

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

AB-9891

File: 20-551410; Reg: 20089870

7-ELEVEN, INC. and MANN CONVENIENCE STORES, INC.,
dba 7-Eleven Store 21792E
403 Third Avenue
Chula Vista, CA 91910,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: March 12, 2021
Telephonic

ISSUED MARCH 12, 2021

Appearances: *Appellants:* Alexandra Angel, of Solomon, Saltsman & Jamieson,
as counsel for 7-Eleven, Inc. and Mann Convenience Stores, Inc.;

Respondent: Joseph J. Scoleri III, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Mann Convenience Stores, Inc., doing business as 7-Eleven Store 21792E (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for ten days because their clerk sold an

¹ The decision of the Department, dated October 6, 2020, 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 beer and wine license was issued on February 9, 2015.

There is no record of prior departmental discipline against the license.

On March 4, 2020, the Department filed a single-count accusation against appellants charging that, on August 1, 2019, appellants' clerk, Martha Luna-Mendez (the clerk), sold an alcoholic beverage to 18-year-old Josimar Gonzalez (the decoy). Although not noted in the accusation, the decoy was working as part of a joint operation between the Department and the Chula Vista Police Department (CVPD).

At the administrative hearing on June 18, 2020, documentary evidence was received, and testimony concerning the sale was presented by the decoy and CVPD Detective Ginger Van Houten, Jasbir Singh, the manager for the licensed premises, testified on appellants' behalf.

Testimony established that on August 1, 2019, the decoy entered the licensed premises and walked straight to the alcoholic beverage refrigerators. There, he selected a three-pack of Coors Light beer which he brought to the sales counter. The clerk scanned the beer and asked the decoy for his identification (ID). The decoy handed her his valid California ID card, which had a vertical orientation, depicted his correct date of birth (showing him to be 18 years old), and included a red stripe which stated, "AGE 21 IN 2021." (Exh. 2.) The clerk looked at the ID for a couple of seconds,

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

then returned it to the decoy and proceeded with the sale. The decoy exited the store after he paid for the beer.

A short time later, the decoy re-entered the licensed premises with Detective Van Houten and an unnamed Department agent. Detective Van Houten asked the decoy to identify who sold alcohol to him and he identified the clerk. Detective Van Houten approached the clerk and asked her to step away from the cash register and speak with her. The clerk, the decoy, and Detective Van Houten walked to an office in the back of the licensed premises. There, Detective Van Houten again asked the decoy to identify the person who sold him alcoholic beverages and he pointed at the clerk. The decoy and the clerk were standing approximately three feet apart at the time of this identification with nothing in between them. Detective Van Houten took a photograph of the clerk and the decoy standing next to one another after the identification, while the decoy was holding the three-pack of Coors Light beer in his left hand and his California ID card in his right hand. (Exh. 4.) The clerk was issued a citation for the sale.

The administrative law judge (ALJ) issued a proposed decision on July 22, 2020 sustaining the accusation and recommending a ten-day suspension. The Department adopted the proposed decision in its entirety on September 16, 2020 and issued a certificate of decision on October 6, 2020. Appellants filed a timely appeal contending that: 1) the Department's finding that the face-to-face identification complied with rule 141(b)(5)³ is not supported by substantial evidence, and; 2) the penalty is excessive.

³ All references to rule 141 and its subdivision are to title 4 of the California Code of Regulations, section 141, unless otherwise stated.

DISCUSSION

Appellants argue that a proper face-to-face identification did not occur. (Appellant's Opening Brief (AOB), at pp. 8-11.) Further, appellants contend that the Department failed to consider mitigation factors in determining the penalty under rule 144. (*Id.* at pp. 11-15.) These issues will be discussed separately.

I

FACE-TO-FACE IDENTIFICATION

Appellants' contention regarding the face-to-face identification stems from the decoy's testimony at the administrative hearing that the operation occurred at approximately 8:50 p.m., which was "two hours after Detective Van Houten noted the operation began and after [the] citation had been issued." (AOB, p. 9 (emphasis in original).) Further, appellants argue that, even if the decoy's estimation of time is incorrect, "Detective Van Houten noted the operation occurred at around 6:50 p.m., but issued a citation at 6:51 p.m." (*Id.* at p. 11.) In short, appellants argue that evidence in this case establishes that the citation was issued *before* the face-to-face identification occurred, rendering it invalid under rule 141(b)(5). (*Ibid.*)

Rule 141(b)(5) provides:

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.

