

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

AB-9905

File: 21-477676; Reg: 20089895

GARFIELD BEACH CVS, LLC and
LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store #9545
1123 South California Boulevard
Walnut Creek, CA 94596,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: July 9, 2021
Telephonic

ISSUED JULY 9, 2021

Appearances: *Appellants:* Jade Quintero, of Solomon, Saltsman & Jamieson, as
counsel for Garfield Beach CVS, LLC and Longs Drug Stores
California, LLC;

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

OPINION

Garfield Beach CVS LLC, and Longs Drug Stores California, LLC, doing
business as CVS Pharmacy Store #9545 (appellants), appeal from a decision of the
Department of Alcoholic Beverage Control¹ suspending their license for five days

¹ The decision of the Department, dated March 9, 2021, is set forth in the
appendix.

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

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. There is no record of prior departmental discipline against the license.

On March 5, 2020, the Department filed a single-count accusation against appellants charging that, on January 28, 2020, appellants' clerk, Liubov Malysh (the clerk), sold an alcoholic beverage to 17-year-old J.W. (the decoy). Although not noted in the accusation, the decoy was working for the Department at the time.

At the administrative hearing held on December 2, 2020, documentary evidence was received, and testimony concerning the sale was presented by the decoy and Department Agent Daniel Louie. Appellants did not present any witnesses.

Evidence established that the decoy entered the licensed premises on January 28, 2020, and selected a six-pack of Coors beer from the beer aisle. He went to one of the cash registers and presented the beer to the clerk for purchase. The clerk asked the decoy for his identification, and the decoy gave her his valid California Driver's license showing him to be 17 years old. The decoy's identification was in the vertical format issued to those under 21 years old, contained his correct birthdate in red lettering, and in white print on a red background, it stated "Age 21 in 2023."

The clerk inspected the license for a few seconds, then put on a pair of glasses and looked at it again. She then returned the license to the decoy and told him the

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

price of the beer. The decoy paid the clerk for the beer, received change, and then left the licensed premises with the beer.

Agent Louie, who witnessed the transaction from inside the licensed premises, exited the store after the decoy and met up with him outside. The decoy told Agent Louie that the clerk checked his identification but did not ask any age-related questions. Agent Louie and two other agents re-entered the licensed premises, approached the clerk, and identified themselves as law enforcement officers.

Agent Louie then had the decoy stand within approximately four feet of the clerk and asked the decoy who sold him the beer. The decoy pointed at the clerk and said, “she did.” (Findings of Fact, ¶ 9.) The clerk was not assisting any other customers.

After the decoy exited the store, Agent Louie asked the clerk about the sale, and she indicated she was trained to ask for identifications and that she had entered the decoy’s date of birth into the register. Agent Louie informed her that she must not have entered the correct date as the decoy had given her his true identification.

The administrative law judge (ALJ) issued a proposed decision on December 21, 2020 sustaining the accusation and recommending a five-day suspension. The Department adopted the proposed decision on March 1, 2021. Appellants filed a timely appeal contending that the Department’s decision is not supported by substantial evidence regarding the face-to-face identification and the decoy’s appearance. Appellants also contend that its penalty is excessive.

DISCUSSION

I

RULE 141(B)(5)

Rule 141(b)(5)³ 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:

[T]he evidence established that after the decoy and Agent Louie met outside after the sale, the, along with Agents Ott and Sanders, all entered the licensed premises. The agents identified themselves as police/agent to the clerk. They had the decoy stand within approximately 4’ of the clerk and then asked him who sold him the beer. The decoy pointed at and identified the clerk. Agent Louie then engaged the clerk in a discussion about her sale of beer to the decoy. There was no evidence the clerk did not understand she had been identified by the decoy as the one who sold beer to him. Rather, she had been instructed to check identifications when selling alcoholic beverages and could not recall what birthdate she had entered for the decoy’s sale. The evidence established that after the sale there was a face-to-face identification. Respondent did not establish any citation was issued to the clerk before the face-to-face identification occurred. Respondent did not establish there was non-

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

compliance with rule 141(b)(5) so as to be entitled to a defense to the accusation under rule 141(c).

