

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

AB-9849

File: 20-447420; Reg: 19088683

7-ELEVEN, INC., PAWANJIT KAUR, and GURMEET SINGH SIDHU
dba 7-Eleven Store #13926D
1629 East Ashlan Avenue
Fresno, CA 93704,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: June 11, 2020
Telephonic

ISSUED JUNE 19, 2020

Appearances: *Appellants:* Megan Wolniewicz, of Solomon, Saltsman & Jamieson,
as counsel for 7-Eleven, Inc., Pawanjit Kaur, and Gurmeet Singh
Sidhu

Respondent: Matthew Gaughan, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

7-Eleven, Inc., Pawanjit Kaur, and Gurmeet Singh Sidhu, doing business as 7-Eleven Store #13926D (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 15 days, because their clerk sold an alcoholic beverage to a police minor decoy in violation of Business and

¹The decision of the Department, dated December 5, 2019, is set forth in the appendix.

Professions Code² section 25658(a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 21, 2007.

There is one instance of prior departmental discipline against the license in 2011 for violation of section 25658(a).

On April 3, 2019, the Department filed a single-count accusation against appellants charging that, on December 21, 2018, appellants' clerk, Anthony Paul Hammon (the clerk), sold an alcoholic beverage to 17-year-old J.M. (the decoy). Although not noted in the accusation, the decoy was working for the Fresno Police Department (FPD) in a joint minor decoy operation with the Department at the time.

At the administrative hearing held on September 12, 2019, documentary evidence was received, and testimony concerning the sale was presented by the decoy and Department Agent Lori Kohman. Co-licensee Gurmeet Singh Sidhu testified for appellants.

Testimony established that on December 21, 2018, the decoy entered the licensed premises and selected a three pack of 25-ounce Bud Light beer cans from the alcoholic beverage coolers. He took the beer to the counter and presented it for purchase. The clerk asked the decoy if he was 21 years old. The decoy replied that he was 17. The clerk responded that his "cutoff" is normally 18 but that he would let him "slide." (Findings of Fact, ¶ 7.) The clerk then completed the sales transaction, and the decoy left the licensed premises with the beer. Once outside, the decoy met with law enforcement officers who were waiting nearby.

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

The decoy and law enforcement officers entered the licensed premises approximately five minutes after the sale and approached the clerk. Agent Kohman identified herself as law enforcement and asked the clerk if she could speak with him. After relocating to the back area of the licensed premises, the decoy identified the clerk as the person who sold him the beer³ and posed for a photograph standing next to the clerk. (Exh. D-3.) The clerk admitted to selling beer to the decoy and told Agent Kohman that he believed the decoy was joking when he said he was 17 years old. The clerk was subsequently cited for the sale.

The administrative law judge (ALJ) issued his proposed decision on September 19, 2019, sustaining the accusation and recommending a 15-day suspension. The Department adopted the proposed decision on November 20, 2019 and issued a certificate of decision on December 5, 2019. Appellants filed a timely appeal contending that the decoy's appearance did not comply with rule 141(b)(2)⁴ and that the penalty is excessive.

DISCUSSION

I

RULE 141(b)(2) - SUBSTANTIAL EVIDENCE

Appellants contend that the decoy did not display an appearance generally expected of a person under 21 years of age at the time of the minor decoy operation. (AOB at pp. 7-9.) Specifically, appellants argue that the decoy had "the stature and

³ The face-to-face identification of the clerk is not at issue in this appeal.

⁴ All references to rule 141 and its subdivisions are to Cal. Code Regs., tit. 4, § 141.

appearance of a grown man, with significantly more height and heft than would be expected from an adolescent.” (*Id.* at p. 8.) Appellants further contend that the decoy had prior law enforcement experience, “participat[ing] in approximately twenty to thirty minor decoy sting operations prior to the one at hand.” (*Ibid.*) Based on this experience, the decoy “clearly felt at ease during the transaction, and as such, appeared older because of his demeanor, mannerisms, and poise.” (*Ibid.*)

Rule 141(b)(2) provides:

The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense.

This rule provides an affirmative defense, and the burden of proof lies with appellants.

(*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

Here, the ALJ found that the decoy’s appearance complied with rule 141(b)(2). (Findings of Fact, ¶ 12; Conclusions of Law, ¶ 11.) Therefore, this Board is required to defer to those findings so long as they are supported by substantial evidence. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Southland)* (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652, 659] [citing *Kirby v. Alcoholic Beverage Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628] [“In considering the sufficiency of the evidence issue the court is governed by the substantial evidence rule[;] any conflict in the evidence is resolved in favor of the decision; and every reasonably deducible inference in support thereof will be indulged. [Citations.]”]; see also *Kirby v. Alcoholic Bev. etc. Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815] [“When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its

deductions for those of the department.”].) “Substantial evidence” is “evidence of ponderable legal significance, which is ‘reasonable in nature, credible and of solid value.’ ” (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 814 [38 Cal.Rptr.2d 304, 307–308], internal citations omitted.)

