

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

AB-9897

File: 20-508457; Reg: 20089948

HZAZ, INC.,
dba Hzaz, Inc.
36001 Date Palm Drive
Cathedral City, CA 92234-1541,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: April 9, 2021
Telephonic

ISSUED APRIL 9, 2021

Appearances: *Appellant:* Alexandra Angel, of Solomon, Saltsman & Jamieson, as
counsel for Hzaz, Inc.,

Respondent: Alanna Ormiston, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

Hfaz, Inc., doing business as Hzaz, Inc. (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 15 days, because its clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code² section 25658(a).

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

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

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on April 25, 2011. There is one instance of prior departmental discipline against the license.

The Department filed a single-count accusation against appellant on March 26, 2020, charging that appellant's clerk, Europa Hernandez (the clerk), sold an alcoholic beverage to 19-year-old Areli Rodriguez (the decoy) on December 16, 2019. Although not noted in the accusation, the decoy was working for the Cathedral City Police Department (CCPD) at the time.

Documentary evidence and testimony were presented at the administrative hearing held on August 12, 2020. The decoy testified on behalf of the Department. Appellant did not present any witnesses.

Evidence established that on December 16, 2019, the decoy entered the licensed premises and walked to the alcoholic beverage coolers. She selected a three-pack of Bud Light beer in cans and brought it to the sales counter. The clerk did not ask the decoy for her identification or any age-related questions. The clerk proceeded with the sales transaction and told the decoy the cost of the beer. The decoy paid for the beer and received her change and a receipt from the clerk. The decoy then exited the store.

The decoy re-entered the licensed premises with an officer who asked her to identify who sold her the beer. The decoy identified the clerk while they were standing a few feet apart and facing each other. A photograph of the clerk and the decoy were taken together, while the decoy was holding the three-pack of Bud Light beer. (Exh. 5.)

At the time of the sale, the decoy was five feet, two inches tall and weighed approximately 137 pounds. She wore a green cardigan sweater over a purple shirt,

with black leggings and pink shoes. Her hair was straightened, with two-inch black roots and lighter highlights running the length of her hair, which fell just past her shoulders. She wore black bodycam eyeglasses. (Exhs. 3 and 5.) Her appearance at the hearing was the same, except she did not wear the glasses and her highlights had grown out and appeared near the bottom length of her hair.

The administrative law judge (ALJ) issued a proposed decision on September 17, 2020, recommending that the Department sustain the accusation and suspend appellant's license for 15 days. The Department adopted the proposed decision in its entirety on November 24, 2020 and issued a certificate of decision on December 7, 2020. Appellant filed a timely appeal contending that the Department's finding that the decoy displayed an appearance generally expected of a person under 21 years of age was not supported by substantial evidence.

DISCUSSION

Appellant contends that the ALJ's finding that the decoy's appearance complied with rule 141(b)(2)³ is not supported by substantial evidence. (AOB, at pp. 5-8.) Specifically, appellant argues that the Department's findings are "impermissibly based on the appearance of the decoy at the hearing, rather than how the decoy appeared before the seller, or even how she appeared on the day of the operation." (*Id.* at pp. 5-6.) Appellant further argued that the decoy's "non-physical" characteristics, such as her experience and demeanor, were "out of the ordinary for a person under 21 years of age." (*Id.* at p. 8.)

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 ¶ 7.) 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 appellant's arguments that the decoy's appearance failed to comply with rule 141(b)(2). The Department found that "[t]here

was nothing about decoy Rodriguez's appearance, hair high-lights, demeanor, police or decoy explorer experience which made her older than her actual age." (Conclusions of Law, ¶ 7.) The Department further noted that "[i]n-person, *and in the photographs taken of her on the date of the operation*, decoy Rodriguez looks [19-years-old]." (*Ibid* [emphasis added].) 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 two photographs of the decoy from the day of the operation. (Exhs. 3 and 5; Findings of Fact, ¶¶ 5 and 8.) 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 ALJ found the decoy credibly testified that "[h]er appearance at the hearing was the same, except she did not wear the glasses and her high-lights had grown out and 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 her 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, the decoy's testimony, and the ALJ's personal observations of the decoy at

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

Appellant further contends that certain non-physical factors, such as the decoy’s demeanor and law enforcement experience, made her appear older than 21 years old. (AOB at pp. 7-8.) However, there is no evidence in the record that the clerk sold alcohol to the decoy based on her experience or demeanor. In this matter, the clerk did not testify. Thus, there is no evidence as to why the clerk sold beer to the decoy, much less any evidence to establish that the clerk’s error was the result of the decoy’s demeanor or experience.

