

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

AB-9850

File: 20-558763; Reg: 19088902

APRO, LLC,
dba United Oil #1966
9001 Grant Line Road
Elk Grove, CA 95624,
Appellant/Licensee

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: *Appellant:* Megan Wolniewicz, of Solomon, Saltsman & Jamieson,
as counsel for Apro, LLC,

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

OPINION

Apro, LLC, doing business as United Oil #1966 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ (the Department), suspending its license for 15 days because its clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

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

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on January 27, 2016.

There is no record of departmental discipline against the license.

On May 30, 2019, the Department filed a single-count accusation charging that appellant's clerk, Kylie Oleson (the clerk), sold an alcoholic beverage to 19-year-old Andrea Leyva (the decoy) on February 22, 2019. Although not noted in the accusation, the decoy was part of a joint operation between the Elk Grove Police Department (EGPD) and the Department.

At the administrative hearing held on September 25, 2019, documentary evidence was received, and testimony concerning the sale was presented by the decoy and EGPD Officer Jessica Villareal. Appellant's District Manager, Lawrence Krzak, testified on its behalf.

Testimony established that on February 22, 2019, Ofcr. Villareal entered the licensed premises in plainclothes, followed shortly thereafter by the decoy. The decoy was accompanied by a second individual who did not participate in the decoy operation. The decoy selected a six-pack of Bud Light beer in bottles and took it to the register. She set the beer down and the clerk asked for her identification.

The decoy handed the clerk her California Identification Card, which had a vertical orientation. It contained her correct date of birth, showing her to be 19 years of age, and a red stripe indicating "AGE 21 IN 2020." (Exh. D-2.) The clerk looked at the ID, then handed it back and completed the sale without asking any age-related questions. The decoy and officer both exited the premises, then returned for the decoy to make a face-to-face identification of the clerk. The clerk admitted to making the sale, saying she did so because she was tired and accidentally entered 1997 as the birthdate

(which would have made the decoy 22 years old). A photograph was taken of the decoy and clerk together (exh. D-3) and the clerk was issued a citation.

The administrative law judge (ALJ) issued his proposed decision on September 30, 2019, sustaining the accusation and recommending the license be suspended for 15 days. The Department adopted the decision in its entirety on November 21, 2019, and a certificate of decision was issued on December 5, 2019.

Appellant then filed a timely appeal contending: (1) the decoy did not display the appearance required by rule 141(b)(2),² and (2) the ALJ abused his discretion by improperly balancing factors in mitigation and aggravation.

DISCUSSION

I

ISSUE CONCERNING DECOY'S APPEARANCE

Appellant contends that the decoy's experience as a decoy and as an Explorer, and her wearing of a smartwatch and jewelry, gave her the appearance of a person over the age of 21, rather than the appearance required by rule 141(b)(2). (AOB at pp. 10-11.) It argues specifically:

Decoy Levya wore an expensive Apple watch during the operation, bespeaking a level of disposable income not available to most minors, who either live at their parent's sufferance or are in the early stages of their careers. Additionally, Decoy Levya sported a ring on her finger, earrings in her ears, and a large gold cross necklace on the day of the operation. (RT 37:2-38-6). Not only does this violate case law regarding an appearance that could generally be expected of someone older than the age of 21, but it also violates the rules perpetuated by the Elk Grove Police Department in conducting their minor decoy operations ("All the decoys are advised... not to wear extra jewelry, anything flashy that might make them appear older.") (RT 21:15-22:4). Officer Villarreal testified

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.

herself that flashy jewelry might make a minor decoy appear older, yet Decoy Levya participated in the operation with the above-listed jewelry, including an expensive apple watch and a large cross necklace. For this reason alone, Appellant's Rule 141(b)(2) defense is established.

(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 appellant.

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

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani) (2004)

118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department's decision.

(*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106, 112 [28 Cal.Rptr. 74].)

