

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

AB-9907

File: 20-484953; Reg: 20090143

7-ELEVEN, INC. and PRINCE SANDHU,
dba 7-Eleven Store #34291
1601 West Redlands Boulevard
Redlands, CA 92373,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: August 6, 2021
Telephonic

ISSUED AUGUST 9, 2021

Appearances: *Appellants:* Jade Quintero, of Solomon, Saltsman & Jamieson, as
counsel for 7-Eleven Inc. and Prince Sandhu,

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

OPINION

7-Eleven, Inc. and Prince Sandhu, doing business as 7-Eleven Store #34291
(appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹
suspending their license for 10 days because their clerk sold an alcoholic beverage to a
police minor decoy, in violation of Business and Professions Code² section 25658(a).

¹ The decision of the Department, dated March 17, 2021, is set forth in the
appendix.

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

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on January 19, 2010.

There is no record of departmental discipline against the license.

On June 3, 2020, the Department filed a single-count accusation against appellants charging that, on March 14, 2020, appellants' clerk, Bakhshish Singh (the clerk), sold an alcoholic beverage to 18-year-old Garrett Briceno (the decoy). Although not noted in the accusation, the decoy was working for the Redlands Police Department (RPD) at the time.

At the administrative hearing held on November 4, 2020, documentary evidence was received, and testimony concerning the sale was presented by the decoy and RPD Officer Michael Merriman. Appellant did not present any witnesses.

Evidence established that the decoy entered the licensed premises on March 14, 2020, walked straight to the alcoholic beverage section and retrieved a three-pack of 25-ounce Bud Light beer cans. The decoy brought the beer to the sales counter for purchase.

The clerk scanned the beer and made a gesture with his right hand that the decoy understood to mean that the clerk was asking to see the decoy's identification. The decoy began retrieving his identification from his pocket when the clerk made another hand gesture that the decoy understood to mean, "never mind." (Findings of Fact, ¶ 7.) Instead of waiting for the decoy to produce his identification, the clerk pressed a "Visual ID OK" button, which bypassed the POS safety feature and allowed the sale of alcohol to the minor decoy.

The decoy paid for the beer and exited the store. The clerk never spoke to the decoy during the sales transaction.

The decoy re-entered the licensed premises with several RPD officers, including Officer Merriman. Officer Merriman asked the decoy to identify the person who sold him the alcohol and the decoy pointed at the clerk. A photograph of the clerk and the decoy was taken with the decoy holding the three-pack of Bud Light beer. (Exh. 4.)

On December 17, 2020, the administrative law judge (ALJ) issued a proposed decision sustaining the accusation and recommending a 10-day suspension. The Department adopted the proposed decision in its entirety on March 10, 2021 and issued a certificate of decision seven days later. Appellant filed a timely appeal contending that the Department's findings regarding the decoy's appearance are not supported by substantial evidence and that the penalty is excessive.

DISCUSSION

I

SUBSTANTIAL EVIDENCE

Appellants contend that the Department's finding that the decoy's appearance complied with rule 141(b)(2)³ is not supported by substantial evidence. (AOB, at pp. 9-11.) However, appellants do not articulate why they believe the decoy appears over the age of 21. Rather, they claim the Department's finding is not supported by substantial evidence because it did not point to "any particular feature, quality, or aspect of the decoy's demeanor [in finding] that he [had a] very youthful appearance, as that of a teenager." (*Id.* at p. 10.)

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

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

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 appellants' arguments that the decoy's physical appearance did not comply with rule 141(b)(2). The Department found that "[t]here was nothing about decoy Briceno's demeanor or clothing attire which made him appear older than his actual age. In other words, decoy Briceno had the appearance

generally expected of a person under the age of 21.” (Conclusions of Law, ¶ 7.) The Department further noted that the clerk did not testify, and appellants “presented no evidence as to why clerk Singh allegedly believed decoy Briceno to be over 21 years of age.” (*Ibid.*) 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 4; Findings of Fact, ¶ 5; Conclusions of Law, ¶ 7.) 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 five feet and nine inches tall and weighed approximately 178 pounds on the day of the operation. (Findings of Fact, ¶ 5.) The ALJ found the decoy credibly testified “his appearance at the hearing was the same, except that he weighed 183 pounds and his hair was styled in a buzz cut.” (*Ibid.*)

The Department is entitled to rely on an ALJ’s personal observations of a decoy when the decoy testifies that his appearance and mannerisms were “the same on the stand as it was when he purchased the beer.”⁴ (*Southland, supra*, 103 Cal.App.4th at

⁴ Appellants contend that the Department’s findings of fact were “based on the appearance of the decoy at the hearing, rather than how the decoy appeared before the clerk.” (AOB, at p. 8.) However, this assertion has no factual support. The Department’s decision very clearly compares the decoy’s appearance at the hearing to the day of the operation. (Findings of Fact, ¶ 5.) This argument is, therefore, rejected.

