

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

AB-9896

File: 20-600800; Reg: 20089764

7-ELEVEN, INC. and ASIM BUTT,
dba 7-Eleven Store #16525D
67510 Ramon Road
Cathedral City, CA 92234,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: May 7, 2021
Telephonic

ISSUED MAY 10, 2021

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

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

OPINION

7-Eleven, Inc. and Asim Butt, doing business as 7-Eleven Store #16525D (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 15 days because their clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code² section 25658(a).

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

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

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on October 15, 2019.

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

On February 10, 2020, the Department filed a single-count accusation against appellants charging that, on November 20, 2019, appellants' clerk, Xavier Ocegueda (the clerk), sold an alcoholic beverage to 19-year-old Areli Rodriguez (the decoy).

Although not noted in the accusation, the decoy was working for the Cathedral City Police Department (CCPD) in conjunction with the Department at the time.

At the administrative hearing held on August 11, 2020, documentary evidence was received, and testimony concerning the sale was presented by the decoy and Department Agent Danny Bergara. The clerk and Tyler Chavez, a sales associate at the licensed premises, testified on appellants' behalf.

Evidence established that on November 20, 2019, the decoy entered the licensed premises, walked to the alcoholic beverage coolers, and selected a three-pack of Bud Light Beer. The decoy brought the beer to the sales counter, where she presented it to the clerk for purchase. The clerk asked the decoy for her identification, and the decoy handed him her valid California ID card, which had a vertical orientation, depicted her correct date of birth in red lettering, and included a red stripe which stated: "AGE 21 IN 2020." (Exh. 2.) The clerk looked at the ID and then handed it back to the decoy. The clerk did not ask the decoy about her age. Rather, the clerk pressed the "Visual ID OK" button, which bypassed the safety protocol of the point-of-sale system and allowed the sales transaction to be completed. The decoy paid for the beer and exited the store.

The decoy re-entered the store a short time later with another officer, who asked her to identify the individual who sold her the beer. The decoy identified the clerk as the person who sold her the beer. A photograph was taken of the clerk and the decoy standing together. (Exh. 5.)

The administrative law judge (ALJ) issued a proposed decision on September 15, 2020 sustaining the accusation and recommended a 15-day suspension. The Department adopted the proposed decision in its entirety on November 24, 2020 and issued a certificate of decision on December 7, 2020.

Appellants filed a timely appeal contending the Department's finding, that the decoy's physical appearance was generally expected of a person under the age of 21, was not supported by the evidence. Appellants further contend that the Department abused its discretion by imposing a 15-day suspension on its license.

DISCUSSION

I

SUBSTANTIAL EVIDENCE

Appellants contend that the Department's finding that the decoy's appearance complied with rule 141(b)(2)³ is not supported by substantial evidence. (AOB, at pp. 8-12.) Specifically, appellants argue that the ALJ improperly relied on the decoy's appearance at the hearing, rather than on the day of the operation (*id.* at pp. 8-10) and that the decoy's mannerisms and demeanor, "particularly prior law enforcement experience," gave the decoy an appearance not generally expected of a person under 21 years old. (*Id.* at p. 11.)

³ All references to rule 141 and its subdivisions are to title 4 of the California Code of Regulations unless otherwise noted.

Rule 141(b)(2) provides:

The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense.

This rule provides an affirmative defense, and the burden of proof lies with appellants.

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

Here, the Department found that the decoy's appearance complied with rule 141(b)(2). (Conclusions of Law ¶¶ 6-8.) 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 appearance did not comply with rule 141(b)(2). The Department found that the decoy

“has a youthful appearance, not only as exhibited in-person at the hearing, but before clerk Ocegueda, as depicted in Exhibits 3, 4 and 5 which were taken on the date of and during the decoy operation.” (Conclusions of Law, ¶ 7.) The Department further noted that, although the clerk testified he believed the decoy to be over 21 years old, based on her demeanor and because he read her birthdate wrong, the clerk “provided inconsistent testimony and his self-serving statements [were] given little weight” (*Id.* at ¶ 10.) As noted 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 several photographs of the decoy from the day of the operation. (Exhs. 3-5; Findings of Fact, ¶ 5.) 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. The evidence established that the decoy’s “appearance at the hearing was the same [as the date of the operation], except she had light brown high-lights in her hair which appeared near the bottom length of her hair.” (Findings of Fact, ¶ 5.)