Therefore, the issue of substantial evidence when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; *Harris, supra*, 212 Cal.App.2d at p. 114.)

This Board has stated many times that, in the absence of compelling reasons, it will ordinarily defer to the ALJ's findings on the issue of whether there was compliance with rule 141(b)(2). The ALJ made the following findings regarding the decoy's appearance and demeanor:

4. Leyva appeared and testified at the hearing. On September 25, 2019 her appearance was generally as depicted in an image that was taken on February 22, 2019 (Exhibit D-3) except that during the hearing she wore a business suit and her hair was worn up. Her face was as depicted in that image (Exhibit D-3) and in her California Identification Card that was submitted into evidence. (Exhibit D-2) During the operation on February 22, 2019, Leyva wore a red and white sweatshirt and blue jeans. She wore a ring, watch and necklace. Her face was fully exposed and her hair was worn down below her shoulders. Leyva wore minimal makeup. (Exhibit D-3) Leyva was approximately 5 feet tall and 102 pounds at the hearing. Leyva credibly testified that her size and appearance on the date of the operation were essentially the same.

[¶ . . . ¶]

11. Leyva had served as a decoy on approximately 2-3 prior operations for the EGPD prior to February 22, 2019. Leyva became involved as a decoy as the result of her participation in a cadet Explorer program with the EGPD for nearly four years.

12. Based on Leyva's overall appearance, i.e., her physical appearance, clothing, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of Oleson at the Licensed Premises on February 22, 2019, Leyva displayed the appearance which would generally be expected of a person less than 21 years of age during her interactions with Oleson. Oleson did not testify in this matter to explain her age related impressions of Leyva (or the other decoy) or why she sold Leyva alcohol without asking age related questions even though Leyva' s identification showed she was 19 years of age and her appearance was consistent with her chronological age. Oleson did not describe the other decoy as a factor in her decision-making during her discussion with Villareal about the sale to Leyva.

(Findings of Fact, ¶¶ 4-12.) Based on these findings, the ALJ addressed appellant's rule 141(b)(2) arguments:

11. Respondent also asserted that the appearance of the decoy did not comply with rule 141(b)(2). Tangentially, Respondent argued that the presence of the second decoy was a factor in the non-compliance. As noted above, Oleson did not testify in this matter to establish that her sale to Leyva was the result of Leyva's appearance or that the appearance of the other decoy was a factor. Oleson asked for identification from Leyva but did not ask any age related questions, so the exchanges between her and Leyva were minimal. Further, Leyva testified in this matter and her appearance matched the appearance she presented to Oleson on the date of the operation. Leyva had the appearance "which could generally be expected of a person under 21 years of age" which is the standard required by rule 141(b)(2). As previously noted, the clerk did not testify to establish facts suggesting an identification issue or whether there was anything in Leyva's actions, manner, or appearance that led Oleson to reasonably conclude that Leyva 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 , ¶¶ 3-12)

(Conclusions of Law, ¶ 11.) We agree with the ALJ's reasoning and conclusions.

This Board has noted that:

[a]n ALJ's task to evaluate the appearance of decoys is not an easy one, nor is it precise. To a large extent, application of such standards as the

rule provides is, of necessity, subjective; all that can be required is reasonableness in the application. As long as the determinations of the ALJs are reasonable and not arbitrary or capricious, we will uphold them.

(*O'Brien* (2001) AB-7751, at pp. 6-7.) Notably, the standard is *not* that the decoy must display the appearance of a "childlike teenager" but "the appearance which could generally be expected of a person under 21 years of age." (Rule 141(b)(2).) In Findings of Fact paragraphs 4 through 12, and Conclusions of Law paragraph 11, the ALJ found that the decoy met this standard. We agree.

Appellant also argues that the decoy displayed a demeanor which was not typical for a teenager because of her experience as an Explorer and as a decoy. It maintains this experience gave her a confident demeanor which made her appear more mature. The Board has, however, rejected the "experienced decoy" argument many times. As the Board previously observed:

A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. . . . There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.

