

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

AB-9906

File: 21-478675; Reg: 20089778

YOUNG'S MARKETPLACE, INC.,
dba Seafood City Supermarket
2030 Diamond Boulevard
Concord, CA 94520-5702,
Appellant/Licensee

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: *Appellant:* Jade Quintero, of Solomon, Saltsman & Jamieson, as
counsel for Young's Marketplace, Inc,

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

OPINION

Young's Marketplace, Inc., doing business as Seafood City Supermarket (appellant), appeals from a decision of the Department of Alcoholic Beverage Control (Department)¹ suspending its license for 5 days because its clerk sold an alcoholic beverage to a Department minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

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

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on September 17, 2009. There is no record of departmental discipline against the license.

On February 14, 2020, the Department filed a single-count accusation charging that on January 13, 2020, appellant's clerk, Mylene Tuck (the clerk), sold an alcoholic beverage to 18-year-old Benjamin Kelly (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. Appellant presented no witnesses.

Testimony established that on January 13, 2020, the decoy entered the licensed premises and went to the coolers where he selected a six-pack of Bud Light beer in bottles. He took the beer to the counter and the clerk asked for his identification. He handed her his vertical-format California driver's license which contained his correct date of birth, showing him to be 18 years of age, and a red stripe indicating "AGE 21 IN 2022." (Exh. 4.) The clerk looked at the ID for five to ten seconds, then completed the sale without asking any age-related questions. The decoy was joined by ABC agents just inside the entrance to the premises and he informed them of the sale. The agents and decoy returned to the counter where the decoy made a face-to-face identification of the clerk who sold him the beer.

The administrative law judge (ALJ) issued a proposed decision on December 21, 2020, sustaining the accusation and recommending a 5-day suspension. The Department adopted the proposed decision in its entirety on March 1, 2021 and a certificate of decision was issued on March 9, 2021.

Appellant then filed a timely appeal contending: (1) The decoy did not display the appearance required by rule 141(b)(2)² and (2) factors in mitigation were given insufficient weight by the ALJ when determining the penalty.

DISCUSSION

I

DECOY'S APPEARANCE

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 appellant.

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

Appellant contends:

A decoy standing at six feet tall, wearing mature attire, with formal education in administration of justice, police academy experience and over two dozen prior attempted purchases of alcohol under his belt cannot have an appearance which generally can be expected of someone under 21 years of age.

(AOB at p. 7.)

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court

² References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani) (2004)

118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department's decision.

(Kirby v. Alcoholic Bev. Control Appeals Bd. (1972) 25 Cal.App.3d 331, 335 [101

Cal.Rptr. 815]; *Harris v. Alcoholic Beverage Control Appeals Board (1963) 212*

Cal.App.2d 106, 112 [28 Cal.Rptr.74].)

Therefore, the issue of substantial evidence when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control (1970) 2Cal.3d 85, 94 [84 Cal.Rptr. 113]; Harris, supra, at p. 114.*)

This Board has stated many times that, in the absence of compelling reasons, it will ordinarily defer to the Department's findings on the issue of whether there was

compliance with rule 141(b)(2). The ALJ made the following findings regarding the decoy's appearance and experience:

5. Just prior to Kelly entering the licensed premises, he was approximately 6' tall and weighed approximately 160 pounds. He had blonde/brown hair. He wore a black/dark colored flannel shirt, a denim jacket, khaki/brown pants and brown/tan colored boots. He had a thin over-all build and had an over-all youthful appearance, consistent with his actual age.

¶ . . . ¶

10. Kelly volunteered to be a decoy. His college professor had sent him an application to participate in decoy operations. Prior to going to the licensed premises as a decoy, Kelly had already participated in approximately 3-4 decoy operations on earlier dates. On those prior operations, he visited 8-18 licensed premises each time. Kelly testified that although he had become comfortable in acting as a decoy, it was still a little "nerve-racking" when he did so. Kelly recalled those occasions where he was able to purchase alcoholic beverages, but did not really recall those places where no sale was made to him.

11. At the time of the operation at the licensed premises, Kelly was in his first year of college and was taking three criminal justice classes and aspired to become a police officer. On two occasions, Kelly participated in a training exercise at a police academy wherein he posed as someone who fired upon police officers and the cadets had to pursue him.

