Brandon. Brandon was holding a box containing 18, 12 fluid ounce cans of Rolling Rock Extra Pale Premium Beer. (Exhibit 7.) Rolling Rock beer is an alcoholic beverage. There were two clerks, a male and a female clerk, at the cash registers attending to customers.

9. At the counter decoy Vanessa placed the three-pack of Bud Light beer. The female clerk, Samantha Marie Palazzolo (hereinafter referred to as clerk Palazzolo), scanned the beer and asked decoy Vanessa for her identification (ID). Decoy Vanessa handed clerk Palazzolo her valid California Driver License, which clerk Palazzolo accepted and looked at for approximately 10 seconds. Decoy Vanessa's California Driver license had a vertical orientation, showed her correct date of birth and included a red stripe which read, "AGE 21 IN 2020." (Exhibit 2.) Clerk Palazzolo handed the ID back to the decoy and proceeded with the sales transaction.

10. The yellow cash register screen informed the clerk to "ID 30 AND UNDER. MUST BE 21 TO PURCHASE 1. PICTURE ON I.D. MUST MATCH THE CUSTOMER 2. SCAN OR SWIPE I.D. OR IF BIRTHDATE IS ON OR BEFORE 10-12-96 PRESS [MANUAL ENTER]." At the bottom of the screen, there were two options from which to select, "MANUAL ENTER," or "VISUAL ID OK." Clerk Palazzolo pressed the "VISUAL ID OK" button, which permitted the sales transaction to continue. Clerk Palazzolo told decoy Vanessa the price of the beer, for which decoy Vanessa paid. Clerk Palazzolo bagged the Bud Light beer. Decoy Vanessa took three-pack of Bud Light beer and exited the store. There was no evidence clerk Palazzolo asked decoy Vanessa any age-related questions or questions about her ID. Cypress PD Detective Christopher McShane witnessed decoy Vanessa and Brandon standing in line and decoy Vanessa's sales transaction, with a clear view from his vehicle parked directly in front of the store at the gas station pump².

11. Decoy Vanessa walked straight to Detectives McShane and Sanchez' vehicle and entered it. Decoy Vanessa informed the detectives that while she was inside the Licensed Premises she recognized an 18 year old boy in line to purchase alcohol, named Brandon, with whom she went to high school.

12. Inside the Licensed Premises Brandon approached the sales counter, behind which stood clerk Palazzolo, and he placed the 18-pack of Rolling Rock beer upon the counter. (Exhibit 7.) Clerk Palazzolo scanned the beer and asked for his ID. Brandon held up to clerk Palazzolo's face his valid California Driver License, which clerk Palazzolo did not retrieve, but only looked at quickly while in Brandon's hand. Brandon's California Driver license had a vertical orientation, showed his correct date of birth of April 22, 1999, and included a red stripe which read, "AGE 21 IN 2020." Clerk Palazzolo continued with the sales transaction and Brandon put away his ID and paid for the said beer. There was no evidence clerk Palazzolo asked Brandon any age-related questions or questions about his ID.

² Detective McShane testified that although he saw decoy Vanessa hand her California Driver License to clerk Palazzolo, from his vantage point he could not see what, if anything, clerk Palazzolo did with the decoy's ID.

13. Detective McShane saw Brandon exit the Licensed Premises carrying the 18-pack of Rolling Rock beer (Exhibit 7)³, at which point Detective McShane exited his vehicle and detained Brandon just north of the front doors of the Licensed Premises. Detective McShane asked Brandon his age, to which Brandon replied that he was 18 years old. Detective McShane asked Brandon if he purchased the 18-pack of Rolling Rock beer inside the Licensed Premises, to which Brandon admitted that he did purchase the said alcohol from the female clerk behind the sales counter. Detective McShane inquired of Brandon if he had a fake ID, to which Brandon said he did not have a fake ID. Detective McShane asked Brandon if he used his real ID for the alcohol sales transaction. Brandon acknowledged he presented his valid California Driver License to the female clerk. Detective McShane examined Brandon's California Driver License and confirmed Brandon was 18 years of age.

