

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

AB-9908

File: 20-609028; Reg: 20090180

7-ELEVEN, INC.,
dba 7-Eleven Store #34449H
1256 Orange Street
Redlands, CA 92374,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: September 3, 2021
Telephonic

ISSUED SEPTEMBER 13, 2021

Appearances: *Appellant:* Jade Quintero, of Solomon, Saltsman & Jamieson, as
counsel for 7-Eleven, Inc.,

Respondent: Bryan Rouse, as counsel for the Department of
Alcoholic Beverage Control.

ORDER

7-Eleven, Inc., doing business as 7-Eleven Store #34449H (appellant), appeals from a decision of the Department of Alcoholic Beverage Control (Department)¹ suspending its license for 15 days because its clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

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

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on August 23, 2019.

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

On June 19, 2020, the Department filed a single-count accusation charging that on January 24, 2020, appellant's clerk, Anthony Escudero (the clerk), sold an alcoholic beverage to 18-year-old Ibrahim Sarkis (the decoy). Although not noted in the accusation, the decoy was part of a joint operation between the Redlands Police Department (RPD) and the Department 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 Detective Michael Merriman. Raymond Ma, who supervises twelve 7-Eleven corporate stores, including this one, presented testimony regarding the store's policies and training.

Testimony established that on January 24, 2020, the decoy entered the licensed premises and went to the cooler where he selected a three-pack of 25-ounce cans of Bud Light beer. He took the beer to the counter where the clerk asked for his identification and age. The decoy replied that he was 18 years old and handed the clerk his California driver's license, which had a portrait orientation, contained his correct date of birth, and had a red stripe indicating "AGE 21 IN 2022." (Exh. 2.) The clerk looked at the ID then completed the sale. RPD Officer Gutierrez observed the transaction while inside the store in plain clothes.

The decoy exited the premises with the beer, then reentered with RPD Detective Merriman. Detective Merriman asked the decoy who sold him the beer. The decoy pointed at the clerk and said "he sold me it." A photograph of the decoy and clerk was

taken (exh. 4) and the clerk was issued a citation. The clerk's employment was subsequently terminated.

The administrative law judge (ALJ) issued a proposed decision on December 18, 2020, sustaining the accusation and recommending a 15-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 then filed a timely appeal contending: (1) the decoy did not display the appearance required by rule 141(b)(2),² (2) the ALJ's decision finding of compliance is not supported by substantial evidence, and (3) the penalty fails to properly take into account all factors in mitigation.

DISCUSSION

I

DECOY'S APPEARANCE

Appellant contends that the ALJ improperly considered the decoy's in-person appearance at the hearing in determining whether his appearance during the decoy operation complied with rule 141(b)(2). (AOB at p. 10.) Appellant further contends that the finding of compliance is not supported by substantial evidence because the ALJ failed to explain how she reached this conclusion. (*Ibid.* at p. 13.)

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.

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.

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.)

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 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) 2 Cal.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 Department made the following findings regarding the decoy's appearance:

5. Decoy Sarkis appeared and testified at the hearing. On January 24, 2020, he was approximately 5'9" tall and weighed approximately 135 pounds. He wore a black long-sleeved shirt, blue jeans and brown boots. He had braces on his teeth. His hair was styled in a right comb-over. (Exhibits 3A, 3B and 4.) His appearance at the hearing was the same, except that he no longer had his braces.

¶ . . . ¶

10. Decoy Sarkis 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 Escudero at the Licensed Premises on January 24, 2020, decoy Sarkis 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 Sarkis has a youthful appearance, as that of a teenager.

¶ . . . ¶

12. January 24, 2020, was either the first or second day of decoy operations in which decoy Sarkis had participated. Decoy Sarkis visited 22 licensed premises that day, with three of those establishments having sold alcohol to him, including the Licensed Premises. Decoy Sarkis learned about the decoy program through his volunteer service as a police explorer with the San Bernardino County Sheriffs Department. He learned about the explorer program through his brother, who had been in the program prior to decoy Sarkis and who is now a Sheriff's Deputy. Decoy Sarkis has been a police explorer for four years. He received

training on how to interact with the public, which consists of learning how to be respectful toward other people when speaking with them as well as some de-escalation training. He explained that de-escalation training involved learning how to "calm down a situation so things don't get out of hand."

(Findings of Fact, ¶¶ 5-12.) Based on these findings, the Department addressed appellant's rule 141(b)(2) arguments:

6. With respect to rule 141(b)(2), Respondent argued decoy Sarkis did not have the appearance that could generally be expected of someone under the age of 21 for the following reasons, (1) decoy Sarkis' four years' experience as a police explorer with training in de-escalation techniques and how to present himself to the public, and (2) his work attire of work boots, heavy jeans and athlete gear, especially coming into the store late in the evening, he may well have appeared to the clerk as someone coming off of a job site rather than his true nature as a minor under 21.