(*Azzam* (2001) AB-7631, at p. 5, emphasis in original.) This case is no different.

In a similar minor decoy case, where the Court of Appeal was tasked with determining whether an ALJ's assessment of the decoy's appearance was correct, the Court said that under the facts before them, while:

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

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

The instant case is the same. We do not believe the evidence supports a finding that the ALJ “could not reasonably have concluded otherwise.” (*Id.* at p. 1087.) As stated above, case law instructs us that when, as here, “two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department’s decision” (*Kirby, supra*, 25 Cal.App.3d at p. 335.)

Appellant presented no evidence that the decoy’s smartwatch, jewelry, or demeanor, *actually resulted* in her displaying the appearance of a person 21 years old or older on the date of the operation in this case. The clerk did not testify. We cannot know what went through her mind in the course of the transaction, or why she made the sale. There is simply no evidence to establish that the decoy’s accessories or demeanor were the *actual reason* the clerk made the sale — particularly where, as here, the clerk herself noted during the transaction that the decoy looked young.

Ultimately, appellant is simply asking this Board to second guess the ALJ and reach a different conclusion, despite substantial evidence to support the findings in the decision. This we cannot do.

II

ISSUE CONCERNING PENALTY

Appellant contends that the ALJ abused his discretion by improperly balancing factors in mitigation and aggravation, and that the result should have been a mitigated penalty, rather than the standard 15-day suspension. (AOB at pp. 6-8.)

The Board will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52

Cal.2d 287, 291 [341 P.2d 296].) “Abuse of discretion’ in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.]” (*Brown v. Gordon* (1966) 240 Cal.App.2d 659, 666-667 [49 Cal.Rptr. 901].)

If the penalty imposed is reasonable, the Board must uphold it even if another penalty would be equally, or even more, reasonable. “If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within its discretion.” (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

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.)

Among the mitigating factors provided by the rule are the length of licensure without prior discipline, positive actions taken by the licensee to correct the problem, cooperation by the licensee in the investigation, and documented training of the licensee and employees. Aggravating factors include, *inter alia*, prior disciplinary history, licensee involvement, lack of cooperation by the licensee in the investigation, and a continuing course or pattern of conduct. (*Ibid.*)

The Penalty Policy Guidelines further address the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

Penalty Policy Guidelines:

The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

(Ibid.)

In the decision, the ALJ addresses his consideration of factors in mitigation and aggravation:

PENALTY

The Department recommended that the Respondent's license be suspended for an aggravated penalty of 20 days with the conduct of the clerk being an aggravating factor. The standard penalty for this violation would be a 15 day suspension. The Department also argued against any mitigation because the period of licensure without prior discipline is so short that it should be given little, if any weight.

The Respondent argued for a 10 day, all-stayed penalty if the Accusation were sustained based on the lack of prior incidents, the positive actions of the Licensee-Respondent to correct the problem, and the documented training undertaken by the Licensee-Respondent.

The lack of prior discipline, alone, can be given little weight because the period of licensure is so short. However, evidence was presented regarding the Respondent's policies to prevent sales of alcoholic beverages to underage individuals and positive steps taken since the incident to prevent repeat occurrences. These are appropriate mitigating factors. While laudable, one is left questioning the level of seriousness that is communicated by the Respondent to employees about age restricted sales.

The incident itself showed a serious lack of regard for the laws governing age restricted sales and the Respondent's existing policies. Here, a clearly underage person presented an identification showing she was 19 years of age. The clerk circumvented the system by not scanning her identification and then entering a fictitious age to allow the sale to go through. The evidence supports the conclusion that this was a knowing act, not just the product of error. While this employee was later terminated, one has to question whether the Respondent is communicating the importance of these policies effectively enough to have the needed impact. This blunts the mitigation, somewhat, but it does appear that the Respondent made a genuine effort to shore up its approach after the incident.