The Department is entitled to rely on an ALJ’s personal observations of a decoy when the decoy testifies that his appearance and mannerisms were “the same on the stand as it was when he purchased the beer.” (*Southland, supra*, 103 Cal.App.4th at 1094.) The Board sees no error with the Department’s findings regarding the decoy’s appearance, which are supported by the photographs of the decoy from the date of the

operation, as well as the ALJ's personal observations of the decoy at the hearing. Both sources are "reasonable in nature, credible and of solid value." (*County of Los Angeles, supra*, 32 Cal.App.4th at 814.)

Finally, the Board sees no error in the Department rejecting the clerk's testimony that the "decoy's demeanor, decoy or explorer experience" impacted her appearance "while she was inside the Licensed Premises," causing him to make the sale. (Conclusions of Law, ¶ 12.) Under Evidence Code section 780, the ALJ is the trier of fact and determines, among other things, a witness' credibility. It was entirely within the ALJ's purview to determine that the clerk was not credible. Additionally, as the Department noted, "[n]ot all minors are alike. Minors can exhibit any number of characteristics, some can be confident and other nervous, just as they can present with any shape or size." (*Ibid.*)

Based on the above, the Department's findings regarding the decoy's appearance must stand. Ultimately, appellants are asking this Board 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

Appellants contend their 15-day penalty is unreasonable, and that the Department should reconsider it on the grounds that the Department disregarded its mitigation evidence. (AOB, at pp. 12-15.) In other words, appellants believe their 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 exactly the penalty appellant received here. (Cal. Code Regs., tit. 4, § 144.) Nevertheless, 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 from the standard 15-day suspension. (AOB, at pp. 12-15.) Specifically, appellants claim that the Department ignored “documented training of its employees and the mitigation weight (if any) provided.” (*Id.* at p. 14.) In its decision, the Department stated “[i]t is not clear that any of these [training] measures are effective in preventing sales to minors given the Respondents’ clerks are still able to bypass all of these measures by pressing the ‘Visual ID OK’ button.” (Decision at p. 11.) Based on the Department’s reasoning, the Board cannot say that the Department abused its discretion.

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 what appellants received. Rule 144 also allows the Department to exercise discretion to consider aggravation and mitigation. The Department’s rejection of appellants’ mitigation evidence because their training program was overshadowed by the clerk’s ability to override the register’s point-of-sale system 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
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 ASIM BUTT
7-ELEVEN STORE 16525D
67510 RAMON ROAD
CATHEDRAL CITY, CA 92234-3392

OFF-SALE BEER AND WINE - LICENSE

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

PALM DESERT DISTRICT OFFICE

File: 20-600800

Reg: 20089764

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on November 24, 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 January 18, 2021, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: December 7, 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 Asim Butt	}	File: 20-600800
Dbas: 7-Eleven Store 16525D	}	
67510 Ramon Road	}	Reg.: 20089764
Cathedral City, California 92234-3392	}	
	}	License Type: 20
Respondents	}	
	}	Word Count: 16,023
	}	
	}	Reporter:
	}	Sandra Mitchell
	}	i-Depo 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 Riverside, California, on August 11, 2020.

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

Adam Koslin, Attorney, represented Respondents, 7-Eleven, Inc., and Asim Butt.

The Department seeks to discipline the Respondents' license on the grounds that, on or about November 20, 2019, the Respondents-Licensees' agent or employee, Xavier Ocegueda, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Areli Rodriguez, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on August 11, 2020.