(Determination of Issues, ¶ 6.) We agree with this assessment.

Testimony offered at the hearing by the decoy and Agent Louie constitutes substantial evidence to support the Department's findings regarding rule 141(b)(5). There was also no evidence offered by appellants to the contrary. Further, even if there was conflicting evidence, the Board is prohibited from reweighing such 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 on this issue must be affirmed.

II

RULE 141(B)(2)

Appellants contend that the Department's finding that the decoy's appearance complied with rule 141(b)(2) is not supported by substantial evidence. (AOB, at pp. 11-13.) Specifically, appellants argue that the decoy's mannerisms, demeanor, and receding hairline made him appear over the age of 21. (*Ibid.*)

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). (Findings of Fact, ¶ 11; Conclusions of Law ¶¶ 4-5.) Therefore, this Board is required to defer to those findings so long as they are supported by substantial evidence. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Southland)* (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652, 659] [citing *Kirby v. Alcoholic Beverage Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628] ["In considering the sufficiency of the evidence issue the court is governed by the substantial evidence rule[;] any conflict in the evidence is resolved in favor of the decision; and every reasonably deducible inference in support thereof will be indulged. [Citations.]"; see also *Kirby v. Alcoholic Bev. etc. Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815] ["When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the department."].) "Substantial evidence" is "evidence of ponderable legal significance, which is 'reasonable in nature, credible and of solid value.'" (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 814 [38 Cal.Rptr.2d 304, 307-308], internal citations omitted.)

In its decision, the Department rejected appellants' arguments that the decoy's physical appearance did not comply with rule 141(b)(2). The Department found that "[w]hile [the decoy] had somewhat of a high forehead, that did not result in him looking older than his true age." (Conclusions of Law, ¶ 4.) The Department further noted that "it was not established that experience made him appear any older than his actual age of 17" (*Id.* at ¶ 5.) Finally, the Department noted "no evidence was presented the

clerk made her sale based upon the decoy appearing old enough to purchase alcoholic beverages.” (*Id* at ¶ 4.)

To support its findings, the Department relied on a photograph of the decoy from the day of the operation. (Exh. 3.) 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 was approximately 5’10” tall and 135 pounds at the on the day of the operation. (Findings of Fact, ¶ 11.) The decoy testified the photo was an accurate depiction of his appearance on the date of the operation. (RT at pp. 18:21-24.)

The Department is entitled to rely on an ALJ’s personal observations of a decoy. (*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 photograph of the decoy from the date of the operation, the decoy’s testimony, as well as 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.)

Further, as noted by the Department, there is no evidence in the record that the clerk sold alcohol to the decoy based on his appearance, experience, or demeanor. As the Department noted, the clerk did not testify. Thus, there is no evidence as to why the clerk sold beer to the decoy after he presented his valid California Driver’s License,

much less any evidence to establish that the clerk's error was the result of the decoy's appearance or demeanor.

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.)

III

PENALTY

Appellants contend its five-day penalty is unreasonable, and that the Department should reconsider it on the grounds that the Department "failed to adequately consider appellants' discipline-free record and Clerk Malysh's training." (AOB, at p. 14.) In other words, appellants believe the 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 ten more days than 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 far enough from the standard 15-day suspension. (AOB, at pp. 15.) In its decision, the Department noted that:

[A] downward adjustment to the 15-day suspension called for in rule 144 is warranted based on the absence of any prior disciplinary history or evidence of problems at the licensed premises for more than 10 years. However, an all-stayed penalty is inappropriate in that the sales clerk asked for and inspected the decoy’s identification that showed he was only 17 years old.

(Penalty, ¶ 5.) The unstated inference is that the Department did not afford much weight to the clerk's training, as it clearly did not work to prevent the sale to the decoy.

Based on the above, 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 ten more days than what appellants received. Rule 144 allows the Department to exercise discretion to consider aggravation and mitigation. The weight the Department gave to appellants' mitigation evidence was reasonable and not an abuse of discretion. Therefore, the penalty must stand.