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.)

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:**

HZAZ, INC.
HZAZ, INC.
36001 DATE PALM DRIVE
CATHEDRAL CITY, CA 92234-1541

OFF-SALE BEER AND WINE - LICENSE

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

PALM DESERT DISTRICT OFFICE

File: 20-508457

Reg: 20089948

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:

| | | |
|---------------------------------------|---|---------------------------------|
| HZAZ, Inc. | } | File: 20-508457 |
| Dbas: HZAZ, Inc. | } | |
| 36001 Date Palm Drive | } | Reg.: 20089948 |
| Cathedral City, California 92234-1541 | } | |
| | } | License Type: 20 |
| Respondent | } | |
| | } | Word Count: 4,324 |
| | } | |
| | } | Reporter: |
| | } | Deborah Morin |
| | } | 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 12, 2020.

Alanna Ormiston, Attorney, represented the Department of Alcoholic Beverage Control (the Department).

Adam Koslin, Attorney, represented Respondent, HZAZ, Inc.

The Department seeks to discipline the Respondent's license on the grounds that, on or about December 16, 2019, the Respondent-Licensee's agent or employee, Europa Hernandez, 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.) At the start of the hearing the Department moved to amend the accusation under the first line of disciplinary history to read a violation date of "02/05/2019," for violation of "B&P 23790.5(d)(1)" and penalty of "POIC in lieu of 10-day suspension."² There was no objection and the accusation was so amended.

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

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

² The accusation, prior to the amendment, had a violation date of "02/05/2020," code section of "23790.5(d)(a)" and a penalty of "Pending."

August 12, 2020.

FINDINGS OF FACT

1. The Department filed the accusation on March 26, 2020.
2. The Department issued a type 20, off-sale beer and wine license to the Respondent for the above-described location on April 25, 2011 (the Licensed Premises).
3. The following is the record of prior Department discipline against the Respondent's license as established by official records introduced by the Department, which matter is final (Exhibit 2):

| <u>Date of Violation</u> | <u>Reg. No.</u> | <u>Violation</u> | <u>Penalty</u> |
|--------------------------|-----------------|--------------------------------|------------------------------|
| February 5, 2019 | 20089941 | BP §23790.5(d)(1) ³ | POIC in lieu of 10-day susp. |

4. Areli Rodriguez (hereinafter referred to as decoy Rodriguez) was born on December 25, 1999. On December 16, 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 December 16, 2019, she was 5'2" tall and weighed approximately 137 pounds. She wore a green cardigan sweater over a purple shirt, with black leggings and pink shoes. Her hair was straightened, with two-inch black roots and lighter high-lights running the length of her hair, which fell just past her shoulders. She wore black body-cam eye glasses. (Exhibits 3 and 5.) Her appearance at the hearing was the same, except she did not wear the glasses and her high-lights had grown out and appeared near the bottom length of her hair.
6. On December 16, 2019, decoy Rodriguez entered the Licensed Premises and 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; there was no line of customers.
7. Decoy Rodriguez placed the three-pack of Bud Light beer upon the sales counter in front of clerk Europa Hernandez (hereinafter referred to as clerk Hernandez). Clerk

³ Count 1 of the prior accusation in Exhibit 2 states that, "On or about February 5, 2019, respondent-licensee's agent or employee [] at said premises, engaged in concurrent sales of motor vehicle fuel with beer and wine for off-premises consumption and displayed beer or wine within five feet of the cash register or the front door, using a display which was not a permanently affixed cooler as of January 1, 1988."

Hernandez did not ask decoy Rodriguez for her identification (ID) or any age-related questions. Decoy Rodriguez had on her person her valid California ID Card, which has a vertical orientation, depicts her correct date of birth and includes a red stripe which reads, "AGE 21 IN 2020." (Exhibit 4.) Clerk Hernandez proceeded with the sales transaction and told the decoy the cost of the beer. Decoy Rodriguez paid for the three-pack of Bud Light beer. Clerk Hernandez gave the decoy change and a receipt. Decoy Rodriguez exited the store with the change, receipt and beer.

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 Hernandez as the person who sold her the three-pack of Bud Light beer. Decoy Rodriguez and clerk Hernandez were standing a few feet apart and facing each other at the time of this identification. A photograph of clerk Hernandez and decoy Rodriguez was taken after the face-to-face identification, with decoy Rodriguez holding the three-pack of beer. (Exhibit 5.)