The rule requires "strict adherence." (See *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126] (*Acapulco*) [finding that no attempt, reasonable or otherwise, was made to identify the clerk in that case].) However, since this rule provides an

affirmative defense, the burden is on appellants to show non-compliance. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

In its decision, the Department rejected appellants' rule 141(b)(5) arguments, reasoning that:

The credible testimony of Detective Van Houten maintained that she issued the citation to clerk Martha Luna-Mendez after the face-to-face identification. Detective Van Houten further credibly maintained that she based her testimony on personal knowledge and that the time frames given were approximations and not exact times.

(Conclusions of Law, ¶ 7.) We agree with this assessment. The exact times written down or testified to by the decoy and Detective Van Houten cannot override common sense. Detective Van Houten's uncontroverted testimony was that the citation was issued after the face-to-face identification occurred. (Reporter's Transcript (RT) at p. 33:19-23.) This testimony constitutes substantial evidence to support the Department's findings regarding rule 141(b)(5); namely, that the face-to-face identification occurred before the clerk was cited. Further, the Board is prohibited from reweighing the evidence or exercising its independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826, 837].) Therefore, the Department's decision regarding this issue must be affirmed.

II

PENALTY

Appellants contend the Department failed to consider mitigation factors under rule 144. (AOB, at pp. 11-15.) Specifically, appellants argue that the Department did

not consider its discipline-free history in determining its penalty. (*Id.* at pp. 13-14.) In other words, appellants believe their ten-day 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 five days more than the penalty appellants received here. (Cal. Code Regs., tit. 4, § 144.) 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 the 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 the subject premises without prior discipline or problems, positive action by the licensee to correct the problem, documented training of the licensee and the employees, and cooperation by the licensee in the 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. 11-15.) Specifically, appellants claim “it is unclear whether ALJ Huebel considered [its discipline-free] history in mitigation at all, other than to formally commend Appellants.” (*Id.* at p. 14.) However, this argument is not supported by the record. The Department’s decision clearly earmarks appellants’ request for a mitigated penalty based on, in part, its “nearly four and one-half years discipline-free history” (Decision at p. 6.) The Department further considers that history, along with appellants’ other mitigation evidence, and reduces appellants’ penalty to ten days from the standard 15-day suspension. (*Id.* at p. 7.) This Board cannot say that the Department abused its discretion by failing to reduce the penalty more.

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 five days more than what appellants received. Rule 144 allows the Department to exercise discretion to consider aggravation and mitigation. The Department clearly considered all of appellants’ mitigation evidence in determining the

penalty. The fact that appellants' mitigation evidence was not afforded more weight does not constitute 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
SHARLYNE PALACIO, 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 ACCUSATION
AGAINST:**

7-ELEVEN, INC., AND MANN CONVENIENCE
STORES, INC.
7-ELEVEN STORE 21792E
403 THIRD AVENUE
CHULA VISTA, CA 91910-4602

OFF-SALE BEER AND WINE - LICENSE

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

SAN DIEGO DISTRICT OFFICE

File: 20-551410

Reg: 20089870

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 September 16, 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 November 16, 2020, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: October 6, 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:

7-Eleven Inc., and Mann Convenience Stores, Inc.	}	File: 20-551410
Dbas: 7-Eleven Store 21792E	}	
403 Third Avenue	}	Reg.: 20089870
Chula Vista, California 91910-4602	}	
	}	License Type: 20
Respondents	}	
	}	Word Count: 14,300
	}	
	}	Reporter:
	}	Brywn Whatford
	}	Kennedy Court Reporters
	}	
<u>Off-Sale Beer and Wine License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at San Marcos, California, on June 18, 2020.

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

Adam Koslin, Attorney, represented Respondents, 7-Eleven Inc., and Mann Convenience Stores, Inc.

The Department seeks to discipline the Respondents' license on the grounds that, on or about August 1, 2019, the Respondents-Licensees' agent or employee, Martha Luna-Mendez, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Josimar Gonzalez, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 1.) At the hearing the Department moved to amend the accusation by interlineation to read, "Martha Luna-Mendez," instead of "Martha Luna-Martinez." There was no objection and the accusation was so amended pursuant to Government Code Section 11507.