ORDER

The decision of the Department is affirmed.⁴

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
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:**

GARFIELD BEACH CVS, LLC AND
LONGS DRUG STORES CALIFORNIA, LLC
CVS PHARMACY STORE 9545
1123 S. CALIFORNIA BLVD
WALNUT CREEK, CA 94596

OFF-SALE GENERAL - LICENSE

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

CONCORD DISTRICT OFFICE

File: 21-477676

Reg: 20089895

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 March 1, 2021. 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 April 19, 2021, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: March 9, 2021



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Garfield Beach CVS, LLC and
Longs Drug Stores California, LLC
Dbas: CVS Pharmacy Store 9545
1123 S. California Boulevard
Walnut Creek, CA 94596

Respondents

Regarding Their Type-21 Off-Sale General License
Under the State Constitution and the Alcoholic Beverage
Control Act

} File: 21-477676

} Reg: 20089895

} License Type: 21

} Word Count Estimate: 11,920

} Rptr: Brenda Sanchez, CSR-13019

PROPOSED DECISION

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter via video hearing on December 2, 2020.

Sean Klein, Attorney III, Office of Legal Services, Department of Alcoholic Beverage Control, represented the Department of Alcoholic Beverage Control. (hereafter the Department)

R. Bruce Evans, attorney-at-law, of Solomon, Saltsman, and Jamieson, represented Garfield Beach CVS, LLC and Longs Drug Stores California, LLC. (collectively hereafter respondent)

After oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the video hearing, the matter was argued by the parties and submitted for decision on December 2, 2020.¹

¹ This hearing was conducted via a "Zoom" video-link in accordance with a stipulation of the parties contained in Exhibit 2.

The Department's accusation alleged cause for suspension or revocation of respondent's license exists under California Constitution, article XX, section 22, and Business and Professions Code, section 24200, subdivision (a) and (b), based on the following ground:² Count 1 : "On or about January 28, 2020, respondent-licensee's agent or employee, Liubov Malysh, at said premises, sold, furnished, gave or caused to be sold, furnished, or given, an alcoholic beverage, to-wit: beer, to J.W., a person under the age of 21 years, in violation of Business and Professions Code Section 25658(a)." (Exhibit 1: Pre-hearing pleadings, accusation)³

FINDINGS OF FACT

1. The Department filed its accusation on March 5, 2020. On March 23, 2020, the Department received respondent's Notice of Defense and Special Notice of Defense requesting a hearing on the accusation. The Department set the matter for a hearing. (Exhibit 1: Pre-hearing pleadings.)
2. On June 22, 2009, the Department issued respondent a type-21 off-sale general license for its premises as captioned above.⁴ (hereafter the licensed premises)
3. Since being licensed, respondent has not suffered any prior disciplinary action at the licensed premises.
4. Jonathan Weiland (hereafter Weiland) as born on October 8, 2002. On January 28, 2020, 17-year old Weiland assisted the Department of Alcoholic Beverage Control on a minor decoy operation at the licensed premises. Weiland's role was to see if he could purchase an alcoholic beverage there.
5. On January 28, 2020, Weiland entered the licensed premises and went to the beer aisle and selected a 6 pack of Coors beer. He carried it to the sales counter area. Alcoholic Beverage Control Agent Daniel Louie (hereafter Agent Louie) also went inside the store for the purpose of watching the decoy's activity regarding any transaction he might have therein.

² All further section references are to the California Business and Professions Code unless noted otherwise.

³ While the minor was identified as J.W. in Count 1, he was fully identified as Jonathan Weiland at the hearing.

⁴ A type-21 license permits the license-holder to retail in beer, wine, and distilled spirits for consumption off the licensed premises.

6. At the sales counter, a salesclerk, Liubov Malysh (hereafter the clerk), came up to one of the registers and Weiland set the beer on the counter near that clerk.

7. The clerk asked for his identification. Weiland gave her his valid California driver license. The clerk inspected it for a few seconds, then she put on a pair of glasses and looked at it again. She then returned Weiland's identification to him. She told Weiland the price of the beer and he gave her a \$20 bill and received some change back from her. Weiland exited the store with his beer.