(Findings of Fact, ¶¶ 5-11.) Based on these findings, the Department addressed appellant's rule 141(b)(2) argument:

5. In this instance, Kelly's appearance met the appearance standard set forth in rule 141(b)(2). Kelly was approximately 6' tall and weighed approximately 160 pounds. He had blonde/brown hair. He wore a black/dark colored flannel shirt with a denim jacket over that. He had khaki/brown pants and wore brown/tan colored boots. He had an over-all youthful appearance consistent with his actual age.

6. While the decoy was taking criminal justice classes, had acted as a decoy on prior operations, aspired to become a police officer, and role-played at a police academy, it was not established those experiences made Kelly appear any older than his actual age, 18. Kelly testified that while he had become comfortable acting as a decoy, it was still a nerve wracking activity for him. There was no evidence the clerk sold beer to the decoy because she believed he appeared old enough to legally

purchase alcoholic beverages. Based on the decoy's overall appearance, i.e., his physical appearance, persona, dress, poise, demeanor, maturity and conduct and photos of him as displayed in Exhibit 4, Kelly displayed the 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 Kelly. Therefore, Kelly met rule 141(b)(2)'s decoy appearance standard.

(Determination of Issues, ¶¶ 5-6.) We agree with this assessment.

Appellant maintains the decoy's experience as a minor decoy and police cadet gave him a confident demeanor which made him appear mature and not in compliance with rule 141(b)(2). The Board has, however, rejected the "experienced decoy" argument many times. As the Board previously observed:

A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. . . . There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.

(Azzam (2001) AB-7631, at p. 5, emphasis in original.) This case is no different.

In a similar minor decoy case, where the Court of Appeal was tasked with determining whether an ALJ's assessment of the decoy's appearance was correct, the Court said that under the facts before them, while:

[O]ne could reasonably look at the photograph [of the decoy] and reasonably conclude that the decoy appeared to be older than 21 years of age, we cannot say that, as a matter of law, a trier of fact could not reasonably have concluded otherwise.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (2002) 103

Cal.App.4th 1084, 1087 [127 Cal.Rptr.2d 652].) The instant case is no different. The

ALJ made a finding, based on the photograph presented in exhibit 4, that the decoy's

appearance met the requirements of rule 141(b)(2). (Findings of Fact, ¶ 6.) We do not

believe the evidence supports a finding that the ALJ "could not reasonably have

concluded otherwise.” (*Ibid.*) As stated above, case law instructs us that when, as here, “two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department’s decision” (*Kirby, supra*, at p. 335.)

Appellant presented no evidence that the decoy’s physical appearance or demeanor *actually resulted* in him displaying the appearance of a person 21 years old or older on the date of the operation in this case. The clerk did not testify. We cannot know what went through her mind in the course of the transaction, or why she made the sale in spite of having seen the decoy’s identification showing him to be under 21. There is simply no evidence to establish that the decoy’s appearance or demeanor were the *actual reason* the clerk made the sale.

Ultimately, appellant is simply asking this Board to second guess the ALJ and reach a different conclusion, despite substantial evidence to support the findings in the decision. This we cannot do.

II

PENALTY

Appellant contends that the ALJ failed to sufficiently mitigate the penalty. It maintains a lesser penalty, or outright reversal, would be more appropriate in light of appellant’s more than ten years of discipline-free operation. (AOB at p. 9.)

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].) "Abuse of discretion" in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all

of the facts and circumstances being considered. [Citations.] (*Brown v. Gordon* (1966) 240 Cal.App.2d 659, 666-667 [49 Cal.Rptr. 901].) If the penalty imposed is reasonable, the Board must uphold it even if another penalty would be equally, or even more, reasonable. “If 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].)

Rule 144 provides:

In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act (Bus. and Prof. Code Sections 23000, et seq.), and the Administrative Procedures Act (Govt. Code Sections 11400, et seq.), the Department shall consider the disciplinary guidelines entitled “Penalty Guidelines” (dated 12/17/2003) which are hereby incorporated by reference. Deviation from these guidelines is appropriate where the Department in its sole discretion determines that the facts of the particular case warrant such a deviation - such as where facts in aggravation or mitigation exist.

(Cal. Code Regs., tit. 4, § 144.)

Among the mitigating factors provided by the rule are the length of licensure without prior discipline, positive actions taken by the licensee to correct the problem, cooperation by the licensee in the investigation, and documented training of the licensee and employees. Aggravating factors include, *inter alia*, prior disciplinary history, licensee involvement, lack of cooperation by the licensee in the investigation, and a continuing course or pattern of conduct. (*Ibid.*)

The Penalty Policy Guidelines further address the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

Penalty Policy Guidelines:

The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

(Ibid.)

