

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

AB-9857

File: 20-429089; Reg: 19088900

7-ELEVEN, INC. and JAGDEV SINGH BISLA,
dba 7-Eleven Store #2172 19969C
290 South Main Street
Orange, CA 92868-3844,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: June 11, 2020
Telephonic

ISSUED JUNE 19, 2020

Appearances: *Appellants:* Megan M. Wolniewicz, of Solomon, Saltsman & Jamieson, as counsel for 7-Eleven, Inc. and Jagdev Singh Bisla,

Respondent: Lisa Wong, as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Jagdev Singh Bisla, doing business as 7-Eleven Store #2172 19969C (appellants), appeal from a decision of the Department of Alcoholic Beverage Control (the Department)¹ suspending their license for 10 days (with all 10 days 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 police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

¹The decision of the Department, dated January 7, 2020, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on September 27, 2005. There is no record of departmental discipline against the license.

On May 31, 2019, the Department filed a single-count accusation charging that appellants' clerk, Abdul Mateen Khan (the clerk), sold an alcoholic beverage to 18-year-old Kelly Banderas (the decoy) on January 23, 2019. Although not noted in the accusation, the decoy was participating in a joint operation between the City of Orange Police Department (OPD) and the Department at the time.

At the administrative hearing held on October 1, 2019, documentary evidence was received, and testimony concerning the sale was presented by the decoy and by OPD Detectives Henry Echandi and Michael Murphy. Co-licensee Jagdev Bisla testified on behalf of appellants.

Testimony established that on January 23, 2019, Det. Echandi entered the licensed premises in a plainclothes capacity, followed shortly thereafter by the decoy. The decoy went to the coolers where she selected a six-pack of Bud Light beer in bottles. She took the beer to the sales counter and set it down. The clerk commented that the decoy looked young, and asked for her identification.

The decoy handed the clerk her California driver's license, which had a vertical orientation. It contained her correct date of birth, showing her to be 18 years of age, and a red stripe indicating "AGE 21 IN 2021." The clerk looked at the ID, keyed something into the register, then completed the sale without asking any age-related questions. Det. Echandi observed the transaction from a distance of about ten feet.

The decoy exited the premises with the beer, followed by the detective, then re-entered with Detectives Echandi and Murphy to make a face-to-face identification of the

clerk. A photograph of the two of them was taken (exh. 4), and the clerk was later issued a citation. During the investigation, Det. Murphy asked the clerk how old he thought the decoy was. The clerk replied that he thought she was between 18 and 20 years old. The clerk did not say he was influenced by the decoy's attire or demeanor.

The administrative law judge (ALJ) issued her proposed decision on November 8, 2019, sustaining the accusation and recommending a 10-day suspension — with the execution of all 10 days stayed for a period of one year, provided no further cause for discipline arises during that period. The Department adopted the proposed decision in its entirety on December 23, 2019, and issued a certificate of decision on January 7, 2020.

Appellants 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 her discretion by considering speculation rather than evidence of mitigation when determining the penalty.

DISCUSSION

I

ISSUE CONCERNING DECOY'S APPEARANCE

Appellants contend that the decoy's experience as a decoy and as an Explorer, and her wearing of a Pink Floyd t-shirt, 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.) They maintain that only an older person would wear a Pink Floyd t-shirt. (*Ibid.*)

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(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.)

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, and the clerk's impression regarding the decoy's age:

5. Decoy Banderas appeared and testified at the hearing. On January 23, 2019, she was 4' 11" tall and weighed approximately 120 pounds. She wore a black Pink Floyd t-shirt, dark blue jeans and tennis shoes. Her hair was black, with barely noticeable highlights, shoulder length, and styled with the top portion of her hair pulled back in a pony tail, allowing the remaining hair to fall upon her shoulders. (Exhibits 3 and 4.) Her appearance at the hearing was the same, except that she weighed 123 pounds, and wore a green sweatshirt over the Pink Floyd t-shirt and wore red Converse tennis shoes. (Exhibit 4.)

[¶ . . . ¶]

11. Detective Murphy asked clerk Khan how old he thought decoy Banderas was. Clerk Khan replied, "between 18 and 20 years old." Clerk Khan told Detective Murphy he looked at decoy Banderas' ID but did not look at the date of birth. Clerk Khan said the store policy regarding IDs was that it was up to the clerk whether the clerk wanted to swipe the ID into the cash register or choose to look at the ID instead. Clerk Khan admitted that he knew it was illegal to sell alcoholic beverages to someone under 21 years of age. There was no evidence that clerk Khan

made any comment that decoy Banderas' Pink Floyd t-shirt had any effect on him in discerning decoy Banderas' appearance.