FINDINGS OF FACT

1. The Department filed the accusation on February 10, 2020.

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

2. The Department issued a type 20, off-sale beer and wine license to the Respondents for the above-described location on October 15, 2019 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Areli Rodriguez (hereinafter referred to as decoy Rodriguez) was born on December 25, 1999. On November 20, 2019, she was 19 years old. On that date she served as a minor decoy in an operation conducted by the Cathedral City Police Department (Cathedral City PD) in conjunction with the Department.
5. Decoy Rodriguez appeared and testified at the hearing. On November 20, 2019, she was 5'2" tall and weighed approximately 135 pounds. She wore a black sweatshirt with attached hoody, black leggings and pink shoes. There was no evidence she wore the hoody on her head while inside the Licensed Premises. She wore her hair down, past her shoulders, with dark colored high-lights. She wore no jewelry and wore only eye liner for make-up. (Exhibits 3, 4 and 5.) Her appearance at the hearing was the same, except she had light brown high-lights in her hair which appeared near the bottom length of her hair.
6. On November 20, 2019, Department Agent Vergara and another officer entered the Licensed Premises, with decoy Rodriguez entering shortly thereafter. Decoy Rodriguez walked down some aisles and looked at the merchandise. She then walked to the alcoholic beverage coolers, where she selected a three-pack of Bud Light beer. Decoy Rodriguez brought the three-pack of beer straight to the sales counter.
7. Decoy Rodriguez placed the three-pack of Bud Light beer upon the sales counter in front of clerk Xavier Ocegueda (hereinafter referred to as clerk Ocegueda). Clerk Ocegueda asked decoy Rodriguez for her identification (ID). Decoy Rodriguez handed the clerk her valid California ID Card, which has a vertical orientation, depicts her correct date of birth in red lettering and includes a red stripe which reads, "AGE 21 IN 2020." (Exhibit 2.) Clerk Ocegueda looked at the date of birth on the ID and gave the ID back to the decoy. The clerk did not ask decoy Rodriguez her age. Clerk Ocegueda pressed the "Visual ID OK" button, which bypassed the safety protocol of the point of sale (POS) system and allowed the sales transaction to be completed. Decoy Rodriguez paid for the three-pack of Bud Light beer, which she took with her as she exited the store. Agent Vergara witnessed and heard the above sales transaction with a clear, unobstructed view from approximately 10 feet away. While inside the Licensed Premises decoy Rodriguez did not communicate with anyone other than the clerk.
8. Decoy Rodriguez re-entered the Licensed Premises with an officer who asked her to identify who sold her the beer. Decoy Rodriguez identified clerk Ocegueda as the person who sold her the three-pack of Bud Light beer. Decoy Rodriguez and clerk Ocegueda

were standing less than a few feet apart, with no obstructions between them, at the time of this identification. A photograph of clerk Ocegueda and decoy Rodriguez was taken after the face-to-face identification. (Exhibit 5.)

9. A citation was issued to clerk Ocegueda after the face-to-face identification. There was no evidence that clerk Ocegueda was distracted during the sales transaction or the face-to-face identification.

10. Agent Vergara asked clerk Ocegueda to show him how he completed the sales transaction with the decoy. After scanning the alcohol 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 11-20-98 PRESS [MANUAL ENTER]." The screen also provided three options at the bottom from which to select, "Manual Enter," "Visual ID OK," or "EXIT." (Exhibit 6.) Clerk Ocegueda admitted he pressed the "Visual ID OK" button, which enabled the sale of alcohol to the decoy. Clerk Ocegueda claimed he misread the decoy's birth year as 1998, and thought the decoy was over 21.

11. Decoy Rodriguez appeared her age at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of clerk Ocegueda at the Licensed Premises on November 20, 2019, decoy Rodriguez 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, at the hearing, decoy Rodriguez had a youthful appearance and appeared her age. Decoy Rodriguez was a little nervous at the hearing and testified based on her independent recollection of the events of the minor decoy operation.

