

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

AB-9807

File: 20-384479; Reg: 18087221

7-ELEVEN, INC. and SHRI SHREEJI CORPORATION, INC.,
dba 7-Eleven Store #17784 C
797 West Highland Avenue,
San Bernardino, CA 92405,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: November 7, 2019
Los Angeles, CA

ISSUED NOVEMBER 19, 2019

Appearances: *Appellants:* Ralph Barat Saltsman and Donna J. Hooper, of
Solomon, Saltsman & Jamieson, as counsel for 7-Eleven, Inc. and
Shri Shreeji Corporation, Inc.,

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

OPINION

7-Eleven, Inc. and Shri Shreeji Corporation, Inc., doing business as 7-Eleven Store #17784 C, appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 10 days (with all 10 days conditionally stayed for a period of one year provided no further cause for discipline arises during that time) because their clerk sold an alcoholic beverage to a Department 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 April 26, 2019, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 21, 2002. There is no prior record of departmental discipline against the license.

On July 20, 2018, the Department filed a single-count accusation against appellants charging that, on February 10, 2018, appellants' clerk, Mariah Rose Rice (the clerk), sold an alcoholic beverage to 18-year-old Stephanie De La Mora (the decoy). Although not noted in the accusation the decoy was working for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on October 2, 2018, documentary evidence was received and testimony concerning the sale was presented by the decoy and Department Agent Jeff Holsapple. Franchisee Jigar Patel testified on behalf of appellants.

Testimony established that on February 10, 2018, two Department agents entered the premises in an undercover capacity, followed shortly thereafter by the decoy. The decoy went to the coolers where she selected a 12-pack of Bud Light beer. (Exh. 2.) She took the beer to the register and waited in line behind three people. Two customers waited in line behind her. One clerk was at the register.

When it was her turn, the decoy placed the beer on the counter and the clerk asked for her identification. The decoy handed the clerk her California driver's license. It had a vertical orientation, contained her correct date of birth — showing her to be 18 years of age — and a red stripe indicating "AGE 21 IN 2020." (Exh. 5.) The clerk looked at the ID for a few seconds, nodded her head in the affirmative, then completed the sale without asking any age-related questions. The decoy later made a face-to-face identification of the clerk, a photo of the two of them was taken (exh. 2), and the clerk

was issued a citation. There was no evidence presented that the clerk was distracted during the sales transaction or the face-to-face identification. (Findings of Fact, ¶ 11.)

The administrative law judge (ALJ) issued her proposed decision on October 12, 2018, sustaining the accusation and recommending a 15-day suspension. The Director declined to adopt the proposed decision on November 28, 2018.

On February 1, 2019, in its Notice Pursuant to Government Code section 11517(c)(2)(E)(i), the Department invited the parties to submit comments on the case — “including, but not limited to, the findings of fact, determination of issues and the penalty or recommendation” — and specifically requesting that two questions be addressed: “What mitigating or aggravating factors should affect the penalty imposed in this case?” [and] “What penalty is appropriate for the violations found by the ALJ in the Proposed Decision?” Both parties submitted comments.

Thereafter, on April 26, 2019, the Director issued his decision pursuant to Government Code section 11517(c), sustaining the accusation and imposing a 10-day suspension — with all ten days stayed for one year, provided no further cause for discipline arises during that time.

Appellants then filed a timely appeal contending the Department failed to proceed in a manner required by law when it sustained the accusation by applying an incorrect interpretation of case law regarding rule 141(a).²

DISCUSSION

Appellants contend that the Department failed to proceed in a manner required by law when it sustained the accusation by applying an incorrect interpretation of case law regarding rule 141(a). (AOB at pp. 4-8.)

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

Rule 141(a) provides:

A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors **in a fashion that promotes fairness.**

(Cal. Code Regs., tit. 4, § 141(a), emphasis added.) Appellants contend the decoy operation was conducted at a particularly busy time — when the store was staffed by only one clerk at the register — and that this should have constituted a complete defense under rule 141(a). (AOB at p. 2.)

The scope of this Board’s review is clearly defined:

The power of the appeals board in reviewing license decisions of the department is ‘limited to the questions whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record.’ (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085.)