14. On October 12, 2017, Brandon was 5'7" tall and weighed 125 pounds; he wore a black and white baseball t-shirt, grey jogging pants, with white sneakers. (Exhibits 5 and 6.) His appearance at the hearing was similar except that he weighed 120 pounds and wore a blue, long-sleeved shirt, black pants, and black and white sneakers.

15. As Detective McShane was interviewing Brandon, another Cypress PD officer and a Department agent entered the Licensed Premises and made contact with clerk Palazzolo, whom they eventually brought outside of the front entrance of the Licensed Premises.

16. Outside of the Licensed Premises Brandon identified clerk Palazzolo as the female clerk who sold him the said 18-pack of Rolling Rock beer. Clerk Palazzolo confirmed she was the clerk who sold Brandon the said beer. Photographs were taken of Brandon (Exhibits 5 and 6), a citation was issued to Brandon and he was released.

17. Detective McShane and Department Agent Delarosa interviewed clerk Palazzolo. Detective McShane asked clerk Palazzolo if she thought Brandon was 21 years old and if she checked his ID. Clerk Palazzolo claimed she thought Brandon was 21 and acknowledged looking at Brandon's ID during the said alcohol sales transaction with him. There was no evidence as to why clerk Palazzolo allegedly believed Brandon appeared 21.

18. Decoy Vanessa was removed from the detectives' vehicle and brought to clerk Palazzolo's location outside of the Licensed Premises. A Cypress PD officer asked decoy Vanessa to identify the person who sold her the beer. Decoy Vanessa pointed at

³ Cypress PD Detective Sanchez later seized the 18-pack of Rolling Rock beer, transported it to the Cypress PD, and booked it into the property room as evidence. Detective McShane retrieved the said Rolling Rock beer from evidence and transported it to the hearing. At the end of the hearing, the 18-pack of Rolling Rock beer (Exhibit 7) was remanded to the Department to be kept there until such time as all appeals have been exhausted and the matter is final.

clerk Palazzolo. Decoy Vanessa and clerk Palazzolo were standing three feet apart and facing each other at the time of this identification. A photo of clerk Palazzolo and decoy Vanessa was taken after the face-to-face identification, with decoy Vanessa holding the three-pack of Bud Light beer and her California Driver License, while standing next to clerk Palazzolo. (Exhibit 3.) Clerk Palazzolo confirmed selling the three-pack of Bud Light to the decoy and claimed she thought the decoy was 21 years old. Clerk Palazzolo did not provide an explanation as to why she thought decoy Vanessa was 21 years old. There was no evidence as to why clerk Palazzolo allegedly believed decoy Vanessa appeared 21.

19. There was no evidence that clerk Palazzolo was distracted during the sales transactions or the face-to-face identifications involving decoy Vanessa and Brandon. Clerk Palazzolo did not appear at the hearing.

20. Detective McShane asked clerk Palazzolo if she could show him how she conducted the sales transactions with decoy Vanessa and Brandon on the cash register. Clerk Palazzolo agreed to simulate the said sales transactions and they walked into the Licensed Premises to a cash register. Clerk Palazzolo scanned the three-pack of Bud Light beer and a yellow window appeared on the screen requesting that the clerk scan the ID, or manually enter the customer's date of birth by pressing the "MANUAL ENTER" button, or "VISUAL ID OK" button. (Exhibit 8.) Clerk Palazzolo explained that instead of entering a date of birth or scanning the IDs she bypassed that by pressing the "VISUAL ID OK" button for both transactions with decoy Vanessa and Brandon, which effectively overrode the system and allowed the sales of alcohol to the two minors.⁴

21. 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 Palazzolo at the Licensed Premises on October 12, 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 the clerk. In-person decoy Vanessa has a small stature and has the appearance of a teenager, appearing her true age.

22. Brandon appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and

⁴ While the testimony of both Detective McShane and decoy Vanessa were credible, the latter had a better recollection as to the decoy's sales transaction and testified that the clerk looked at the decoy's ID and handed it back to her, continuing with the sales transaction. Decoy Vanessa made no mention of the clerk swiping or scanning her ID. Detective McShane was not sure whether the clerk told him she had swiped the decoy's ID during the sales transaction. Therefore decoy Vanessa's testimony is found more credible on this point. It should be noted that no two people will use the exact same words to describe the same event—word choice, distance and time estimates, and so forth will naturally vary from person to person. The minor differences in the testimony of these two witnesses do not call into question either's credibility.

mannerisms shown at the hearing, and his appearance and conduct in front of clerk Palazzolo at the Licensed Premises on October 12, 2017, Brandon displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk. In-person Brandon has a youthful appearance, appearing like a teenager.