[¶ . . . ¶]

13. Decoy Banderas 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 Khan at the Licensed Premises on January 23, 2019, decoy Banderas displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk. In-person decoy Banderas has a youthful appearance and looks her age.

14. January 23, 2019, was the third day of decoy operations in which decoy Banderas participated. She was nervous and a bit uncomfortable during the said sales transaction. She had never been to the Licensed Premises prior to January 23, 2019. Decoy Banderas learned about the decoy program through her service as a police explorer with the City of Orange Police Department. As of the date of the decoy operation, decoy Banderas had been a police explorer for three and a half years. She is currently a cadet. Her duties as a police explorer include participating in law enforcement field training and tactical competitions. Her training includes learning to interact with the public, car stops, hostage rescues and active shooter scenarios.

(Findings of Fact, ¶¶ 5-14.) Based on these findings, the ALJ addressed appellants' rule 141(b)(2) arguments:

6. With respect to rule 141 (b)(2), Respondents argued decoy Banderas did not have the appearance of someone under the age of 21 because of certain factors which made her appear to be older than 21. Those factors, the Respondents argued, included that, (1) the decoy wore a Pink Floyd t-shirt, representing a classic rock band commonly associated with the 1970's and '80's and is more recognized as worn by people over the age of 21, (2) the decoy had approximately 3.5 years explorer training and experience prior to the operation at hand, and (3) her hair was dyed which could be more commonly associated with people over 21 years of age.

7. This rule 141(b)(2) argument is rejected. The Respondents presented no evidence as to why clerk Khan allegedly believed decoy Banderas to be over 21 years of age, let alone 21 years of age. Clerk Khan did not testify. At the time of the decoy investigation, clerk Khan told Detective Murphy he thought the decoy appeared "between 18 and 20 years old." Clerk Khan made no comment to the detectives or at any time that decoy Banderas' Pink Floyd t-shirt had any effect on him discerning decoy

Banderas' appearance. At no time did clerk Khan mention anything specific relating to decoy Banderas' demeanor as a reason for proceeding with the sale. In fact, the evidence indicates clerk Khan knew or at least should have known the decoy was a minor. He was presented with a youthful appearing decoy Banderas, who gave clerk Khan her vertical formatted minor's ID, at which he looked briefly while holding in his hand. The ID had a red stripe to alert the clerk that the person standing before him would not turn 21 until the year 2021. Regardless, there was nothing about decoy Banderas' police explorer training, experience, hair color, clothing or demeanor which made her appear older than her actual age. In fact, when viewing decoy Banderas in-person at the hearing, she has a youthful appearance and looks her age. In other words, decoy Banderas had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 13.)

(Conclusions of Law, ¶¶ 6-7 .) 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 5 through 14, and Conclusions of Law paragraphs 6 and 7, the ALJ found that the decoy met this standard. We agree.

Appellants also argue that the decoy displayed a demeanor which was not typical for a teenager because of her experience as an Explorer and as a decoy. They maintain 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.)

Appellants presented no evidence that the decoy's attire 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 his mind in the course of the transaction, or why he made the sale. There is simply no evidence to establish that the decoy's attire or demeanor were the *actual reason* the clerk made the sale — particularly where, as here, the clerk told the

investigating officer that he thought the decoy was between the ages of 18 and 20 and he failed to mention her attire or demeanor.

Ultimately, appellants are 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

Appellants contend that “the ALJ abused her discretion by taking into account irrelevant details about the implementation of the mitigating steps, rather than examine the mitigating effects themselves.” (AOB at p. 7.) They contend the penalty was based on speculation rather than evidence, and that the decision should therefore be reversed. (*Id.* at p. 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 the issue of penalty and the consideration of mitigating evidence:

PENALTY

The Department requested the Respondents' license be suspended for a period of 15 days, all-stayed for one year for the violation, based on the following factors: (1) the minor decoy's appearance and actual age, (2) clerk Khan had not received training since his hire date four years prior, and Licensee's failure to take immediate action after the January 23, 2019 violation, waiting until September to retrain its employees and implement the policy of annual training as recommended by franchisor 7-Eleven, Inc., makes it seem the remedial actions taken were in response to the upcoming hearing and not the violation, (3) the weakness in the BARS program in which Respondents participate is that it would have rewarded clerk Khan with a green card for asking decoy Banderas for her ID, (4) Respondents acknowledged they had not yet implemented a disciplinary policy for employees who receive red cards from the secret shoppers other than using it as "a teaching moment" to remind clerks to ask for IDs, and (4) the Respondents failed to address the problem associated with the said sales transaction in that its cash register software program provides its clerks multiple ways of bypassing any safety protocol with the "Manual Enter" and "Visual ID OK" buttons, thereby continuing to allow potential future sales to minors. The Department made no mention of considering Respondents' length of licensure without discipline. However, given the enumerated aggravating arguments and its recommendation for an all-stayed penalty, the undersigned understood the Department to have considered the discipline-free licensure.

The Respondents recommended a five-day all-stayed mitigated penalty based on the following: (1) Respondents' nearly 15-year discipline-free history, (2) documented training of Respondents' employees with change in policy to require annual training, (3) Respondents' participation in the BARS program, and (4) Mr. Bisla spoke with clerk Khan the day after the said violation explaining he would be terminated if he received another red card or sold alcohol to a minor again.

The Respondents are correct that their 13-year, three month and 27-day discipline-free operation and documented training warrant mitigation. However, the following argued-for mitigation is compromised for the reasons stated. Despite the remedial steps of retraining employees and implementing annual training, the failure of the Respondents to take immediate action after the said violation causes skepticism as to whether the Respondents' reasons for doing so were not motivated by the hearing 11 days away, rather than for reasons of preventing future sales to minors. Additionally, the Respondents failed to address the problem

related to the sale at hand, in that Respondents' clerks still have available to them, as did clerk Khan, the option of bypassing any safety protocol by either pressing the "Manual Enter" or "Visual ID OK" buttons. There was no evidence the Respondents had these buttons removed or altered to prevent another clerk from doing as clerk Khan did, visually look at the ID without swiping it, and press one of the bypass buttons to enable to sales transaction to proceed. The latter is of grave concern, as well as the minor decoy's youthful appearance in conjunction with the presentation of her vertically oriented minor's ID. While some of the points discussed above are not enumerated aggravating factors under Rule 144, they provide some small aggravation in the analysis of the penalty. 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.

Appellants appear to want the Board to go behind the ALJ's findings and require her to explain her reasons for the penalty imposed. However, such a requirement has been rejected by this Board numerous times. For example, in *7-Eleven, Inc./Cheema* (2004) AB-8181, the Board said: "Appellants misapprehend *Topanga*.³ It does not hold that findings must be explained, only that findings must be made." (Also see: *No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 258-259 [242 Cal.Rptr. 760]; *Jacobson v. Co. of Los Angeles* (1977) 69 Cal.App.3d 374, 389 [137 Cal.Rptr. 909].)

³*Topanga Assn. for a Scenic Community v. Co. of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836].

Indeed, unless some statute requires it, an administrative agency's decision need not include findings with regard to mitigation. (*Vienna v. Cal. Horse Racing Bd.* (1982) 133 Cal.App.3d 387, 400 [184 Cal.Rptr. 64]; *Otash v. Bureau of Private Investigators* (1964) 230 Cal.App.2d 568, 574-575 [41 Cal.Rptr. 263].) Appellants have not pointed out a statute with such requirements. Findings regarding the penalty imposed are not necessary as long as specific findings are made that support the decision to impose disciplinary action. (*Williamson v. Bd. of Med. Quality Assurance* (1990) 217 Cal.App.3d 1343, 1346-1347 [266 Cal.Rptr. 520].)

With regard to factual findings supporting the accusation — *not* the penalty imposed — this Board has said:

If this Board observes that the evidence appears to contradict the findings of fact, it will review the ALJ's analysis — assuming some reasoning is provided — to determine whether the ALJ's findings were nevertheless proper. Should this Board be faced with evidence clearly at odds with the findings and no explanation from the ALJ as to how he or she reached those findings, this Board will not hesitate to reverse. . . . While an ALJ may better shield himself against reversal by thoroughly explaining his reasoning, he is not required to do so. **The omission of analysis alone is not grounds for reversal, provided findings have been made.**

(*Garfield Beach CVS, LLC/Longs Drug Stores Cal., LLC* (2015) AB-9514, at pp. 6-7, emphasis added.) Moreover, the Board has firmly clarified that it will not widen this holding to include the penalty:

We emphasize that this above language does *not* extend to the penalty. No “analytical bridge” of any sort is required in imposing a penalty. Provided the penalty is reasonable, this Board will have no cause to retrace the ALJ's reasoning.