7. This rule 141(b)(2) argument is rejected. The Respondent's arguments are all speculative. The Respondent presented no evidence as to why clerk Escudero allegedly believed decoy Sarkis to be over 21 years of age. Clerk Escudero did not testify. There was nothing about decoy Sarkis' police explorer experience, training, demeanor or attire which made him appear older than his actual age. In other words, decoy Sarkis had the appearance generally expected of a person under the age of 21. (Findings of Fact ¶¶ 5 and 10.)

Conclusions of Law, ¶¶ 6-7.) We agree with this assessment.

As this Board has said many times, minors come in all shapes and sizes and we are reluctant to suggest that a minor decoy automatically violates the rule based on physical characteristics. (See, e.g., *7-Eleven/ NRG Convenience Stores* (2015) AB-9477; *7-Eleven Inc./Lobana* (2012) AB-9164.) This Board has noted that:

[a]n ALJ's task to evaluate the appearance of decoys is not an easy one, nor is it precise. To a large extent, application of such standards as the rule provides is, of necessity, subjective; all that can be required is reasonableness in the application. As long as the determinations of the ALJs are reasonable and not arbitrary or capricious, we will uphold them.

(*O'Brien* (2001) AB-7751, at pp. 6-7.) Notably, the standard is not that the decoy must display the appearance of a "childlike teenager" but "the appearance which could

generally be expected of a person under 21 years of age." (Rule 141(b)(2).) In Findings of Fact paragraphs 5 through 12, and Conclusions of Law paragraphs 6 and 7, the Department found that the decoy met this standard, notwithstanding appellant's assertion that he displayed the appearance of someone over 21.

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. 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*, 25 Cal.App.3d at p. 335.)

While appellant contends that the ALJ impermissibly based her findings on the appearance of the decoy at the hearing, rather than at the time of the decoy operation the decision very clearly states:

10. Decoy Sarkis 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 Escudero at the Licensed Premises on January 24, 2020**, decoy Sarkis 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 Sarkis has a youthful appearance, as that of a teenager.

(Findings of Facts, ¶ 10, emphasis added.) This argument is entirely without merit and is not supported by the record.

Appellant further asserts that the ALJ is required to not just make findings, but that she must explain his findings. However, such a requirement has been rejected by this Board numerous times. For example, in *7-Eleven, Inc./Cheema* (2004) AB-8181 at p. 6, the Board said: “Appellants misapprehend *Topanga*.³ It does not hold that findings must be explained, only that findings must be made.” (Also see: *No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 258-259 [242 Cal.Rptr. 760]; *Jacobson v. Co. of Los Angeles* (1977) 69 Cal.App.3d 374, 389 [137 Cal.Rptr. 909].) This Board has stated very clearly, “The omission of analysis alone is not grounds for reversal, provided findings have been made.” (*Garfield Beach CVS, LLC/Longs Drug Stores Cal., LLC* (2015) AB-9514, at pp. 6-7.)

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 penalty is excessive because it fails to take into account all of the mitigating factors presented by appellant at the administrative hearing, and fails to articulate the ALJ’s reasoning in applying these factors to the

³*Topanga Assn. for a Scenic Community v. Co. of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836].

determination of the penalty, thereby constituting an abuse of discretion. (AOB at pp. 15-17.)

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.*)

Appellant faults the decision for failing to mitigate the penalty further. However, as we have said time and again, 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 *extent* to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion — pursuant to rule 144 — and the Board may not interfere with that discretion absent a clear showing of abuse of discretion. Accordingly, the fact that the ALJ recommended a 15-day penalty, rather than the mitigated penalty requested by appellant, is entirely within her discretion. Furthermore, her reasoning in reaching that conclusion need not be explained, as discussed in Section I, *supra*.

Appellant has not established that the Department abused its discretion by imposing a 15-day penalty in this matter.

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 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:**

7-ELEVEN, INC.
7-ELEVEN STORE 34449H
1256 ORANGE STREET
REDLANDS, CA 92374

OFF-SALE BEER AND WINE - LICENSE

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

RIVERSIDE DISTRICT OFFICE

File: 20-609028

Reg: 20090180

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.	}	File: 20-609028
Dbas: 7-Eleven Store 34449H	}	
1256 Orange Street	}	Reg.: 20090180
Redlands, California 92374	}	
	}	License Type: 20
Respondent	}	
	}	Word Count: 16,015
	}	
	}	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 Respondent, 7-Eleven, Inc.