(*Rice v. Alcoholic Bev. Control Appeals Bd.* (1978) 79 Cal.App.3d 372, 374 [144 Cal.Rptr. 851].) Disagreement with the Department’s decision constitutes neither error nor an abuse of discretion.

Appellants’ fairness argument is addressed at length in the decision:

8. With respect to rule 141(a), the Respondents argued the violation “occurred during a hectic time at the store.” Agent Holsapple testified there were three people in line in front of the decoy and some behind her, along with the agent and decoy testifying there was only one clerk working on February 10, 2018, which Respondents’ counsel believed was a Saturday. The Respondents cited AB-7476, and argued, “it is conceivable Ms. Rice was extremely busy and was attempting to rush the transaction and glanced down at Exhibit C and possibly made a mistake and noticed the 1999 on the sign of which she did state to Agent Holsapple that she believed 1999 was – or was the year that someone needed to purchase alcohol.”

9. This argument is rejected. The Respondents’ rule 141(a) argument is based off the long-discredited rush-hour defense - specifically that it was

not fair of the Department to conduct the decoy operation when the premises was busy. Again, Respondents are offering conjecture in lieu of direct evidence when they bear the burden of proving their affirmative defense. While there was absolutely no evidence the store was busy, or that clerk Rice was “attempting to rush the transaction “ or she misread the yellow sign at the sales counter. Regardless, the Respondents’ clerk was responsible for ensuring that not sales to minors took place, whether the store was busy or not. There was no evidence either that the department attempted to take unfair advantage of the situation or that clerk Rice was distracted during the sales transaction. In fact, clerk Rice was focused enough to ask for the minor’s ID, look at the ID, and nod her head in the affirmative.

10. Moreover, the California Court of Appeal has made it clear that the notion of fairness does not authorize the creation of new defenses under rule 141 beyond those specified in rule 141(b). In *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2017) 7 Cal.App.5th 628, 638 [213 Cal.Rptr.3d 130], the Court of Appeal determined “Contrary to the Appeals Board’s contention, Rule 141 provides specific guidance regarding how to preserve fairness in minor decoy operations. Subdivision (b) of Rule 141 implements the goal of fairness by imposing five specific requirements for every minor decoy operation. Decoys must be under the age 20; have the appearance of a person under 21; carry their own actual identification and present that identification upon request; truthfully answer any questions about their ages; and make face-to-face identifications of the persons who sold the alcoholic beverages. (Rule 141(b)(1)-(5).) Fairness under Rule 141 is assured by a set of five expressly defined safeguards, all of which must be fulfilled during a minor decoy operation.” Accordingly, the court did not recognize the separate criteria of “fairness” to be applied when assessing whether individual decoy operations comply with rule 141(a). The Court of Appeal was clear that “fairness” is achieved by adhering to the five standards set forth in Rule 141(b)(1)-(5). In the matter at hand, the record made clear that all five of the standards set forth in Rule 141(b)(1)-(5) were complied with during the said decoy operation.

(Conclusions of Law, at ¶¶ 8-10.)

Appellants contend the language quoted from the *Garfield Beach/CVS* case in Conclusions of Law paragraph 10 constitutes non-binding dicta rather than binding precedent. They maintain, “non-binding dicta cannot be used to rewrite the [*sic*] rule 141 and eliminate a substantive defense for licenses which would allow the Department to conduct manifestly unfair decoy operations as long as they do not violate the *minimum* requirements of rule 141, subdivision (b)(1)-(5).” (AOB at pp. 5-6.)

The concept of dicta is explained by Witkin as follows:

The *ratio decidendi* is the principle or rule that constitutes the ground of the decision, and it is this principle or rule that has the effect of a precedent. It is therefore necessary to read the language of an opinion in the light of its facts and the issues raised, to determine (a) which statements of law were necessary to the decision, and therefore binding precedents, and (b) which were **arguments and general observations, unnecessary to the decision**, i.e., dicta, with no force as precedents.

[¶ . . . ¶]

To say that dicta are not controlling . . . does not mean that they are to be ignored; on the contrary, dicta are often followed. A statement that does not possess the force of a square holding may nevertheless be considered highly persuasive, particularly when made by an able court after careful consideration, or in the course of an elaborate review of the authorities, or when it has been long followed. In short, while a court is free to disregard a dictum that it strongly disapproves, it is quite likely to rely on a dictum where no contrary precedent is controlling and where the view commends itself on principle.