12. November 20, 2019, was decoy Rodriguez' third decoy operation. Decoy Rodriguez learned about the decoy program through her service as a police explorer with the Cathedral City PD. As part of the explorer program decoy Rodriguez participated in a few competitions involving fitness and tactical operations. As an explorer she has worn a uniform. Her training in the explorer program taught her to be respectful toward the community when interacting with the public, which training she has used in her personal life.

13. On November 20, 2019, decoy Rodriguez visited seven establishments, with three having sold alcoholic beverages to her, including the Licensed Premises.

(Respondents' Witnesses)

14. Tyler Chavez appeared and testified at the hearing. Mr. Chavez has been working as a sales associate for the Respondents since the beginning of September 2019. As a sales associate² he stocks shelves, works the register, and “pretty much [does] everything around the store.” New-hire employees are trained on-line through a video program which includes instruction on how to avoid sales of age-restricted products to minors and how to spot a fake ID. Employees are taught to ask for the ID of anyone appearing 30 years of age and under, to match the picture on the ID with the customer, and to swipe or scan the ID to ensure it is valid and the customer is of legal age to purchase the age-restricted merchandise. After completion of the on-line training, the employee is required to sign an acknowledgement of completion of the training and knowledge thereof. (Exhibit B - “Age-Restricted Product Sales Acknowledgement Form Store # 16525.”) That form specifically provides “Associates will not be permitted to over-ride the system procedures” and advises that, “Any associate who knowingly sells age-restricted products to a minor will be terminated.” Thereafter employees receive weekly reminders by the manager, and occasionally the “owner,” to check the IDs of customers appearing under the age of 30. There are no current measures the manager or owner take to check whether Respondents’ employees are asking for IDs other than relying on the sales associates to self-monitor each other and the Respondents’ participation in a secret shopper program.

15. In the secret shopper program an undercover person visits the Licensed Premises every other month, approximately twice a month, to (1) attempt to purchase age-restricted merchandise to see if the Respondents’ clerks are asking for customer IDs, and (2) to see if sales associates “up-sale” merchandise in the store and are complying with other non-alcohol related policies. If a secret shopper attempts to purchase an age-restricted product and 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 relating to an age-restricted product the clerk is given a red card. The only way the Respondents know whether its sales associates receive a red or green card for age-restricted attempted sales is if the sales associate informs the manager or owner thereof, or the manager occasionally reviews the video surveillance footage. If the sales associate informs the manager/owner that they received a red card the associate will be required to retake the portion of the training relating to age-restricted sales. Mr. Chavez has never been on the cash register when a secret shopper was in the store. The Respondents produced a black and white photocopy of five green cards, some marked 2018, or 2019, and others with no dates. (Exhibit A.) Mr. Chavez did not know whether all of the green cards in Exhibit A were from the Licensed Premises or from the owner’s other licensed premises, but Mr. Chavez did recognize one

² While the word sales associate is used throughout the decision it also includes the term clerk(s).

of the green cards as coming from the Licensed Premises.³ He said it was difficult to recognize any other green card because the exhibit was a black and white photocopy.

16. Mr. Chavez said he is not aware of any policy regarding the use of the “Visual ID OK” button on the yellow screen prompt which appears when an age-restricted product is scanned at the register. The screen prompt provides a specific date of birth the customer must be born on or before to legally purchase age-restricted products or to be considered 21 years of age or older. Mr. Chavez’ understanding is that sales associates are not supposed to use the “Visual ID OK” button. Mr. Chavez recalled asking the manager what to do with a broken ID or ID that would not scan or swipe. He was told the sales associates are permitted to press the “Visual ID OK” button when an ID is broken and/or will not swipe or scan, and the associates have matched the picture on the ID with the customer, checked the birthdate to ensure the customer is age-appropriate for the sale, and made sure the ID is not expired. Mr. Chavez chooses to refuse the sale of an age-restricted product if an ID appears to be in good shape but will not scan or swipe because he presumes the ID is a fake. Sales associates will use the “Manual Enter” key option to enter the birthdate from a customer’s passport.