The ALJ explained the basis and rationale for the penalty imposed as follows:

PENALTY

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 of any kind and the absence of 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 18 years old. She had all the information she needed to correctly refuse to make the sale and comply with the law. The decoy also had the appearance of his actual age, 18. The clerk did not testify and there was no other evidence to establish why she proceeded to sell beer to the decoy under those circumstances.

(Decision, at p. 7.)

The decision itself debunks appellant's' assertion that these appellant's length of licensure without discipline was ignored. The ALJ takes note of all of this factor in mitigation, but simply reaches the conclusion that a 5-day suspension is appropriate when looking at all the evidence. While appellant argues against this determination, it fails to acknowledge that the penalty is less than the standard 15-day suspension, due to the mitigation considered by the ALJ.

In addition, we fail to see how appellant can assert that no factors in aggravation exist in this matter. As the ALJ notes, “the sales clerk asked for and inspected the decoy's identification that showed he was only 18 years old. She had all the information she needed to correctly refuse to make the sale and comply with the law.” (Decision, at p. 7.) While this fact is not specifically identified by the ALJ as a factor in aggravation, we believe it may well be treated as such. In case after case, this Board is presented with clerks who look directly at an ID with a vertical orientation — containing a red stripe clearly indicating the year that the individual will be 21 — who then go on to make a sale of alcohol by pressing an override key on the cash register. While this may or may not be labeled as aggravation, it certainly suggests less weight should be given to countervailing factors in mitigation when balancing the equities in such cases.

Appellant's disagreement with the penalty imposed does not mean the Department abused its discretion. This Board's review of a penalty looks only to see whether it can be considered reasonable, and, if it is reasonable, the Board's inquiry ends there. The penalty here is within the bounds of the Department's discretion, and the Board is simply not empowered to reach a contrary conclusion from that of the Department — and substitute its own judgment — when, as here, the underlying decision is reasonable and supported by substantial evidence. We find no abuse of discretion and the penalty imposed complies with the guidelines of rule 144.

ORDER

The decision of the Department is affirmed.³

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

³ 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 of said code.

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:**

YOUNGS MARKETPLACE, INC.
SEAFOOD CITY SUPERMARKET
2030 DIAMOND BLVD
CONCORD, CA 94520

OFF-SALE GENERAL - LICENSE

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

CONCORD DISTRICT OFFICE

File: 21-478675

Reg: 20089778

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:

Youngs Marketplace, Inc.
Dbas: Seafood City Supermarket
2030 Diamond Boulevard
Concord, CA 94520

Respondents

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

} File: 21-478675
}
} Reg: 20089778
}
} License Type: 21
}
} Word Count Estimate: 8,391
}
} Rptr: Debra Morin, CSR-11558
}
}

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 Youngs Marketplace, Inc. (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 13, 2020, respondent-licensee's agent or employee, Mylene Tuck, at said premises, sold, furnished, gave or caused to be sold, furnished, or given, an alcoholic beverage, to-wit: beer, to Benjamin Kelly, a person under the age of 21 years, in violation of Business and Professions Code Section 25658(a)." (Exhibit 1: Pre-hearing pleadings, accusation)

FINDINGS OF FACT

1. The Department filed its accusation on February 14, 2020. On March 5, 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 September 17, 2009, the Department issued respondent a type-21 off-sale general license for its premises as captioned above.³ (hereafter the licensed premises)
3. Since being licensed, respondent has not suffered any prior disciplinary action at the licensed premises.
4. Benjamin Kelly was born on May 11, 2001. (hereafter Kelly) On January 13, 2020, 18-year old Kelly assisted the Department of Alcoholic Beverage Control with a minor decoy operation at the licensed premises. Kelly's role was to act as a decoy to see if he could purchase an alcoholic beverage there.
5. Just prior to Kelly entering the licensed premises, he was approximately 6' tall and weighed approximately 160 pounds. He had blonde/brown hair. He wore a black/dark colored flannel shirt, a denim jacket, khaki/brown pants and brown/tan colored boots. He had a thin over-all build and had an over-all youthful appearance, consistent with his actual age.

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

³ A type-21 off-sale general license permits the license holder to retail in beer, wine, and distilled spirits for consumption off the licensed premises.

6. Kelly entered the licensed premises and went to the alcoholic beverage section. He removed one six-pack of bottled Bud-Light beer, carried it to a check-out lane, and put the beer down to purchase.

