

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

AB-9789

File: 20-552726; Reg: 17085793

99 CENTS ONLY STORES, LLC,
dba 990 Only Store #65
5130 West 190th Street
Torrance, CA 90503,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: October 3, 2019
Los Angeles, CA

ISSUED OCTOBER 15, 2019

Appearances: *Appellant:* Adam N. Koslin, of Solomon, Saltsman & Jamieson, as
counsel for 99 Cents Only Stores, LLC,

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

OPINION

99 Cents Only Stores, LLC, doing business as 990 Only Store #65, appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 15 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 under Government Code section 11517, subdivision (c), dated December 19, 2018, is set forth in the appendix, as is the Proposed Decision of the administrative law judge (ALJ), dated April 21, 2018.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on April 22, 2016. There is no record of departmental discipline against the license.

On August 1, 2017, the Department filed a single-count accusation charging that appellant's clerk, Diana Miroslava Nava (the clerk), sold an alcoholic beverage to 16-year-old Vanessa C. (the decoy) on August 10, 2016. 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 April 9, 2018, documentary evidence was received, and testimony concerning the sale was presented by the decoy; TPD Detectives Scott Norris and Ryan Schmitz; Department Agent Vic Duong; and William Solper, Senior Director of Learning and Organizational Development for the licensed premises — the individual responsible for training appellant's employees.

Testimony established that on August 10, 2016, the decoy entered the licensed premises and went to the coolers where she selected a six-pack of Hite beer. (Exh. 7.) She took the beer to the counter and the clerk completed the sale without asking for identification and without asking any age-related questions. The decoy exited the store with the beer and met with officers outside to confirm that she had purchased alcohol.

The decoy re-entered the premises with Agent Duong and Detectives Lee and Chavez, and the decoy pointed out the clerk who sold her the beer. The officers identified themselves to the clerk and explained the violation to her. Agent Duong asked the decoy to identify the person who sold her the beer and she did so while standing three feet from the clerk. A photo of the decoy and the clerk was taken (exh.

6) and the clerk was issued a citation.

The administrative law judge (ALJ) issued her proposed decision on April 21, 2018, sustaining the accusation and recommending a 15-day suspension. On July 25, 2018, in its Notice Concerning Proposed Decision, the Department advised the parties that the Department had considered, but did not adopt, the proposed decision and that it would decide the matter pursuant to section 11517(c)(2)(E).²

On September 20, 2018, in its notice pursuant to Government Code Section 11517(c)(2)(E)(i), the parties were invited to submit written argument to the Department regarding the findings of fact, determination of issues, and penalty recommendations in the proposed decision. Both appellant and counsel for the Department submitted written argument in reference to the penalty recommendations. On December 19, 2018, the Director issued his decision under Government Code Section 11517(c), adopting the original proposed decision in its entirety.

Appellant then filed a timely appeal contending: (1) the decoy did not display the appearance required by rule 141(b)(2),³ and; (2) the Department erred when it failed to consider mitigating factors in determining the penalty.

DISCUSSION

I

ISSUE CONCERNING DECOY'S APPEARANCE

²Section 11517, subdivision (c)(2)(E) permits the Department to reject the proposed decision — as it initially did here — and decide the case upon the record, including the transcript of the hearing.

³References 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.

Appellant contends that the ALJ's decision is not supported by substantial evidence because she “possessed the body of a grown woman; a heavy, curvy build with significantly more heft than most people would expect of a person under 21.” (AOB at p. 12.) It maintains her extensive experience as a police Explorer — in addition to her physical appearance — gave her the bearing of a mature individual. (*Ibid.*) Appellant contends that the decoy did not display the appearance required by rule 141(b)(2). (*Id.* at pp. 10-13.)

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 that the decoy's mature physical appearance and her experience as an Explorer undermine a finding that her appearance complied with rule 141(b)(2). It argues:

it is a complete abuse of discretion on the part of the ALJ to find that Ms. C [REDACTED] appeared under the age of 21 when she was wearing mascara, a black lace shirt, capris pants, has experience working with local police department, and is rather large and matronly in stature.

