

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

AB-9801

File: 21-519099; Reg: 18086978

BELLFLOWER LIQUOR, INC.,
dba Cheap Corner Liquor and Grocery Market
14312 Bellflower Boulevard
Bellflower, CA 90706,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris H. Huebel

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

ISSUED OCTOBER 15, 2019

Appearances: *Appellant:* Ralph B. Saltsman, of Solomon, Saltsman & Jamieson,
as counsel for Bellflower Liquor, Inc.,

Respondent: Joseph J. Scoleri, III, as counsel for the Department
of Alcoholic Beverage Control.

OPINION

Bellflower Liquor, Inc., doing business as Cheap Corner Liquor and Grocery Market, appeals from a decision of the Department of Alcoholic Beverage Control¹ revoking their license because its clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Profession Code section 25658(a). The violation was appellant's third in a 36-month timeframe.

¹The decision of the Department, dated March 11, 2019, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on April 2, 2012. Appellant has two prior instances of departmental discipline, both involving violations of section 25658(a).² All three violations occurred within 36 months of one another.

On May 29, 2018, the Department filed a single-count accusation against appellant charging that, on April 20, 2018, appellants' clerk, Mr. Rajbir³ (the clerk), sold an alcoholic beverage to 19-year-old minor decoy Fernando Ponce-Perez (the decoy). Although not noted in the accusation, the decoy was working for the Department at the time.

At the administrative hearing held on December 5, 2018, documentary evidence was received and testimony concerning the sale was presented by the decoy and Agent Carlos Valencia. Mandeep Singh, who provides security cameras for the licensed premises, testified on appellant's behalf.

Testimony established that on April 20, 2018, Agent Valencia arrived at the licensed premises with the decoy. As the decoy entered the licensed premises, Agent Valencia, dressed in plain clothes, remained outside and positioned himself with a view of the sales counter.

Once inside, the decoy walked to the alcoholic beverage section and selected a 24-ounce can of Bud Light beer, which he took to the sales counter. The sales counter

² One of the prior records of discipline also involved violations of Penal Code sections 330b, 330.1, and 330.4 (maintaining an illegal gambling device at the licensed premises). Further, there was another pending allegation against appellant at the time of the administrative hearing for violation of Penal Code sections 664/496(a) (purchase or receipt of distilled spirits, believing them to be stolen).

³ There is no mention of Mr. Rajbir's first name in the record.

was insulated by a clear glass or plexiglass barrier that ran the length of the counter and extended almost to the height of the ceiling. The clerk was standing behind the barrier and talking on a cell phone.

The decoy placed the beer can on the sales counter and through a boxed opening of the barrier. The clerk placed his cell phone down on top of the boxed opening, retrieved the beer can, scanned the beer can, and then pushed the can back through the boxed opening. The decoy gave the clerk five dollars and retrieved the beer can. The clerk accepted the money and placed it in the cash register.

While the clerk was opening the cash register and had his head down, he said something incomprehensible to the decoy. The decoy could not understand what the clerk said and thought the clerk might have mentioned something about a bag. To make sure, the decoy replied, "bag?" The clerk did not respond. Instead, he handed the decoy his change and a small plastic bag, which the decoy accepted. The clerk then picked up his cell phone and appeared to continue his conversation.

After the decoy exited the store, Agent Valencia went to his vehicle and advised other agents that a violation had occurred. The decoy met the agents at Agent Valencia's vehicle and informed them that the clerk did not ask for his age or identification. The agents and the decoy reentered the store, and the decoy identified the clerk as the person who sold him the beer. After the face-to-face identification, agents took a photograph of the clerk and the decoy together with the can of beer. (Exh. 5.) Agent Valencia also advised appellant's store manager, Karnail Singh, of the violation. Singh was also inside the premises at the time of the sale.

After the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established. The Department also

ordered that appellant's license be revoked. Appellant filed a timely appeal contending that the penalty of revocation is excessive.