In its decision, the Department rejected appellants’ arguments that the decoy’s physical appearance did not comply with rule 141(b)(2). The Department found that “J.M.’s height and weight were unremarkable and well within the range of many 17 year old male teenagers.” (Conclusions of Law, ¶ 11.) The Department further noted that “the clerk did not testify to establish facts suggesting his rejection of J.M.’s explicit statement [regarding his age] was reasonable or whether there was anything in J.M.’s actions, manner, or appearance that led Hammon to reasonably conclude J.M. was over 21.” (*Ibid.*) As noted above, “we are bound to construe the evidence in the light most favorable to the ALJ’s decision” and will uphold the findings so long as they are supported by substantial evidence. (*Southland, supra*, 103 Cal.App.4th at 1087.)

To support its findings, the Department relied on a photograph of the decoy from the day of the operation. (Exh. D-3; Findings of Fact, ¶¶ 4, 7, 10.) Photographs of a decoy from the day of the operation are “arguably the most important piece of evidence in considering whether the decoy displayed the physical appearance of someone under 21 years of age.” (*Southland, supra*, 103 Cal.App.4th at 1094.) Further, the Department relied on the ALJ’s personal observations of the decoy’s appearance at the hearing. The evidence established that the decoy was approximately six feet tall and 175 pounds at the administrative hearing. (Findings of Fact, ¶ 4.) The ALJ found the decoy credibly testified “that his size and appearance on the date of the operation were the same except that he was approximately 10 pounds lighter on that date.” (Findings

of Fact, ¶ 4; Conclusions of Law, ¶ 11.)

The Department is entitled to rely on an ALJ's personal observations of a decoy when the decoy testifies that his appearance and mannerisms were "the same on the stand as it was when he purchased the beer." (*Southland, supra*, 103 Cal.App.4th at 1094.) The Board sees no error with the Department's findings regarding the decoy's appearance, which are supported by the photograph of the decoy from the date of the operation, as well as the ALJ's personal observations of the decoy at the hearing. Both sources are "reasonable in nature, credible and of solid value." (*County of Los Angeles, supra*, 32 Cal.App.4th at 814.)

However, appellants contend that certain non-physical factors, such as the decoy's law enforcement experience, made him appear older than 21 years old. (AOB at p. 8.) However, as noted by the Department, there is no evidence in the record that the clerk sold alcohol to the decoy based on his experience or demeanor. As the Department noted, the clerk did not testify. Thus, there is no evidence as to why the clerk sold beer to the decoy and rejected the decoy's true statement about his age, much less any evidence to establish that the clerk's error was the result of the decoy's demeanor.

Based on the above, the Department's findings regarding the decoy's appearance must stand. Ultimately, appellants are asking this Board second guess the Department and reach a different result. Extensive legal authority prohibits this Board from doing so. (*Southland, supra*, 103 Cal.App.4th at 1094.)

II

EXCESSIVE PENALTY

Appellants contends its 15-day penalty is excessive. (AOB at pp. 9-11.) Specifically, appellants disagree with the Department's balancing of mitigation and aggravation factors. (*Id.* at pp. 10-11.) Appellants argue that the Department abused its discretion in negating its mitigation efforts on the basis of "lax oversight" of the clerk. (*Id.* at p. 11.)

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-time⁵ violation of section 25658(a) is 15 days, which is

⁵ Even though this is technically appellants' second violation, it counts as a first violation since the prior violation did not occur within 36 months. (Cal. Code Regs., tit. 4, § 144.)

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, appellants take issue with the fact that the Department did not deviate from the standard 15-day suspension. (AOB, at pp. 9-11.) Specifically, appellants feel that their training program, store policies, corrective action taken after their previous violation in 2011, and termination of the clerk, warranted a mitigated penalty. (*Id.* at p. 11.) The Department disagreed. The Department noted appellants’ mitigation evidence, but felt it was “diminished by what appeared to be lax oversight of an employee who felt free to show up to work under the influence and then make a sale of alcohol to a person he knew was underage.”⁶ (Decision at p. 7.) The Board cannot say that the

⁶ Co-licensee Gurmeet Singh Sidhu testified that the clerk was terminated as 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 evidence is a matter entirely within its discretion. Rule 144 provides a standard 15-day suspension for a section 25658(a) violation, which is what appellants received. Rule 144 also allows the Department to exercise discretion to consider aggravation and mitigation. The Department's balancing of appellants' mitigation evidence because of the clerk's aggravating conduct during the sale was reasonable and not an abuse of discretion. Therefore, the penalty must stand.