17. Xavier Ocegueda appeared and testified at the hearing. Mr. Ocegueda worked for the Respondents as a sales associate for 13 months and left that employment on June 9, 2020. As a new hire for the Respondents he took the on-line video training and signed the above-referenced acknowledgment form on June 6, 2019. (Exhibit B.) As a sales associate Mr. Ocegueda worked on the cash register, stocked shelves, as well as checked deliveries and orders. During his employment with the Respondents he recalled several times being approached by minors attempting to purchase alcohol, at which times he said he refused the sales. He said he noticed the minors would be “a little bit more antsy, would be a little more talkative, and go about it, maybe trying to take the focus away from me asking for [their] ID or taking away the focus from the purchase itself, but then there’s a red flag,” so he would ask to see their ID and then by “the shock on their face already indicates that they probably don’t have [an ID] and they tell me they don’t, and I say unfortunately I can’t go on with the sale.”

18. Mr. Ocegueda recalled decoy Rodriguez, her ID (Exhibit 2) and the sales transaction of November 20, 2019. Mr. Ocegueda said he recalled seeing decoy Rodriguez for the first time that date when she approached his register with the three-pack of Bud Light beer. He said that to him, the decoy “looked pretty nonchalant, more laid back, more confident I guess,” and she did not hesitate when he asked for her ID but said “sure.” She did not appear nervous or overly talkative like the other minors he had experience with. He looked at the birthdate on her ID and claimed he mistakenly read 1998 as the birth year instead of 1999. He claimed he thought she was over 21, at least, in part because of

³ Mr. Chavez drew a red arrow to the green card which he recognized on Exhibit A.

her demeanor. He pressed the “Visual ID OK” button instead of scanning/swiping the ID along the register. He said by pressing that button it allowed him to be “able to make the sale happen.” Mr. Ocegueda recognized the yellow screen depicted on Exhibit 6 as the yellow prompt on Respondents’ POS system after scanning age-restricted merchandise.

19. Mr. Ocegueda’s manager spoke to him about the said sales transaction of November 20, 2019, and Mr. Ocegueda was required to retake the portions of the on-line computer video training relating to age-restricted sales. Mr. Ocegueda said during his employment with the Respondents he had taken the on-line training a total of twice, and on one occasion he took a paper version of the training. He testified that after each occasion the sales associates take the training, they are required to sign the “Age-Restricted Product Sales Acknowledgement Form.” Mr. Ocegueda acknowledged that he only signed this acknowledgment form once, on June 6, 2019. (Exhibit B.) There was no evidence that the Respondents addressed the problem relating to the sale at issue, specifically clerk Ocegueda’s use of the “Visual ID OK” option and their sales associates’ ability to continue to use the same. There was no evidence the Respondents removed the “Visual ID OK” button.

20. Mr. Ocegueda initially said he received multiple green cards through the secret shopper program and later said, “I can remember for sure” having passed the secret shopper program twice.

21. 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 November 20, 2019, the Respondents-Licensees’ employee, clerk Xavier

Ocegueda, inside the Licensed Premises, sold alcoholic beverages, to-wit: a three-pack of Bud Light beer, to Areli Rodriguez, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-9.)

5. The Respondents argued the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)⁴, and, therefore, the accusation should be dismissed pursuant to rule 141(c).