DISCUSSION

Appellant contends that the penalty of revocation is excessive. (Appellant's Opening Brief, at pp. 5-10.) Specifically, appellant characterizes the decoy operation as a "series of near misses of rule violation,"⁴ which it argues should have been considered in mitigation of the penalty. (*Id.* at pp. 5, 7.) Further, appellant contends the Department relied too heavily on the violation being the third within 36 months, especially since "the third violation was two months shy of exceeding the 36th month measure" (*Id.* at p. 7.)

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].)

⁴ The "near misses" appellant alleges concern rules 141(b)(1), 141(b)(2), and 141(b)(4). However, appellant does not allege that any of the rules were actually violated.

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.)

Here, appellants argue that revocation is not reasonable considering the “near miss” violations of rules 141(b)(1), 141(b)(2), and 141(b)(4), and other disagreements with the Department’s consideration of mitigating and aggravating evidence. (AOB, at pp. 5-10.) First, appellant’s argument is moot since the Department already considered and rejected its 141(b)(2) and 141(b)(4) arguments at the hearing, and appellant never argued a violation (or near violation) of rule 141(b)(1). (Conclusions of Law, ¶¶ 5-15.) In any event, there is no authority which requires the Department to consider, as mitigation evidence, whether it “almost” violated one of the rules. Appellant’s argument must, therefore, fail.

Second, there is no authority for the position that the Department must consider how close the third violation was in relation to the 36-month window when determining the penalty. As the Department succinctly states in its Decision, “Business and Professions Code section 25658.1 and rule 144 provide the Department may revoke a license for a third violation of section 25658 within 36 months.” (Decision, at p. 11.) The Department, in fact, revoked appellant’s license for its third violation in 36 months, and the Board cannot say that revocation is “not justified by and clearly against reason” (*Brown, supra* at p. 667.)

This Board has said many times that the extent to which the ALJ or 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. The record indicates that the Department considered appellant’s 141(b)(2) and 141(b)(4) arguments and that appellant never argued a rule 141(b)(1) violation. There is no authority requiring the Department to consider how

close appellant came to prove actual violations, or how close the third violation was to being outside the 36-month timeframe, as evidence of mitigation. The Board sees no error with the penalty.

ORDER

The decision of the Department is affirmed.⁵

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

⁵ 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:**

BELLFLOWER LIQUOR, INC.
CHEAP CORNER LIQUOR AND GROCERY
MARKET
14312 BELLFLOWER BLVD
BELLFLOWER, CA 90706

OFF-SALE GENERAL - LICENSE

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

LAKWOOD DISTRICT OFFICE

File: 21-519099

Reg: 18086978

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 March 1, 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 slated 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 April 22, 2019, a representative of the Department will contact you to arrange to pick up the license certificate.

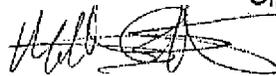
Sacramento, California

Dated: March 11, 2019

RECEIVED

MAR 12 2019

Alcoholic Beverage Control
Office of Legal Services



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Bellflower Liquor, Inc.	}	File: 21-519099
Dbas: Cheap Comer Liquor And Grocery Market	}	
14312 Bellflower Boulevard	}	Reg.: 18086978
Bellflower, California 90706	}	
	}	License Type: 21
Respondent	}	
	}	Word Count: 20,657
	}	
	}	Reporter:
	}	Dorothy Simpson
	}	California Reporting
	}	
<u>Off-Sale General 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 December 5, 2018.

Joseph Scoleri, Attorney, represented the Department of Alcoholic Beverage Control (the Department).

Donna Hooper, Attorney, represented the Respondent, Bellflower Liquor, Inc.

The Department seeks to discipline the Respondent's license on the grounds that, on or about April 20, 2018, the Respondent's agent or employee, Rajbir¹, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to wit: beer, to Fernando Ponce-Perez, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).² (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 December 5, 2018.

¹ The Accusation in Count 1 identified Respondent's clerk as "Unknown Rajbir," and the hearing record did not make clear Mr. Rajbir's first name. The undersigned will herein out refer to him as clerk Rajbir.

² All statutory references are to the Business and Professions Code unless otherwise noted.