There appear to be no additional factors in aggravation applicable to this violation beyond the facts of the sale itself. Mitigation is found to be in balance with the aggravation. The penalty recommended herein complies with rule 144.

(Decision at pp. 7-8.)

As we have said time and again, this Board's review of a penalty looks only to see whether it can be considered reasonable, and, if it is reasonable, the Board's inquiry ends there. The *extent* to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion — pursuant to rule 144 — and the Board may not interfere with that discretion absent a clear showing of abuse of discretion.

Appellant has not established that the Department abused its discretion by imposing the standard 15-day penalty in this matter.

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:**

APRO, LLC
UNITED OIL 1966
9001 GRANT LINE ROAD
ELK GROVE, CA 95624-9412

OFF-SALE BEER AND WINE - LICENSE

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

SACRAMENTO DISTRICT OFFICE

File: 20-558763

Reg: 19088902

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 November 21, 2019. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after January 15, 2020, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: December 5, 2019



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

APRO, LLC,
DBA: United Oil 1966
9001 Grant Line Road
Elk Grove, California 95624-9412

Respondent

Off-Sale Beer and Wine License

} File: 20-558763
}
} Registration: 19088902
}
} License Type: 20
}
} Page Count: 55
}
} Reporter:
} Teresa Kenworthy-CSR # 6673
} Atkinson Baker
}
} **PROPOSED DECISION**

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Sacramento, California, on September 25, 2019.

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

Brian Washburn, Attorney, represented Respondent APRO, LLC. (Respondent)

The Department seeks to discipline the Respondent's license on the grounds that, on or about February 22, 2019 the Respondent-Licensee, through their agent or employee, Kylie Oleson, sold, furnished, or gave an alcoholic beverage, to-wit: beer, to Andrea Leyva, an individual under the age of 21 in violation of Business and Professions Code section 25658(a)¹ (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 25, 2019.

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

FINDINGS OF FACT

1. The Department filed the accusation on May 30, 2019. (Exhibit D-1)
2. On January 27, 2016 the Department issued a type 20, off-sale beer and wine license to the Respondent for the above-described location (the Licensed Premises). There is no record of prior Department discipline against the Respondent's license.
3. Andrea Leyva (Leyva) was born on September 26, 1999 and was 19 years old on February 22, 2019. On that date, Leyva served as a minor decoy in an operation conducted by the Elk Grove Police Department (EGPD) at various locations, including the Licensed Premises.
4. Leyva appeared and testified at the hearing. On September 25, 2019 her appearance was generally as depicted in an image that was taken on February 22, 2019 (Exhibit D-3) except that during the hearing she wore a business suit and her hair was worn up. Her face was as depicted in that image (Exhibit D-3) and in her California Identification Card that was submitted into evidence. (Exhibit D-2) During the operation on February 22, 2019, Leyva wore a red and white sweatshirt and blue jeans. She wore a ring, watch and necklace. Her face was fully exposed and her hair was worn down below her shoulders. Leyva wore minimal makeup. (Exhibit D-3) Leyva was approximately 5 feet tall and 102 pounds at the hearing. Leyva credibly testified that her size and appearance on the date of the operation were essentially the same.
5. On February 22, 2019 Leyva went to the Licensed Premises as a decoy for the EGPD for the purpose of trying to buy alcohol. Leyva was instructed about the requirements of 141². She was told to carry her identification, show it if requested, and to be truthful regarding her age if asked. Leyva carried her California identification card to produce if asked. Leyva was briefed prior to her attempt to purchase alcohol by EGPD Officer Jessica Villareal (Villareal) and she had been a decoy on prior occasions. Another female decoy was going to accompany Leyva but not have any role in the attempted purchase.
6. Villareal, who was in plain clothes, entered the Licensed Premises on February 22, 2019 just prior to the decoys. Villareal's role was to monitor the safety of the decoys and to watch the transaction from a distance. Shortly after Villareal entered, Leyva entered the Licensed Premises along with the other decoy. After entering, she went to the back area where the coolers were. Leyva selected a six-pack of Bud Light beer bottles. Leyva then took the beer to the register area and presented it for purchase. While the other

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

decoy was standing next to Leyva, she did not have any role in the transaction for the beer purchase that occurred.

