

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

**AB-9797**

File: 47-521623; Reg: 18087216

LOS HERMANOS MEXICAN FOODS, INC.,  
dba Los Tres Hermanos Restaurant  
1047-49 San Fernando Road  
San Fernando, CA 91340-3312,  
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: December 5, 2019  
Sacramento, CA

**ISSUED DECEMBER 17, 2019**

*Appearances:*      *Appellant:* Dean R. Lueders, of ACTlegally, as counsel for Los Hermanos Mexican Foods, Inc.,

*Respondent:* John P. Newton, as counsel for the Department of Alcoholic Beverage Control.

**OPINION**

Los Hermanos Mexican Foods, Inc., doing business as Los Tres Hermanos Restaurant, appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> suspending its license for 15 days because its clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Profession Code<sup>2</sup> section 25658(a).

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<sup>1</sup>The decision of the Department, dated February 7, 2019, is set forth in the appendix.

<sup>2</sup> All statutory references are to the California Business and Professions Code unless otherwise stated.

## FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on October 4, 2012. There is one record of prior departmental discipline against the current license, and one record of discipline against appellant's prior license.

On July 20, 2018, the Department filed a single-count accusation against appellants and an amended accusation on October 9, 2018, charging that on January 26, 2018, appellant's employee/bartender, Carlos Roca Estrada (the bartender), sold an alcoholic beverage to 17-year-old A.E. (the decoy). Although not noted in the accusation, the decoy was working for the San Fernando Police Department (SFPD) at the time.

At the administrative hearing held on November 2, 2018, documentary evidence was received, and testimony concerning the sale was presented by the decoy and SFPD Detective Jorge Cervantes. The bartender and appellant's co-owner, Jose Gutierrez, testified for appellant.

Testimony established that on January 26, 2018, the decoy entered the licensed premises with a second minor, Clarissa O, and went to the bar counter. The bartender approached them and asked what they wanted. The decoy ordered a Bud Light beer and Clarissa ordered a water. The bartender obtained the beer and set it down in front of the decoy. He neither asked to see the decoy's ID, nor asked her about her age.

Det. Cervantes was notified that a violation occurred and entered the licensed premises. He contacted the bartender and explained the violation. Afterwards, the decoy identified the bartender as the person who sold her the beer. The decoy and the bartender were photographed together (exh. 5) and the bartender was cited.

The administrative law judge (ALJ) issued his proposed decision on December 3, 2018, sustaining the accusation and proposing a 15-day suspension. The Department adopted the proposed decision on February 4, 2019 and issued a certificate of decision three days later. Appellant then filed a timely appeal arguing that the 15-day suspension is excessive.

### DISCUSSION

Appellant contends its 15-day penalty is unreasonable, and that the Department should reconsider it on the grounds that the ALJ disregarded “proven mitigation and is based solely on the fact that a violation occurred.” (AOB, at p. 5.) In other words, appellant believes its penalty is excessive.

This Board may examine the issue of excessive penalty if it is raised by an appellant. (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183].) However, 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].) An administrative agency abuses its discretion when it “exceeds the bounds of reason.” (*County of Santa Cruz v. Civil Service Commission of Santa Cruz* (2009) 171 Cal.App.4th 1577, 1582 [90 Cal.Rptr.3d 394, 397].) However, “[i]f reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within its discretion.” (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

In determining disciplinary action, the Department is required to consider the penalty guidelines incorporated in California Code of Regulations, title 4, section 144.

The standard penalty for a first-time<sup>3</sup> violation of section 25658(a) is 15 days, which is exactly the penalty appellant received here. (Cal. Code Regs., tit. 4, § 144.)

Nevertheless, rule 144 allows the Department to deviate from the standard penalty when, “*in its sole discretion*[, it] determines that the facts of the particular case warrant such deviation — such as where facts in aggravation or mitigation exist.” (*Ibid.*, emphasis added.)