(AOB at p. 13.)

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, 112 [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 of fact regarding the decoy's appearance and demeanor:

5. Decoy C ██████ appeared and testified at the hearing. On August 10, 2016, she was approximately 5' 5" tall and weighed 220 pounds. She wore a black V-neck shirt, denim capris and black Nike shoes. She wore only mascara for make-up. (Exhibits 4 and 6.) Her appearance at the hearing was similar.

[¶ . . . ¶]

Decoy C ██████ 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 Nava at the Licensed Premises on August 10, 2016, decoy C ██████ displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to clerk Nava. Decoy C ██████ appeared her true age.

12. Decoy C ██████ learned about the decoy program through her two years' experience (as of the date of the hearing) as an Explorer with the Torrance PD. She currently has the rank of corporal. On August 10, 2016, she visited 10 locations, with two of those locations selling alcohol to her, including the Licensed Premises.

(Findings of Fact, ¶¶ 5-12.) Based on these findings, the ALJ reached the following conclusions on the issue of compliance with rule 141(b)(2):

6. With respect to rule 141(b)(2), specifically, the Respondent argued decoy C ██████ did not have the appearance generally expected of a person under the age of 21. Respondent's counsel opined that decoy C ██████ "doesn't look 16," "definitely looks older than 21," and explained that since the decoy is 220 pounds, carrying a lot of extra weight can sometimes age people and one "cannot tell if they have a baby face or not." . . .

7. This rule 141(b)(2) argument is rejected. The Respondent presented no evidence that any of these factors actually resulted in decoy C ██████

appearing 21 or older to clerk Nava. Decoy C ██████ appears her true age, no matter what her weight. Decoy C ██████ looked her age at the time of the sales transaction, 16, and at the time of the hearing, 18. In other words, decoy C ██████ had the appearance generally expected of a person under the age of 21. (Findings of Fact ¶ 11.)

(Conclusions of Law, ¶¶ 6-7.)

Minors come in all shapes and sizes, and the Board has historically been 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." (Rule 141(b)(2).) The ALJ found that the decoy met this standard in this case.

Appellant argues that the Board's past decisions dictate reversal in this case because the Board previously found that:

The phrase "could generally be expected" clearly implies, as this board has said, that *not everyone* will necessarily believe that a particular decoy appears to be under 21, but it also means that *most* people will believe that the decoy appears to be under 21.

(Quoting *7-Eleven/Dianne Corp.* (2002) AB-7835 at p. 6, emphasis in original.) While the "most people" standard may have been the position of the Board in 2002, it simply

does not state the controlling law on rule 141(b)(2). In a case where the Court of Appeal was tasked with determining whether an ALJ's assessment of the decoy's appearance was correct, the Court said that under the facts before them, while:

one could reasonably look at the photograph [of the decoy] and reasonably conclude that the decoy appeared to be older than 21 years of age, we cannot say that, as a matter of law, a trier of fact could not reasonably have concluded otherwise.

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (2002) 103 Cal.App.4th 1084, 1087 [127 Cal.Rptr.2d 652].)

The instant case is no different. We do not believe the evidence supports a finding that the ALJ “could not reasonably have concluded otherwise.” (*Ibid.*) As stated above, case law instructs us that when, as here, “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, supra.*)

The Board has also repeatedly declined to substitute its judgment for that of the ALJ on the issue of 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.)

Appellant presented no evidence that the decoy's experience and training *actually resulted* in her displaying the appearance of a person 21 years old or older on

the date of the operation in this case. The clerk did not testify. We cannot know what went through her mind in the course of the transaction, or why she failed to ask for identification. Appellant relies on a difference of opinion — theirs versus that of the ALJ — as to what conclusion the evidence in the record supports. Absent an evidentiary showing, this argument must fail. In Finding of Fact paragraphs 5-12, and Conclusions of Law paragraphs 6-7, *supra*, the ALJ found that the decoy met the standard required by rule 141(b)(2).