FINDINGS OF FACT

1. The Department filed the accusation on May 29, 2018.
2. The Department issued a type 21, off-sale general license to the Respondent for the above-described location on April 2, 2012 (the Licensed Premises).
3. The Respondent has been the subject of the following discipline:

<u>Date of Violation</u>	<u>Reg. No.</u>	<u>Violation</u>	<u>Penalty</u>
June 20, 2015	16083553	BP§25658(a), PC§§330B, 330.1 and 330,4	POIC in lieu of 15 day suspension
October 21, 2016	17085331	BP§25658(a)	POIC in lieu of 25 day suspension
May 25, 2017	18086688	PC§§664/496(a)	Pending

The foregoing disciplinary matters are final except the matter listed under Registration number 18086688. (Exhibits 2, 3, and 4.)

4. Fernando Ponce-Perez (hereinafter referred to as decoy Perez) was born on May 10, 1998. On April 20, 2018, he was 19 years old. On that date he served as a minor decoy in an operation conducted by the Department.
5. Decoy Perez appeared and testified at the hearing. On April 20, 2018, he was 5'6" tall and weighed approximately 180 pounds. He wore a black jacket with white and red striping and lettering, a black t-shirt, blue jeans, and black Vans shoes with white striping. The decoy described his hair style as a right comb-over with the sides of his hair cut close to his scalp. (Exhibits 5 and 6.) His appearance at the hearing was the same, except that he weighed approximately 190 pounds.
6. On April 20, 2018, at approximately 8:40 p.m., Department Agent Valencia arrived with decoy Perez at the Licensed Premises. Agent Valencia was in a plain clothes capacity, and stood, positioning himself, outside of the north entrance door of the premises, with a view of the sales counter from approximately 15 feet away.
7. Decoy Perez entered the Licensed Premises from the south entrance, walked to the alcoholic beverage section, and selected a 24 ounce can of Bud Light beer, which he took to the sales counter for purchase. There were no customers in line.³ Clerk Rajbir, who

³ Viewing the different video angles of Exhibit A, there appears to be no other customers in the store, beginning approximately at time stamp 20:42:10 through 20:43:17.

was standing behind the sales counter and speaking on a cellular telephone⁴, was secured behind what appeared to be a clear, glass or plexiglass barrier that ran the length of the sales counter and extended almost to the height of the ceiling, with a glass door for employee entrance.⁵

8. Decoy Perez placed the can of Bud Light beer upon the sales counter through a plexiglass boxed opening of the barrier.⁶ Clerk Rajbir appeared to interrupt his telephone call and placed the cellular telephone down on top of the boxed opening.⁷ Clerk Rajbir retrieved the beer can, scanned the can and then pushed the beer can back to the decoy through the boxed opening. Decoy Perez gave \$5 to clerk Rajbir, and retrieved the beer can, placing the can in front of him on the sales counter. Clerk Rajbir accepted the money and then told the decoy the cost of the beer.⁸ The clerk placed the \$5 in the cash register and made change. While clerk Rajbir was opening the cash register to make change, with his head down, he quickly said something incomprehensible. The decoy could not understand what the clerk said and thought the clerk might have mentioned something about a bag, but to make sure the decoy replied questioningly, "Bag?" Clerk Rajbir did not look at the decoy or say anything in response to the decoy's question, but appeared to maintain his vision on the cash register till as he made change and then handed the decoy a small plastic bag and change, which decoy Perez accepted.⁹ The decoy deduced that since the clerk gave him a bag the clerk must have mentioned something about a bag as the decoy had thought. The video depicts clerk Rajbir picking up the cellular telephone and appearing to continue his conversation.¹⁰

9. Decoy Perez picked up the Bud Light beer can, bagged the beer as he walked away from the sales counter and exited the store. Clerk Rajbir did not ask for the decoy's identification (ID). There is no evidence the clerk looked at the decoy while the decoy stood before the clerk at the sales counter, until after the clerk provided the decoy change.¹¹ Agent Valencia testified that he observed the above-described transaction while standing outside of the north entrance door.. There was no evidence Agent Valencia heard the verbal exchange between clerk Rajbir and decoy Perez. After decoy Perez exited the store, Agent Valencia walked to his state vehicle, where he informed

⁴ Mr. Singh testified that clerk Rajbir was speaking in an Indian language while on the telephone.

