

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

AB-9871

File: 21-477893; Reg: 19088540

GARFIELD BEACH CVS, LLC and
LONGS DRUGS STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store #9243
1000 West Kettleman Lane
Lodi, CA 95240,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: David W. Sakamoto

Appeals Board Hearing: September 10, 2020
Telephonic

ISSUED SEPTEMBER 14, 2020

Appearances: *Appellants:* David Brian Washburn, of Solomon, Saltsman &
Jamieson, as counsel for appellants;

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

OPINION

Garfield Beach CVS, LLC and Longs Drugs Stores California, LLC, doing
business as CVS Pharmacy Store #9243 (appellants), appeal from a decision of the
Department of Alcoholic Beverage Control¹ suspending their license for ten days, with
five days conditionally stayed for a period of one year, because their clerk sold an

¹ The decision of the Department Under Government Code section 11517(c),
dated March 19, 2019, is set forth in the appendix.

alcoholic beverage to a police minor decoy, in violation of Business and Professions Code² section 25658(a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. There is no prior disciplinary action against the license.

On February 12, 2019, the Department filed a single-count accusation against appellants charging that, on November 2, 2018, appellants' clerk, Kimberli Ramirez Resendiz (the clerk), sold an alcoholic beverage to 19-year-old Marcos Theodore Elithorp (the decoy). Although not noted in the accusation, the decoy was working for the Department and the Lodi Police Department (LPD) at the time.

At the administrative hearing held on August 6, 2019, documentary evidence was received, and testimony concerning the sale was presented by the decoy and Department Agent David Bickel. Appellant did not present any witnesses.

Evidence offered at the hearing established that the decoy went to the licensed premises on November 2, 2018. On that date, the decoy was 19 years old, stood 5'9" and weighed approximately 145 pounds. He wore a long-sleeve black t-shirt and tan pants. His hair was combed straight back, and his face was fully visible. The decoy had no facial hair but wore an Apple watch on his left wrist and had a tattoo on his forearm. He had operated as a decoy at the licensed premises on a prior occasion; however, he had never been to the store as a customer in a private non-decoy capacity.

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

The decoy entered the licensed premises and selected a six-pack of Coors Light beer from the refrigerated coolers. He took the beer to the check-out registers and waited in line. When it was his turn, he put the beer on the conveyor belt. The clerk sold the beer to the decoy but did not ask his age or to view his identification. The decoy took his beer and exited the store.

The decoy re-entered the licensed premises with Agent Bickle. Agent Bickle approached the clerk, identified himself, and told her she had just sold beer to a minor decoy. Agent Bickle then asked the decoy who sold him the beer, and the decoy identified the clerk. Agent Bickle asked the clerk if she understood that she had just been identified as the one who sold beer to the decoy and she indicated that she understood. Officers took a photograph of the decoy standing next to the clerk (exh. 2) and issued the clerk a citation.

The decoy visited a total of four licensed premises on November 2, 2018, and was able to purchase alcohol at two of them. The decoy participated in approximately six prior decoy operations wherein he visited approximately eight to ten licensed premises on each operation.

On August 6, 2019, the administrative law judge (ALJ) issued a proposed decision sustaining the 25658(a) violation and recommended a 10-day, all stayed penalty. The Department rejected the proposed decision on October 29, 2019 and notified the parties on December 16, 2019 to submit written argument on any issues the parties wished to address. However, the Department specifically requested the briefs address whether mitigating or aggravating factors should affect the penalty, and what penalty would be appropriate for the 25658(a) violation. On March 19, 2020, the Department issued a decision under Government Code section 11517(c) sustaining the

accusation and imposed a ten-day penalty, with five days stayed for a period of 12 months, provided that no further cause for disciplinary action arose during that time.

Appellants filed a timely appeal contending the Department's finding that the decoy displayed an appearance generally expected of a person under 21 years of age is not supported by substantial evidence. Appellant further contends the Department abused its discretion in determining the penalty because it did not afford the proper weight to its discipline-free history.

DISCUSSION

I

SUBSTANTIAL EVIDENCE

Appellant contends that the Department violated rule 141(b)(2)³ in using a minor decoy that did not display an appearance generally expected of a person under 21 years of age. (AOB, at pp. 5-7.) Specifically, appellant argues that the decoy's physical appearance, namely, his expensive jewelry and arm tattoo, coupled with his "extensive experience" in conducting "similar minor decoy operation[s]," as well as his "high" success rate, rendered his appearance as "much older than 21 years of age." (*Id.* at p. 7.) We disagree.