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 she testifies and to make the determination whether the decoy's appearance met the requirement of rule 141 that she 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 herself, clearly provided substantial evidence for finding that the decoy's appearance complied with the requirements of rule 141(b)(2). We see no flaw in the ALJ's findings or determinations. Ultimately, appellant is 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.

II

ISSUE CONCERNING PENALTY

Appellant contends that the Department erred when it failed to consider

mitigating factors in determining the penalty. (AOB at pp. 7-9.)

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* (1966) 240 Cal.App.2d 659, 666-667 [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 penalty portion of the decision, the ALJ explains why the factors in aggravation outweighed the mitigating factors:

PENALTY

The Department requested the Respondent's license be suspended for a period of 15 days, and suggested the undersigned consider increasing it to a 20 day suspension. The department based its arguments on several aggravating factors which include: (1) the Respondent was licensed a very short period of time since April 22, 2016, with the violation occurring only on August 10, 2016, (2) the Respondent sold to an extremely young person, a 16 year old, (3) there was no evidence clerk Nava received any training whatsoever, and (4) there was no evidence clerk Nava even asked for the youthful appearing decoy's ID.

The Respondent did not recommend a penalty in the event the accusation was sustained. The Respondent argued mitigating factors which included: (1) clerk Nava was fired, and (2) Mr. Solper testified the Respondent's thorough alcohol sales training program which was in place since 2013.

The aggravating factors far outweigh any argued for mitigation. Clerk Nava, less than four months after Respondent received its license, sold alcohol to a youthful appearing minor who was only 16 years old at the time of the said violation. Despite the Respondent's training module being available to employees since 2013, the training is not correcting the problem. Employees still only currently receive alcohol sales related training once during their employment. There is a lot of information in the training module, that if not repeated could easily be forgotten. There was no evidence as to when the Respondent would implement a plan to train employees once every two years. It would behoove the Respondent to train employees at least annually. The test employees take after the training module, consisting of only 10 questions, does not include the simple red flags of minor's IDs. There was no evidence that clerk Nava received any of the testified to training. Also of grave concern, is that since the violation of August 10, 2016, Respondent's POS system has not changed. While there is no override button, the POS system permits a cashier to manually enter a random, age-appropriate date of birth, effectively tricking the POS system into allowing a sale of alcoholic beverages to a minor. As such, it is concerning that since there is no evidence clerk Nava asked for decoy C [REDACTED]' ID, based on Respondent's witness testimony, clerk Nava would have had to enter some date of birth to allow the sale to proceed. The penalty recommended herein complies with rule 144.

(Decision at pp. 6-7.) The discretion used in determining the penalty 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 in this case was entirely within the scope of the ALJ's discretion.

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.⁴

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

⁴This 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:**

99 CENTS ONLY STORES, LLC
DBA: 99 ¢ Only Store #65
5130 West 190th Street
Torrence, CA 90503

Licensee(s).

File No.: 20-552726

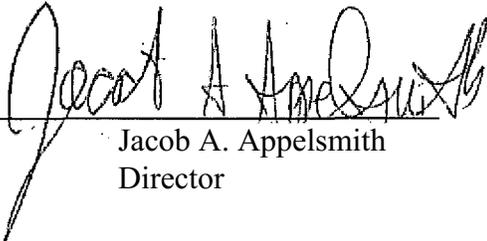
Reg. No.: 17085793

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department December 19, 2018, for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held on April 9, 2018, before Administrative Law Judge D. Huebel, and the written arguments of the parties, and good cause appearing, the proposed decision of the Administrative Law Judge dated April 21, 2018, is hereby adopted as the decision of the Department.

Sacramento, California

Dated: December 19, 2018



Jacob A. Appelsmith
Director

Pursuant to Government Code section 11521(a), any party may petition for reconsideration of this decision. The Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or on the effective date of the decision, whichever is earlier.

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9, of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

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

IN THE MATTER OF THE ACCUSATION AGAINST:

99 Cents Only Stores, LLC	}	File: 20-552726
Dbas: 99¢ Only Store #65	}	
5130 West 190 th Street	}	Reg.: 17085793
Torrance, California 90503	}	
	}	License Type: 20
Respondent	}	
	}	Word Count: 13,275
	}	
	}	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 April 9, 2018.