(*Hawara* (2015) AB-9512, at p. 9.) We see no reason to deviate from this precedent or to require that the ALJ explain her reasoning process.

Appellants have not established that the Department abused its discretion by imposing a 10-day all-stayed penalty in this matter.

ORDER

The decision of the Department is affirmed.⁴

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

⁴This 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 JAGDEV SINGH BISLA
7-ELEVEN STORE 2172 19969C
290 SOUTH MAIN STREET
ORANGE, CA 92868-3844

OFF-SALE BEER AND WINE - LICENSE

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

SANTA ANA DISTRICT OFFICE

File: 20-429089

Reg: 19088900

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 December 23, 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.

Sacramento, California

Dated: January 7, 2020

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Alcoholic Beverage Control
Office of Legal Services



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

7-Eleven, Inc., and Jagdev Singh Bisla
Dbas: 7-Eleven Store 2172 19969C
290 South Main Street
Orange, California 92868-3844

Respondents

} File: 20-429089
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} Reg.: 19088900
}
} License Type: 20
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} Word Count: 14,038
}
} Reporter:
} Miranda Perez
} Kennedy Court Reporters

Off-Sale Beer and Wine License

PROPOSED DECISION

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Santa Ana, California, on October 1, 2019.

Lisa Wong, Attorney, represented the Department of Alcoholic Beverage Control (the Department).

Brian Washburn, Attorney, represented Respondents, 7-Eleven, Inc., and Jagdev Singh Bisla.

The Department seeks to discipline the Respondents' license on the grounds that, on or about January 23, 2019, the Respondents-Licensees' agent or employee, Abdul Mateen Khan, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Kelly Banderas, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on October 1, 2019.

FINDINGS OF FACT

1. The Department filed the accusation on May 31, 2019.

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

2. The Department issued a type 20, off-sale beer and wine license to the Respondents for the above-described location on September 27, 2005 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Kelly Banderas (hereinafter referred to as decoy Banderas) was born on February 29, 2000. On January 23, 2019, she was 18 years old. On that date she served as a minor decoy in an operation conducted by the City of Orange Police Department (OPD).
5. Decoy Banderas appeared and testified at the hearing. On January 23, 2019, she was 4'11" tall and weighed approximately 120 pounds. She wore a black Pink Floyd t-shirt, dark blue jeans and tennis shoes. Her hair was black, with barely noticeable highlights, shoulder length, and styled with the top portion of her hair pulled back in a pony tail, allowing the remaining hair to fall upon her shoulders. (Exhibits 3 and 4.) Her appearance at the hearing was the same, except that she weighed 123 pounds, and wore a green sweatshirt over the Pink Floyd t-shirt and wore red converse tennis shoes. (Exhibit 4.)
6. On January 23, 2019, OPD Detective Echandi entered the Licensed Premises, in a plain clothes capacity, followed shortly thereafter by decoy Banderas. There was one customer in the Licensed Premises at the time. Decoy Banderas walked straight to the alcoholic beverage coolers and selected a six-pack of Bud Light beer bottles. Decoy Banderas brought the 6-pack of beer to the sales counter.
7. Banderas placed the six-pack of Bud Light beer upon the sales counter. Clerk Abdul Mateen Khan (hereinafter referred to as clerk Khan) commented that decoy Banderas looked young and asked for her identification (ID). Decoy Banderas handed clerk Khan her valid California Driver License, which clerk Khan accepted. Decoy Banderas' California Driver License had a vertical orientation, showed her correct date of birth and included a red stripe which read, "AGE 21 IN 2021." (Exhibit 2.) Clerk Khan looked at the ID briefly and handed it back to the decoy. Clerk Khan did not swipe or scan the ID into the cash register. Clerk Khan continued with the sales transaction, keying something into the register. Decoy Banderas gave \$10 to the clerk, who provided the decoy with change. Decoy Banderas took the change, the six-pack of Bud Light beer and exited the store. There was no evidence clerk Khan asked the decoy her age or questions about her ID. Detective Echandi witnessed the transaction with a clear, unobstructed view from approximately 10 feet away. Detective Echandi exited the store soon after decoy Banderas. While decoy Banderas was inside the Licensed Premises she did not communicate with Detective Echandi.

