

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

AB-9877

File: 21-548433; Reg: 19089019

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #10005
6401 Mack Road
Sacramento, CA 95823,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: September 10, 2020
Telephonic

ISSUED SEPTEMBER 14, 2020

Appearances: *Appellants:* Adam N. Koslin, of Solomon, Saltsman & Jamieson, as
counsel for Garfield Beach CVS, LLC and Longs Drug Stores
California, LLC,

Respondent: Sean Klein, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing
business as CVS Pharmacy #10005 (appellants), appeal from a decision of the
Department of Alcoholic Beverage Control (Department)¹ suspending their license for
20 days because their clerk sold an alcoholic beverage to a police minor decoy, in
violation of Business and Professions Code section 25658, subdivision (a).

¹ The decision of the Department, dated April 10, 2020, is set forth in the
appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on April 3, 2015. There is one prior instance of departmental discipline against the license.

On July 2, 2019, the Department filed an accusation against appellants charging that, on February 7, 2020, appellants' clerk, Der Xiong (the clerk), sold an alcoholic beverage to 18-year-old Jennifer Palmer (the decoy). Although not noted in the accusation, the decoy was part of a joint operation between the Department and the Sacramento Police Department (SPD) at the time.

At the administrative hearing held on January 8, 2020, documentary evidence was received and testimony concerning the sale was presented by the decoy and SPD Officer Jesus Trejo. Susan Denise Nosler, appellants' store manager, testified on behalf of appellants.

Testimony established that on the day of the operation,² the decoy entered the licensed premises and went to the coolers where she selected a six-pack of Coors Light beer which she took to the register. She waited in line and when it was her turn she presented the beer to the next available clerk. The clerk asked the decoy for her identification and the decoy handed the clerk her California driver's license which had a portrait orientation, contained her correct date of birth (showing her to be 18 years of age), and a red stripe indicating, "AGE 21 IN 2021." (Exh. D-2.) The clerk looked at the license briefly, then completed the sale without asking any age-related questions.

The decoy exited the premises and met with SPD officers waiting outside. She then re-entered the store with the officers to make a face-to-face identification of the

² Discrepancies in the decision regarding the date of the operation are discussed more fully in section II.

clerk who sold her the beer. A photograph was taken of the clerk and decoy together (exh. D-3) and the clerk was issued a citation.

The administrative law judge (ALJ) issued a proposed decision on February 4, 2020, sustaining the accusation and recommending a 20-day suspension of the license. The Department adopted the proposed decision in its entirety on April 6, 2020 and issued a certificate of decision on April 10, 2020.

Appellants then filed a timely appeal contending: (1) the decoy's appearance was improperly evaluated by the ALJ, and (2) compliance with rule 141(b)(2)³ is not supported by substantial evidence.

DISCUSSION

I

ISSUES REGARDING DECOY'S APPEARANCE

Appellants contend the ALJ relied on the decoy's appearance at the hearing, rather than on the date of the operation, to conclude that the decoy operation complied with rule 141(b)(2). Appellants maintain that the ALJ's findings on this issue are not supported by substantial evidence and that the decoy's appearance did not comply with the rule. (AOB at pp. 5-7.)

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 References 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.

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:

4. Palmer appeared at the hearing and her physical appearance was generally as depicted in an image that was taken on February 9, 2019 [sic] (Exhibit D-3). Her face was as depicted in that image (Exhibit D-3) and in her California driver's license that was submitted into evidence. (Exhibit D-4) During the operation on February 22, 2019 [sic], Palmer wore a red and gray long sleeve Henley shirt and blue jeans with multiple horizontal holes above the knees. She wore earrings, a watch and a narrow necklace with a cross. Her face was fully exposed, and her hair was worn down below her shoulders. Palmer wore minimal makeup except for mascara. Palmer had significant visible acne on the date of the operation (Exhibit D-3). Palmer was approximately 5 feet, 5 inches tall and 170 pounds on that date.