⁵ The said barrier can be seen while viewing the different video angles of the Respondent's DVD (Exhibit A, files Ch05_CH05, Ch11_CH11, Ch14_CH14, and Ch16_CH16).

⁶ Viewing the video files of Exhibit A (Ch11_CH11, and Ch16_CH16), the opening, which clerk Rajbir puts his hands through, appears to be a plexiglass boxed opening, *approximately* 16 inches above the counter, two feet wide (not including the sliding doors), and the depth of the counter.

⁷ Exhibit A, viewing files Ch11_CH11 and Ch16_CH16, time stamp 20:42:34.

⁸ Clerk Rajbir spoke with an Indian accent, Exhibit A, Ch01_CH01.

⁹ Exhibit A, viewing files Ch01_CH01, Ch11_CH11, Ch14_CH14, and Ch16_CH16 of the said sales transaction.

¹⁰ Exhibit A, viewing file Ch11_CH11, time stamp 20:43:05.

¹¹ Viewing the different video angles of the said sales transaction on Exhibit A (files Ch11_CH11, Ch14_CH14, and Ch16_CH16), it appears the clerk does not look at the decoy while the decoy is at the sales counter, until after the clerk provides the decoy change.

Agents Zavala and Reese that a violation had occurred. Decoy Perez walked to the state vehicle and met up with the agents, who asked the decoy if the selling clerk had requested his age or ID. Decoy Perez informed the agents that the clerk had not asked for his age or ID. Decoy Perez informed the agents that the only thing the clerk said was something about wanting a bag.

10. Decoy Perez re-entered the Licensed Premises with the Department agents. Agent Valencia asked clerk Rajbir, who was standing behind the sales counter, to walk to the customer side of the counter, which the clerk did. Agent Valencia asked decoy Perez to identify the person who sold him the beer. Decoy Perez pointed at clerk Rajbir and identified clerk Rajbir as the person who sold him the Bud Light beer can. Decoy Perez and clerk Rajbir were standing three to four feet apart at the time of this identification. Agent Valencia asked decoy Perez how old he was, to which decoy Perez replied that he was 19. A photo of clerk Rajbir and decoy Perez was taken after the face-to-face identification, with decoy Perez holding the 24 ounce can of Bud Light beer in his right hand, while standing next to clerk Rajbir. (Exhibit 5.) Respondent's store manager, Kamil Singh, was inside the premises at the time and Agent Valencia advised him of the violation.

11. Decoy Perez appeared his age at the time of the decoy operation and at the hearing. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of clerk Rajbir at the Licensed Premises on April 20, 2018, decoy Perez displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to clerk Rajbir. Decoy Perez has a youthful appearance in-person.

12. April 20, 2018, was the fourth day of minor decoy operations in which decoy Perez participated. On that date, the Department agents gave decoy Perez instructions to truthfully answer questions about his age and provide his valid ID if requested. On April 20, 2018, decoy Perez visited approximately five different locations, with two of those locations selling alcoholic beverages to him, including the Licensed Premises.

13. Decoy Perez learned about the decoy program through his volunteer participation in the Police Explorer Program at the Long Beach Police Department. As of April 20, 2018, decoy Perez was a police explorer for approximately six years. His police explorer training involves participation in a one week academy, attending civic functions such as the Kindergarten Festival and Special Olympic events. His role at these events includes helping out with anything needed such as carrying boxes and providing security awareness. Decoy Perez believes his police explorer experience in dealing with the public has made him more mature and confident, including feeling confident and comfortable participating in decoy operations, such as the one at the Licensed Premises.