8. Decoy Banderas stood outside the Licensed Premises and while she did so she became cold and put on a green sweatshirt over her t-shirt. (Exhibit 4.) Decoy Banderas re-entered the Licensed Premises with Detectives Echandi and Murphy. Detective Echandi contacted clerk Khan at the cash register, advised the clerk of the violation, and asked clerk Khan to step away from the cash register, which clerk Khan did.

9. Detective Murphy asked decoy Banderas to identify the person who sold her the alcohol. Decoy Banderas pointed at clerk Khan and replied, "he was the one who sold me the beer." Decoy Banderas and clerk Khan were standing approximately three feet apart, with nothing between them, at the time of this identification. A photograph of clerk Khan and decoy Banderas was taken after the face-to-face identification, with decoy Banderas holding the six-pack of Bud Light beer in her hands, while standing next to clerk Khan. (Exhibit 4.)

10. During the sales transaction with decoy Banderas clerk Khan scanned the six-pack of Bud Light beer bottles, whereupon a yellow screen appeared advising the clerk to ID anyone 30 and under, that a person must be 21 to purchase alcohol, and instructing the clerk to "scan or swipe ID OR if birthdate is on or before 01-23-98 press [Manual Enter]," with button options at the bottom from which to select, including, but not limited to, "Manual Enter" and "Visual ID OK." (Exhibit 6.) Clerk Khan pressed one of the two said buttons, which enabled him to proceed with selling the beer to the minor. There was no evidence the Respondents had these buttons removed or altered in any way to prevent future sales to minors.

11. Detective Murphy asked clerk Khan how old he thought decoy Banderas was. Clerk Khan replied, "between 18 and 20 years old." Clerk Khan told Detective Murphy he looked at decoy Banderas' ID but did not look at the date of birth. Clerk Khan said the store policy regarding IDs was that it was up to the clerk whether the clerk wanted to swipe the ID into the cash register or choose to look at the ID instead. Clerk Khan admitted that he knew it was illegal to sell alcoholic beverages to someone under 21 years of age. There was no evidence that clerk Khan made any comment that decoy Banderas' Pink Floyd t-shirt had any effect on him in discerning decoy Banderas' appearance.

12. Detective Murphy issued a citation to clerk Khan.² There was no evidence that clerk Khan was distracted during the sales transaction or the face-to-face identification. Clerk Khan did not appear at the hearing.

13. Decoy Banderas 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

² Detective Echandi speculated that detective Murphy issued the citation to clerk Khan toward the end of the investigation, prior to the officers leaving the Licensed Premises.

mannerisms shown at the hearing, and her appearance and conduct in front of clerk Khan at the Licensed Premises on January 23, 2019, decoy Banderas displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk. In-person decoy Banderas has a youthful appearance and looks her age.

14. January 23, 2019, was the third day of decoy operations in which decoy Banderas participated. She was nervous and a bit uncomfortable during the said sales transaction. She had never been to the Licensed Premises prior to January 23, 2019. Decoy Banderas learned about the decoy program through her service as a police explorer with the City of Orange Police Department. As of the date of the decoy operation, decoy Banderas had been a police explorer for three and a half years. She is currently a cadet. Her duties as a police explorer include participating in law enforcement field training and tactical competitions. Her training includes learning to interact with the public, car stops, hostage rescues and active shooter scenarios.

15. On January 23, 2019, decoy Banderas visited eight locations, with two of those eight establishments having sold alcohol to the decoy, including the Licensed Premises. (Exhibit 5.)

(Respondents' Witness)

16. Jagdev Singh Bisla appeared and testified at the hearing. Mr. Bisla is the franchisee and one of the licensees of the Licensed Premises. He owns three other 7-Eleven franchises. He has never received a Department violation at any of his licensed premises until the said violation on January 23, 2019. Mr. Bisla runs the day-to-day operations as a franchisee, including hiring and firing employees, following 7-Eleven corporate procedure, trying to build store sales, and conducting out-reach to the community.