7. The clerk who received the beer from Leyva was the same individual in the image that was later taken of Leyva standing next to the clerk that sold the beer to her. (Exhibit D-3) The clerk started the transaction for the beer and asked Leyva for identification. Leyva handed her California identification card to the clerk in response. (Exhibit D-2) The clerk appeared to look at the identification for a few seconds and she appeared to enter information into the register's keys. Even though the portrait oriented identification showed that Leyva was 19 years old and that she would not be 21 until 2020, the clerk did not ask Leyva any age related questions or stop the transaction. Leyva paid the clerk for the beer with cash provided by the EGPD. Leyva took possession of the beer and the change the clerk handed to her. Leyva then left the Licensed Premises with these items and the other decoy. At no point during Leyva's interaction with the clerk did the other decoy speak with or otherwise interact with Leyva or the clerk.

8. Leyva and the other decoy approached the vehicle where the EGPD officers had staged their vehicle. After Villareal joined them, she told her about what had just happened in the Licensed Premises. Villareal had also watched the transaction from inside and was aware of which clerk had made the sale to Leyva. Less than 5 minutes later, Villareal went back into the Licensed Premises. Villareal approached the clerk to identify herself and why they were there. Leyva came in shortly after Villareal and approached where the clerk and Villareal were speaking across the counter.

9. Villareal asked Leyva if she could identify the clerk who sold the beer. Leyva was approximately five feet away and could see that the clerk was upset and crying. Leyva identified the clerk as the person who made the sale. Leyva noticed that the clerk looked at her during the identification she made. The clerk was identified as Kylie Oleson (Oleson) during Villareal's investigation of the sale to Leyva. Oleson admitted to making the sale to Leyva. She said she was very tired and accidentally entered 1997 into the register during the transaction.

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

11. Leyva had served as a decoy on approximately 2-3 prior operations for the EGPD prior to February 22, 2019. Leyva became involved as a decoy as the result of her participation in a cadet Explorer program with the EGPD for nearly four years.

12. Based on Leyva's overall appearance, i.e., her physical appearance, clothing, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of Oleson at the Licensed Premises on February 22, 2019, Leyva displayed the appearance which would generally be expected of a person less than 21 years of age during her interactions with Oleson. Oleson did not testify in this matter to explain her age related impressions of Leyva (or the other decoy) or why she sold Leyva alcohol without asking age related questions even though Leyva's identification showed she was 19 years of age and her appearance was consistent with her chronological age. Oleson did not describe the other decoy as a factor in her decision-making during her discussion with Villareal about the sale to Leyva.

13. District Manager Lawrence Krzak (Krzak) testified for the Respondent. Krzak testified that he is actively involved in the training of employees at the Licensed Premises and seven other locations. He has done so for the last 5 years. Krzak explained that all employees go through age restricted sales training within 90 days of hire. He and the local managers review these policies regularly with employees and employees go through an annual training review. The policy at the Licensed Premises, at the time of this sale, was that employees were to ask for identification if the person appeared under 30 years of age. The company has since revised the policy to 40 years of age as a result of this incident. In addition, all of the Licensed Premises employees were required to complete retraining after this incident occurred. (Exhibit L-1) 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 or the age can be manually entered. Oleson was initially suspended during the investigation and ultimately terminated as a result of this incident.