(9 Witkin, Cal. Procedure (5th ed. 2019) Appeal §§ 509; 511, emphasis added.)

Appellants maintain that the holding in the *Garfield Beach/CVS* case only discussed fairness in the context of analyzing subdivision (b)(4) of rule 141 — not fairness in general. They argue:

The Court did not contemplate, and certainly did not hold that their decision removed the fairness rule in all circumstances, the result that the Department is promoting. The Department is in error attempting to write rule 141 subdivision (a) out of rule 141 based on the court's dicta in *CVS*.

(AOB at p. 6.)

We disagree with appellants' characterization of the Department's decision as being based exclusively on the dicta in *Garfield Beach/CVS*. Appellants would have us ignore the existence of paragraphs 8 and 9, and focus entirely on paragraph 10. If paragraph 10 stood alone, perhaps appellants' argument would be persuasive, but reading all three paragraphs as a whole, the argument must fail. The Department did

not just reject appellants' defense on the basis of dicta in the *Garfield Beach/CVS* decision, it also considered and rejected appellants' rush hour defense.

This Board has repeatedly rejected the so-called "rush hour" defense tendered by appellants, and has noted many times that the obligation to prevent sales to minors does not simply vanish as the number of customers increases:

The prevention of sales to minors requires a certain level of vigilance on the part of sellers. It is nonsense to believe a minor will attempt to buy an alcoholic beverage only when the store is not busy, or that a seller is entitled to be less vigilant simply because the store is busy.

(*Circle K Stores, Inc.* (2000) AB-7476, at p. 5.) If anything, previous decisions have emphasized that the licensee must ensure that its employees are *more* vigilant during rush hour periods, as a savvy minor could take advantage of a clerk's inattention. This Board has made it clear that preventing sales to minors must be among the licensee's highest priorities:

When commerce reaches the point where the desire not to inconvenience customers overrides the importance of preventing sales of alcoholic beverages to minors, the public safety and morals of the people of the State of California will be irreparably injured. Such an unacceptable result will not occur on this Board's watch.

(*The Vons Company, Inc.* (2001) AB-7788 at p. 4).

As appellants point out, this Board has indeed noted in the past that there may be circumstances where a truly incapacitating level of activity, coupled with an intent on the part of officers to take advantage of the situation, might merit relief:

It is conceivable that, where an unusual level of patron activity that truly interjects itself into a decoy operation to such an extent that a seller may be legitimately distracted or confused, and the law enforcement officials seek to take advantage of such distraction or confusion, relief might be appropriate.

(*Circle K Stores, Inc.*, *supra*, at pp. 4-5.) However, such an exception would require "persuasive evidence of something associated with the timing of the decoy operation

that truly **prevents** a seller from acting with circumspection when faced with the possibility that a prospective purchaser of alcoholic beverages is a minor.” (*The Vons Company, Inc., supra*, at p. 4, emphasis added.) Notably, we are unaware of any case where such an abuse has been proven.

Contrary to appellants’ assertion, there is no evidence that the clerk in this case was overwhelmed or distracted. Appellants presented neither a level of activity sufficient to make compliance truly impossible nor an intent on the part of Department agents to exploit such a situation. Under the facts of this case, the so-called rush hour defense must fail — not because of dicta quoted from the *Garfield Beach/CVS* case, but because appellants have not presented sufficient evidence to establish their defense.

ORDER

The decision of the Department is affirmed.³

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

³This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

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

APPENDIX

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

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

7-Eleven, Inc., and Shri Shreeji Corporation, Inc.
Dbas: 7-Eleven Store 17784 C
797 West Highland Avenue
San Bernardino, California 92405

Licensee(s).

File No.: 20-384479

Reg. No.: 18087221

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department April 26, 2019, for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held on October 2, 2018, before Administrative Law Judge D. Huebel, and the written arguments of the parties adopts the following decision.