[¶ . . . ¶]

11. Palmer had recently begun serving as a decoy for the SPD and the February 9, 2019 [sic] operation at the Licensed Premises was one of the first she had done. Palmer became involved as a decoy as the result of her participation in cadet Explorer programs with the Roseville Police Department and the SPD.

12. Based on Palmer'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 Xiong at the Licensed Premises on February 9, 2019 [sic], Palmer displayed the appearance which would generally be expected of a person less than 21 years of age during her interactions with Xiong. Xiong did not testify in

this matter to explain her age related impressions of Palmer or why she sold Palmer alcohol even though Palmer's presented identification showed she was 18 years of age and her appearance was consistent with her chronological age.

(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). As noted above, Xiong did not testify in this matter to establish that her sale to Palmer was the result of Palmer's appearance. Xiong only asked for identification from Palmer, so the exchanges between her and Palmer were minimal. Further, Palmer testified in this matter and her appearance matched the appearance she presented to Xiong on the date of the operation. Palmer 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 Palmer's actions, manner, or appearance that led Xiong to reasonably conclude that Palmer 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, ¶ 4.)

We agree with the ALJ's reasoning and conclusions, and question appellants' position that these findings are based only on observations of the decoy at the hearing, rather than on evidence of her appearance on the date of the operation. In contrast to that contention, observations were made throughout the ALJ's findings about the decoy's appearance on the date of the operation, as reflected in the photograph taken that day. (Exh. D-3.) This photograph supports the ALJ's findings that the decoy met the requirements of rule 141(b)(2). As we have said many times in regards to photographs of the decoy in the record:

[A]n appellate court has said that a photograph taken immediately following an illegal sale is "arguably the most important piece of evidence in considering whether the decoy displayed the physical appearance of someone under 21 years of age" . . .

(Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Southland Corporation) (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652].)

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 4, the ALJ found that the decoy met this standard - as established by her appearance on the date of the operation. We agree. While the ALJ mentions the decoy's appearance at the hearing, this is done in the context of highlighting the fact that the decoy looked the same at the hearing as on the day of the operation. This does not constitute error.

Appellants also argue that the decoy displayed a demeanor which was not typical for a teenager because of her experience as an Explorer. (AOB at p. 7.) 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.

As stated above, case law instructs us that when, as here, “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.” (*Kirby, supra*, 25 Cal.App.3d at p. 335.) We find that in the instant case, substantial evidence supports the findings made by the ALJ about this decoy’s appearance on the date of the operation.

Appellants presented no evidence that the decoy’s experience 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 experience or demeanor were the *actual reason* the clerk made the sale.

We would affirm the decision of the Department in this matter, but for the problems addressed in section II below.

II

ISSUE REGARDING DATE OF THE OPERATION

Substantial evidence supports affirming the Department’s decision only if we ignore the fact that the decision contains numerous errors regarding the date of the operation. The decoy operation is incorrectly referenced eight times as February 9, 2019. (Findings of Fact, ¶¶ 3-6, 11-12; Conclusions of Law, ¶¶ 4, 9.) In addition, the decision makes a single erroneous reference to “the operation on February 22, 2019”. (Finding of Fact, ¶ 4.)

Appellants did not raise this issue on appeal. Ordinarily we do not raise issues on appellants’ behalf, but in this case, the errors are so numerous and unacceptable

that we feel the issue must be raised. Nine references to incorrect dates cannot be swept aside and ignored, particularly when they include two different incorrect dates. Instead, we believe such a quantity of errors constitutes abuse of discretion.

In the California Code of Civil Procedure, in the section devoted to inquiries regarding the validity of administrative decisions, it states: “[a]buse of discretion is established if . . . the order or decision is not supported by the findings, or the findings are not supported by the evidence.” (Cal. Code Civ. Proc § 1094.5(b).)