(Respondent's Witness)

14. Mandeep Singh appeared and testified at the hearing. Mr. Singh is familiar with the Licensed Premises and Mr. Saab, whom Mr. Singh referred to as the owner of Cheap Comer Liquor and Grocery Market. Mr. Singh is a professional camera-video equipment and surveillance operator and installer. Mr. Singh installed an HD camera-video surveillance system in the Licensed Premises, which included 16 cameras placed in and around the premises. The fee the Respondent paid Mr. Singh for the system includes three years of maintenance. The entire system was installed by Mr. Singh less than three years ago¹².

15. At the Respondent's request, Mr. Singh appeared at the Licensed Premises a few days after April 20, 2018, viewed, listened to, and downloaded onto a DVD, six video camera angles of the said sales transaction with decoy Perez of April 20, 2018. The audio came from camera number one, which had an overhead view of the cash register. At the Respondent's request, Mr. Singh made a duplicate DVD for his own records, and provided the Respondent with its own DVD copy of the said six video camera angles, including the audio clip on camera one. On Monday, December 3, 2018, Mr. Singh produced a duplicate DVD of the same said video and audio to the Respondent, which was admitted as Exhibit A at the hearing. Prior to dropping off the said DVD to the Respondent on December 3, 2018, Mr. Singh viewed the video and listened to the audio thereon. At the hearing, all video angles and audio on Exhibit A¹³ were thoroughly played for Mr. Singh. Mr. Singh testified that Exhibit A had the same video and audio that he downloaded a few days after April 20, 2018, and which he viewed/listened to again on December 3, 2018. Mr. Singh testified that he did not alter the video or audio of Exhibit A in any way.

16. At some time prior to the hearing, Mr. Singh spoke with Mr. Saab, and they discussed whether the audio on channel one of the DVD depicted the clerk asking the decoy if he was old enough.

17. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

¹²This time frame was an estimate by Mr. Singh, and the undersigned understood his response to refer to a time reference as of the date of the hearing.

¹³All video clips were date stamped April 20, 2018, and the time stamp range which was viewed during the hearing was from 20:41:57 to 20:43:24. The video/audio clips are listed on the DVD as: Ch01_CH01 (this contains both video and audio), Ch05_CH05, Ch11_CH11, Ch13_CH13, Ch14_CH14, and Ch16_CH16.

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 April 20, 2018, the Respondent's employee, clerk Rajbir, inside the Licensed Premises, furnished an alcoholic beverage to Fernando Ponce-Perez, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-11.)
5. The Respondent argued the decoy operation at the Licensed Premises failed to comply with rules 141(b)(2) and 141(b)(4), and, therefore, the accusation should be dismissed pursuant to rule 141(c).
6. With respect to rule 141(b)(2), the Respondent argued decoy Perez did not have the appearance of someone under 21 based on a number of factors including: (1) Respondent counsel's opinion she thought decoy Perez looked "very mature" and 25 years of age and that the video (Exhibit A) depicts the decoy as mature and confident, (2) on April 20, 2018, the decoy was less than 30 days shy of his 20th birthday, (3) the decoy testified that his police explorer experience made him more mature and confident when purchasing alcohol during decoy operations, (4) the decoy's height, weight and stubble on his face.
7. This rule 141(b)(2) argument is rejected. Respondent presented unsupported assertions and conjecture. There was nothing about decoy Perez' police explorer experience, age, height, weight or barely visible chin stubble, demeanor, or mannerisms, or appearance on the video (Exhibit A), which made the decoy appear older than his actual age. In other words, decoy Perez had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 11.)
8. Respondent included in its 141(b)(2) argument a reference to the decoy's approximate age of 19 years and 11 months at the time of the operation. The undersigned addressed

the age reference above, however, since this also appears to be an argument of the Department's failure to comply with rule 141(b)(1), the undersigned will address it as such. This rule 141(b)(1) argument is rejected. Rule 141(b)(1) requires the decoy shall be less than 20 years of age at the time of the operation. Decoy Perez was less than 20 years of age at the time of the said operation. The Department complied with rule 141(b)(1).