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.

³ All references to rule 141 are to the California Code of Regulations, title 4, section 141 and its subdivisions.

This rule provides an affirmative defense, and the burden of proof lies with appellants. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

Here, the Department found that the decoy's appearance complied with rule 141(b)(2). (Determination of Issues, ¶¶ 4-8.) Therefore, this Board is required to defer to those findings so long as they are supported by substantial evidence. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Southland)* (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652, 659] [citing *Kirby v. Alcoholic Beverage Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628] ["In considering the sufficiency of the evidence issue the court is governed by the substantial evidence rule[;] any conflict in the evidence is resolved in favor of the decision; and every reasonably deducible inference in support thereof will be indulged. [Citations.]"; see also *Kirby v. Alcoholic Bev. etc. Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815] ["When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the department."].) "Substantial evidence" is "evidence of ponderable legal significance, which is 'reasonable in nature, credible and of solid value.'" (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 814 [38 Cal.Rptr.2d 304, 307–308], internal citations omitted.)

In its decision, the Department rejected appellants' arguments that the decoy's physical appearance did not comply with rule 141(b)(2). The Department found that "[b]ased on the Decoy's overall appearance, i.e., his physical appearance, persona, dress, poise, demeanor, maturity and conduct, the Decoy displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Clerk Resendiz on November 2, 2018, and therefore, the

Decoy met Rule 141(b)(2)'s appearance standard.” (Determination of Issues, ¶ 8.)

The Department further noted that “[a]s the Clerk did not testify, there was no evidence to establish whether she made any assessment of the Decoy’s age in any fashion whatsoever in her decision to sell him beer.” (*Id.* at ¶ 5.) As stated above, “we are bound to construe the evidence in the light most favorable to the ALJ’s decision” and will uphold the findings so long as they are supported by substantial evidence. (*Southland, supra*, 103 Cal.App.4th at 1087.)

To support its findings, the Department relied on a photograph of the decoy from the day of the operation. (Exh. 2; Findings of Fact, ¶ 4.) Photographs of a decoy from the day of the operation are “arguably the most important piece of evidence in considering whether the decoy displayed the physical appearance of someone under 21 years of age.” (*Southland, supra*, 103 Cal.App.4th at 1094.) Further, the Department relied on the ALJ’s personal observations of the decoy’s appearance at the hearing, as compared to his appearance during the operation. The evidence established that the decoy was approximately 5’9” and 145 pounds on the date of the operation and a photograph was taken of him on that date. (Findings of Fact, ¶ 7; Exh. 2.) The Department found that “[t]he photo depicted the Decoy as he appeared at the time he went to the Licensed Premises.” (*Ibid*; Reporter’s Transcript pp. 13:10-12, 16-18; 26:13-23.)

The Board sees no error with the Department’s findings regarding the decoy’s appearance, which are supported by the photograph of the decoy from the date of the operation, as well as the decoy’s testimony at the hearing that his appearance in said photograph was how he appeared before the clerk during the operation. This evidence

is “reasonable in nature, credible and of solid value.” (*County of Los Angeles, supra*, 32 Cal.App.4th at 814.)

Additionally, the Department did not err in rejecting the significance of the decoy’s jewelry, arm tattoo, and prior experience. It noted that there was no evidence that the decoy’s “Apple watch” was “expensive,” or that “it would likely be worn by an older person as opposed to a younger person.” (Determination of Issues, ¶ 4.) Regarding the decoy’s arm tattoo, the Department noted that appellant wore a long-sleeve shirt during the operation, which made his tattoo not visible to the clerk. (*Id.* at ¶ 5.) Finally, the Department found that appellants failed to show how the decoy’s prior experience during minor decoy operations, or his “high” success rate was the result of him appearing older than he was. (*Id.* at ¶¶ 5, 7.)

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

II

PENALTY

Appellant contends its net five-day penalty is unreasonable because the Department failed to consider mitigating circumstances. (AOB, at pp. 7-9.) In other words, appellant believes its penalty is excessive.