The accusation states that the decoy operation occurred on February 7, 2019. This date is correctly referenced on page one of the decision, and noted twelve times in the reporter’s transcript. (RT 5, 10, 16-21, 30, 44, 53, 67.) Neither the accusation nor the reporter’s transcript reference any other date for this decoy operation. The recitation of February 9, 2019 eight times in the decision as the date of the violation, plus a single recitation of February 22, 2019, seems inexplicable given the quantity of testimony in the record supporting a violation date of February 7, 2019.

In the instant matter, the decision makes nine references to an incorrect date for the violation. The only correct reference to the date of the operation is on page one of the decision. In short, the decision is not supported by the findings as presently written, and constitutes an abuse of discretion in its present form given the volume of errors it contains.

Having determined that the current decision must be reversed for the reasons stated, we also believe the errors are clerical errors, in need of correction by the Department to comport with the evidence in the record. Given the volume of references to the correct date in the record, it seems indisputable that the use of the incorrect dates was simply clerical error.

“Where the judgment as signed does not express the actual judicial intention of the court, but is contrary thereto, the signing of such a purported judgment is a clerical error rather than a judicial one.” (*Zisk v. City of Roseville* (1976) 56 Cal.App.3d 41, 47 [127 Cal.Rptr. 896].)

. . . a trial judge has power to correct mistakes and to annul orders and judgments which were inadvertently or improvidently made, and . . . he has the power to vacate judgments and orders inadvertently made which are not actually a result of the exercise of judgment. The distinction between a clerical error and a judicial error does not depend so much on the person making it as it does on whether it was the deliberate result of judicial reasoning and determination. [Citations.] "The distinction between clerical error and judicial error is 'whether the error was made in rendering the judgment, or in recording the judgment rendered.'" [Citations.]

(*People v. Anderson* (1976) 59 Cal.App.3d 831, 839 [131 Cal.Rptr. 104].)

ORDER

The underlying decision would be affirmed if not for the errors discussed herein. Accordingly, the decision of the Department is reversed and the matter is remanded to the Department to permit the issuance of a corrected decision containing findings which comport with the record.⁴

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

⁴ This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.

APPENDIX

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

IN THE MATTER OF THE APPEAL BY:

GARFIELD BEACH CVS, LLC. & LONGS
DRUGS STORES CALIFORNIA, LLC.
DBA: CVS PHARMACY #10005
6401 MACK RD.
SACRAMENTO, CA 95823-4656

SACRAMENTO DISTRICT OFFICE

File: 21-548433

Reg: 19089019

AB: 9877

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 June 18, 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 &
LONGS DRUG STORES CALIFORNIA, LLC
CVS PHARMACY #10005
6401 MACK ROAD
SACRAMENTO, CA 95823-4656

OFF-SALE GENERAL - LICENSE

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

SACRAMENTO DISTRICT OFFICE

File: 21-548433

Reg: 19089019

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 April 6, 2020. 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 May 21, 2020, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: April 10, 2020



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 &	}	File: 21-548433
Longs Drug Stores California, LLC	}	
DBA: CVS Pharmacy #10005	}	Registration: 19089019
6401 Mack Road	}	
Sacramento, California 95823-4656	}	License Type: 21
	}	
Respondent	}	Page Count: 76
	}	
	}	Reporter:
	}	Wendy Harranty-CSR # 11494
	}	Atkinson Baker
	}	
<u>Off-Sale General License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Sacramento, California, on January 8, 2020.

Sean Klein, Attorney, represented the Department of Alcoholic Beverage Control (Department).

Adam Koslin, Attorney, represented Respondents Garfield Beach CVS, LLC & Longs Drug Stores California, LLC. (Respondent)

The Department seeks to discipline the Respondent's license on the grounds that, on or about February 7, 2019 the Respondent-Licensee, through their agent or employee, Der Xiong, sold, furnished, or gave an alcoholic beverage, to-wit: beer, to Jennifer Palmer, 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 January 8, 2020.