9. With respect to rule 141(b)(4), the Respondent argued decoy Perez failed to answer truthfully a question about his age. Respondent pointed to Exhibit A's audio under file Ch01_CH01 between the time stamps of 20:42:32 and 20:43:15, claiming that it clearly depicts clerk Rajbir asking, "You old enough?" and decoy Perez visually nodding his head in the affirmative and it sounding like the decoy responding, "Yea." Respondent's further pointed to decoy Perez' testimony that clerk Rajbir posed a question to him, and did not make a statement.

10. The Department argued Exhibit A's audio is not clear, but inaudible, and the decoy testified that he thought he was asked for a bag and replied in the form of a question, "Bag?" The Department argued that it comes down to two issues, (1) whether clerk Rajbir made a statement or question - with the Department citing "a Garfield Beach CVS case," *Department of Alcoholic Beverage Control vs. Alcoholic Beverage Control Appeals Board*, (2017) 7 Cal App.5th 628, and arguing that a statement, "Hey you look old enough," is not a question that requires a response by the decoy and is not a defense under 141; and (2) and if it was a question, whether the question was age-related, arguing it was not clear that it was age-related since the decoy testified he did not understand it.

11. The Respondent's 141(b)(4) argument is rejected. The undersigned repeatedly reviewed the record, including all the video clips and the audio of Exhibit A. The audio file (Ch01_CH01) in Exhibit A is not clear, as the Respondent claims it to be.¹⁴ Decoy Perez credibly testified he could not understand what clerk Rajbir said to him, not only at the time of the operation but upon listening to the DVD audio file at the hearing. When the undersigned first listened at the hearing to the audio of clerk Rajbir, the undersigned understood the clerk to say something to the effect of, "low lelah." After the hearing, the undersigned repeatedly listened to the audio and understood the clerk to say, "you low leh-luh." It was difficult to understand clerk Rajbir because he spoke quickly, incoherently, and with his head down while working the cash register. It is possible his accent may have contributed as well. It is understandable why the decoy did not make out what clerk Rajbir said and did not recognize clerk Rajbir to ask an age-related question, since clerk Rajbir was not only behind a plexiglass/or glass barrier but had his

¹⁴ Also of note, Mr. Singh's testimony and inference that clerk Rajbir can clearly be heard on file Ch01_CH01 to say, "you old enough" is not credible, weighing the factors set forth in Evidence Code section 780, due to his potential bias and coaching, with Mr. Singh's admitted pre-hearing discussions with Mr. Saab as to clerk Rajbir's statement.

head down while mumbling something incoherently. On April 20, 2018, the decoy only had one opportunity to hear the clerk say something from behind the plexiglass, unlike the undersigned, who repeatedly rewound and re-played the audio and still had difficulty understanding the clerk. The Respondent's witness, Mr. Singh, testified that the audio heard on file Ch01_CH01, is from camera channel one, which camera and microphone are located on the employee side of the plexiglass or glass barrier. There was no evidence that the level of the audio heard on file Ch01_CH01 of Exhibit A, was the same audio level of clerk Rajbir's voice which emanated to the decoy, who stood on the other side of the plexiglass or glass barrier. Decoy Perez' testimony is found wholly credible that the decoy did not understand what clerk Rajbir said to him, and that the decoy replied in the form of a question, "Bag?" in an attempt to clarify what the clerk had said. In listening to the audio it sounds to the undersigned that the decoy replies, "Bag?" In viewing the video clips¹⁵ the decoy appears to mouth the word, "Bag?"

12. Rule 141(b)(4) requires that a decoy shall answer truthfully any questions about his age. As to whether the decoy answered truthfully, under the circumstances, it is found decoy Perez answered clerk Rajbir truthfully by way of trying to clarify what the clerk said, by asking clerk Rajbir, "Bag?" It is also understandable that decoy Perez would reply, "Bag?" speaking in-kind and in the same manner in which clerk Rajbir spoke - quickly and speaking using broken sentence structure. It is unclear, however, why clerk Rajbir failed to follow-up with the decoy to clarify his question of "Bag?" It is also unclear why the clerk failed to ask for the decoy's ID and diligently look at the decoy while he stood before him at the sales counter, until after the clerk handed the decoy his change.