Kerry Winters, Attorney, represented the Department of Alcoholic Beverage Control.

Donna Hooper, Attorney, represented Respondent, 99 Cents Only Stores, LLC.

The Department seeks to discipline the Respondent's license on the grounds that, on or about August 10, 2016, the Respondent, through their agent or employee, at said premises, sold, furnished, gave or caused to be sold, furnished or given, alcoholic beverages to Vanessa C [REDACTED] (V.C.), an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 1 A.)

On March 21, 2018, the Department filed a Motion to Consolidate the hearings for accusations bearing registration numbers 17085793 and 17086198, and requested separate proposed decisions. Both accusations involve a single count of a sale to the same minor decoy at the same licensed location, with the same parties and attorneys. On March 30, 2018, Chief Administrative Law Judge John Lewis issued an Order Consolidating Hearings with both accusations to be heard on April 9, 2018, and two separate proposed decisions to be written.

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

Although there is only one set of exhibits and one transcript, the exhibits and the transcript apply to both accusations; with the exception that Exhibits 1B, 2 and 3 apply only to registration number 17086198, and Exhibits 1A, 4, 6, and 7, apply only to registration number 17085793.

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 April 9, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on August 1, 2017.
2. The Department issued a type 20, off-sale beer and wine license to the Respondent for the above-described location on April 22, 2016 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondent's license.
4. Vanessa C [REDACTED] (hereinafter referred to as decoy C [REDACTED]) was born on September 11, 1999. On August 10, 2016, she was 16 years old. On that date she served as a minor decoy in an operation conducted by the Torrance Police Department (Torrance PD).
5. Decoy C [REDACTED] appeared and testified at the hearing. On August 10, 2016, she was approximately 5'5" tall and weighed 220 pounds. She wore a black V-neck shirt, denim capris and black Nike shoes. She wore only mascara for make-up. (Exhibits 4 and 6.) Her appearance at the hearing was similar.
6. On August 10, 2016, decoy C [REDACTED] entered the Licensed Premises. She walked straight to the back of the store to the alcoholic beverage section and selected a six-pack of hite beer. (Exhibit 7.) Beer is an alcoholic beverage. Decoy C [REDACTED] took the six-pack of beer to the front sales counter for purchase.
7. Decoy C [REDACTED] placed the six-pack of hite beer upon the sales counter, behind which stood clerk Nava. There is no evidence that clerk Nava asked for the decoy's identification (ID), date of birth or any age-related questions. Decoy C [REDACTED] had on her person 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 5.) Clerk Nava proceeded with the sale of alcohol. Decoy C [REDACTED] paid for the beer. Decoy C [REDACTED] took the six-pack of hite beer and exited the store.

8. Outside the store decoy C [REDACTED] met with Department Agent Vic Duong and Torrance PD Detectives Lee and Chavez, confirming the alcohol sales transaction.
9. Decoy C [REDACTED] re-entered the Licensed Premises with Agent Duong and Detectives Lee and Chavez. Once they entered the store decoy C [REDACTED] pointed out clerk Nava as the person who sold her the hite beer. Thereafter, they all approached clerk Nava. Agent Duong and the detectives identified themselves as police officers to clerk Nava and informed her of the violation. Agent Duong asked decoy C [REDACTED] to identify the person who sold her the beer. Decoy C [REDACTED] looked at clerk Nava and identified clerk Nava as the person who sold her the beer. Decoy C [REDACTED] and clerk Nava were standing three feet apart at the time of this identification. A photo of clerk Nava and decoy C [REDACTED] was taken after the face-to-face identification, with decoy C [REDACTED] holding her ID and the six-pack of hite beer while standing next to clerk Nava. (Exhibit 6).
10. Clerk Nava was issued a citation after the face-to-face identification. Clerk Nava did not appear and did not testify at the hearing. There is no evidence clerk Nava was distracted, or that anyone interfered, during the sales transaction or the face-to-face identification. There was no evidence the cash register/POS (point of sale) system was not functioning properly.
11. Decoy C [REDACTED] 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 Nava at the Licensed Premises on August 10, 2016, decoy C [REDACTED] displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to clerk Nava. Decoy C [REDACTED] appeared her true age.
12. Decoy C [REDACTED] learned about the decoy program through her two years' experience (as of the date of the hearing) as an Explorer with the Torrance PD. She currently has the rank of corporal. On August 10, 2016, she visited 10 locations, with two of those locations selling alcohol to her, including the Licensed Premises.
13. William Solper appeared and testified at the hearing. Mr. Solper has been working for 99 Cents Only Stores LLC for eight years as the Senior Director of Learning and Organizational Development. His role includes developing store operations training programs for all store operations company-wide and leadership development. In 2013, Mr. Solper developed and the company began using an on-line module employee training course and certification of alcohol sales for the company's stores licensed with the Department. Cashiers and store associates who use the company's point of sale system are required to log into the on-line interactive training module, which includes videos and an audio component of someone reading each slide as the employee reads along.