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

FINDINGS OF FACT

1. The Department filed the accusation on July 2, 2019. (Exhibit D-1)
2. On April 3, 2015 the Department issued a type 21, off-sale general license to the Respondent for the above-described location (the Licensed Premises). The following is the record of prior Department discipline against the Respondent's license as established by official records introduced by the Department (Exhibit D-2):

Violation Date	Violation	Registration Date	Registration Number	Penalty
5/19/2016	25658(a)	7/27/2016	16084534	15 day suspension

3. Jennifer Ellen Palmer (Palmer) was born on March 18, 2000 and was 18 years old on February 9, 2019. On that date, Palmer served as a minor decoy in an operation conducted by the Sacramento Police Department (SPD) at various locations, including the Licensed Premises.
4. Palmer appeared at the hearing and her physical appearance was generally as depicted in an image that was taken on February 9, 2019 (Exhibit D-3). Her face was as depicted in that image (Exhibit D-3) and in her California driver's license that was submitted into evidence. (Exhibit D-4) During the operation on February 22, 2019, Palmer wore a red and gray long sleeve Henley shirt and blue jeans with multiple horizontal holes above the knees. She wore earrings, a watch and a narrow necklace with a cross. Her face was fully exposed, and her hair was worn down below her shoulders. Palmer wore minimal makeup except for mascara. Palmer had significant visible acne on the date of the operation (Exhibit D-3). Palmer was approximately 5 feet, 5 inches tall and 170 pounds on that date.
5. On February 9, 2019 Palmer went to the Licensed Premises as a decoy for the SPD for the purpose of trying to buy alcohol. Palmer 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. Palmer carried her California driver's license to produce if asked.
6. On February 9, 2019 during the late morning hours, Palmer entered the Licensed Premises. After entering, she went to the back area where the coolers were. Palmer selected a six-pack of Coors Light beer. Palmer then took the beer to the register area where there was a single line leading to two working registers. Palmer stood in line for her turn.
7. When Palmer got to the front of the ^{queue,} she went to the next available clerk and presented the beer for purchase. The clerk who received the beer from Palmer was the same individual in the image that was later taken of Palmer standing next to the clerk that sold the beer to her. (Exhibit

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

D-3) The clerk started the transaction for the beer and asked Palmer for her identification. Palmer handed her California driver's license 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 she gave the clerk showed that Palmer was 18 years old and that she would not be 21 until 2021, the clerk did not stop the transaction. Palmer paid the clerk for the beer with cash provided by the SPD. Palmer took possession of the beer and the change the clerk handed to her. Palmer then left the Licensed Premises with these items.

8. Palmer approached where the SPD officers had staged their vehicle and informed them of the sale. Immediately after this, Palmer went back into the Licensed Premises with the SPD officers. After entering the Licensed Premises, one of the officers asked Palmer to point out the clerk who sold the beer to her. Palmer pointed to the clerk and the SPD officers approached to identify themselves and to tell the clerk why they were there. Palmer approached with the SPD officers. At the time Palmer approached, the SPD officers had already identified themselves and the clerk was no longer waiting on customers.

9. While Palmer was standing 5-10 feet from the clerk, one of the SPD officers asked Palmer if she could identify the clerk who sold the beer. Palmer then pointed at the clerk who made the sale to her. The clerk was identified as Der Xiong (Xiong) during the investigation of the sale to Palmer. SPD Officer J. Trejo (Trejo) was the officer who spoke with her about the sale. Xiong admitted to making the sale to Palmer.

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

11. Palmer had recently begun serving as a decoy for the SPD and the February 9, 2019 operation at the Licensed Premises was one of the first she had done. Palmer became involved as a decoy as the result of her participation in cadet Explorer programs with the Roseville Police Department and the SPD.

12. Based on Palmer'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 Xiong at the Licensed Premises on February 9, 2019, Palmer displayed the appearance which would generally be expected of a person less than 21 years of age during her interactions with Xiong. Xiong did not testify in this matter to explain her age related impressions of Palmer or why she sold Palmer alcohol even though Palmer's presented identification showed she was 18 years of age and her appearance was consistent with her chronological age.