1094.) The Board sees no error with the Department's findings regarding the decoy's appearance, which are supported by the photographs of the decoy from the date of the operation, as well as the ALJ's personal observations of the decoy at the hearing. Both sources are "reasonable in nature, credible and of solid value." (*County of Los Angeles, supra*, 32 Cal.App.4th at 814.)

Based on the above, the Department's findings regarding the decoy's appearance must stand. Ultimately, appellants are asking this Board second-guess the Department and reach a different result. Extensive legal authority prohibits this Board from doing so. (*Southland, supra*, 103 Cal.App.4th at 1094.)

II

PENALTY

Appellants contend its 10-day penalty is unreasonable, and that the Department should reconsider it on the grounds that the ALJ "failed to consider the evidence presented as to Appellants' system safeguards, which speak to Appellants' training efforts." (AOB, at p. 11.) In other words, appellants believe its 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 a 15-day suspension, which is five 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 enough from the standard 15-day suspension. (AOB, at pp. 11-13.) The Department stated in its decision that appellants were warranted some mitigation by their discipline-free operation. (Decision, at p. 5.) However, the Department found that this mitigation was “counter-balanced somewhat by (1) the decoy’s very youthful appearance, (2) no

evidence of documented training of the licensee(s) and/or employee(s), and (3) the lack of any evidence the Respondent took any steps to correct any problems relating to the sale at hand to prevent future similar sales.” (*Ibid.*) Based on this reasoning, the Board cannot say that the Department abused its discretion.

As the Board has said many times over the years, the extent to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion. Rule 144 provides a standard 15-day suspension for a section 25658(a) violation, which five more days than appellant received. Rule 144 allows the Department to exercise discretion to consider aggravation and mitigation, and its rejection of appellants’ mitigation evidence based on the facts of the sale and failure to produce documented evidence of training is not an abuse of discretion. Therefore, the penalty must stand.

ORDER

The decision of the Department is affirmed.⁵

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

⁵ This final order is filed in accordance with Business and Professions Code section 23088 and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 *et seq.*

APPENDIX

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

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

7-ELEVEN, INC., AND PRINCE SANDHU
7-ELEVEN STORE 2171 34291
1601 WEST REDLANDS BLVD.
REDLANDS, CA 92373-3130

OFF-SALE BEER AND WINE - LICENSE

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

RIVERSIDE DISTRICT OFFICE

File: 20-484953

Reg: 20090143

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 10, 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 27, 2021, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: March 17, 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:

7-Eleven, Inc., and Prince Sandhu	}	File: 20-484953
Dbas: 7-Eleven Store 2171 34291	}	
1601 West Redlands Blvd.,	}	Reg.: 20090143
Redlands, California 92373-3130	}	
	}	License Type: 20
Respondents	}	
	}	Word Count: 7,485
	}	
	}	Court 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 Upland, California, on November 4, 2020.

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

Adam Koslin, Attorney, represented Respondents, 7-Eleven, Inc., and Prince Sandhu.

The Department seeks to discipline the Respondents' license on the grounds that, on or about March 14, 2020, the Respondents-Licensees' agent or employee, Bakhshish Singh, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Garrett Briceno, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on November 4, 2020.