23. Decoy Vanessa learned about the decoy program through her service as a Police Explorer with the Cypress PD. As of October 12, 2017, the decoy had been a Police Explorer for approximately one and one-half years. She has no rank as an Explorer. Her duties as a Police Explorer include participating in community events such as the Fourth of July in which she assists at the military base with traffic or people when they are lost. The Police Explorer Program has taught her how to present herself in public, to be respectful to the person speaking, and carry herself with confidence. Decoy Vanessa believed she carried herself with confidence during the said decoy operation. On October 12, 2017, decoy Vanessa visited four locations, with only the Licensed Premises selling alcoholic beverages to her.

24. Brandon Hyun Jun Kwon appeared and testified at the hearing. Brandon said that he had been to the Licensed Premises to purchase alcoholic beverages prior to October 12, 2017, with his most recent visit two weeks prior, on or about September 28, 2017. Brandon said that when he goes into the Licensed Premises to purchase alcohol clerk Palazzolo usually lets him purchase the alcohol. On September 28, 2017, he purchased Rolling Rock beer from clerk Palazzolo, at which time Brandon held up his valid California Driver License to clerk Palazzolo's face for her to view, without clerk Palazzolo taking the ID. Brandon said that clerk Palazzolo "sometimes asks for [his] ID and sometimes she doesn't even ask."

(Respondents' Witness)

25. Christine Duggan appeared and testified at the hearing. Ms. Duggan is currently the senior sales associate, having been promoted from a sales associate position three months prior to the hearing. Ms. Duggan was hired by Respondents in November of 2015, as was clerk Palazzolo. Both Ms. Duggan and clerk Palazzolo went through the same training when they were hired, which included computer module training relating to age-restricted sales. The training also included what to look for on IDs, including making sure the ID is current, the person presenting the ID matches the picture on the ID, that it is a California ID, and there are no alterations to the ID. The training also included the red flags of minors' IDs, including their vertical format and the red stripe which advises the clerk when the minor will be 21 years old. The computer module includes questions the employees must answer, but there was no evidence presented as to whether the questions reviewed the red flags of a minor's ID. As of October 12, 2017, employees received that training only once, at their hire. There was no evidence in the record whether the Respondents have implemented annual or more frequent training of

employees. 7 Eleven store policy requires clerks to ask for the ID of anyone who appears under the age of 30.

26. Clerk Palazzolo was placed on suspension after the said violation, but subsequently quit. Ms. Duggan did not know the circumstances of clerk Palazzolo's end of employment.

27. Ms. Duggan usually scans customers' IDs into the cash register. If the customer is a minor a red screen appears, at which point she will not proceed with the sales transaction. She did not explain what the red screen indicated and to her knowledge she did not think a clerk can override that red screen. If Ms. Duggan does not scan the ID, she will press the "VISUSAL ID OK" button on the yellow screen, as depicted on Exhibit 8, after comparing the customer with the ID and visually inspecting the ID. By pressing the "VISUAL ID OK" button that allows the sale of the age-restricted product.

28. After being promoted to senior sales associate, Ms. Duggan goes over the store policy with employees as often as she can. Since the violation of October 12, 2017, all employees have been retrained on the same computer module training relating to age-restricted sales. The point of sale (POS) cash register system is still the same, except the screen is smaller. Ms. Duggan plans to coach employees on recognizing the red flags of minors' IDs and place a photocopy of a minor's ID at the register in case clerks are not clear what to look for, such as the vertical format and red stripe advising when the minor turns 21.