FINDINGS OF FACT

1. The Department filed the accusation on July 20, 2018.
2. The Department issued a type 20, off-sale beer and wine license to the Respondents for the above-described location on March 21, 2002 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Stephanie De La Mora (hereinafter referred to as decoy Stephanie) was born on November 11, 1999. On February 10, 2018, she was 18 years old. On that date she served as a minor decoy in an operation conducted by the Department.
5. Decoy Stephanie appeared and testified at the hearing. On February 10, 2018, she was 5'4" tall and weighed 120 pounds. She wore a pink shirt, dark blue jeans, and brown leather boots. Her hair was light brown and pulled back, with some loose strands along the sides. She wore no

make-up or jewelry. (Exhibits 2 and 4.) Her appearance at the hearing was the same, except that she wore concealer and mascara, and her hair was shoulder length and a little darker in color.

6. On February 10, 2018, at approximately 1:10 p.m., Department Agents Holsapple and Hernandez entered the Licensed Premises, in a plain clothes capacity, followed shortly thereafter by decoy Stephanie. Decoy Stephanie walked straight to the alcoholic beverage coolers and selected a 12-pack of Bud Light beer cans. (Exhibit 2.) Beer is an alcoholic beverage. Decoy Stephanie brought the 12-pack of beer directly to the check-out line and waited in line behind three patrons. There were two patrons waiting in line behind decoy Stephanie. There was one female clerk working at the cash register.

7. At the counter decoy Stephanie placed the 12-pack of Bud Light beer upon the sales counter. Clerk Mariah Rose Rice (hereinafter referred to as clerk Rice) scanned the beer and asked decoy Stephanie for her identification (ID). Decoy Stephanie handed clerk Rice her valid California Driver License, which clerk Rice accepted. Decoy Stephanie's California Driver license had a vertical orientation, showed her correct date of birth, and included a red stripe, which read, "AGE 21 IN 2020." (Exhibit 5.) Clerk Rice looked at the ID for two to three seconds, nodded her head up and down in the affirmative, then handed the ID back to the decoy. Clerk Rice continued with the sales transaction. Clerk Rice told the decoy the price of the beer. Decoy Stephanie gave \$20 to the clerk, who provided the decoy with change. Decoy Stephanie took the change and the 12-pack of Bud Light beer and exited the store. There was no evidence clerk Rice asked decoy Stephanie any age-related questions or questions about her ID. Decoy Stephanie did not communicate with the agents while she was inside the Licensed Premises. Agent Holsapple witnessed these above-described events while posing as a customer. Agent Hernandez exited the store soon after decoy Stephanie. Agent Holsapple remained in the Licensed Premises.

8. Agent Holsapple approached clerk Rice at the cash register and identified himself as a police officer to the clerk. Decoy Stephanie re-entered the Licensed Premises with Agents Hernandez and Patel, all of whom approached Agent Holsapple and clerk Rice. Agent Holsapple advised clerk Rice of the violation. Agent Holsapple asked decoy Stephanie how old she was, to which decoy Stephanie replied, "18." Agent Holsapple then asked decoy Stephanie to identify the person who sold her the alcohol. Decoy Stephanie pointed at clerk Rice and replied, "She sold me the alcohol." Decoy Stephanie and clerk Rice were standing two to three feet apart and looking at each other at the time of this identification. A photo of clerk Rice and decoy Stephanie was taken after the face-to-face identification, with decoy Stephanie holding the 12-pack of Bud Light beer in her left hand and her California Driver License in her right hand, while standing next to clerk Rice. (Exhibit 2.)

9. Agent Holsapple asked clerk Rice if she knew how old someone had to be to purchase alcohol, to which clerk Rice replied, "You have to be 21 or older." Agent Holsapple asked clerk Rice if she was able to recall the birth year listed on decoy Stephanie's Driver License. Clerk Rice recalled the birth year and stated that it was 1995, and then corrected herself and said that the birth year was 1999. While answering Agent Holsapple's questions, clerk Rice later spontaneously stated that the employees at the store know the local under-aged customers and would routinely sell alcohol to these known, local under-aged customers.¹