13. As to the second part of rule 141(b)(4), whether clerk Rajbir posed a question about the decoy's age, it is found that since what the clerk said was incomprehensible there was no clear question posed to the decoy about his age. It was imperative upon the clerk to clearly ask the decoy an age-related question, and further incumbent upon clerk Rajbir to follow-up and clearly ask an age-related question when the decoy responded questioningly, "Bag?" Under the totality of the circumstances, clerk Rajbir did not clearly question the decoy about his age. At no time did clerk Rajbir clearly ask the decoy his age or date of birth. *Department of Alcoholic Beverage Control, supra*, held that rule 141 does not impose an affirmative duty on the minor decoy to speak up in order to clarify any mistake regarding age articulated by sales clerk. In this matter, the minor decoy had no affirmative duty to clarify clerk Rajbir's mistakenly incomprehensible articulation. However, the decoy did make such an attempt by asking, "Bag?" and the clerk did not, in any fashion, clarify what he had said to the decoy. It could be argued and is more probable that clerk Rajbir did hear the decoy say "Bag?" in response and

¹⁵ Exhibit A, Ch11_CH11, Ch14_CH14, and Ch16_CH16, at time stamp 20:42:47 to 20:42:48.

understood the decoy wanted a bag, which was why the clerk handed him a bag¹⁶. Under the circumstances clerk Rajbir failed to follow-through with the decoy in clarifying and clearly asking the decoy an age-related question.

14. The Respondent argued that the decoy nodded his head in the affirmative to clerk Rajbir's question, "you old enough?" However, in the video file clips of Ch11_CH11, Ch14_CH14, and Ch16_CH16, at time stamp 20:42:47, it does not show the decoy nodding his head, but it appears to show the decoy inquisitively asking, not only with his eyes but with his lips mouthing, "Bag?" It is not until time stamp 20:43:04 when the decoy receives his change that the decoy nods his head affirmatively, which, more appropriately appears, is in response to clerk Rajbir saying something to the effect of, "Danks bruh-duh."¹⁷

15. The Respondent further argued that it was suspicious when the decoy first described the incident he said something about the clerk asking for a bag. This is not suspicious at all. On April 20, 2018, within minutes of the said sales transaction, the decoy told the agents the clerk said something about a bag, and did not ask his age or for his ID. The decoy further credibly testified that on April 20, 2018, the decoy deduced that the clerk must have been asking him if he wanted a bag, when the clerk handed the decoy a bag after their said verbal exchange on that matter. Throughout the decoy's testimony he was clear that he had difficulty understanding the clerk. Even from time stamp 20:42:35 at Ch14_CH14, it looks like the decoy is having trouble understanding what the clerk is saying because it appears the decoy is stumbling, then he reaches for his wallet in his back left pocket, and then quickly, to comply, pushes the beer can closer to the clerk, who in the audio clip (Ch01_CH01) is heard saying something to the effect of "I need scan" while reaching for the beer can, and then clerk Rajbir is seen scanning the beer. The decoy presented credible testimony that, (1) even after listening to the audio (Ch01_CH01) the decoy still did not understand what clerk Rajbir was saying to him, and (2) after listening to the audio he confirmed hearing himself reply in question form, "Bag?" It should be noted that decoy Perez testified credibly. The minor difference in the decoy's testimony does not call into question his credibility. While the decoy's initial recollection as to what his response was to the clerk differed, when the decoy's recollection was refreshed after hearing the audio of his own voice, the decoy confirmed that he replied inquiringly, "Bag?" The decoy consistently testified that he thought the clerk asked him whether he wanted a bag.

¹⁶ While the video was not fully considered in making this aforementioned point, in reviewing the video file Ch11_CH11, clerk Rajbir does not give any of the prior customers a bag despite their purchase of multiple products and yet the decoy, who purchases one item, receives a bag, after the decoy questioningly asks, "Bag?"

¹⁷ Exhibit A, Ch01_CH01, Ch11_CH11, Ch14_CH14, and Ch16_CH16.