8. When Agent Louie was inside the licensed premises, he witnessed the clerk's sale of beer to Weiland from about 12-15 feet away and then followed Weiland outside the store. Once outside, Weiland told Agent Louie the transaction was completed, the clerk had checked his identification, and she had not asked him any age-related questions. Agent Louie then contacted Agent Ott and Agent Sanders. Within approximately one minute of the decoy exiting the store with his beer, the three agents and the decoy re-entered the licensed premises.

9. The agents approached the sales clerk and identified themselves to her as agents/police officers. Agent Louie had the decoy stand within approximately 4' of the clerk and then asked him who sold to him. Weiland pointed at the clerk and said, "she did." At that time, the clerk was not assisting any other customers. Agent Sander then escorted the decoy out of the licensed premises.

10. Agent Louie remained inside and asked the clerk about her sale of beer to the decoy. The clerk indicated she was trained to ask for identifications when selling alcoholic beverages. She indicated she had entered the decoy's date of birth into the register, but she could not recall exactly what date she entered for the decoy. Agent Louie informed her that she must not have entered the correct date as the decoy had given her his true identification.

11. When Weiland made his purchase of beer, he was approximately 5' 10" tall and weighed approximately 135 pounds. He wore a black shirt and a gray zip-up sweatshirt. He also wore blue jeans. His hair was about 2" long and he had somewhat of a high forehead. He had a youthful appearance consistent with his actual age.

12. Weiland had given the clerk his valid California driver license. It was in the vertical format issued to those under 21 years old. It contained his birthdate printed in red lettering. In white print on a red background it stated, "Age 21 in 2023".

13. As of January 28, 2020, Weiland had been a Newark police explorer for about one year. He heard about the decoy program as an explorer. Weiland had not served as a decoy prior to January 28, 2020. As an explorer, he participated in weekly meetings where he was taught about various aspects of police work including such topics as negotiations and arrest procedure. Sometimes the explorers assisted in traffic control. He also participated in a week-long explorer academy where they received lessons on such topics as traffic control and DUI (driving under the influence) and engaged in P.T. (physical training). At the end, they were given a test on material taught which he passed.

LEGAL BASIS OF DECISION

1. Article XX, section 22, of the California Constitution and Business and Professions Code section 24200, subdivision (a), provide a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

2. Business and Professions Code section 24200, subdivision (b), provides that a licensee's violation, or causing or permitting of a violation of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Business and Professions Code section 25658, subdivision (a), provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.

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

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

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

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

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

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

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

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

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

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

DETERMINATION OF ISSUES

1. Cause for suspension or revocation of respondent's license exists under article XX, section 22, of the California Constitution and Business and Professions Code section 24200, subdivision (a) and (b), because on January 28, 2020, respondent's agent or employee, Liubov Malysh, upon the licensed premises, sold, furnished, or gave an alcoholic beverage to J.W., fully identified as Jonathan Weiland, a person under the age of 21, in violation of Business and Professions Code section 25658, subdivision (a). (Findings of Fact ¶¶ 4-8)
2. The evidence established clerk Malysh sold a six-pack of canned Coors Light beer, an alcoholic beverage, to 17-year old minor decoy Weiland. The sale was completed even though Malysh asked for and inspected the decoy's identification that contained not only his true birthdate but indicated he would not be 21 until 2023. While the clerk indicated to Agent Louie she had received training about asking for identifications when selling alcoholic beverages that still did not prevent the sale in this instance. As the clerk did not testify at the hearing, she was not able to describe what training she received prior to this

this incident and why she sold beer to the decoy despite her inspection of his identification that evidenced he was only 17-years old that day.

3. Under rule 141(c): "Failure to comply with this rule shall be a defense to any action brought pursuant to Business and Professions Code Section 25658."