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 June 18, 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 or about March 4, 2020.
2. The Department issued a type 20, off-sale beer and wine license to the Respondents for the above-described location on February 9, 2015 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Josimar Gonzalez (hereinafter referred to as decoy Gonzalez) was born on September 19, 2000. On August 1, 2019, he was 18 years old. On that date he served as a minor decoy in an operation conducted by the Chula Vista Police Department (Chula Vista PD) in conjunction with the Department.
5. Decoy Gonzalez appeared and testified at the hearing. On August 1, 2019, he was 5'8" tall and weighed 120 pounds. He wore a white t-shirt, blue jeans, black Vans shoes and eye glasses. (Exhibits 3 and 4.) His appearance at the hearing was the same.
6. On August 1, 2019, Chula Vista PD Detective Casey entered the Licensed Premises, followed shortly thereafter by decoy Gonzalez. Decoy Gonzalez walked straight to the alcoholic beverage refrigerators and selected a three-pack of Coors Light beer, which he brought to the sales counter.
7. Decoy Gonzalez placed the three-pack of Coors Light beer upon the sales counter. Clerk Martha Luna-Mendez (hereinafter clerk Martha) scanned the three-pack of Coors Light beer. A yellow screen appeared on the register monitor advising the clerk to "ID 30 AND UNDER. MUST BE 21 TO PURCHASE. 1. PICTURE ON I.D. MUST MATCH THE CUSTOMER. 2. SCAN OR SWIPE I.D. OR IF BIRTHDATE IS ON OR BEFORE 08-01-98 PRESS [MANUAL ENTER]" with three options at the bottom from which to select "Manual Enter," "Visual ID OK," or "Exit." (Exhibits 5A and 5B.) Clerk Martha asked the decoy for his identification (ID). Decoy Gonzalez handed her his valid California ID Card, which has a vertical orientation, depicts his correct date of birth and includes a red stripe which reads, "AGE 21 IN 2021." (Exhibit 2.) Clerk Martha did not ask the decoy any age-related questions or questions about his ID. Clerk Martha looked at the ID for a couple of seconds and then returned it to the decoy, proceeded with the sale and told the decoy the cost of the beer. Decoy Gonzalez gave clerk Martha money and paid for the three-pack of Coors Light beer. Decoy Gonzalez exited the store with the three-pack of Coors Light beer. Detective Casey stood to the left and behind the decoy during the above-described sales transaction, approximately two feet away. Decoy Gonzalez did not communicate with Detective Casey while he was inside the premises. Detective Casey exited the store soon after the decoy.

8. Decoy Gonzalez re-entered the Licensed Premises with Detective Van Houten and a Department agent. Detective Van Houten asked the decoy to identify which of the two clerks had sold alcohol to him, and he identified clerk Martha. Detective Van Houten approached clerk Martha and asked her to step away from the cash register and go to the back room of the premises to speak. Detective Van Houten, clerk Martha and decoy Gonzalez walked to the back office of the premises. Detective Van Houten asked decoy Gonzalez to identify the person who sold him the alcohol. Decoy Gonzalez pointed at clerk Martha and identified her as the person who sold him the three-pack of Coors Light beer. Decoy Gonzalez and clerk Martha were standing approximately three feet apart at the time of this identification, with nothing between them. Detective Van Houten took a photograph of clerk Martha and decoy Gonzalez after the face-to-face identification, with decoy Gonzalez holding the three-pack of Coors Light beer in his left hand, and his California ID Card in his right hand, while standing next to clerk Martha. (Exhibit 4.)

9. Detective Van Houten issued a citation to clerk Martha after the face-to-face identification. (Exhibit A.) There was no evidence clerk Martha was distracted during the sales transaction or the face-to-face identification. Clerk Martha did not appear at the hearing.

10. Decoy Gonzalez appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of clerk Martha at the Licensed Premises on August 1, 2019, decoy Gonzalez 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 Gonzalez has a youthful appearance.

11. August 1, 2019, was the first day of decoy operations in which decoy Gonzalez participated. On that date, decoy Gonzalez visited approximately six establishments, with only the Licensed Premises selling alcoholic beverages to him.

(Respondents' Witness)

12. Jasbir Singh appeared and testified at the hearing. Mr. Singh works at the Licensed Premises six days a week, from 6:00 a.m. to 2:00 p.m. Mr. Singh has been the manager at the Licensed Premises since 2014. As the manager his duties include training new hires on how to use the cash register point of sale (POS) system. New employees are taught to look at the date of birth on customer IDs to make sure they are of legal age (21 or over) to purchase age-restricted products, and to either manually enter a date of birth on the cash register keyboard or swipe the ID in the register. Clerks also had the option to press the "Visual ID OK" button after they looked at the date of birth on the ID and determined the person was age-appropriate to purchase age-restricted products. By

pressing the “Visual ID OK” button this allows the sale to go through without performing the other options. Mr. Singh reminds Respondents’ clerks daily to check customer IDs for age-restricted product sales. Mr. Singh had trained clerk Martha when she was hired, which was approximately in January or February of 2019. Mr. Singh acknowledged that Martha Luna-Mendez was the clerk who had sold alcoholic beverages to decoy Gonzalez in the Licensed Premises on August 1, 2019. Mr. Singh questioned clerk Martha about the said sale. Clerk Martha claimed she did not know what happened. Mr. Singh said that most likely clerk Martha pressed the “Visual ID OK” button, which enabled the sale of alcohol to the minor decoy.