This Board may examine the issue of excessive penalty if it is raised by an appellant. (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183].) However, the Board will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v.*

Alcoholic Bev. Control Appeals Bd. & Haley (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) An administrative agency abuses its discretion when it “exceeds the bounds of reason.” (*County of Santa Cruz v. Civil Service Commission of Santa Cruz* (2009) 171 Cal.App.4th 1577, 1582 [90 Cal.Rptr.3d 394, 397].) However, “[i]f reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within its discretion.” (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

In determining disciplinary action, the Department is required to consider the penalty guidelines incorporated in California Code of Regulations, title 4, section 144. The standard penalty for a first-time violation of section 25658(a) is 15 days, which is more than what appellants received here. (Cal. Code Regs., tit. 4, § 144.) However, rule 144 allows the Department to deviate from the standard penalty when, “*in its sole discretion*[, it] determines that the facts of the particular case warrant such deviation — such as where facts in aggravation or mitigation exist.” (*Ibid.*, emphasis added.)

Factors in aggravation include prior disciplinary history, prior warning letters, licensee involvement, premises located in high crime area, lack of cooperation by licensee in investigation, appearance and actual age of minor, and continuing course or pattern of conduct. (Cal. Code Regs., tit. 4, § 144.) Factors in mitigation include the length of licensure at subject premises without prior discipline or problems, positive action by licensee to correct problem, documented training of licensee and employees, and cooperation by licensee in investigation. However, neither list of factors is exhaustive; the Department may use its discretion to determine whether other aggravating or mitigating circumstances exist. (*Ibid.*)

Here, appellants take issue with the fact that the Department did not deviate enough from the standard 15-day suspension. (AOB, at pp. 7-9.) Specifically, appellants opine that “[n]o violations for 9.5 years should be afforded nearly maximum mitigation, as it shows the Appellant [*sic*] has been going above and beyond to prevent any violations.” (*Id.* at pp. 7-8.) However, appellants’ opinion is exactly that: an opinion. Among the Department’s reasons for not granting an all-stayed penalty was that, notwithstanding appellants’ claim that the length of time indicates their training measures were successful, “there was no evidence presented as to what training [appellants] gave its employees, including the Clerk in this matter.” (Penalty, ¶ 6.) The Board cannot say that the Department’s logic is flawed and that it abused its discretion in granting only a five-day stay, instead of ten.

As the Board has said many times over the years, the extent to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion. Rule 144 provides a standard 15-day suspension for a section 25658(a) violation, which is more than what appellant received. Rule 144 allows the Department to exercise discretion to consider aggravation and mitigation, which it clearly did in this instance. The weight the Department afforded appellants’ mitigation evidence was reasonable and not an abuse of discretion. Therefore, the penalty must stand.

ORDER

The decision of the Department is affirmed.⁴

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

⁴ This final order is filed in accordance with Business and Professions Code section 23088 and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7.

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

APPENDIX

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

IN THE MATTER OF THE APPEAL BY:

GARFIELD BEACH CVS, LLC. AND LONGS
DRUG STORES CALIFORNIA, LLC.
DBA: CVS PHARMACY STORE 9243
1000 W KETTLEMAN LN
LODI, CA 95240-6054

STOCKTON DISTRICT OFFICE

File: 21-477893

Reg: 19088540

AB: 9871

OFF-SALE GENERAL - LICENSE

Respondent(s)/Licensee(s)
under the Alcoholic Beverage Control Act.

CERTIFICATION

I, Yuri Jafarinejad, do hereby certify that I am a Senior Legal Analyst for the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that annexed hereto is a true, correct and complete record (not including the Hearing Reporter's transcript) of the proceedings held under Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code concerning the petition, protest, or discipline of the above-listed license heretofore issued or applied for under the provisions of Division 9 of the Business and Professions Code.

IN WITNESS WHEREOF, I hereunto affix my signature on May 28, 2020, in the City of Sacramento, County of Sacramento, State of California.