6. With respect to rule 141(b)(2), the Respondents argued decoy Rodriguez did not have the appearance of someone under the age of 21 because of certain factors including, (1) her prior decoy and police explorer experience, including having worn a uniform as an explorer and her testimony that her training in the explorer program taught her to be respectful toward the community when interacting with the public, which training she has used in her personal life, (2) three of seven premises sold alcohol to her, which while it represents slightly less than half of the premises visited, it is an elevated success rate and circumstantial evidence that a significant number of premises believed her to be of age, (3) the fact she was one month shy of her 20th birthday, the statutory maximum for minor decoys, and (4) citing Precedential Decision (PD) No. 19-02-E⁵ for a “relevant factor” of her demeanor before the selling clerk, who in this case testified about his experience with “actual minors” attempting to purchase alcohol who would be nervous, “more talkative” and try to take the focus off of the sale whereas the decoy did not exhibit those characteristics but appeared nonchalant and confident. The Respondents argued the decoy’s nervousness on the witness stand did not indicate her demeanor before the clerk on November 20, 2019.

7. This rule 141(b)(2) argument is rejected. There was no credible evidence that any of these alleged factors had any impact upon clerk Ocegueda discerning the appearance of the decoy. Clerk Ocegueda’s testimony and Respondents’ contentions otherwise are not credible, as discussed more fully below. There was nothing about decoy Rodriguez’ appearance, demeanor, police explorer or decoy experience which made her appear older than her actual age. Decoy Rodriguez has a youthful appearance, not only as exhibited in-person at the hearing, but before clerk Ocegueda, as depicted in Exhibits 3, 4 and 5 which were taken on the date of and during the decoy operation. Decoy Rodriguez looks her age regardless of whether she appears nervous or nonchalant and in control. In other words, decoy Rodriguez had the appearance generally expected of a person under the age of 21. (Findings of Fact ¶¶ 5, 8 and 11.)

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

⁵ *7-Eleven and Gytari*, Precedential Decision No. 19-02-E (April 12, 2019).

8. The Respondents' argument that three of seven premises sold alcohol to decoy Rodriguez is circumstantial evidence that a significant number of premises believed her to be of age is based on unsupported assertion and conjecture. There was no evidence as to why the two clerks at the other licensed premises sold alcohol to the decoy. Further, three out of seven is not a significant number.

9. In determining the credibility of a witness, as provided in section 780 of the Evidence Code, the administrative law judge may consider any matter that has any tendency in reason to prove or disprove the truthfulness of the testimony at the hearing, including the manner in which the witness testifies, the extent of the capacity of the witness to perceive, to recollect, or to communicate any matter about which the witness testifies, a statement by the witness that is inconsistent with any part of the witness's testimony at the hearing, the existence or nonexistence of any fact testified to by the witness, and the existence or nonexistence of a bias, interest, or other motive.

10. Clerk Ocegueda's contentions he believed decoy Rodriguez was over 21 years of age because in part due to her demeanor as well as his claim that he read her birth year wrong is disbelieved for the following reasons. Clerk Ocegueda provided inconsistent testimony and his self-serving statements are given little weight for the following reasons.

11. While PD No. 19-02-E discusses a decoy's demeanor as a subjective factor by which a clerk can gauge the appearance of a person, it also takes into consideration the totality of all factors present during the decoy operation, giving less evidentiary value to the decoy's demeanor than the generally more objective physical attributes of a decoy. Specifically, PD No. 19-02-E states, "a licensee seeking to meet its burden of establishing the affirmative defense under subdivision (c) may only rest on the language of Rule 141(b)(2). In doing so, if a decoy is actually under 20 years old at the time of the offense (as required by Rule 141(b)(1)), there is a rebuttable presumption that he or she had an appearance that could generally be expected of a person under the age of 21. Therefore, the licensee must provide actual, *substantial* evidence of indicia of appearing over the age of 21, under the actual circumstances presented to the seller at the time of the violation, to overcome such a presumption." The decision then discusses both the physical and non-physical aspects of a decoy's appearance. It points out that physical attributes of appearance are generally more objective. While non-physical aspects of a person's overall appearance, for example, "[h]ow a decoy speaks, acts, or presents himself or herself to a seller of alcohol *may* be relevant in evaluating that person's *overall appearance*[, h]owever, because these factors are inherently more subjective, they are generally of less evidentiary value."⁶

⁶ *7-Eleven and Gytari*, Precedential Decision No. 19-02-E (April 12, 2019) at p. 6 ¶7, and p. 9 ¶17. (Emphasis added by italics.)