4. Respondent contended a defense to the accusation under rule 141(b)(2) was established because the decoy did not "... 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." However, the decoy did meet that appearance standard. The decoy was only 17 years old and was approximately 5' 10" tall and weighed approximately 135 pounds giving him a leaner build. He wore casual clothing consisting of a black shirt and a gray zip-up sweatshirt. He also wore blue jeans. His hair was about 2" long. While he had somewhat of a high forehead, that did not result in him looking older than his true age. Further, no evidence was presented the clerk made her sale based upon the decoy appearing old enough to purchase alcoholic beverages.

5. While Weiland was a police explorer for about one year prior to his decoy operation at the licensed premises, it was not established that experience made him appear any older than his actual age of 17 or not meet rule 141(b)(2)'s decoy appearance standard. Rather, based on the decoy's overall appearance, i.e., his physical appearance, persona, dress, poise, demeanor, maturity, and photos of the decoy as seen in Exhibit 3, Weiland displayed the overall appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk at the time she sold the six-pack of beer to him. Therefore, Weiland met rule 141(b)(2)'s decoy appearance standard and respondent did not establish the contrary.

6. Respondent also contended there was conflicting evidence presented on the proper conduct of the face-to-face identification required under rule 141(b)(5) that states: "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." In this instance, the evidence established that after the decoy and Agent Louie met outside after the sale, they, along with Agents Ott and Sanders, all entered the licensed premises. The agents identified themselves as police/agent to the clerk. They had the decoy stand within approximately 4' of the clerk and then asked him who sold him the beer. The decoy pointed at and identified the clerk. Agent Louie then engaged the clerk in a discussion about her sale of beer to the decoy. There was no evidence the clerk did not understand she had been identified by the decoy as the one who sold beer to him. Rather, she

indicated she had been instructed to check identifications when selling alcoholic beverages and could not recall what birthdate she had entered for the decoy's sale. The evidence established that after the sale there was a face-to-face identification. Respondent did not establish any citation was issued to the clerk before the face-to-face identification occurred. Respondent did not establish there was non-compliance with rule 141(b)(5) so as to be entitled to a defense to the accusation under rule 141(c).

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

PENALTY

1. In assessing a penalty, the Department's penalty guidelines are in California Code of Regulations, title 4, section 144. (Hereafter rule 144) Under rule 144, the presumptive penalty for a first violation of selling or furnishing an alcoholic beverage to a minor in violation of section 25658 is a 15-day license suspension.

2. However, rule 144 also permits imposition of a revised penalty based on the presence of aggravating or mitigating factors, a non-exhaustive list of which are stated therein. The duration of discipline free licensure is specified as a factor in mitigation.

3. The Department recommended a 15-day license suspension indicating the decoy was only 17 years old and that the sale occurred after the clerk inspected the decoy's identification.

4. Respondent contended that if any penalty was assessed, a 15-day suspension, with all 15 days stayed, was warranted because respondent had been licensed for over 10 years with no prior disciplinary action. Respondent contended that, at most, the sale of beer to the decoy was merely an unfortunate mistake and the clerk entered the wrong birthdate into the sales register.

5. In this matter, a downward adjustment to the 15-day suspension called for in rule 144 is warranted based on the absence of any prior disciplinary history or evidence of problems at the licensed premises for more than 10 years. However, an all-stayed penalty is inappropriate in that the sales clerk asked for and inspected the decoy's identification that showed he was only 17 years old. The decoy had a youthful appearance consistent with his actual age. There was no evidence of exactly what date the clerk entered into the sales register. The clerk had all the information she needed to correctly refuse to make the sale and comply with the law.

6. Based upon the above, the penalty set forth in the order is the result of appropriately weighing the facts and circumstances of this matter in conjunction with rule 144.

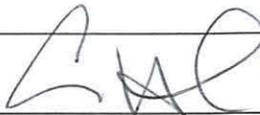
7. Except as set forth in this decision, all other arguments, contentions, and assertions raised by the parties with respect to the penalty are without merit.

ORDER

1. Count 1 of the accusation is sustained.
2. Respondent's license is suspended for 5 days.

Dated: December 21, 2020


David W. Sakamoto
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By:  _____
Date: <u>03/01/21</u> _____