Office of Legal Services

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

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

GARFIELD BEACH CVS, LLC AND
LONGS DRUG STORES CALIFORNIA, LLC
CVS PHARMACY STORE 9243
1000 W. KETTLEMAN LANE
LODI, CA 95240-6054

OFF-SALE GENERAL - LICENSE

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

STOCKTON DISTRICT OFFICE

File: 21-477893

Reg: 19088540

CERTIFICATE OF DECISION

NOTICE CONCERNING PROPOSED DECISION

To the parties in the above-entitled proceedings:

You are hereby advised that the Department considered, but did not adopt, the Proposed Decision in the above titled matter and that the Department will itself decide the case pursuant to the provisions of Section 11517(c)(2)(E). A copy of the Proposed Decision has previously been sent to all parties.

The Department has requested that a transcript of the hearing be prepared. A copy of the record will be made available to you. Upon receipt of the hearing transcript, the Department will notify you of the cost of a copy of the record. At that time you all also be advised of the date by which written argument if any, is to be submitted.

Sacramento, California

Dated: October 29, 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:

Garfield Beach CVS, LLC and	}	File: 21-477893
Longs Drug Stores California, LLC	}	
Db: CVS Pharmacy Store 9243	}	Reg.: 19088540
1000 W. Kettleman Lane	}	
Lodi, CA 95240-6054	}	License Type: 21
	}	
Respondents	}	Word Count Estimate: 9,122
	}	
	}	Rptr: Brittany Flores, CSR-13460
	}	(California Reporting)
<u>Regarding Their Type-21 Off-Sale General License</u>	}	
<u>Under the State Constitution and the Alcoholic</u>	}	
<u>Beverage Control Act.</u>	}	<u>PROPOSED DECISION</u>
	}	

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter in Stockton, California, on August 6, 2019.

Colleen Villarreal, Attorney III, Office of Legal Services, Department of Alcoholic Beverage Control, represented the Department of Alcoholic Beverage Control. (Hereafter the Department)

Brian Washburn, Esq., of Solomon, Saltsman, and Jamieson, represented Garfield Beach CVS, LLC and Longs Drug Stores California, LLC. (Collectively hereafter Respondent)

After oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing, the matter was argued by the parties and submitted for decision on August 6, 2019.

The Department's accusation alleged cause for suspension or revocation of Respondent's license exists under California State Constitution, Article XX, section 22, and Business and Professions Code section 24200, subdivision (a) and (b), based on the following ground:¹

¹ All further section references are to the California Business and Professions Code unless noted otherwise.

Count 1 : “On or about November 2, 2018, respondent-licensee’s agent or employee, Kimberli Ramirez Resendiz, at said premises, sold, furnished, gave or caused to be sold, furnished, or given, an alcoholic beverage, to-wit: beer, to Marcos Theodore Elithorp, a person under the age of 21 years, in violation of Business and Professions Code Section 25658(a).” (Exhibit 1: Pre-hearing pleadings)

FINDINGS OF FACT

1. The Department filed its accusation on February 12, 2019. On May 2, 2019, the Department received Respondent’s Notice of Defense and Special Notice of Defense requesting a hearing on the accusation. The Department set the matter for a hearing. (Exhibit 1: Pre-hearing pleadings.)
2. On June 22, 2009, the Department issued Respondent a type-21 off-sale general license for its premises as captioned above.² (Hereafter the Licensed Premises)
3. Since being licensed, Respondent has not suffered any prior disciplinary action.
4. On November 2, 2018, Elithorp (Hereafter the Decoy) assisted the Lodi Police Department and the Department of Alcoholic Beverage Control in conducting a decoy operation. The decoy operation consisted of the under-age Decoy, under police supervision and direction, entering selected businesses licensed by the Department wherein he sought to purchase an alcoholic beverage. The Decoy worked with Lodi Police Department Sergeant Redding, Officer Dunphy, Officer LeStrange, one additional Lodi Police officer, and Alcoholic Beverage Control Agent Bickle. (Hereafter Agent Bickle)³
5. The Decoy was born on March 8, 1999 and was 19 years old when he went to the Licensed Premises on November 2, 2018. He had operated as a decoy at the Licensed Premises on an unspecified prior occasion. However, he had never been there as a customer in a private non-decoy capacity.

² A type-21 license permits the license-holder to retail beer, wine, and distilled spirits for consumption off the licensed premises.

³ Both decoy Elithorp and Agent Bickle testified at the hearing regarding their investigation at the Licensed Premises.