10. Agent Holsapple asked clerk Rice to scan the said 12-pack of Bud Light beer cans on the cash register and show the agent how the clerk conducted the sales transaction with the decoy on the cash register software. Clerk Rice complied and scanned the beer, whereupon a yellow screen displayed, "ID 30 AND UNDER. MUST BE 21 TO PURCHASE. 1. PICTURE ON I.D. MUST MATCH THE CUSTOMER 2. SCAN OR SWIPE I.D. OR IF BIRTHDATE IS ON OR BEFORE 02-10-97 PRESS [MANUAL ENTER]." (Exhibit 3.) Clerk Rice simulated the transaction and explained that during the said sales transaction she pressed the "VISUAL ID OK" button, to the right of the "MANUAL ENTER" button, as a means to bypass the yellow screen prompt and complete the transaction, effectively overriding the safety feature of the software. There was no evidence that clerk Rice said anything about decoy Stephanie's appearance or demeanor as a reason for proceeding with the sale. While Agent Holsapple was inside the Licensed Premises he observed security cameras throughout the premises, including over the cash registers.

11. A citation was issued to clerk Rice. There was no evidence that clerk Rice was distracted during the sales transaction or the face-to-face identification. Clerk Rice did not appear at the hearing.

¹ The undersigned determined these statements by the clerk to be non-hearsay statements because they were not used to prove the truth of the matter, but used as circumstantial evidence to prove a state of mind, such as belief, intent, or knowledge. In this matter, just as in AB-9442, "the clerk's statements – even disregarding the assertions within them – support the inference that [she] knowingly and intentionally sold the beer to the decoy." The circumstantial evidence corroborates the direct evidence that the youthful appearing decoy handed the clerk her vertical formatted minor's California Driver License, which depicted her birth year as 1999 and had a red stripe reading, "AGE 21 IN 2020," which the clerk took possession of, looked at and nodded her head in affirmation, with the presence of the yellow register screen and yellow sign at the register stating a person has to be born in 1997 to purchase alcohol, and proceeded with the sale of alcohol to the minor. A statement is not hearsay, though made extra judicially, to the extent that it is offered as circumstantial evidence of some fact in issue other than the truth or falsity of the statement itself. (*People v. Jackson* (1989) 49 Cal.3d 1170, 1187 [264 Cal.Rptr. 852]; 31 Cal.Jur.3d (2010) Evidence, § 247.) Use of such circumstantial evidence to prove a state of mind, such as belief, intent, or knowledge, is not opposed by the hearsay rule "because the utterance is not used for the sake of inducing belief in any assertion it may contain. The assertion, if in form there is one, is to be disregarded, and the indirect inference alone regarded." (*Skelly v. Richman* (1970) 10 Cal.App.3d 844, 858 [89 Cal.Rptr. 556], citing 6 Wigmore on Evid. (3d ed. 1940), § 1790, p. 239]; *Estate of Truckenmiller* (1979) 97 Cal.App.3d 326 [158 Cal.Rptr. 699]; *Sandoval v. Southern Cal. Enterprises* (1950) 98 Cal.App.2d 240 [219 P.2d 928]; *Hickman v. Arons* (1960) 187 Cal.App.2d 167 [9 Cal.Rptr.379].)

12. Decoy Stephanie 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 Rice at the Licensed Premises on February 10, 2018, decoy Stephanie displayed the appearance that could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk. In-person, decoy Stephanie has a youthful appearance and looks her age, 18.

13. February 10, 2018, was the first day of decoy operations in which decoy Stephanie participated. Decoy Stephanie had never been to the Licensed Premises prior to that date. Decoy Stephanie learned about the decoy program through her service as a police explorer. Decoy Stephanie has been a police explorer for three years. She says the Police Explorer Academy she attended entails "a lot of maturity, just a lot of things you can contribute into law enforcement." Decoy Stephanie participates in the Police Explorer Program every Monday. Her duties as a police explorer include assisting with traffic stops, pedestrian checks, and memorandums. Her training as a police explorer includes learning how to interact with the public, such as with pedestrian checks where she learns "how to walk up to someone and present oneself." During the decoy operation at the Licensed Premises, decoy Stephanie did not use the latter described training when she interacted with clerk Rice and purchased the beer.

(Respondents' Witness)

14. Jigar Patel appeared and testified at the hearing. Mr. Patel has been the franchisee of the Licensed Premises for one and a half years, having formally been named in the corporate documents in 2017. Prior to his becoming the franchisee, both his mother and father were the co-franchisees since December 1987, until his father's death in 2010, when his mother became the sole franchisee. After his father's death, Mr. Patel managed the Licensed Premises for eight years.