14. Mr. Solper presented at the hearing a sample of the screenshots from the said on-line training module, entitled, "Alcohol Sales eLearning Course Screenshots." (Exhibit A.) The training covers store policy and procedure in complying with California laws and regulations on the sales of alcoholic beverages. Employees must ask for IDs of "everyone," hold the ID and inspect it. It identifies acceptable IDs, including any unexpired U.S. Military ID, State issued Driver License or ID Card, unexpired or expired U.S. Passport, Passport Card and Foreign Passport. The training modules include California Provisional Driver License and ID Cards issued to minors, including a picture of their vertical format and the red stripe which indicates when the minor will turn 21 years of age. It teaches employees about fake IDs. Employees are asked to use the "FLAG" step system, which instructs employees to "Feel" the ID to see if there is anything unusual like thickness, raised edges, re-lamination, "Look" at the information on the card and compare it to the minor, looking for alterations, "Ask" the customer questions to ensure their answers meet the descriptions on the ID, and "Give" the ID back to the customer even if it is fake. The training reviews signs of intoxication, refusing the sale of alcohol, employee responsibility and consequences of sales to minors, including, but not limited to, possible termination of employment, as well as suspension and revocation of the store's Department license. If a customer becomes difficult after an employee refuses the sale of alcoholic beverages the employee is required to page the on-duty manager, who will address the situation on a case-by-case basis.

15. After reviewing the on-line training module, employees must answer 10 questions related to the training module. Employees only pass if they get 100 percent correct. If they do not pass they must notify their manager, retake both the on-line training module and the test until they score 100 percent on the test. Mr. Solper presented a sample test at the hearing. (Exhibit D.) Employees are currently trained once. The company is in the process of implementing a new policy which will require employees to undergo training once every two years to ensure employees understand and are reminded of store policy.

16. Prior to September 2017, employees would sit at a computer in the back office of the store, take the on-line training module, and once they completed the training they would take a test, and sign an Associate Meeting Roster to confirm they completed and passed the on-line training. That roster was kept in the office of the store. Mr. Solper presented an Associate Meeting Roster for Store 65 (Exhibit B), but acknowledged he had no personal knowledge of whether the persons listed on the said rosters completed the required training. A problem with the Associate Meeting Roster was that there was no way to instantaneously track employee training compliance since the roster was located in the individual store.

17. Beginning in September of 2017, the Associate Meeting Roster was replaced with the Learning Management System (LMS). Mr. Solper described the LMS as basically a

“cloud” system, which enables the company to track employee completion of the on-line interactive training module. Employee training completion and compliance is placed on the LMS or cloud, and not on the individual stores’ computers. Mr. Solper presented a sample of a report which he generated from the LMS on April 4, 2018, which monitors employee completion and compliance with the on-line training. (Exhibit C.) The advantage of the LMS over the paper roster system, is that the company can timely verify store associate certifications and compliance with company training. The verification of employee training is done on a month-to-month basis.