6. Prior to going to any of the selected licensed businesses on November 2, 2018, Agent Bickle briefed the Decoy regarding "rule 141". Among other things, the Decoy was instructed to disclose his true age if the selling clerk asked for it. He was also instructed to present his true identification if the clerk asked to see it. He was also told not to "beg" and not to lie regarding his age.

7. When the Decoy entered Respondent's Licensed Premises on November 2, 2018, he stood 5'9" and weighed approximately 145 pounds. He wore a long-sleeve black t-shirt and tan pants. His black hair was combed straight back. His face was fully visible. He had no facial hair. He wore an "Apple" watch on his left wrist. He had a tattoo on his forearm. A photograph was taken of him and Respondent's clerk at the Licensed Premises on that date as part of the investigation. (Exhibit 2: Photo of Decoy and clerk) The photo depicted the Decoy as he appeared at the time he went to the Licensed Premises. The Decoy had an over-all youthful demeanor and appeared no older than his actual age, 19.

8. On November 2, 2018, at approximately 5:00 p.m., the Decoy entered the Licensed Premises and selected a six-pack of Coors Light beer from the refrigerated coolers.⁴ He took the beer to one of the check-out registers and waited in line. When it was his turn to make his purchase, he put the six-pack of beer on the check-out stand's conveyor belt. Kimberli Ramirez Resendiz (Hereafter the Clerk) was the sales clerk. She sold the beer to the Decoy but neither asked his age nor asked to view his identification to confirm his age. The Decoy took his beer and exited the Licensed Premises. He was inside the Licensed Premises only 5-8 minutes before he exited with his beer.

9. The Decoy met with Agent Bickle and the other Lodi police officers who were waiting outside for him. Agent Bickle asked the Decoy if the sales clerk had asked his age and asked to view his identification. The Decoy indicated she did neither. The Decoy described the Clerk to Agent Bickle. The Decoy, Agent Bickle, and the other officers promptly entered the Licensed Premises.

10. Just inside the doorway, Agent Bickle quietly confirmed with the Decoy which clerk sold him his beer. The Clerk was tending to some customers. Agent Bickle then approached the Clerk. Agent Bickle identified himself to her as an agent/police officer and told her he needed to speak with her. The Clerk was then pulled aside and Agent Bickle informed her she had just sold beer to a minor-decoy. Agent Bickle asked the Decoy who sold him his beer. The Decoy pointed to the Clerk and indicated she was the one who sold beer to him. Agent Bickle asked the Clerk if she understood she had just been identified as the one who sold beer to the Decoy. She indicated she understood that. The Clerk never

⁴ When the Decoy entered the store, Agent Bickle and the other Lodi police officers stood-by outside at or in their car(s) in a nearby parking lot.

indicated to the officers she asked the Decoy his age or requested to view his identification when she sold him the beer.⁵

11. Next, the officers took a photo of the Decoy and the Clerk. (Exhibit 2: Photo of Decoy and Clerk)

12. The Clerk's identification was in her car. The officers went with the Clerk to her car so she could supply her identification to them. After she produced her identification to the officers and while still in the parking lot, the officers issued her a citation for selling/furnishing an alcoholic beverage to a minor, the Decoy. Agent Bickle also prepared a letter/notice indicating there had been a violation and gave that letter/notice to one of Respondent's managers or head clerks before he concluded his investigation.

13. The Decoy purchased an alcoholic beverage at two of four Department licensed businesses he visited that night.

14. The Decoy participated in approximately six prior decoy operations wherein he visited approximately 8-10 Department licensed businesses on each operation.

LEGAL BASIS OF DECISION

1. Article XX, section 22, of the California Constitution and Business and Professions Code section 24200, subdivision (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. Business and Professions Code section 24200, subdivision (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. Business and Professions Code section 25658, subdivision (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.

⁵ The sales clerk, Ms. Resendiz, did not testify at the hearing.

4. Business and Professions Code Section 25658, subdivision (f), permits law enforcement officials to use persons under 21 years old to apprehend licensees, employees or agents or other persons who sell or furnish alcoholic beverages to minors. The Department was directed to and did adopt and publish a rule regarding the use of underage decoys.