7. A female sales clerk asked for his identification. He presented her with his true California driver license. It was in a vertical format, contained his true birthdate, and indicated in white print on a red background banner that he would not be 21 until 2022. The female clerk examined the identification for 5-10 seconds, then returned it to Kelly. The female clerk did not ask Kelly any questions related to his age or about the identification. Kelly paid for the beer and carried it from the counter.

8. Just inside a store entrance, he met with Alcoholic Beverage Control agents and informed them who had sold him the six-pack of beer.

9. Within approximately three minutes of Kelly leaving the sales register area with the beer, Kelly and the agents walked back up to the sales clerk. One of the agents asked Kelly who sold him his beer. Kelly identified the clerk who had sold him the beer. The clerk was approximately 4-6 feet from Kelly when he identified her. The clerk was not assisting any other customers at that time. Kelly then left the store while the agents remained with the clerk.

10. Kelly volunteered to be a decoy. His college professor had sent him an application to participate in decoy operations. Prior to going to the licensed premises as a decoy, Kelly had already participated in approximately 3-4 decoy operations on earlier dates. On those prior operations, he visited 8-18 licensed premises each time. Kelly testified that although he had become comfortable in acting as a decoy, it was still a little "nerve-racking" when he did so. Kelly recalled those occasions where he was able to purchase alcoholic beverages, but did not really recall those places where no sale was made to him.

11. At the time of the operation at the licensed premises, Kelly was in his first year of college and was taking three criminal justice classes and aspired to become a police officer. On two occasions, Kelly participated in a training exercise at a police academy wherein he posed as someone who fired upon police officers and the cadets had to pursue him.

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 13, 2020, one of respondent's agent or employees, upon the licensed premises, sold, furnished, or gave an alcoholic beverage to Benjamin Kelly, a person under the age of 21, in violation of Business and Professions Code section 25658, subdivision (a). (Findings of Fact ¶¶ 4-7)

2. The evidence established a female sales clerk sold a six-pack of Bud Light beer, an alcoholic beverage, to 18-year old Benjamin Kelly.⁴ The sale occurred after the clerk had asked for and inspected Kelly's driver license that stated his birthdate making him only 18 years old that day. (Exhibit 4: copy of license) Further, Kelly's driver license indicated he would not be 21 until 2022. Kelly's license was also in the vertical format used for driver licenses for those under 21 years of age.

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 was established under rule 141(b)(2) 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.

⁴ While the accusation identified the sales clerk as "Mylene Tuck", no evidence was presented to establish that was the clerk's name. However, her name was not a critical element of the accusation. What was important was that the person who sold the beer to Kelly was an agent or employee of respondent and the evidence established that.

5. In this instance, Kelly's appearance met the appearance standard set forth in rule 141(b)(2). Kelly was approximately 6' tall and weighed approximately 160 pounds. He had blonde/brown hair. He wore a black/dark colored flannel shirt with a denim jacket over that. He had khaki/brown pants and wore brown/tan colored boots. He had an over-all youthful appearance consistent with his actual age.
6. While the decoy was taking criminal justice classes, had acted as a decoy on prior operations, aspired to become a police officer, and role-played at a police academy, it was not established those experiences made Kelly appear any older than his actual age, 18. Kelly testified that while he had become comfortable acting as a decoy, it was still a nerve wracking activity for him. There was no evidence the clerk sold beer to the decoy because she believed he appeared old enough to legally purchase alcoholic beverages. Based on the decoy's overall appearance, i.e., his physical appearance, persona, dress, poise, demeanor, maturity and conduct and photos of him as displayed in Exhibit 4, Kelly displayed the 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 Kelly. Therefore, Kelly met rule 141(b)(2)'s decoy appearance standard.
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 length of licensure free of disciplinary action or problems is specified as a factor in mitigation.
3. The Department recommended a 15-day suspension as the decoy was able to purchase beer even after the clerk inspected his identification indicating the decoy was only 18 years old.
4. Respondent recommended an all-stayed penalty. Respondent noted respondent had been licensed in excess of 10 years with no prior disciplinary action. Thus, under rule 141, mitigation was warranted.

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 of any kind and the absence of 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 18 years old. She had all the information she needed to correctly refuse to make the sale and comply with the law. The decoy also had the appearance of his actual age, 18. The clerk did not testify and there was no other evidence to establish why she proceeded to sell beer to the decoy under those circumstances.

6. Based upon the above, the penalty set forth in the order below is the result of appropriately weighing the facts and circumstances of this matter in light of rule 144's provisions.

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> _____