13. At some unknown date after August 1, 2019, Mr. Singh discussed with Bhubinder Singh, to whom he referred as the owner of the Licensed Premises, about removing the “Visual ID OK” button to ensure no other clerk used that command to prevent future sales of alcohol to minors. Mr. Singh did not know when the “Visual ID OK” button was removed but claimed that Bhubinder Singh removed the button sometime after this said discussion. This was the only change the Respondents made after the said violation of August 1, 2019. On June 15, 2020, Mr. Singh took a photograph of the Respondents’ register monitor, after scanning an alcoholic beverage, to show the yellow screen no longer has the “Visual ID OK” button as an option and only the “Manual Enter” and “Exit” buttons remain. (Exhibit B.) Mr. Singh said that this change leaves the Respondents’ clerks with the options of either swiping the customer’s ID in the register or manually entering the customer’s date of birth for age-restricted product sales. Mr. Singh acknowledged that with the “Manual Enter” button a clerk could enter “any” birthdate.

14. The Respondents participate in a secret shopper program every three to four months, which sends undercover persons to the Licensed Premises to attempt to purchase age-restricted merchandise to see if the Respondents’ clerks are asking for customer IDs. If a clerk asks the secret shopper for an ID, the clerk is given a green card. If a clerk fails to ask the secret shopper for an ID the clerk is given a red card. The only way Mr. Singh learns whether Respondents’ clerks receive a red or green card is if the clerk provides the same to him the following day after they receive it. Mr. Singh has received green cards from Respondents’ clerks, which are posted on a wall in the premises. Other than the clerks informing Mr. Singh about receiving a card there is no other system for Mr. Singh to check to determine what color cards, if any, clerks receive through the secret shopper program. To Mr. Singh’s knowledge the Respondents’ clerks have not received red cards. There was no evidence of any policy in place or discipline should clerks receive a red card or sell an age-restricted product to a minor. There was no evidence whether clerk Martha was disciplined, still worked at the Licensed Premises or whether she was fired for the sale of alcohol to decoy Gonzalez.

15. The Licensed Premises received on February 27, 2020, an ABC-341 letter for having successfully prevented the sale of alcoholic beverages to a minor decoy. (Exhibit C.)
16. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.
2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.
3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.
4. Cause for suspension or revocation of the Respondents' license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on August 1, 2019, the Respondents-Licensees' employee, clerk Martha Luna-Mendez, inside the Licensed Premises, sold alcoholic beverages, to-wit: a three-pack of Coors Light beer, to Josimar Gonzalez, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-12.)
5. The Respondents argued the decoy operation at the Licensed Premises failed to comply with rule 141(b)(5)², and, therefore, the accusation should be dismissed pursuant to rule 141(c).
6. With respect to rule 141(b)(5), the Respondents argued there was a discrepancy between the testimony of detective Van Houten, who initially testified after refreshing her recollection, the minor decoy operation began at 1850 hours, and decoy Gonzalez, who testified, based on refreshing his recollection from a statement he wrote, that the operation began at 2050 hours. The Respondents argued that if the operation began at 1850 hours, per Detective Van Houten's testimony, and the citation was written at 1851 hours then the citation occurred just one minute after the operation began and could not have been issued after the face-to-face identification since the decoy testified that after

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

the sales transaction he estimated he re-entered the premises three minutes later and then the face-to-face identification occurred.

7. This rule 141(b)(5) argument is rejected as without merit. The credible testimony of Detective Van Houten maintained that she issued the citation to clerk Martha Luna-Mendez after the face-to-face identification. Detective Van Houten further credibly maintained that she based her testimony on personal knowledge and that the time frames given were approximations and not exact times. Detective Van Houten testified that when she and the Chula Vista PD officers write their reports they use approximations because the time is not logged and they do not “have a minute-by-minute time log.” She further clarified upon re-direct that the 6:50 p.m. time frame to which she testified related to the time of arrest of Martha Luna-Mendez, and that while writing the citation Detective Van Houten probably looked at her watch when she wrote 1851 on the citation. Finally, it should be noted that both Department witnesses testified credibly. The minor differences in the testimony of these two witnesses do not call into question either’s credibility. No two people will use the exact same words to describe the same event—word choice, distance and time estimates, and so forth will naturally vary from person to person.