5. Under California Code of Regulations, title 4, section 141, (Hereafter rule 141):

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

(b) The following minimum standards shall apply to actions filed pursuant to Business and Professions Code Section 25658 in which it is alleged that a minor decoy has purchased an alcoholic beverage:

(1) At the time of the operation, the decoy shall be less than 20 years of age;

(2) 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;

(3) A decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages;

(4) A decoy shall answer truthfully any questions about his or her age;

(5) Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

(c) Failure to comply with this rule shall be a defense to any action brought pursuant to Business and Professions Code Section 25658.

DETERMINATION OF ISSUES

1. Cause for suspension or revocation of Respondent's license exists under Article XX, section 22, of the California State Constitution and Business and Professions Code section 24200, subdivision (a), because on November 2, 2018, Respondent's agent or employee, Kimberli Ramirez Resendiz, in the Licensed Premises, sold an alcoholic beverage to decoy-Elithorp, a person under the age of 21, in violation of Business and Professions Code section 25658, subdivision (a).
2. The evidence established Respondent's Clerk, Resendiz, sold an alcoholic beverage, in the form of a six-pack of Coors Lite beer, to the Decoy, Elithorp, a person under 21 years old, at the Licensed Premises. The Clerk neither asked the Decoy his age nor asked to view his identification at the time of the sale. To that extent, there was sufficient evidence to sustain Count 1, a violation of section 25658, subdivision (a). (Findings of Fact ¶¶ 4-8)
3. However, as this was a decoy operation, it was also governed by rule 141. Under rule 141(c), a defense to the accusation is established if there was non-compliance with any provision of rule 141.
4. Respondent asserted the Decoy did not meet the decoy appearance standard set forth in Rule 141(b)(2) that states: "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." Respondent argued the Decoy looked too old because he wore an "Apple" watch. Respondent argued that was an expensive watch costing approximately \$500.00 and would be worn by an older person. While the Decoy wore an "Apple" watch when he bought his beer, there was no evidence presented as to its cost or market value. That value was only mentioned in Respondent's closing argument with no factual basis in the record. There was also no evidence it would likely be worn by an older person as opposed to a younger person. Further, as the clerk did not testify, there was no evidence she was even aware if the Decoy was wearing a watch, what type it was, and if that played any role in her decision to sell beer to the Decoy.⁶
5. Respondent argued the Decoy acted as a decoy on prior operations and collectively visited as many as 50-60 licensed premises. Yet, Respondent did not explain how, in this instance, that experience made the Decoy appear any older than his 19 years of age. As the Clerk did not testify, there was no evidence to establish whether or not she made any assessment of the Decoy's age in any fashion whatsoever in her decision to sell him beer.

⁶ Respondent presented no witnesses at the hearing either in defense to the accusation nor with respect to mitigation.

6. Respondent asserted the Decoy had a tattoo on his forearm and that as he had been to the Licensed Premises on a prior decoy-visit, it could have been noticed at that time. This argument had no merit. Exhibit 2 showed that the Decoy wore a long-sleeved shirt so his tattoo was not visible on November 2, 2018. There was no evidence establishing what the Decoy wore on his prior decoy visit to the Licensed Premises. There was no evidence the Decoy's tattoo was displayed during the prior operation. It was not established when that visit occurred and whether it involved the same clerk as in this matter. Again, as the Clerk in this matter did not testify at the hearing, there was no evidence she was even aware the Decoy had ever been to the Licensed Premises on any prior occasion or that he had a tattoo on his forearm or that it played any role in her decision to sell him beer on November 2, 2018.

7. Respondent also argued the Decoy appeared too old because on November 2, 2018, the Decoy visited four licensed premises of which two sold him an alcoholic beverage. While that is true, the statistical sampling of only four is too small to be any reasonable indicator in assessing the Decoy's appearance that day. There was no evidence introduced as to the facts of the Decoy's purchase at the other licensed premises or that the seller there relied on the Decoy's appearance in making his/her sale to the Decoy. There was no evidence the Decoy's purchase of an alcoholic beverage at two of four licensed premises he visited on November 2, 2018 made the Decoy appear any older than he was, 19.

8. As required in rule 141(b)(2), in this instance, the Decoy did: "...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". The Decoy was only 19 years old, stood 5'9' tall, and weighed 145 lbs. During this decoy operation, he was casually dressed in a long-sleeved shirt, tan jeans, sneakers. His black hair was combed straight back. He had no facial hair. At the hearing, he had a youthful appearance, presence, persona, and demeanor. The photo taken of the decoy that night, Exhibit 2, depicts a youthful appearing person. The Clerk never asserted to the investigating Agent or officers she sold beer to the Decoy because she believed he looked old enough to purchase an alcoholic beverage. None of the arguments made by Respondent why the Decoy looked too old, whether considered individually or collectively, were persuasive.