13. Licensed Premises store Manager Susan Denise Nosler (Nosler) testified for the Respondent. Nosler testified that she is actively involved in the ongoing training and supervision of employees at the Licensed Premises. Nosler has done so for the last 3 years. Nosler explained

that all employees go through age restricted sales training at the time of hire (Exhibit L-2) and they must review this training on an annual basis. Nosler reviews these policies regularly with employees and employees go through an annual training review on a variety of subjects including alcohol sales. Xiong was timely on her training. (Exhibit L-1) 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 27 years of age. The scanning of an alcoholic beverage will trigger the register reminding the clerk to ask for identification. (Exhibit L-5) The register is not able to scan identifications, so the date of birth has to be manually entered. Subsequent to the incident, Xiong was verbally counselled regarding the sale to Palmer. As a result of the incident, Nosler had requested from the district manager that scanners be installed at the Licensed Premises, but the Respondent has not acted on the request as of the hearing in this matter. Prior to the incident, the Licensed Premises posted warnings about the unlawfulness of underage sales of alcoholic beverages and that the store policy is to refuse service. (Exhibit L-3) Since the incident, an additional notice with the same information was added to the coolers. (Exhibit L-4)

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 9, 2019 the Respondent's clerk, Der Xiong, inside the Licensed Premises, sold an alcoholic beverage to Jennifer Palmer, 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 Palmer of Xiong 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 make clear that this particular regulation is focused on the narrower 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. SPD officers approached Xiong at the counter, got her attention, and identified themselves as law enforcement officers investigating a sale of alcohol to a minor. While the sale to Palmer was discussed among the SPD officers and Xiong at the counter, Palmer approached and then stood with the SPD officers. During this discussion, Palmer was asked by one of the SPD officers about who made the sale to her. In the immediate presence of Xiong, from about 5-10 feet away, Palmer pointed out Xiong as the seller. Xiong was clearly aware that the decoy was Palmer because she discussed making the sale to Palmer with Trejo. Before Xiong was cited on February 9, 2019, Palmer and Xiong were photographed next to each other. (Findings of Fact ¶ 10 and Exhibit D-3) Xiong clearly came face to face with Palmer under circumstances that made it clear

that Xiong had been identified as the person who sold Palmer beer and that Palmer 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 Xiong to become aware that Palmer 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). As noted above, Xiong did not testify in this matter to establish that her sale to Palmer was the result of Palmer's appearance. Xiong only asked for identification from Palmer, so the exchanges between her and Palmer were minimal. Further, Palmer testified in this matter and her appearance matched the appearance she presented to Xiong on the date of the operation. Palmer 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 Palmer's actions, manner, or appearance that led Xiong to reasonably conclude that Palmer 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)

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

PENALTY

The Department recommended that the Respondent's license be suspended for 25 days as a result of the prior discipline. The standard penalty for this violation would be a 25 day suspension since the prior discipline occurred within a 3 year period. The Department also argued against any mitigation because the Respondent has not taken actions that would show a significant effort to correct the problem that occurred. Other than Xiong's verbal counselling, little has changed even though Nosler identified that installing scanners would have helped to prevent the sale to Palmer.

The Respondent argued for a 15 day penalty if the Accusation were sustained based on the positive actions of the Licensee-Respondent to avoid alcohol sales to minors, and the documented training undertaken by the Licensee-Respondent.

Evidence was presented regarding the Respondent's policies to prevent sales of alcoholic beverages to underage individuals and some 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

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age restricted sales given the lack of consequence to Xiong for violating the employer's policy. In addition, a significant preventative measure was identified by the store manager but the Respondent, at the district level, has failed to act on this commonsense request.

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 18 years of age. The clerk allowed the sale to go through. 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 some effort to shore up its approach after the incident.

There appear to be no factors in aggravation applicable to this violation. Mitigation is found. The penalty recommended herein complies with rule 144.

ORDER

The Respondents' off-sale general license is hereby suspended for a period of 20 days.

Dated: February 4, 2020



Alberto Roldan
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: _____
Date: 4/6/20