15. Mr. Patel hires and trains the Respondents' employees. New hires are placed on a 30-day probationary trial period and are required to undergo training within the first two weeks of their employment. That training consists of two-parts: (1) cash register training, to get employees familiar with running the registers and customer service, and (2) on-line computer-based training provided by the franchisor, 7-Eleven, entitled, "7 Excel," which includes a number of on-line programs that employees are required to review, and that entail answering questions and receiving a passing rate of 100 percent on those questions. One of the programs is entitled, "Come of Age," which details training on age-restricted products. The latter "Come of Age" training includes recognizing intoxicated customers and how to check customer identification for the date of birth, expiration, and picture comparison to the customer. The Respondents produced at the hearing four screen shots of the Age-Restricted Sales training module, which includes a

list of key topics reviewed: "The Rules and Laws for selling Age-Restricted Products, Health Effects of Tobacco Use, Tobacco Sales Laws and Policies, Tips for Recognizing Valid Information, How to Refuse a Sale, and Best Practices for Alcohol Sales." (Exhibits B1 through B4.)

16. To ensure the Respondents' employees comply with their training and policies, the Respondents do the following:

(1) participate in the BARS Secret Shopper Program on a random basis each quarter. The Respondents' staff are provided green cards upon their successfully requesting identification of a secret shopper who attempts to purchase an age-restricted product, and a red card for failing to request identification. The Respondents produced at the hearing a color photograph of two green cards received by two of its associates, Sky Stewart on July 3, 2018, and Marina Ramirez on September 9, 2018. (Exhibit A.)

(2) Mr. Patel performs weekly spot checks of staff, especially new-hires, to see how they handle customer service and sales of age-restricted products.

(3) The Respondents have a yellow sign posted at both of their cash registers to aide their clerks with what year they should look for on customer IDs during age-restricted sales. The signs read, "In order to purchase Alcohol Products, the customer must have been born on or before today's date in 1997. To purchase Tobacco, the customer must have been born on or before today's date in 1997. To purchase Lottery items, the customer must have been born on or before today's date in 1999." (Exhibit C.) This sign was posted at both of Respondents cash registers on February 10, 2018, during the said sales transaction. The Respondents update these two signs annually.

17. Mr. Patel learned of the violation of February 10, 2018, when his manager, Mohammad, telephoned and advised him, while the Department agents were conducting their investigation. Mr. Patel instructed manager Mohammad to comply with any of the Department agents' requests. In early March or mid-March 2018, clerk Rice gave Mr. Patel a two-week notice of her intent to quit, and thereafter timely resigned. Mr. Patel said that all of Respondents' employees "are well aware" that security cameras are over the Licensed Premises' cash registers.

18. Mr. Patel flatly denied the hearsay statement made by clerk Rice to Agent Holsapple that the Licensed Premises routinely sells alcohol to local kids under the age of 21. Mr. Patel testified, "That's completely untrue. We as a family have owned that 7-Eleven for over 30 years. We've been a pillar in the community for, ever since I can remember, since I have been a kid we have seen many of our customers grow up there coming in every day since they were kids. Now they are parents with their own kids. San Bernardino in particular has some rough spots, and we

understand that, we've partnered up with the San Bernardino School Police to do a positive behavior program where we pass out at least a couple 100 coupons for free Slurpees, hot dogs and drinks to the police department that they then hand out to kids exhibiting positive behavior. We've joined forces with other 7-Eleven franchisees in the area for a project called, 'Project A Game' where we help put together youth sports to keep kids off the street and give them outlets to do other things. We've received letters from the police department. So we take that role seriously, that we have to invest in our community and most importantly in our children. So selling to minors, which would then possibly lead them down a spiraling path, would be something definitely we would take --- we would never do that."

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 Respondents' license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on February 10, 2018, the Respondents-Licensees' employee, clerk Mariah Rose Rice, inside the Licensed Premises, sold alcoholic beverages, to-wit: a 12-pack of Bud Light beer, to Stephanie De La Mora, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-12.)
5. The Respondents argued the decoy operation at the Licensed Premises failed to comply with rules 141(a)² and 141(b)(2), therefore, the accusation should be dismissed pursuant to rule 141(c).