Factors in aggravation include prior disciplinary history, prior warning letters, licensee involvement, premises located in high crime area, lack of cooperation by licensee in investigation, appearance and actual age of minor, and continuing course or pattern of conduct. (Cal. Code Regs., tit. 4, § 144.) Factors in mitigation include the length of licensure at subject premises without prior discipline or problems, positive action by licensee to correct problem, documented training of licensee and employees, and cooperation by licensee in investigation. However, neither list of factors is exhaustive; the Department may use its discretion to determine whether other aggravating or mitigating circumstances exist. (*Ibid.*)

Here, appellant takes issue with the fact that the Department did not deviate from the standard 15-day suspension. (AOB, at pp. 3-5.) Specifically, appellant disagrees with the fact that the Department did not consider its “LEAD<sup>4</sup> training and [...] weekly meetings, coupled with the constant reminders to check ID” enough to warrant a lesser penalty. (Decision, at p. 4.) The Department’s reasons were that appellant’s training

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<sup>3</sup> Even though this is technically appellant’s third violation, and second under the current license, it counts as a first violation since neither of the other two occurred within 36 months. (Cal. Code Regs., tit. 4, § 144.)

<sup>4</sup> LEAD stands for Licensee Education on Alcohol and Drugs.

program was “informal,” and clearly ineffective, based on the fact that “the bartender in this case simply grabbed a beer and served it without checking ID, even though he had been reminded to do so just that morning.” (*Ibid.*) The Board cannot say that the Department abused its discretion.

As the Board has said many times over the years, the extent to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion. Rule 144 provides a standard 15-day suspension for a section 25658(a) violation, which is what appellant received. Rule 144 also allows the Department to exercise discretion to consider aggravation and mitigation. The Department’s rejection of appellant’s mitigation evidence because its training program was informal and ineffective was reasonable and not an abuse of discretion. Therefore, the penalty must stand.

#### ORDER

The decision of the Department is affirmed.<sup>5</sup>

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

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<sup>5</sup> This final order is filed in accordance with Business and Professions Code section 23088 and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7.

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:**

LOS HERMANOS MEXICAN FOOD, INC.  
LOS TRES HERMANOS RESTAURANT  
1047-49 SAN FERNANDO RD.  
SAN FERNANDO, CA 91340-3312

**ON-SALE GENERAL EATING PLACE - LICENSE**

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

VAN NUYS DISTRICT OFFICE

File: 47-521623

Reg: 18087216

**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 February 4, 2019. 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 March 20, 2019, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: February 7, 2019



Matthew D. Botting  
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Los Hermanos Mexican Foods Inc.  
dba Los Tres Hermanos Restaurant  
1047-49 San Fernando Rd.  
San Fernando, California 91340-3312

Respondent

} File: 47-521623

} Reg.: 18087216

} License Type: 47

} Word Count: 11,500

} Reporter:

} Justyne Johnson

} Kennedy Court Reporters

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 November 2, 2018.

John P. Newton, Attorney, represented the Department of Alcoholic Beverage Control.

Dean R. Lueders, attorney-at-law, represented respondent Los Hermanos Mexican Foods Inc. Jose Gutierrez, one of the owners of the Respondent was present.

The Department seeks to discipline the Respondent's license on the grounds that on or about January 26, 2018, the Respondent, through its agent or employee, sold, furnished, or gave alcoholic beverages to Arlene E., an individual under the age of 21, in violation of Business and Professions Code section 25658(a).<sup>1</sup> (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 November 2, 2018.

**FINDINGS OF FACT**

1. The Department filed the accusation on July 20, 2018 and a first amended accusation on October 9, 2018.

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<sup>1</sup> 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 October 4, 2012 (the Licensed Premises). The Respondent previously held a type 41, on-sale beer and wine eating place licensed for the Licensed Premises from June 27, 2006 through September 17, 2012.

3. The Respondent's current license has been the subject of the following discipline:

<u>Date Filed</u>	<u>Reg. No.</u>	<u>Violation</u>	<u>Penalty</u>
5/8/2014	14080457	BP §25658(a)	25-day susp.

The Respondent's prior license was the subject of the following discipline:

<u>Date Filed</u>	<u>Reg. No.</u>	<u>Violation</u>	<u>Penalty</u>
5/8/2012	12076835	BP §25658(a)	10-day susp.

The foregoing disciplinary matters are final. (Exhibits 2-3.)

4. Arlene E. was born on January 3, 2001. She served as a minor decoy during an operation conducted by the San Fernando Police Department on January 26, 2018. On that date she was 17 years old.<sup>2</sup>

5. Arlene E. appeared and testified at the hearing. On January 26, 2018, she was 5'5" tall and weighed 135 pounds. She wore a black sweatshirt, jeans, and tennis shoes. She wore her hair down; it came to a point just below her shoulders. (Exhibits 4-5.) Her appearance at the hearing was the same.