The Department seeks to discipline the Respondent's license on the grounds that, on or about January 24, 2020, the Respondent-Licensee's agent or employee, Anthony Escudero, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Ibrahim Sarkis, 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 19, 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 Respondent for the above-described location on August 23, 2019 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondent's license.
4. Ibrahim Sarkis (hereinafter referred to as decoy Sarkis) was born on December 14, 2001. On January 24, 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) in conjunction with the Department.
5. Decoy Sarkis appeared and testified at the hearing. On January 24, 2020, he was approximately 5'9" tall and weighed approximately 135 pounds. He wore a black long-sleeved shirt, blue jeans and brown boots. He had braces on his teeth. His hair was styled in a right comb-over. (Exhibits 3A, 3B and 4.) His appearance at the hearing was the same, except that he no longer had his braces.
6. On January 24, 2020, decoy Sarkis entered the Licensed Premises, walked to the alcoholic beverage section and retrieved a three-pack of 25-ounce cans of Bud Light beer. He brought the beer to the sales counter for purchase.
7. Decoy Sarkis placed the Bud Light beer upon the sales counter. Clerk Anthony Escudero (hereinafter referred to as clerk Escudero) asked the decoy for his ID and age. Decoy Sarkis replied that he was 18 years old and handed clerk Escudero his valid California Driver License which was vertical in orientation, had his correct date of birth and included a red stripe which read, "AGE 21 IN 2022." (Exhibit 2.) Clerk Escudero looked at the decoy's ID for a couple of seconds, handed it back and proceeded with the sale of alcohol to the minor. Decoy Sarkis paid for the beer and exited the store with it. Redlands PD Officer Gutierrez witnessed the entire sales transaction while in a plain clothes capacity posing as a customer. During the time decoy Sarkis and Officer Gutierrez were inside the Licensed Premises they did not communicate with each other.
8. Decoy Sarkis re-entered the Licensed Premises with Redlands PD Detective Merriman and other officers. Detective Merriman asked decoy Sarkis to identify the person who sold him the alcohol. Decoy Sarkis pointed at clerk Escudero and replied, "He sold me it." Decoy Sarkis and clerk Escudero were standing a couple of feet apart and facing each other, with no obstruction between them, at the time of the identification. A photograph of clerk Escudero and decoy Sarkis was taken after the face-to-face identification, with decoy Sarkis holding his ID and the three-pack of Bud Light beer while standing next to clerk Escudero. (Exhibit 4.)
9. Clerk Escudero was issued a citation after the face-to-face identification. There was no evidence that clerk Escudero was distracted during the sales transaction or the face-to-

face identification, or that he did not understand he was being identified as having sold alcoholic beverages to decoy Sarkis. Clerk Escudero did not appear at the hearing.

10. Decoy Sarkis 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 Escudero at the Licensed Premises on January 24, 2020, decoy Sarkis 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 Sarkis has a youthful appearance, as that of a teenager.

11. Detective Merriman asked clerk Escudero to show him how he sold the three-pack of Bud Light beer to decoy Sarkis on the Respondent's point of sale (POS) system. Clerk Escudero scanned the three-pack of beer and a yellow prompt appeared on the screen requesting the clerk scan the customer's ID or manually enter the customer's date of birth. If the clerk does not scan the ID, the screen has two options from which to select, a "Visual ID OK" button or a "Manual Enter" button. The "Manual Enter" button requires the clerk manually enter a date of birth into the POS. The "Visual ID OK" button bypasses the safety protocol and allows the sale of alcohol to proceed. Clerk Escudero admitted that he neither scanned the decoy's ID nor entered a birthdate but selected the bypass button.

12. January 24, 2020, was either the first or second day of decoy operations in which decoy Sarkis had participated. Decoy Sarkis visited 22 licensed premises that day, with three of those establishments having sold alcohol to him, including the Licensed Premises. Decoy Sarkis learned about the decoy program through his volunteer service as a police explorer with the San Bernardino County Sheriff's Department. He learned about the explorer program through his brother, who had been in the program prior to decoy Sarkis and who is now a Sheriff's Deputy. Decoy Sarkis has been a police explorer for four years. He received training on how to interact with the public, which consists of learning how to be respectful toward other people when speaking with them as well as some de-escalation training. He explained that de-escalation training involved learning how to "calm down a situation so things don't get out of hand."