12. The Respondents failed to provide substantial evidence of indicia of the decoy appearing over the age of 21 under the actual circumstances presented to clerk Ocegueda. For arguments sake, even if clerk Ocegueda found the decoy to be nonchalant and confident and compared the decoy's demeanor with the minors he had contact with in the past, which is not found credible, the Department counsel is correct, it is concerning that clerk Ocegueda should rely solely on one subset of minors. Not all minors are alike. Minors can exhibit any number of characteristics, some can be confident and others nervous, just as they can present with any shape or size. It is incredulous that clerk Ocegueda relied on his limited experience with talkative minors despite the youthful appearing minor before him who also presented her multi-red-flagged, vertical-oriented minor's ID. Clerk Ocegueda never said anything to the officers on the day of the operation about the decoy's demeanor or appearance (non-physical or physical aspects) as having any influence whatsoever on his decision to sell alcoholic beverages to the decoy. When given the opportunity to explain why he sold alcohol to the decoy, he only claimed to have misread the birth year as 1998 instead of 1999 as an explanation as to why he allegedly believed she was old enough to buy alcohol. Contrary to Respondents' assertions otherwise, these statements indicate clerk Ocegueda was not in any way misled by the minor's appearance (non-physical or otherwise). Had the decoy's demeanor played any role during the sales transaction that would have been what clerk Ocegueda would have told the officers. As such, there is no credible evidence that the decoy's demeanor, decoy or explorer experience had any impact upon the clerk discerning her appearance while she was inside the Licensed Premises.

13. Clerk Ocegueda's claim that he misread the decoy's birth year on her ID was also self-serving and not credible. Decoy Rodriguez' minor's ID had three red flags: the vertical-orientation, the red stripe reading, "AGE 21 IN 2020," and the red lettering depicting her birth date of "12/25/1999." Yet despite those red flags in addition to decoy Rodriguez' youthful appearance, clerk Ocegueda chose to bypass the Respondents' safety protocol. Even the Respondents' yellow screen prompt informed clerk Ocegueda that if the customer's birthdate is "ON OR BEFORE 11-20-98" only then could she legally purchase alcohol. If clerk Ocegueda truly misread the birth year, when looking at the birth date, even if he had read "12/25/1998," that date is *after* the prompt date given and as such he should have refused the sale. His inconsistent statements are disbelieved and found to be a motive at the time of the operation to save his employment. Based on the record, clerk Ocegueda was aware of Respondents' policies that, "Associates will not be permitted to over-ride the system procedures" and "Any associate who knowingly sells age-restricted products to a minor will be terminated." With clerk Ocegueda's deliberate use of the "Visual ID OK" over-ride function and said sale to the minor he knew his employment was subject to termination.

14. Clerk Ocegueda presented further inconsistent testimony throughout the giving of his testimony. For example, he initially said he received multiple green cards through the

secret shopper program and later admitted to remembering “for sure” having passed the secret shopper program twice. Another example was when he testified that employees sign the “Age-Restricted Product Sales Acknowledgement Form Store # 16525” (Exhibit B) after each occasion they take the Respondent’s training. Yet, he admitted to only signing one such form. (Exhibit B.) This puts in question whether he had any training other than his new hire training in June of 2019. Nonetheless, the undersigned gave the Respondents the benefit of the doubt in that regard.

15. Finally, while the Respondents cited non-compliance with rule 141(b)(2), during its argument Respondents mentioned the decoy being one month shy of the statutory maximum, which is a reference to rule 141(b)(1). In addressing that argument, there is no requirement that the minor decoy reach a certain time period prior to the age of 20 for there to be compliance with that rule. Rule 141(b)(1) states, “At the time of the operation, the decoy shall be less than 20 years of age.” Decoy Rodriguez was still 19 years old and had not yet turned 20 at the time of the operation. In summation, there was compliance with both rules 141(b)(1) and 141(b)(2).