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 February 22, 2019 the Respondent's clerk, Kylie Oleson inside the Licensed Premises, sold an alcoholic beverage to Andrea Leyva, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 2-12)

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 Leyva of Oleson 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. Villareal approached Oleson at the counter, got her attention and identified herself as a law enforcement officer investigating a sale of alcohol to a minor. While the sale to Leyva was discussed between Villareal and Oleson at the counter, Leyva approached and then stood with Villareal. Right after this discussion, Leyva was asked by Villareal about who made the sale to her. Villareal had watched the transaction so she knew that Oleson had made the sale. Villareal did this to give Oleson the opportunity to confirm who the minor at issue was. In the immediate presence of Oleson, Leyva pointed out Oleson as the seller. Oleson was clearly aware that the decoy was Leyva because she discussed making the sale to Leyva with Villareal. Before Oleson was cited on February 22, 2019, Leyva and Oleson were photographed next to each other. (Findings of Fact ¶ 10 and Exhibit D-3) Oleson clearly came face to face with Leyva under circumstances that made it clear that Oleson had been identified as the person who sold Leyva beer and that Leyva was the minor at issue. (Findings of Fact ¶¶ 3-12)

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 Oleson to become aware that Leyva was the decoy. Respondent has offered no evidence or 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 ¶¶ 3-12)

11. Respondent also asserted that the appearance of the decoy did not comply with rule 141(b)(2). Tangentially, Respondent argued that the presence of the second decoy was a factor in the non-compliance. As noted above, Oleson did not testify in this matter to establish that her sale to Leyva was the result of Leyva’s appearance or that the

appearance of the other decoy was a factor. Oleson asked for identification from Leyva but did not ask any age related questions, so the exchanges between her and Leyva were minimal. Further, Leyva testified in this matter and her appearance matched the appearance she presented to Oleson on the date of the operation. Leyva had the appearance “which could generally be expected of a person under 21 years of age” which is the standard required by rule 141(b)(2). As previously noted, the clerk did not testify to establish facts suggesting an identification issue or whether there was anything in Leyva’s actions, manner, or appearance that led Oleson to reasonably conclude that Leyva 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 ¶¶ 3-12)

PENALTY

The Department recommended that the Respondent’s license be suspended for an aggravated penalty of 20 days with the conduct of the clerk being an aggravating factor. The standard penalty for this violation would be a 15 day suspension. The Department also argued against any mitigation because the period of licensure without prior discipline is so short that it should be given little, if any weight.

The Respondent argued for a 10 day, all-stayed penalty if the Accusation were sustained based on the lack of prior incidents, the positive actions of the Licensee-Respondent to correct the problem, and the documented training undertaken by the Licensee-Respondent.

The lack of prior discipline, alone, can be given little weight because the period of licensure is so short. However, evidence was presented regarding the Respondent’s policies to prevent sales of alcoholic beverages to underage individuals and positive steps taken since the incident to prevent repeat occurrences. These are appropriate mitigating factors. While laudable, one is left questioning the level of seriousness that is communicated by the Respondent to employees about age restricted sales.

The incident itself showed a serious lack of regard for the laws governing age restricted sales and the Respondent’s existing policies. Here, a clearly underage person presented an identification showing she was 19 years of age. The clerk circumvented the system by not scanning her identification and then entering a fictitious age to allow the sale to go through. The evidence supports the conclusion that this was a knowing act, not just the product of error. While this employee was later terminated, one has to question whether the Respondent is communicating the importance of these policies effectively enough to have the needed impact. This blunts the mitigation, somewhat, but it does appear that the Respondent made a genuine effort to shore up its approach after the incident.

APRO, LLC,
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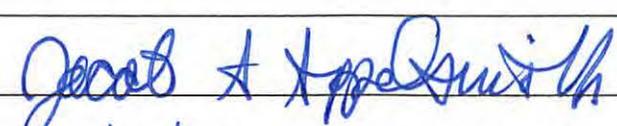
There appear to be no additional factors in aggravation applicable to this violation beyond the facts of the sale itself. Mitigation is found to be in balance with the aggravation. The penalty recommended herein complies with rule 144.

ORDER

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

Dated: September 30, 2019


Alberto Roldan
Administrative Law Judge

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<input type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>11/21/19</u>