9. As Respondent did not establish there was non-compliance with rule 141(b)(2) or any other provision of rule 141, a defense to the accusation under Rule 141(c) was not established. The evidence supported sustaining Count 1 of the accusation.

10. Except as set forth in this decision, all other allegations in the accusation and all other contentions made by the parties in the pleadings or at the hearing regarding those allegations lack merit.

PENALTY

1. In assessing an appropriate measure of discipline, the Department's penalty guidelines are in California Code of Regulations, title 4, section 144. (Hereafter rule 144) Under rule 144, the presumptive penalty for a first violation of selling or furnishing an alcoholic beverage to a minor in violation of section 25658 is a 15-day license suspension.
2. Rule 144 also permits imposition of a revised penalty based on the presence of aggravating or mitigating factors. Rule 144 contains a non-exhaustive list of those factors. One of the aggravating factors listed is the: "Appearance and actual age of minor". One of the mitigating factors listed is: "Length of licensure at subject premises without prior discipline or problems."
3. The Department recommended a 10-day license suspension in this matter. It acknowledged Respondent had been discipline free since 2009. However, the Department contended that term of being discipline free was partially off-set by the aggravating factor that the Decoy was only 19 years old and had a youthful appearance. Also, the clerk did not ask the decoy his age or view his identification or tender any explanation why she sold beer to the Decoy.
4. Respondent argued that, if the accusation was sustained, a mitigated penalty of a 5-day suspension, with all 5 days stayed/suspended, was more appropriate. Respondent contended that it had been licensed since 2009 with no prior disciplinary action. It attributed that to its training efforts. However, Respondent did not present any evidence establishing what, if any, training it gave its employees, including the Clerk in this case, either before or after November 2, 2018, regarding preventing, suppressing, and avoiding selling alcoholic beverages to minors at the Licensed Premises.
5. In assessing the proper penalty for this matter, rule 144 states that the "Appearance and actual age of minor" can be an aggravating factor. In this matter, the evidence established the Decoy was 19 years old and met rule 141(b)(2)'s appearance standard. However, the Decoy did not appear so youthful as to rise to be an aggravating factor in this case. The Department also argued the Cashier did not ask for the Decoy's identification or to disclose his age. There was no evidence presented why she did not do so in this instance. Her omission to do those things may have been caused by a myriad of factors. There is no evidence to point to the true cause. Therefore, her omission does not, in this matter, rise to the level of constituting an aggravating factor.

6. Rule 144 list the length of licensure without disciplinary action as a factor in mitigation. Respondent's discipline-free operation for almost 10 years is significant. While Respondent indicated that was proof its training measures worked, as explained above, there was no evidence presented as to what training it gave its employees, including the Clerk in this matter. However, rule 144 does not require it be shown how or why a lengthy term of discipline-free licensure occurred before it is deemed a mitigating factor, but only that such discipline-free term occurred.
7. After weighing the aggravating and mitigating factors, some net reduction from the 15-day suspension called for in rule 144 is warranted. The penalty ordered below is a result of that assessment and complies with rule 144.
8. Except as set forth in this decision, all other arguments, contentions, and assertions raised by the parties with respect to the appropriate penalty are without merit.

ORDER

Count 1 of the accusation is sustained.

Respondent's license is suspended for a period of 10 days, with all 10 days of license suspension stayed for a period of 12 months commencing the date the decision in this matter becomes final, upon the condition that no subsequent final determination is made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred during the period of the stay. Should such a determination be made, the Director of the Department of Alcoholic Beverage Control may, in the Director's sole discretion and without further hearing, vacate the stay and impose the 10 stayed-days of suspension, and should no such determination be made, the stay shall become permanent.

Dated: August 16, 2019


David W. Sakamoto
Administrative Law Judge

<input type="checkbox"/> Adopt
<input checked="" type="checkbox"/> Non-Adopt: _____
By: <u>Jessal A. Applequist</u>
Date: <u>10/29/19</u>