6. On January 26, 2018, Arlene entered the Licensed Premises with a second decoy, Clarissa O.<sup>3</sup> Det. Gallegos and his partner entered separately. Arlene and Clarissa went to the bar counter. The bartender, Carlos Roca Estrada, approached and asked them what they wanted. Arlene ordered a Bud Light beer and Clarissa ordered a water. Estrada obtained the beer and set it down in front of Arlene. He did not ask to see any ID nor did he inquire as to her age.

7. Det. Jorge Cervantes was notified by Det. Gallegos that a violation had occurred. He entered, contacted Arlene, and asked her to identify the person who furnished her with the alcohol. She pointed to Estrada and said that he had.

8. Det. Cervantes and his partner contacted Estrada, identified themselves, and explained the violation. They brought Arlene over and asked her to identify the person who

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<sup>2</sup> Because she is still a juvenile, Arlene will only be referred to by her first name and the first initial of her last name.

<sup>3</sup> Clarissa is also a juvenile.

furnished the beer to her. She pointed to Estrada and said that he had. Arlene and Estrada were within two feet of each other at the time, facing each other. A photo of the two of them was taken (exhibit 5), after which Estrada was cited.

9. Arlene learned of the decoy program through her participation in the Explorers with the San Fernando Police Department. As an Explorer, she wore a uniform (light blue shirt and navy pants) with an Explorer patch and a badge. Among the duties performed by Explorers are fingerprinting and packaging food for the needy. They also participate in ride-alongs. Arlene had participated in two decoy operations prior to this one, visiting approximately four locations each time.

10. Arlene 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 the Licensed Premises on January 26, 2018, Arlene displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Estrada.

11. Jose Gutierrez, who co-owns the Respondent with his father, testified that they hold licenses at other locations as well. During the last three years, they have not had any problems at any of their locations.

12. The Respondent provides LEAD training to all of its employees. Gutierrez meets weekly with the manager, who in turn meets with the staff. Sometimes Gutierrez is present for the meetings with the staff. These meetings include training regarding the sale of alcohol. The morning of January 26, 2018 was one such meeting; they discussed alcohol service with the bartenders and managers.

13. The Respondent's policy is to card anyone who appears to be under the age of 30. The register has a prompt reminding its employees to check ID. (Exhibit B.) All employees wear buttons indicating that they check ID. (Exhibit D.) The Respondent also has scanner to check IDs. (Exhibit A.)

14. 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 January 26, 2018, the Respondent's bartender, Carlos Roca Estrada, inside the Licensed Premises, sold an alcoholic beverage to Arlene E., a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-10.)

#### PENALTY

The Department requested that the Respondent's license be suspended for a period of 15 days. In the Department's view, the Respondent does not have specific procedures or a specific program which might warrant mitigation. The Respondent argued that the LEAD training and the weekly meetings, coupled with the constant reminders to check ID (e.g., the buttons and the register prompt) constituted just such a program. (Findings of Fact ¶¶ 11-13.) Accordingly, the Respondent recommended that a 15-day suspension with 10 or 15 days stayed would be appropriate.

Certainly the Respondent is making an effort to prevent the sale of alcohol to minors. Although its program is informal—relying heavily on meetings—it is consistent, using both weekly and monthly meetings. Conversely, the bartender in this case simply grabbed a beer and served it without checking ID, even though he had been reminded to do so just that morning. The penalty recommended herein complies with rule 144.<sup>4</sup>

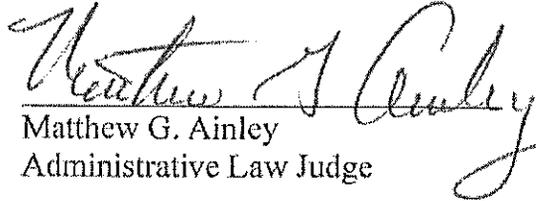
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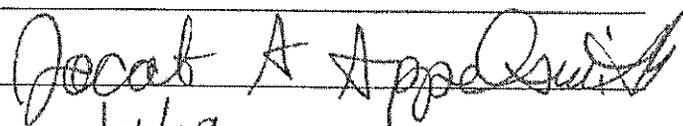
<sup>4</sup> All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

**ORDER**

The Respondent's on-sale general eating place license is hereby suspended for a period of 15 days.

Dated: December 3, 2018

  
Matthew G. Ainley  
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>2/4/19</u>