ORDER

The decision of the Department is affirmed.⁷

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

result of his sale to the decoy and for being under the influence during the shift where the sale was made. (Findings of Fact, ¶ 13.)

⁷ 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:

7 Eleven, Inc., Pawanjit Kaur, and
Gurmeet Singh Sidhu
DBA: 7 Eleven Store 2237 13296D
1629 E. Ashlan Ave.
Fresno, California 93704-3938

Respondent

Off-Sale Beer and Wine License

} File: 20-447420
}
} Registration: 19088683
}
} License Type: 20
}
} Page Count: 51
}
} Reporter:
} Jennifer Hennagin-CSR #13559
} Atkinson Baker
}
} **PROPOSED DECISION**

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Fresno, California, on September 12, 2019.

Matthew Gaughan, Attorney, represented the Department of Alcoholic Beverage Control (Department).

Brian Washburn, Attorney, represented Respondents 7 Eleven, Inc., Pawanjit Kaur, and Gurmeet Singh Sidhu. (Respondents)

The Department seeks to discipline the Respondent's license on the grounds that, on or about December 21, 2018 the Respondent-Licensee, through their agent or employee, Anthony Paul Hammon, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to wit: beer to J.M.¹, an individual under the age of 21 in violation of Business and Professions Code section 25658(a)² (Exhibit D-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 September 12, 2019.

¹ In this matter, the Decoy used by the Department was under 18 years of age at the time of the alleged incident. He is referred to by his initials in this proposed decision to protect his privacy.

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

FINDINGS OF FACT

1. The Department filed the accusation on April 3, 2019. (Exhibit D-1)
2. On February 21, 2007 the Department issued a type 20, off-sale beer and wine license to the Respondent for the above-described location (the Licensed Premises). The following is the record of prior Department discipline against the Respondent's license as established by official records introduced by the Department (Exhibit D-2):

Violation Date	Violation	Registration Date	Registration Number	Penalty
5/2/2011	25658(a)	5/26/2011	11075162	15 day suspension, stayed, POIC in lieu of suspension.

3. J.M. was born on July 14, 2001 and was 17 years old on December 21, 2018. On that date, J.M. served as a minor decoy in an operation conducted by the Department and Fresno Police Department (FPD) at various locations, including the Licensed Premises.
4. J.M. appeared and testified at the hearing. On September 12, 2019 his appearance was generally as depicted in an image that was taken during the operation on December 21, 2018. (Exhibit D-3) During the operation on December 21, 2018, J.M. wore a black hooded jacket with the hood down and the front zipper closed. J.M. wore blue jeans and white canvas sneakers. His face was exposed, and his hair was combed in a neat haircut with close cropped sides. J.M. was clean shaven. (Exhibit D-3) J.M. was approximately 6 feet tall and 175 pounds at the hearing. J.M. credibly testified that his size and appearance on the date of the operation were the same except that he was approximately 10 pounds lighter on that date.
5. On December 21, 2018 J.M. went to the Licensed Premises with a Department agent and an FPD officer for the purpose of trying to buy alcohol. J.M. was instructed about the requirements of 141³. He was told to have his identification, show it if requested, and to be truthful regarding his age, if asked. J.M. carried his California driver's license to produce if asked. J.M. was briefed regarding these requirements by the law enforcement officers prior to entering the Licensed Premises to attempt to purchase alcohol.

³ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

6. J.M. entered the Licensed Premises at around 8:15 p.m. on December 21, 2018. After entering, he went to the back where the alcoholic beverages were in coolers. J.M. selected a three-pack of 25 ounce Bud Light beer cans. J.M. took the beer to the register and set it down on the counter in front of the clerk for purchase.

7. This clerk was the same individual in the image that was later taken of J.M. standing next to the clerk that sold the beer to him. (Exhibit D-3) After setting down the beer, the clerk asked J.M. if he was 21. J.M. responded and told the clerk he was 17 years old. The clerk responded and said that his "cutoff" is normally 18 but that he would let him "slide". The clerk then processed the beer purchase. The clerk did not ask J.M. for identification or any further age related questions. J.M. paid the clerk for the beer in cash. J.M. then took possession of the beer and the change the clerk handed to him. J.M. left the Licensed Premises with these items and approached the vehicle where the law enforcement officers were waiting.