² Respondents did not specifically state which rule they believed the Department violated. The undersigned understood the Respondents to argue a fairness violation under rule 141(a) with the Respondents' recitation of language from AB-7476

6. With respect to rule 141(b)(2), Respondents argued decoy Stephanie did not have the appearance of someone under the age of 21 because of a certain factor which made her appear to be older than 21. That factor, the Respondents argued, included decoy Stephanie's "extensive explorer training wherein" the decoy said the academy and training entails a lot of maturity and conducting activities such as the pedestrian checks and dealing with how to interact with the public. The Respondents argued the decoy's police explorer training "would go directly to her demeanor and maturity" and appearance.

7. This rule 141(b)(2) argument is rejected. Respondents' unsupported assertions are nothing but assumption and conjecture. Respondents presented no evidence as to why clerk Rice allegedly believed decoy Stephanie to be 21 years old or older. Clerk Rice did not testify. At the time of the decoy operation, clerk Rice mentioned nothing specific relating to decoy Stephanie's appearance or demeanor as a reason for proceeding with the sale. In fact, the evidence indicates clerk Rice knew the decoy was a minor. Mr. Patel testified that on February 10, 2018, the yellow signs (Exhibit C), which Respondents update annually, were posted at the cash registers informing clerks that for customers to purchase alcohol they have to "have been born on or before today's date in 1997." During questioning by Agent Holsapple after the sales transaction, clerk Rice did know decoy Stephanie's birth year was 1999. Clerk Rice also admitted to Agent Holsapple she knew a person had to be 21 years old or older to purchase alcohol. Decoy Stephanie credibly testified that when clerk Rice looked at the decoy's driver license the clerk nodded her head in the affirmative. Based on the preponderance of the evidence, it is more probable clerk Rice knew the decoy was a minor and proceeded with the sale anyway. Regardless, there was nothing about decoy Stephanie's police explorer training, experience, or demeanor which made her appear older than her actual age. In fact, when viewing decoy Stephanie in-person at the hearing, she has a youthful appearance and looks her age. In other words, decoy Stephanie had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 12.)

8. With respect to rule 141(a), the Respondents argued the violation "occurred during a hectic time at the store." Agent Holsapple testified there were three people in line in front of the decoy and some behind her, along with the agent and decoy testifying there was only one clerk working on February 10, 2018, which Respondents' counsel believed was a Saturday. The Respondents cited AB-7476, and argued, "it is conceivable Ms. Rice was extremely busy and was attempting to rush the transaction and glanced down at Exhibit C and possibly made a mistake and noticed the 1999 on the sign of which she did state to Agent Holsapple that she believed 1999 was -- or was the year that someone needed to purchase alcohol."

9. This argument is rejected. The Respondents' rule 141(a) argument is based off the long-discredited rush-hour defense - specifically that it was not fair of the Department to conduct the decoy operation when the premises was busy. Again, Respondents are offering conjecture in lieu of direct evidence when they bear the burden of proving their affirmative defense. While the Licensed Premises may have had three customers in front of the decoy and two behind her, there was absolutely no evidence the store was busy, or that clerk Rice was "attempting to rush the transaction" or she misread the yellow sign at the sales counter. Regardless, the Respondents' clerk was responsible for ensuring that no sales to minors took place, whether the store was busy or not. There was no evidence either that the Department attempted to take unfair advantage of the situation or that clerk Rice was distracted during the sales transaction. In fact, clerk Rice was focused enough to ask for the minor's ID, look at the ID, and nod her head in the affirmative.

10. Moreover, the California Court of Appeal has made it clear that the notion of fairness does not authorize the creation of new defenses under rule 141 beyond those specified in rule 141(b). In *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2017) 7 Cal. App.5th 628, 638 [213 Cal.Rptr.3d 130], the Court of Appeal determined, "Contrary to the Appeals Board's contention, Rule 141 provides specific guidance regarding how to preserve fairness in minor decoy operations. Subdivision (b) of Rule 141 implements the goal of fairness by imposing five specific requirements for every minor decoy operation. Decoys must be under the age of 20; have the appearance of a person under 21; carry their own actual identification and present that identification upon request; truthfully answer any questions about their ages; and make face-to-face identifications of the persons who sold the alcoholic beverages. (Rule 141(b)(1)-(5).) Fairness under Rule 141 is assured by a set of five expressly defined safeguards, all of which must be fulfilled during a minor decoy operation." Accordingly, the court did not recognize the separate criteria of "fairness" to be applied when assessing whether individual decoy operations comply with rule 141(a). The Court of Appeal was clear that "fairness" is achieved by adhering to the five standards set forth in Rule 141(b)(1)-(5). In the matter at hand, the record made clear that all five of the standards set forth in Rule 141(b)(1)-(5) were complied with during the said decoy operation.