17. Respondents' store policy has been to require its clerks to ask for IDs of anyone 30 years of age and under. Franchisor 7-Eleven Inc. recommends that franchisees conduct annual "Come of Age" employee training on the 7-Excel on-line training modules, which review protocol and scenarios relating to age-restricted sales and how to check IDs. Mr. Bisla takes the on-line training regularly and just completed the same approximately six months ago (as of the date of the hearing). Mr. Bisla does not participate in training employees. The Respondents' store policy did not incorporate the franchisor's recommendation to train employees annually and instead has only required employees to go through training once - at the time they are hired. At some point in September of 2019 Mr. Bisla decided to incorporate the said recommended annual training of employees. Mr. Bisla began retraining some of the Respondents' employees on September 17, 2019;

not all have been retrained. He began “just now”³ printing out employee Certificates of Completion for said training. (Exhibit C.)⁴

18. Mr. Bisla admits that he cannot be at the Licensed Premises to watch every sales transaction to ensure the employees are complying with store policy, so he relies upon the BARS program, in which the Licensed Premises participates. The BARS program involves a secret shopper randomly visiting the premises on a monthly or bi-monthly basis to verify the Respondents’ clerks are asking for IDs for age-restricted merchandise sales transactions. (Exhibit A.) A green card is issued to a clerk who asks for an ID, and a red card is issued when the clerk fails to ask for an ID. Mr. Bisla does not have a policy in place relating to clerks who receive red cards. Mr. Bisla does not issue a warning to any employee who receive a red card. Instead Mr. Bisla uses it as a “teaching moment” to remind the employee who receives a red card to ask for the ID of anyone 30 years of age and under and reiterates the option available to the clerk to scan the black stripe on the back of the ID. Mr. Bisla is in the process of putting a policy together relating to the red cards; he did not say what that policy might entail. After the said violation of January 23, 2019, Mr. Bisla contacted the BARS program consultant and requested an increase in the random secret shopper visits as well as a focus on alcohol-related merchandise sales.

19. The Respondents have a sign located off the cash register and adjacent to a window that informs customers that the store asks for IDs for age-restricted sales. (Exhibit B.)

20. After the said violation of January 23, 2019, Mr. Bisla met with Respondents’ staff, informed them the store had received a violation and explained they “have to be extremely careful about making sure [they] ID every person” that is 30 years or under who attempts to purchase age-restricted merchandise. Mr. Bisla did not discipline clerk Khan for said violation but did inform him that if he received another red card or sold alcohol to a minor again he would be terminated. Clerk Khan retook the “Come of Age” on-line module training, which he completed on September 17, 2019. (Exhibit C.) Prior to September 17, 2019, the last time clerk Khan took the said training was when he was hired four years ago.⁵

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

³ Upon cross-examination, When Mr. Bisla was asked when he started printing out the Certificates of Completion he replied, “I started printing certificates as of just now.”

⁴ Exhibit C 7 Excel Certificate of Completion dates for retraining include September 17, 19 and 20, 2019.

⁵ As of the date of the hearing.

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 January 23, 2019, the Respondents-Licensees' employee, clerk Abdul Mateen Khan, inside the Licensed Premises, sold alcoholic beverages, to-wit: a six-pack of Bud Light beer, to Kelly Banderas, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-15.)
5. The Respondents argued the decoy operation at the Licensed Premises failed to comply with rules 141(b)(2)⁶ and 141(b)(5), and, therefore, the accusation should be dismissed pursuant to rule 141(c).
6. With respect to rule 141(b)(2), Respondents argued decoy Banderas did not have the appearance of someone under the age of 21 because of certain factors which made her appear to be older than 21. Those factors, the Respondents argued, included that, (1) the decoy wore a Pink Floyd t-shirt, representing a classic rock band commonly associated with the 1970's and '80's and is more recognized as worn by people over the age of 21, (2) the decoy had approximately 3.5 years explorer training and experience prior to the operation at hand, and (3) her hair was dyed which could be more commonly associated with people over 21 years of age.
7. This rule 141(b)(2) argument is rejected. The Respondents presented no evidence as to why clerk Khan allegedly believed decoy Banderas to be over 21 years of age, let alone 21 years of age. Clerk Khan did not testify. At the time of the decoy investigation, clerk Khan told Detective Murphy he thought the decoy appeared "between 18 and 20 years old." Clerk Khan made no comment to the detectives or at any time that decoy

⁶ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

Banderas' Pink Floyd t-shirt had any effect on him discerning decoy Banderas' appearance. At no time did clerk Khan mention anything specific relating to decoy Banderas' demeanor as a reason for proceeding with the sale. In fact, the evidence indicates clerk Khan knew or at least should have known the decoy was a minor. He was presented with a youthful appearing decoy Banderas, who gave clerk Khan her vertical formatted minor's ID, at which he looked briefly while holding in his hand. The ID had a red stripe to alert the clerk that the person standing before him would not turn 21 until the year 2021. Regardless, there was nothing about decoy Banderas' police explorer training, experience, hair color, clothing or demeanor which made her appear older than her actual age. In fact, when viewing decoy Banderas in-person at the hearing, she has a youthful appearance and looks her age. In other words, decoy Banderas had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 13.)