8. J.M. told them what had just happened in the Licensed Premises. Approximately five minutes later, the law enforcement officers went into the Licensed Premises with J.M. Agent Lori Kohman (Kohman) approached the clerk to identify herself and why they were there. The clerk was still working at the register so Kohman asked him to arrange for coverage, so they could talk to him, away from customers, about the sale to J.M.

9. After another employee took over the register, the officers, J.M., and the clerk went to an area in the back of the Licensed Premises away from the register to continue the discussion. After they relocated, Kohman asked J.M. if he could identify the clerk who sold the beer. J.M. responded "he did" and pointed at the same clerk as the person who made the sale. J.M. and the clerk were facing each other when this occurred. The clerk was identified as Anthony Paul Hammon (Hammon) during Kohman's investigation of the sale to J.M. Hammon admitted to making the sale to J.M. Hammon said he did not believe J.M. when he said he was 17 years old because he thought he was "kidding".

10. Hammon was subsequently photographed while standing next to J.M. while J.M. held the Bud Light three-pack. (Exhibit D-3) From the initial law enforcement contact with Hammon until after this photograph was taken; J.M. was in the immediate presence of Hammon and the law enforcement officers. Hammon was subsequently issued a citation for the sale.

11. J.M. had served as a decoy on approximately 4-5 occasions for law enforcement prior to this operation. J.M. became involved as a decoy at the request of FPD Officer Jeanette Olson (Olson) who was the other law enforcement officer working with Kohman. Olson was a work acquaintance of J.M.'s grandmother.

12. Based on J.M.'s overall appearance, i.e., his physical appearance, clothing, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of Hammon at the Licensed Premises on December 21, 2018, J.M. displayed the appearance which would generally be expected of a person less than 21 years of age during his interactions with Hammon. Hammon did not testify in this matter to explain his age related impressions of J.M. or why he sold J.M. beer even though J.M. had specifically stated that he was 17 years old prior to the sale.

13. Licensee Gurmeet Singh Sidhu (Sidhu) testified for the Respondent. Sidhu testified that he is actively involved in the training and day to day supervision of employees at the Licensed Premises and that he has done so for the last 13 years. Sidhu explained that all employees go through computer training for age restricted sales that they must pass before being allowed to work the register. The policy at the Licensed Premises is that employees are to ask for identification if the person appears under 30 years old. All policies are reviewed with employees regularly. Sidhu reviews video footage to ensure that policies are enforced, and the Respondent participates in a secret shopper program to reinforce age restricted sale policies. The scanning of an alcoholic beverage will trigger the register reminding the clerk to ask for identification. The register is able to scan identifications. Even though Hammond was the son of a twelve year employee, he was terminated as a result of this incident and being under the influence during the shift where he made the sale to J.M.

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 December 21, 2018 the Respondent's clerk, Anthony Paul Hammon inside the Licensed Premises, sold an alcoholic beverage to J.M., a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 2-13)

5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141 and, therefore, the accusation should be dismissed. Specifically, the Respondent argued that the face to face identification failed to comply with rule 141(b)(5) and the appearance of the decoy did not comply with rule 141(b)(2). Either of these alleged violations, if established, would be affirmative defenses and require dismissal of the accusation pursuant to rule 141(c).

6. There is no credible evidence supporting the assertions by the Respondent that there was a failure to comply with rule 141. Regarding the rule 141(b)(5) violation, *Acapulco Restaurants, Inc. v. Alcoholic Beverages Control Appeals Board* (1998) 67 Cal.App.4th 575 confirmed that a face to face must occur for compliance, but that case never established a baseline standard for what was a compliant face to face identification. The subsequent decision in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1687 held that the regulation at "section 141, subdivision (b)(5), ensures-admittedly not as artfully as it might-that the seller will be given the opportunity, soon after the sale, to come "face-to-face" with the decoy." *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1687, 1698. This decision confirmed that the purpose of the face to face was to give the seller notice of who the decoy was.