9. There was no evidence that clerk Hernandez was distracted during the sales transaction or the face-to-face identification. Clerk Hernandez did not appear at the hearing.

10. 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 Hernandez at the Licensed Premises on December 16, 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.

11. December 16, 2019, was decoy Rodriguez' second decoy operation. Decoy Rodriguez learned about the decoy program through her service as a police explorer with the Cathedral City PD. The explorer program gave her an idea of what law enforcement officers do and what to expect in that field.

12. 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 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 December 16, 2019, the Respondent-Licensee's employee, clerk Europa Hernandez, 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 ¶¶ 4-10.)
5. The Respondent 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 Respondent argued decoy Rodriguez did not have the appearance of someone under the age of 21 because of certain factors including, her prior police explorer experience, hair highlights, and the fact she was "nine days shy of the statutory maximum for minor decoys."
7. This rule 141(b)(2) argument is rejected. There was no evidence that any of these alleged factors had any impact upon clerk Hernandez' ability to discern the decoy's appearance or conduct her job and comply with the law. There was nothing about decoy Rodriguez's appearance, hair high-lights, demeanor, police or decoy explorer experience which made her appear older than her actual age. In-person, and in the photographs taken of her on the date of the operation, decoy Rodriguez looks her age. In other words, decoy Rodriguez had the appearance generally expected of a person under the age of 21. (Findings of Fact ¶¶ 5 and 10.)
8. Finally, while the Respondent cited non-compliance only with rule 141(b)(2), as part of that argument Respondent explained that the decoy was nine days shy of the statutory maximum, which is a reference to rule 141(b)(1). The Department attorney is correct, 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 the 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

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

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 Respondent's license be suspended for a period of 15 days. The Department, citing Precedential Decision No. 19-03-E⁵, noted that while the prior violation dated of February 5, 2019, involved an unrelated matter, that previous discipline placed the licensee "on notice" that problems were occurring at the Licensed Premises prior to the current violation at hand, and as such "may be used in the instant case for purposes of penalty consideration" as a factor in aggravation.

The Respondent argued that, if the accusation were sustained, some small mitigation is warranted given the Respondent's close-to-a-decade discipline-free history and spotless record of no prior sale-to-minor violations, stressing that the prior discipline involved an unrelated display violation under section 23790.5(d)(1).

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.

The Respondent is commended for its approximate seven years and nine months of discipline-free history up until the prior violation of February 5, 2019. The Respondent is correct to point out that the prior discipline involved an unrelated violation to the sale-to-minor violation at hand. As such it did not place the Respondent on notice of the current sale-to-minor violation, as argued by the Department. Precedential Decision No. 19-03-E emphasized the fact that the prior and instant violations involved "the same provision," explaining that, "Nothing in section 25658.1, or elsewhere, precludes the use of prior actual notice of an alleged violation of section 25658(a), whether by way of verbal or written warning, or of a pending accusation, as an aggravating factor in determining the appropriate level of discipline following a determination that the licensee has subsequently violated the *same law*."⁶ (Emphasis added by italics.) In that matter, since the licensee had been placed on notice after allegedly violating the same law a little over a year earlier, that same alleged prior violation could be used as an aggravating

⁵ 7-Eleven and Yi, Precedential Decision No. 19-03-E (April 18, 2019).

⁶ *Id.*, at p. 4 ¶ 3, and p. 5 ¶ 5.

factor for purposes of penalty consideration. The same can not be said of the unrelated prior discipline in the matter at hand.

Nonetheless, the Respondent's argued-for mitigation is compromised for the following reasons. On December 16, 2019, clerk Hernandez failed to ask any age-related questions or for the ID of a youthful appearing decoy. Despite that there was no evidence the Respondent took seriously its responsibility to prevent future sales to minors *after* that violation. The Respondent failed to present evidence of any positive action by the licensee to correct the problem of the said sale. There was no evidence of any safety protocol in place in Respondent's POS system, such as a requirement to swipe or scan an ID to prevent its clerks from doing the same thing as clerk Hernandez. There was no evidence of documented training or retraining that clerk Hernandez or any of Respondent's employees received relating to age-restricted sales, let alone discipline for the said sale. 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.

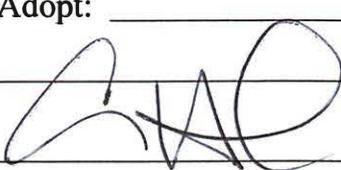
ORDER

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

Dated: September 17, 2020



D. Huebel
Administrative Law Judge

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