FINDINGS OF FACT

1. The Department filed the accusation on or about June 3, 2020.

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

2. The Department issued a type 20, off-sale beer and wine license to the Respondents for the above-described location on January 19, 2010 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Garrett Briceno (hereinafter referred to as decoy Briceno) was born on September 11, 2001. On March 14, 2020, he was 18 years old. On that date he served as a minor decoy in an operation conducted by the Redlands Police Department (Redlands PD).
5. Decoy Briceno appeared and testified at the hearing. On March 14, 2020, he was 5'9" tall and weighed approximately 178 pounds. He wore a black and grey, long-sleeved flannel shirt, black pants, and black sneakers. He wore his hair in a comb-over style. (Exhibits 3 and 4.) His appearance at the hearing was the same, except that he weighed 183 pounds and his hair was styled in a buzz cut.
6. On March 14, 2020, at approximately 5:55 p.m. decoy Briceno entered the Licensed Premises. He walked straight to the alcoholic beverage section and retrieved a three-pack of 25-ounce Bud Light beer cans. He brought the beer to the sales counter for purchase. There was no line of customers.
7. Decoy Briceno placed the Bud Light beer upon the sales counter. Clerk Bakhshish Singh (hereinafter referred to as clerk Singh) scanned the beer. A yellow screen appeared on the point of sale (POS) system notifying clerk Singh to "ID 30 AND UNDER. MUST BE 21 TO PURCHASE. 1. PICTURE ON I.D. MUST MATCH THE CUSTOMER. 2. SCAN OR SWIPE I.D. OR IF BIRTHDATE IS ON OR BEFORE 03-14-99 PRESS [MANUAL ENTER]." There were two buttons at the bottom of the yellow screen, "Manual Enter" and "Visual ID OK." Clerk Singh did not ask the decoy his age. Clerk Singh made a hand gesture, by raising his right index finger and right thumb to create the form of a card. Decoy Briceno understood the gesture to mean that the clerk was asking for the decoy's identification (ID). Decoy Briceno had on his person his valid California Driver License which was vertical in orientation, showed his correct date of birth and included a red stripe which read, "AGE 21 IN 2022." (Exhibit 2.) Clerk Singh watched decoy Briceno reach in his pant pocket to retrieve his ID from his wallet. Before decoy Briceno removed his wallet, clerk Singh made another hand gesture, using his right hand and motioned side-to-side in a horizontal fashion. Decoy Briceno understood clerk Singh's hand motion to indicate "never mind," and that clerk Singh did not want to see his ID. Instead of seeking the decoy's ID, clerk Singh pressed the "Visual ID OK" button, which bypassed the POS safety feature and allowed the sale of alcohol to the minor decoy. Decoy Briceno paid for the beer and exited the store with it. Clerk Singh never spoke to decoy Briceno during the sales transaction.

8. Decoy Briceno re-entered the Licensed Premises with Redlands PD Detective Merriman and other Redlands PD Officers. Detective Merriman asked decoy Briceno to identify the person who sold him the alcohol. Decoy Briceno pointed at clerk Singh to indicate he was the person who sold him the beer. Decoy Briceno and clerk Singh were standing approximately five feet apart, facing and looking at each other, with the sales counter between them, at the time of this identification. A photograph of clerk Singh and decoy Briceno was taken after the face-to-face identification, with decoy Briceno holding the three-pack of Bud Light beer while standing next to clerk Singh. (Exhibit 4.)

9. After the face-to-face identification Detective Merriman issued a citation to clerk Singh. (Exhibit A.) There was no evidence that clerk Singh was distracted during the sales transaction or the face-to-face identification. Clerk Singh did not appear at the hearing.

10. Detective Merriman spoke in English to clerk Singh and asked him to demonstrate on the POS system how he completed the sale of alcohol to decoy Briceno. Clerk Singh scanned the three-pack of Bud Light beer cans and the yellow screen prompt appeared, as described above. A photograph of the screen prompt was taken. (Exhibit 5.) In demonstrating the said sales transaction, despite the instructions on the screen, clerk Singh indicated he asked for the decoy's ID, but did not look at the decoy's ID, did not scan the ID, and did not manually enter the decoy's date of birth into the POS system. Clerk Singh instead said he pressed the "Visual ID OK" button to enable the sale of alcohol to decoy Briceno. There was no evidence the Respondents removed the "Visual ID OK" button.

11. Decoy Briceno appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of clerk Singh at the Licensed Premises on March 14, 2020, decoy Briceno displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk. In-person, decoy Briceno has a very youthful appearance, as that of a teenager.

12. During the decoy operation on March 14, 2020, decoy Briceno visited 26 licensed premises and only one premises, the Licensed Premises, sold alcoholic beverages to him.

13. Decoy Briceno learned about the decoy program through his volunteer experience as a police explorer with the Redlands PD. As of the date of the hearing he had been a police explorer for 11 months. As part of his explorer training, he did not receive any instruction on how to interact with the public. He was not nervous when he entered the Licensed Premises on March 14, 2020, because he focused on performing his decoy duties therein.

14. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

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

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

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

4. Cause for suspension or revocation of the Respondents' license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on March 14, 2020, the Respondents-Licensees' employee, clerk Bakhshish Singh, inside the Licensed Premises, sold alcoholic beverages, to-wit: a three-pack of 25-ounce cans of Bud Light beer, to Garrett Briceno, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-12.)

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

6. With respect to rule 141(b)(2), Respondents argued decoy Briceno did not have the appearance of someone under the age of 21 for the following reasons, (1) he was a calm, self-assured young man who testified he was not nervous when entering the Licensed Premises to conduct the minor decoy operation but did his duty; and (3) he wore clothing attire more reminiscent of someone coming from a work-site, since the decoy operation took place after 5:00 p.m.

7. This rule 141(b)(2) argument is rejected. The Respondents arguments are all speculative. Respondents presented no evidence as to why clerk Singh allegedly believed decoy Briceno to be over 21 years of age. Clerk Singh did not testify. In fact, the evidence indicates clerk Singh most likely knew or at least should have known the decoy

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

was a minor. Clerk Singh was presented with a very, young-appearing decoy Briceno, as that of a teenager. There was nothing about decoy Briceno's demeanor or clothing attire which made him appear older than his actual age. In other words, decoy Briceno had the appearance generally expected of a person under the age of 21. (Findings of Fact ¶¶ 5 and 11.)

PENALTY

The Department requested the Respondents' license be suspended for a period of 10 days, taking into account their discipline-free history, and based on the following factors: (1) the minor decoy's youthful appearance and actual age of 18, and (2) clerk Singh made no effort to prevent the sale to the minor, refusing to see the minor's ID, waiving him off when the minor tried to retrieve the ID for him.

The Respondents recommended an all-stayed suspension should the accusation be sustained. The Respondents argued for a substantially mitigated penalty based on the following: (1) Respondents' 10-year, one-month and 26 days licensure without prior disciplinary history, (2) with the corona virus pandemic first breaking into the United States with severe concern of its affects on essential workers like convenience store clerks and the elderly, both of which clerk Singh appears to be based on the photograph of him in exhibit 4, it is understandable, while not laudable, the clerk did not want to handle the minor's ID, and (3) the Respondents' POS screen reminds its clerks to verify the customer's age, swipe the ID or manually enter the customer's date of birth, and displayed the exact date, month and year a person has to be born on or before to be able to legally purchase age-restricted products. The Respondent argued the most it can do is attempt to ensure its employees exercise discretion in a responsible manner by giving them the tools to succeed and comply with the requirements of the law.

The Respondents are correct that their approximate 10-year, and one-month discipline-free operation warrants mitigation. However, that mitigation is counter-balanced somewhat by (1) the decoy's very youthful appearance, (2) no evidence of documented training of the licensee(s) and/or employee(s), and (3) the lack of any evidence the Respondent took any steps to correct any problems relating to the sale at hand to prevent future similar sales.

Respondents' arguments as to clerk Singh's alleged intentions are all speculative. It could also be presumed, from the facts of the case, clerk Singh mistakenly believed that since the decoy was going to comply with the clerk's request to provide his ID, by reaching for his wallet in his pant pocket, clerk Singh assumed the decoy was of legal age to purchase the alcohol. But again, this too is speculative.

There was no evidence clerk Singh was concerned about the effects of the covid-19 pandemic. However, even if clerk Singh was, he certainly could have asked decoy Briceno his age and/or allowed the decoy to either hold up his ID or place his ID on the sales counter for clerk Singh to scan, and thereafter use hand-sanitizer. The Department makes a counter argument that any responsible licensee will ensure a safe workplace by providing hand sanitizers and other mitigating efforts; and if covid-19 really was a concern a responsible licensee would not place an elderly man on a shift that would leave him vulnerable. Regardless, there were many ways in which clerk Singh could have ensured he was safely verifying the age of decoy Briceno and comply with the law. The Department also pointed out that 25 licensed premises that day complied with the law, which indicates there are ways to train employees and to enforce policies to ensure clerks do not violate policy or the law.

The Respondents' argument that the most they could do is give their clerks the tools to succeed and comply with the law is faulty. There was no evidence the Respondents proactively made any attempt to ensure their clerks comply with the law. Furthermore, as discussed above, there was no evidence of any positive steps taken to prevent future similar sales and the "Visual ID OK" remains a viable option for their clerks to bypass any safety protocol in place.

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. The penalty recommended herein complies with rule 144.

ORDER

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

Dated: December 17, 2020



D. Huebel
Administrative Law Judge