7. Further clarification of what constituted a compliant face to face occurred in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2017) 18 Cal.App.5th 541. This case is particularly helpful since the identification by J.M. of Hammon in this matter was substantively similar to the identification that was found to be compliant with rule 141(c) in that case. In finding that identification compliant, that court ruled:

"Here there is no violation of Rule 141, as explained above, because the decoy made a face-to-face identification by pointing out the clerk to the officer inside the store while approximately 10 feet from her, standing next to her when the officer informed her she had sold alcohol to a minor, and taking a photograph with her as the minor held the can of beer he purchased from her. She had ample opportunity to observe the minor and to object to any perceived misidentification. The rule requires identification, not confrontation. The identification here meets the letter and the spirit

of Rule 141.” *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2017) 18 Cal.App.5th 541, 547

8. While, general due process considerations demand a fair identification be facilitated by law enforcement, these cases makes clear that this particular regulation is focused on the more narrow concern of allowing the *seller* the opportunity to be aware of the identity of the decoy. It stands to reason that compliance with Rule 141, subdivision (b)(5) occurs if the clerk and the decoy, during the process of the investigation, prior to the citation being issued or departure of the decoy, are brought in reasonable proximity to each other to assure that the seller knows (or reasonably ought to know) that he or she is being identified as the seller by the decoy.

9. Kohman approached Hammon at the counter, got his attention and identified herself as a law enforcement officer investigating a sale of alcohol to a minor. While the sale to J.M. was discussed between Kohman and Hammon at the counter, J.M. stood inside of the store with the FPD officer in the immediate area of where Hammon was talking with Kohman. Right after this discussion, Hammon relocated to another area away from the customers. He was accompanied by Kohman, J.M. and the FPD officer. After they relocated, J.M. was asked by Kohman about who made the sale to him. In the immediate presence of Hammon, J.M. pointed out Hammon as the seller. Hammon was clearly aware that the decoy was J.M. because he discussed making the sale to J.M. with Kohman while J.M. was in the immediate area. Before Hammon was cited on December 21, 2018, J.M. and Hammon were photographed next to each other. (Finding of Fact ¶ 10 and Exhibit D-3) Hammon clearly came face to face with J.M. under circumstances that made it clear that Hammon had been identified as the person who sold J.M. beer and that J.M. was the minor at issue. (Findings of Fact ¶¶ 3-13)

10. None of the evidence presented by the Respondent rebutted the credible evidence presented by the Department that this was a fully compliant identification that allowed Hammon to become aware that J.M. was the decoy. Respondent has offered no evidence or supported argument suggesting that the identification violated state or federal due process considerations. Given the totality of the evidence presented by the Department credibly establishing compliance with rule 141(b)(5), the Respondent’s assertions that compliance did not occur are unsupported. (Findings of Fact ¶¶ 3-13)

11. Respondent also asserted that the appearance of the decoy did not comply with rule 141(b)(2). This assertion was unsupported other than a reference to J.M.’s height and weight. J.M.’s height and weight were unremarkable and well within the range of many 17 year old male teenagers. As noted above, Hammon did not testify in this matter to establish that his sale to J.M. was the result of a reasonable mistake. *J.M.* expressly stated that he was 17 years old. Further, J.M. testified in this matter and his appearance

matched the appearance he presented to Hammon on the date of the operation. J.M. had the appearance “which could generally be expected of a person well under 21 years of age” which complies with the standard required by rule 141(b)(2). As previously noted, the clerk did not testify to establish facts suggesting his rejection of J.M.’s explicit statement was reasonable or whether there was anything in J.M.’s actions, manner, or appearance that led Hammon to reasonably conclude that J.M. was over 21. The Department has established compliance with rule 141(b)(2) and the Respondent has failed to rebut this evidence. (Findings of Fact ¶¶ 3-13)

PENALTY

The Department recommended that the Respondent’s license be suspended for 20 days with the appearance and actual age of the Decoy being an aggravating factor and the existence of prior discipline outside of the statutory enhancement period being a factor to weigh against mitigation. The standard penalty is a 15 day suspension.

The Respondent argued for a 5 day penalty if the Accusation were sustained based on the long period of licensure since 2007 without prior incidents beyond the one that occurred in 2011. The Respondent also argued that the incident was a deviation from the standards enforced by the Respondent and that the clerk was fired for the misconduct that led to the sale. These should be considered as positive actions by the Respondent to correct the problem.

Evidence was presented regarding the Respondent’s policies to prevent sales of alcoholic beverages to underage individuals. The Respondent has been licensed since February 2007 and this is their second incident. The Respondent does have policies and procedures in place to prevent underage sales. This effort by the Licensee to prevent a recurrence of the 2011 incident does support some mitigation. However, this mitigation is somewhat diminished by what appeared to be lax oversight of an employee who felt free to show up at work under the influence and then make a sale of alcohol to a person he knew was underage.

There appear to be no specific factors in aggravation applicable to this violation beyond the appearance and actual age of the Decoy. Mitigation is found to be in balance with the aggravation. The penalty recommended herein complies with rule 144.