29. The Respondents use a secret shopper program at the Licensed Premises. If a clerk fails to ask the secret shopper for ID the clerk is given a red card, asked why they did not ask for the ID and advised to review store policy and procedure. Ms. Duggan is aware of one clerk who received a red card after October 12, 2017, for selling tobacco to a secret shopper. If the clerk asks for the secret shopper's ID the clerk receives a green card. Green cards are placed behind the register for everyone to see. Since Ms. Duggan's hiring date, there have been signs posted on the counter at each POS register informing customers that anyone appearing under the age of 30 will be asked for their ID. Ms. Duggan said that sometimes the signs on the counter are covered up with sales display items. She does not know whether the signs were covered by sales items on October 12, 2017.

30. 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 October 12, 2017, the Respondents-Licensee's employee, clerk Samantha Marie Palazzolo, inside the Licensed Premises, sold alcoholic beverages, to-wit: a three-pack of Bud Light beer, to Vanessa Denice Tavaréz, and an 18-pack of Rolling Rock beer to Brandon Hyun Jun Kwon, both of whom are persons under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-22.) (Counts 1 and 2.)
5. The Respondents argued the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2), therefore, the accusation should be dismissed pursuant to rule 141(c).
6. With respect to rule 141(b)(2), Respondents argued decoy Vanessa did not have the appearance of someone under 21 because of several factors which made her appear to be older than 21. Those factors included: (1) Respondents' counsel's opinion that the decoy's eye glasses, coat and confident demeanor "tipped her over the age of 21," and (2) clerk Palazzolo's hearsay statement to Detective McShane that she thought decoy Vanessa was over 21 years old.
7. This rule 141(b)(2) argument is rejected. Respondents presented no evidence as to why clerk Palazzolo allegedly believed decoy Vanessa (or for that matter Brandon) appeared 21 or older. Clerk Palazzolo never testified. Respondents' unsupported assertions are nothing but assumption and conjecture. The hearsay statement(s) by clerk Palazzolo to the officers that she thought the decoy (and Brandon) looked 21 years old, is found not credible and self-serving, in light of clerk Palazzolo's bias in facing discipline for the violations. There was nothing about decoy Vanessa's eye glasses, coat or demeanor which made her appear older than her actual age. In fact, when viewing decoy

Vanessa in-person at the hearing, she has a youthful appearance, small in stature, appearing as a teenager. In other words, decoy Vanessa had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 21.)

8. Section 25660 provides a defense to any person who was shown and acted in reliance upon bona fide evidence of majority in permitting a minor to enter and remain in a public premises in contravention of section 25665, in making a sale forbidden by section 25658(a), or in permitting a minor to consume in an on-sale premises in contravention of section 25658(b).

9. The defense offered by this section is an affirmative defense. As such, the licensee has the burden of establishing all of its elements, namely, that evidence of majority and identity was demanded, shown, and acted on as prescribed.⁵ To provide a defense, reliance on the document must be reasonable, that is, the result of an exercise of due diligence. *This section applies to identifications actually issued by government agencies as well as those which purport to be.*⁶ A licensee or his or her employee is not entitled to rely upon an identification if it does not appear to be a bona fide government-issued identification or if the personal appearance of the holder of the identification demonstrates above mere suspicion that the holder is not the legal owner of the identification.⁷ The defense offered by section 25660 is not established if the appearance of the minor does not match the description on the identification.⁸ Thus, reasonable reliance cannot be established unless the appearance of the person presenting identification indicates that he or she could be 21 years of age and the seller makes a reasonable inspection of the identification offered.

10. In the present case, the Respondents failed to meet their burden of proof in establishing an affirmative defense under Section 25660. Despite asking for Brandon's ID, clerk Palazzolo failed to exercise due diligence in inspecting the minor's ID. Had she done so, she would have readily seen, based on the training she received, that the minor's ID was in a vertical format and had a red stripe advising Brandon would not be 21 years old until the year 2020. Even if clerk Palazzolo had simply scanned Brandon's ID, the red screen, Ms. Duggan testified to, would have appeared to alert the clerk a minor stood before her; confirming Brandon's obvious youthful appearance.

⁵ *Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control*, 261 Cal. App. 2d 181, 189, 67 Cal. Rptr. 734, 739 (1968); 27 Ops. Atty. Gen. 233, 236 (1956).