PENALTY

The Department requested the Respondents' license be suspended for a period of 20 days, based on certain factors, including: (1) despite clerk Rice knowing that a person has to be 21 to purchase alcohol, knowing the decoy's birth year was 1999, was faced with a sign at the register stating a person has to have been born in 1997 to purchase alcohol, clerk Rice deliberately overrode the security software on the cash register, all the while knowing she was on security

surveillance, and stating that the premises' general practice is to sell alcohol to minors³; (2) the Respondents took no positive steps since the violation, only continuing to do all the same things it did prior to the violation, in following the 7-Eleven required training, participating in the BARS program only quarterly, and providing no green cards for any time prior to the violation; and (3) despite the Respondents' licensure since 2002 with no prior violations, it appears from the evidence "they haven't been caught yet."

The Respondents recommended a mitigated penalty based on the following factors: (1) the Licensed Premises' "immaculate" discipline-free operation for almost 16 years (from 2002 through February 10, 2018), and (2) the Respondents' use of the 7 Excel on-line training for its employees, the BARS program, and other positive steps it has taken to ensure no sales to minors occur.

The undersigned agrees with Respondents' counsel that the Department is purely speculating that the Respondents' length of licensure without discipline in this case means "they haven't been caught yet." The Respondents' discipline free history and cooperation in the investigation deserves some mitigation. In addition, the Department's hearsay evidence that there was a continuing course or pattern of conduct constituting aggravation of penalty is rejected as noted above based on the evidence presented by Respondent. However, it is important to note, the Respondents have not shown they have made any changes or taken steps to address the problem at issue, which is that its clerks are able to override the cash register's safety protocol by pressing the "VISUAL ID OK" button, and tricking the system into believing the customer is age appropriate for the sale. As of the hearing the registers' yellow screen still had the "VISUAL ID OK" button, which has not been removed. While the Respondents mentioned their employees are required to participate in cash register training and 7-Eleven's on-line training within two weeks of their hire dates, and Mr. Patel testified that he focuses his weekly spot checks on new hires, there was no mention of whether the Respondents incorporate additional training, for example bi-annual training, and retraining after a violation. The Respondents made no mention of having a zero tolerance policy in place as a deterrent for when its clerks violate their policy and sell age-restricted merchandise to minors. The Respondents made no mention that their training includes the simple red flags of minor's IDs, including the vertical format and red stripe advising when the minor will turn 21; which is a quick and simple tool for their clerks to use when presented with a minor's ID during a transaction involving age-restricted products. While the above remediation is not an enumerated aggravating factor under Rule 144, it can provide some small aggravation in the analysis of penalty. The penalty recommended herein complies with rule 144.

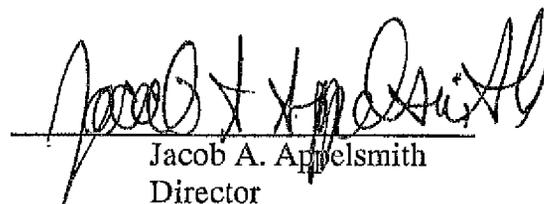
³ The undersigned would like to address one of the Department's argued for aggravating factors in favor of bumping the standard penalty to 20 days based on clerk Rice's statement to Agent Holsapple alleging the Respondents' employees at the store knew the local under-aged customers and would routinely sell alcohol to these known local under-aged customers. The undersigned finds in favor of Mr. Patel's sworn, direct, and un rebutted denial of the said allegation. The Department presented weaker and less satisfactory evidence in this regard. (Evidence Code, section 412.)

ORDER

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

Sacramento, California

Dated: April 26, 2019



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.