8. With respect to rule 141(b)(5), the Respondents argued the Department failed to establish the citation was issued after the face-to-face identification. This argument misconstrues the burden of proof. Rule 141(b) offers an affirmative defense. As with all affirmative defenses, the burden of proof rests with the party asserting it—here, the Respondents. Thus, in order to establish the citation was not issued as required by rule 141(b)(5), the Respondents must offer evidence that the citation was issued prematurely (i.e., before the face-to-face identification). The Respondents did not. Rather, the record indicates through Detective Echandi's speculation that the citation was issued toward the end of the investigation prior to the officers leaving the premises, otherwise the record is silent as to the timing of the citation and, therefore, the Respondents failed to meet their burden of proof.

PENALTY

The Department requested the Respondents' license be suspended for a period of 15 days, all-stayed for one year for the violation, based on the following factors: (1) the minor decoy's appearance and actual age, (2) clerk Khan had not received training since his hire date four years prior, and Licensee's failure to take immediate action after the January 23, 2019 violation, waiting until September to retrain its employees and implement the policy of annual training as recommended by franchisor 7-Eleven, Inc., makes it seem the remedial actions taken were in response to the upcoming hearing and not the violation, (3) the weakness in the BARS program in which Respondents participate is that it would have rewarded clerk Khan with a green card for asking decoy Banderas for her ID, (4) Respondents acknowledged they had not yet implemented a disciplinary policy for employees who receive red cards from the secret shoppers other than using it as "a teaching moment" to remind clerks to ask for IDs, and (4) the Respondents failed to address the problem associated with the said sales transaction in that its cash register software program provides its clerks multiple ways of bypassing any safety protocol with the "Manual Enter" and "Visual ID OK" buttons, thereby continuing to allow potential future sales to minors. The Department made no mention of

considering Respondents' length of licensure without discipline. However, given the enumerated aggravating arguments and its recommendation for an all-stayed penalty, the undersigned understood the Department to have considered the discipline-free licensure.

The Respondents recommended a five-day all-stayed mitigated penalty based on the following: (1) Respondents' nearly 15-year discipline-free history, (2) documented training of Respondents' employees with change in policy to require annual training, (3) Respondents' participation in the BARS program, and (4) Mr. Bisla spoke with clerk Khan the day after the said violation explaining he would be terminated if he received another red card or sold alcohol to a minor again.

The Respondents are correct that their 13-year, three month and 27-day discipline-free operation and documented training warrant mitigation. However, the following argued-for mitigation is compromised for the reasons stated. Despite the remedial steps of retraining employees and implementing annual training, the failure of the Respondents to take immediate action after the said violation causes skepticism as to whether the Respondents' reasons for doing so were not motivated by the hearing 11 days away⁷, rather than for reasons of preventing future sales to minors. Additionally, the Respondents failed to address the problem related to the sale at hand, in that Respondents' clerks still have available to them, as did clerk Khan, the option of bypassing any safety protocol by either pressing the "Manual Enter" or "Visual ID OK" buttons. There was no evidence the Respondents had these buttons removed or altered to prevent another clerk from doing as clerk Khan did, visually look at the ID without swiping it, and press one of the bypass buttons to enable to sales transaction to proceed. The latter is of grave concern, as well as the minor decoy's youthful appearance in conjunction with the presentation of her vertically oriented minor's ID. While some of the points discussed above are not enumerated aggravating factors under Rule 144 they provide some small aggravation in the analysis of the penalty. The penalty recommended herein complies with rule 144.

⁷ Exhibit C 7 Excel Certificate of Completion dates for retraining include September 17, 19 and 20, 2019; which dates Mr. Bisla said coincided with his policy changes.

ORDER

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

Dated: November 8, 2019



D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: <u> <i>Jacob K. Thompson</i> </u>
Date: <u> 12/23/19 </u>