⁶ *Dept. of Alcoholic Beverage Control v. Alcoholic Control Appeals Bd. (Masani)*, 118 Cal. App. 4th 1429, 1444-45, 13 Cal. Rptr. 3d 826, 837-38 (2004).

⁷ *Masani*, 118 Cal. App. 4th at 1445-46, 13 Cal. Rptr. 3d at 838; *5501 Hollywood, Inc. v. Department of Alcoholic Beverage Control*, 155 Cal. App. 2d 748, 753, 318 P.2d 820, 823-24 (1957); *Keane v. Reilly*, 130 Cal. App. 2d 407, 411-12, 279 P.2d 152, 155 (1955); *Conti v. State Board of Equalization*, 113 Cal. App. 2d 465, 466-67, 248 P.2d 31, 32 (1952).

⁸ *5501 Hollywood*, 155 Cal. App. 2d at 751-54, 318 P.2d at 822-24; *Keane*, 130 Cal. App. 2d at 411-12, 279 P.2d at 155 (construing section 61.2(b), the predecessor to section 25660).

PENALTY

The Department requested the Respondents' license be suspended for a period of 20 days, based on the aggravating factor that clerk Palazzo sold to two youthful appearing minors, one after the other, who presented their valid California Driver Licenses, which had the glaring red flags of a minor's ID, including the vertical format and red stripe which said they would not be 21 until the year 2020. The Department further argued there is evidence of prior alcohol sales to Brandon Kwon based on his testimony.

The Respondents recommended a 15 day suspension based on the following: (1) it was not several of Respondents' clerks who committed sale to minor violations, it was only clerk Palazzolo who was obviously careless on October 12, 2017, (2) this is the first violation since Respondents were issued their license on August 26, 2015, (3) Respondents use a secret shopper program, (4) clerk Palazzolo is no longer employed with Respondents, having quit subsequent to being suspended, (5) and clerk Palazzolo was cooperative with the investigation by answering questions and simulating the sales transactions she engaged in with decoy Vanessa and Brandon. In the alternative Respondents suggested that if the undersigned found cause for aggravation Respondents recommended the undersigned stay any amount of time above 15 days, for a one year period so that the Licensed Premises is on notice thereof and will be required to be very strict in ensuring all of its clerks are compliant.

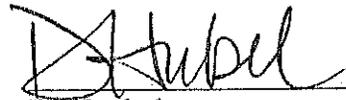
While the Respondents have retrained their employees, the enumerated factors fail to address the underlying issue. Despite the Respondents' computer module training, secret shopper program, posted signs to check the IDs of anyone appearing under 30, and clerk Palazzolo's suspension, the Respondents' POS system still allows its clerks to override any safeguard the system has, by pressing the "VISUAL ID OK" button. Clerk Palazzolo had the same training, secret shopper program, POS system and signs available to her, but she still sold alcohol to two youthful appearing minors who presented their vertical formatted IDs with a red stripe stating they would not be 21 until the year 2020. Additionally, after the decoy operation of October 12, 2017, one of the Respondents' clerks was issued a red card for selling tobacco to a secret shopper. The Respondents have not shown that they take sales to minors seriously. They have yet to post a sample of a minor's ID at the registers and Ms. Duggan was only recently promoted to senior sales associate and has yet to explain the red flags of a minor's ID to Respondents' clerks, which she planned to do when she "go[es] back to work." While there was testimony that the computer module training includes questions, there was no evidence presented as to whether the questions reviewed the red flags of a minor's ID. There was no evidence in the record whether the Respondents have implemented annual or more frequent training of employees, rather than once at their hire and after a violation. With the amount of information in the training module, as testified to by Ms. Duggan, it would

behoove the Respondents to implement a regular retraining program. The penalty recommended herein complies with rule 144.

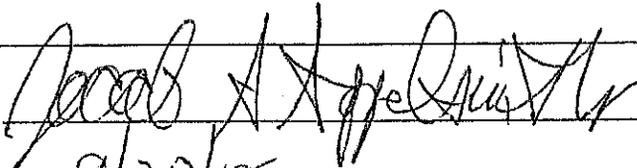
ORDER

The Respondents' off-sale beer and wine license is hereby suspended for a period of 20 days.

Dated: August 10, 2018



D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>9/20/18</u>