18. After the said violation of August 10, 2016, clerk Nava was fired, pursuant to Respondent’s store policy. There is no evidence clerk Nava received alcohol sales related training or that the Respondent’s clerks were trained soon after this violation. Since the said violation, the Respondent has not changed its POS register system. Once an alcoholic beverage is scanned the system makes a loud noise and alerts the clerk to check the customer ID and enter the customer’s date of birth. If the customer’s date of birth is such that the customer would be 21 years or older the sale will proceed; otherwise the sale will not be permitted. There is no visual override button, to override the system requirements, other than by manually entering a date of birth which would make the customer 21 years or older.

19. 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 August 10, 2016, the Respondent’s clerk, Diana Miroslava Nava, inside the Licensed Premises, sold alcoholic beverages, to-wit: beer, to Vanessa Contreras, a

person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-12.)

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 C [REDACTED] did not have the appearance generally expected of a person under the age of 21. Respondent's counsel opined that decoy C [REDACTED] "doesn't look 16," "definitely looks older than 21," and explained that since the decoy is 220 pounds, carrying a lot of extra weight can sometimes age people and one "cannot tell if they have a baby face or not."

7. This rule 141(b)(2) argument is rejected. The Respondent presented no evidence that any of these factors actually resulted in decoy C [REDACTED] appearing 21 or older to clerk Nava. Decoy C [REDACTED] appears her true age, no matter what her weight. Decoy C [REDACTED] looked her age at the time of the sales transaction, 16, and at the time of the hearing, 18. In other words, decoy C [REDACTED] had the appearance generally expected of a person under the age of 21. (Findings of Fact ¶ 11.)

PENALTY

The Department requested the Respondent's license be suspended for a period of 15 days, and suggested the undersigned consider increasing it to a 20 day suspension. The Department based its arguments on several aggravating factors which include: (1) the Respondent was licensed a very short period of time since April 22, 2016, with the violation occurring only on August 10, 2016, (2) the Respondent sold to an extremely young person, a 16 year old, (3) there was no evidence clerk Nava received any training whatsoever, and (4) there was no evidence clerk Nava even asked for the youthful appearing decoy's ID.

The Respondent did not recommend a penalty in the event the accusation was sustained. The Respondent argued mitigating factors which included: (1) clerk Nava was fired, and (2) Mr. Solper testified the Respondent's thorough alcohol sales training program which was in place since 2013.

The aggravating factors far outweigh any argued for mitigation. Clerk Nava, less than four months after Respondent received its license, sold alcohol to a youthful appearing minor who was only 16 years old at the time of the said violation. Despite the

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

Respondent's training module being available to employees since 2013, the training is not correcting the problem. Employees still only currently receive alcohol sales related training once during their employment. There is a lot of information in the training module, that if not repeated could easily be forgotten. There was no evidence as to when the Respondent would implement a plan to train employees once every two years. It would behoove the Respondent to train employees at least annually. The test employees take after the training module, consisting of only 10 questions, does not include the simple red flags of minor's IDs. There was no evidence that clerk Nava received any of the testified to training. Also of grave concern, is that since the violation of August 10, 2016, Respondent's POS system has not changed. While there is no override button, the POS system permits a cashier to manually enter a random, age-appropriate date of birth, effectively tricking the POS system into allowing a sale of alcoholic beverages to a minor. As such, it is concerning that since there is no evidence clerk Nava asked for decoy Contreras' ID, based on Respondent's witness testimony, clerk Nava would have had to enter some date of birth to allow the sale to proceed. The penalty recommended herein complies with rule 144.

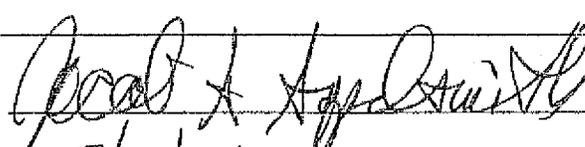
ORDER

The Respondent's off-sale beer and wine license is hereby suspended for a period of 15 days.

Dated: April 21, 2018



D. Huebel
Administrative Law Judge

<input type="checkbox"/> Adopt
<input checked="" type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>7/23/18</u>