PENALTY

The Department requested the Respondent's license be revoked based on certain factors, which included: (1) no evidence of mitigation, (2) the existence of prior disciplinary history¹⁸, (3) a clear pattern of violations with disturbing frequency, and (4) the Respondent's short licensure, since 2012.

The Respondent requested "something short of outright revocation" since it claimed it was clear clerk Rajbir was "doing his job" inquiring about the decoy's age.

The Respondent presented no evidence of positive action taken to correct the problem of its prior discipline for similar sale-to-minor violations of 2015 and 2016, let alone for the violation of April 20, 2018, Respondent's repeated similar violations exhibit a continuing course or pattern of conduct. There was no evidence of documented training of the licensee and its employees.

Nothing about clerk Rajbir's performance exhibited that he "was doing his job" in a manner to responsibly avoid sales to minors, as Respondent suggests. At the beginning of the transaction, when clerk Rajbir first assists the decoy, clerk Rajbir is only concerned with scanning the beer can. The clerk does not look at the decoy's appearance and does not ask the decoy for ID. Clerk Rajbir then pushes the beer can to the decoy, takes the decoy's \$5, whereupon the clerk tells the decoy the cost of the beer. As clerk Rajbir opens the cash register he quickly and incoherently says something, with his head down; and then fails to respond to the decoy's inquiry, "Bag?"¹⁹ It would behoove the Respondent's clerks to first *responsibly* identify the age of their youthful appearing customers *before* proceeding with the sale of alcohol. What the undersigned means by responsibly identifying the customer's age is to ask for ID and diligently verify from the ID the customer's age. Minors' IDs are easily recognizable by their vertical format and red stripe indicating the year the minor turns 21. If the clerk does not ask for ID, then the clerk should make sure to *clearly* ask for the customer's age and confirm the customer's age *before* proceeding with the sale of alcohol. As the California Supreme Court has noted, "licensees have a ready means of protecting themselves from liability by simply asking any purchasers who could possibly be minors to produce bona fide evidence of their age and identity."²⁰ After the sales transaction with decoy Perez clerk Rajbir picks up the telephone and appears to resume his conversation, in which he was engaged prior

¹⁸ The undersigned did not consider and did not find relevant for penalty aggravation the pending discipline under registration number 18086688, which the Department argued for in part to base its recommendation for revocation. It was not clear that an argument was made for a third strike under the Penalty Guidelines of Rule 144.

¹⁹ As discussed above, it is more probable clerk Rajbir did hear the decoy reply, "Bag?" and understood he wanted a bag, thereby failed to clarify by folio wing-up with clearly asking an age-related question.

²⁰ (*Proviso Corp. v. Alcoholic Beverage Control Appeals Bd.* (1994) 7 Cal.4th 561, 570, 28 Cal.Rptr.2d 638, 869 P.2d 1163)

to the transaction. Clerk Rajbir more likely may have been too concerned with getting back to his telephone call rather than diligently performing his job.

Business and Professions Code section 25658.1 and rule 144 provide the Department may revoke a license for a third violation of section 25658 within 36 months. Rule 144 specifies that this mandate is satisfied by a stayed revocation as well as an outright revocation. The rule 144 penalty guidelines are not intended to be an exhaustive list or to preclude imposition of a discipline different than those listed or recommended. In fact section 25658.1 provides that “[t]his provision shall not be construed to limit the department’s authority and discretion to revoke a license prior to a third violation when the circumstances warrant that penalty.” An aggravated penalty is warranted given the sale in question (on April 20, 2018) is the Respondent’s third violation of section 25658(a) within a 36 month period, exhibiting a continuing course or pattern of conduct within its short licensure, the decoy’s youthful appearance and no evidence of mitigation. The penalty recommended herein complies with rule 144.

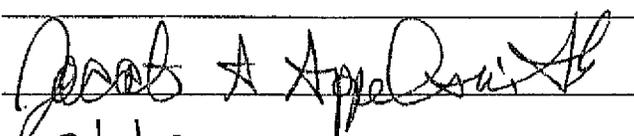
ORDER

The Respondent’s off-sale general license is hereby revoked.

Dated: January 8, 2019



D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt:
By: 
Date: 3/1/19