PENALTY

The Department requested the Respondents’ license be suspended for a period of 15 days. The Department based this recommendation on aggravating factors of the decoys’ youthful appearance and actual age of 19. It also argued that mitigation is not warranted given the ineffective training and Respondents’ failure to take any other actions after the violation.

The Respondents argued that, if the accusation were sustained, a mitigated penalty of 10 days is warranted given, (1) the Respondents’ computerized training, re-training and requiring employees to sign an acknowledgment thereafter, (2) the disciplinary policy up to and including termination of employment for sales to minors, (3) the secret shopper program, (4) weekly reminders and screen prompt to check IDs, (5) as well as employees who self-police each other to check IDs. The Respondents further argued that clerk Ocegueda made a mistake, which single mistake is not indicative of a pattern. In rebuttal to the Department’s argument of the decoy’s actual age, the Respondents pointed out she was one month shy of her 20th birthday.

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, recognizing it is not an exhaustive list.

Addressing the Respondents' mitigation arguments: The Respondents are commended for having clerk Ocegueda retrained after the violation in age-restricted sales.⁷ Nonetheless, any further mitigation argued by the Respondents is compromised. Despite Respondents' policy, training, weekly reminders, secret shopper program, yellow screen prompt, and employees allegedly policing each other, clerk Ocegueda ignored all of it. It is not clear that any of these measures are effective in preventing sales to minors given the Respondents' clerks are still able to bypass all of these measures by pressing the "Visual ID OK" button. As for the secret shopper program, it would have rewarded clerk Ocegueda with a green card for having asked for decoy Rodriguez' ID, despite selling alcohol to her.

Regarding Respondents' argument that clerk Ocegueda made a mistake, pursuant to Mr. Chavez' testimony about Respondents' policy, sales associates are to match the picture on the ID with the customer, and to swipe or scan the ID to ensure it is valid and the customer is of legal age to purchase the age-restricted merchandise. The "Age-Restricted Product Sales Acknowledgement Form Store # 16525" (Exhibit B) specifically provides "Associates will not be permitted to over-ride the system procedures." The evidence established that Respondents' clerks were not trained on the use of the "Visual ID OK" button and were not supposed to use it, except under certain circumstances. Given the foregoing, there was no credible evidence why clerk Ocegueda used the "Visual ID OK" button when decoy Rodriguez' ID was not broken and there was no evidence it would not scan or swipe. The weight of the evidence established that clerk Ocegueda willfully violated Respondents' policy. The only mistake Mr. Ocegueda made was failing to comply with Respondents' policy. Had he done so, the sale of alcohol would not have been completed. Instead, he admitted he chose to press the "Visual ID OK" button to be "able to make the sale happen," in other words "over-ride the system procedures" rather than scan/swipe the decoy's ID as required. Mr. Ocegueda knew what he was doing; it was no mistake.

Irrespective of the foregoing, what is of concern is that the Respondents knew the sale to the decoy occurred because clerk Ocegueda pressed the "Visual ID OK" button. Yet, the Respondents failed to present evidence of any positive action by the licensee to correct the problem of the said sale. There was no evidence the Respondents' removed that button or implemented a policy specifically prohibiting its sales associates from using that bypass function.

While some of the points discussed above are not enumerated aggravating factors under Rule 144, they provide some small aggravation in the analysis of the penalty, countering any mitigation warranted. The penalty recommended herein complies with rule 144.

⁷ The undersigned gave the Respondents the benefit of the doubt in this regard, as discussed above.

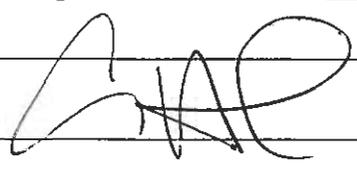
ORDER

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

Dated: September 15, 2020



D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: _____ 
Date: _____ 11/24/20