PENALTY

The Department requested the Respondents’ license be suspended for a period of 15 days, given the decoy’s age and youthful appearance. The Department argued the Respondents’ argued-for mitigation was insubstantial because they only made one change after the said violation, which was to remove the “Visual ID OK” button. The Department further argued aggravation was present because there was circumstantial evidence clerk Martha had intentionally sold alcohol to decoy Gonzalez and knowingly violated the law because she held a vertical minor’s ID which had the decoy’s date of birth in red, along with a red bar indicating he would not be 21 until the year 2021.

The Respondents argued that, if the accusation were not dismissed, a mitigated penalty was warranted. The Respondents recommended a 5-day penalty based on the Respondents’ nearly four and one-half years discipline-free history and the testified-to removal of the “Visual ID OK” button, Mr. Singh’s daily reminders to clerks to check IDs, and Respondents’ new hire training, receipt of secret shopper program green cards and multiple “successful letters.”

In assessing an appropriate measure of discipline, the Department’s penalty guidelines are in California Code of Regulations, Title 4, Division 1, Article 22, section 144, commonly referred to as 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. Rule 144 also permits imposition of a revised penalty based on the presence of aggravating or mitigating factors.

Since clerk Martha did not testify, it is impossible to determine why she performed as she did. There is no evidence of the clerk's state of mind in making the sale—whether she intentionally ignored the facts in front of her or simply made a mistake is a matter of conjecture. In the absence of such evidence, no aggravation or mitigation is warranted in that regard. However, aggravation is warranted for the decoy's actual age and youthful appearance.

As to mitigation, the Respondents had over four years and five months discipline-free operation and had removed the "Visual ID OK" button believing that was the cause of the problem relating to the violation of August 1, 2019. The Respondents are commended for their discipline-free history and removal of the said button. However, while some weight is given for the remedial step of removing the "Visual ID OK" button, it is reduced for the following reason. As for when the "Visual ID OK" button was removed Mr. Singh's testimony the button was changed near the violation date was not credible. Upon cross-examination Mr. Singh claimed various time frames when the change was made. Finally, during re-direct Mr. Singh admitted, "honestly I don't even remember that time." All Mr. Singh could competently testify to was to reply, "Yes," when he was asked had the Respondents changed their register "since" August 1, 2019. Exhibit B is the only credible evidence that as of June 15, 2020, the "Visual ID OK" button had been removed from the Respondents' POS system. Based on the weight of the evidence it is more probable the said button was removed on or about June 15, 2020. While, June 15, 2020, falls under the time frame of "since" August 1, 2019, it is well after both the violation and accusation filing dates; and just three days before the hearing date. It appears the change was made in anticipation of the hearing rather than as a remedial measure to correct the problem. Nonetheless, some small measure of weight is given for its removal.

The Respondents' other argued-for mitigating factors are compromised as well. The fact the Respondents' clerks received green cards through the secret shopper program does not warrant mitigation since clerk Martha would have received a green card for asking decoy Gonzalez for his ID despite selling alcohol to him anyway. The Respondents' claim that they received no red cards is not credible given Mr. Singh's admission that he relies on the clerks informing him of whether they receive green or red cards, and since there is no other system by which he can verify what color, if any cards, the clerks receive through the secret shopper program. The Respondents' claim that they received four to five "successful" letters prior to August 1, 2019, is not credible given Mr. Singh's inconsistent testimony, inability to recall material matters about which he testified and Respondents' failure to produce the same. Mr. Singh initially testified that no other minor decoy operations occurred at the Licensed Premises. When pressed by Respondents'

counsel Mr. Singh replied, "I don't recall honestly, not to my knowledge - no I wasn't there." When asked a third time, Mr. Singh claimed the Respondents had received "many, many, at least four or five" prior to August 1, 2019. If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust. (Evidence Code, section 412.) As such, it is found the Respondents did not receive any other "successful" letters other than the ABC-341 produced at the hearing. (Exhibit C.)

There was no evidence of documented training or that the Respondents retrained their employees, either after hire or after the said violation. There was no evidence the Respondents disciplined clerk Martha or took any other steps other than removing the "Visual ID OK" button. The Respondents continued to train new employees and remind employees daily to check ID's as they had done prior to the said violation. While some of the points discussed above are not enumerated aggravating factors under Rule 144, they provide some small analysis of the penalty.

The penalty recommended herein complies with rule 144.

ORDER

The Respondents' off-sale beer and wine license is hereby suspended for a period of 10 days.

Dated: July 22, 2020


D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By:  _____
Date: <u>07/22/20</u>