(Respondent's Witness)

13. Raymond Ma appeared via video/audio and testified at the hearing.² On August 1, 2020, Mr. Ma became the area leader of the Licensed Premises. Mr. Ma oversees 12 7-Eleven corporate stores, with individual store managers as his direct

² The parties stipulated to having Mr. Raymond Ma appear for the hearing via Zoom's video/audio conference method. (See last two pages of exhibit 1.)

reports. Mr. Ma does not oversee franchise stores, because those are overseen by a field consultant. The Licensed Premises is a corporate store. The 7-Eleven Corporation is in charge of running all of the corporate stores' day-to-day operations, which includes hiring, training, firing and managing employees who work in the corporate stores.

14. As soon as possible after franchise and corporate employees are hired they take a computer-based on-line compliance training course, known as "Coming of Age." The training covers age-restricted product sales, the legal age for such purchases, the acceptable forms of ID and the ID markers to look for relating to counterfeit IDs. (Exhibit A2.) The training modules include videos and a test component, which employees must pass with a score of 80 percent or better. Employees are made aware, during their training, that if they violate company policy or the law, or if they sell alcoholic beverages to a minor their employment will be terminated. A communication flyer is sent monthly to corporate stores to serve as employee reminders on varying topics, including, but not limited to, asset protection, customer service, and ID/age verification reminders for age-restricted sales. The age-restricted flyers are placed on the sales counter facing the customer near the credit card/pin pad as reminders to employees that there are certain age-restricted products for which they need to request an ID. The Respondent produced at the hearing a copy of the age-restricted flyer which Mr. Ma sent to corporate stores in August of 2020. (Exhibit A1.)

15. The Respondent produced a three-page "Field Consultant Compliance Report," which Mr. Ma generated and printed on October 30, 2020. (Exhibit C.) The report shows each corporate stores' completed training category by percentage. The training categories include Addressing Shoplifting and Robberies, Age-Restricted Sales, Anti-Money Laundering: The Patriot Act, Fueling Station Safety for Class C Operators, Handling Food Safely, Preventing Fraud, Working Safely, and Workplace Awareness. The report shows that as of October 30, 2020, of the 11 employees at the Licensed Premises 90.91% were compliant in their Age-Restricted Sales training; meaning that 10 out of 11 of the employees had passed and completed their Age-Restricted Sales portion of the "Coming of Age" training.³ Mr. Ma was not aware of the Licensed Premises' training compliance rating prior to October 30, 2020, except that clerk Escudero had completed the Age-Restricted training on January 23, 2020. The training at the Licensed Premises has not changed since the date of the minor decoy operation, January 24, 2020.

16. Corporate stores typically have a store manager and assistant manager. Each store typically has three different shifts, which include a morning, afternoon and an evening shift. The Licensed Premises is a limited-hour store so the store manager is typically in the store in the morning and the assistant manager will work the shift when the store manager is not on site. Where possible 7-Eleven will try to minimize the amount of time

³ Mr. Ma pointed out that detail location on the first page, fourth row from the bottom.

there is no management on site. However, when no management is on shift the store manager and assistant manager are on-call seven days a week, 24 hours a day. As an alternative to contacting their direct managers, sales associates may telephone the next level manager, the human resources manager and Mr. Ma, through 7-Eleven's "open door policy." The store manager and assistant manager's duties include ensuring employees follow company policy and are properly verifying customers' ages for age-restricted sales. The managers will remind clerks to verify customer IDs with age-restricted sales and other areas which need focused attention.

17. On January 24, 2020, the Licensed Premises had a store manager, Claudia Hernandez⁴ and an assistant manager, Brea Lang, the former of whom would know more about the day-to-day operations at the Licensed Premises than Mr. Ma. Neither the store manager nor the assistant manager was on shift at the Licensed Premises with clerk Escudero during the minor decoy operation at issue. Clerk Escudero and the other sales associate working with him that night were in charge of the Licensed Premises, and had the option to telephone either the store manager or assistant manager "in times of need." After the violation the sales associate working with clerk Escudero telephoned and informed the store manager that clerk Escudero had sold alcoholic beverages to a minor.

18. Clerk Escudero was hired on January 9, 2020. He completed the "Coming of Age" training on January 23, 2020. Clerk Escudero's last day of employment was on the day of the minor decoy operation, January 24, 2020, when he was suspended, and thereafter on January 27, 2020, his employment was terminated due to failing to pass a background check.

19. The Respondent produced a three-page document which serves as a job aide for store operators and provides an overview of how to ring-up sales on the POS system. (Exhibit B.) If an alcoholic beverage is scanned on the Respondent's POS system, a yellow screen prompt appears informing the clerk, "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 04-24-97⁵ PRESS [MANUAL ENTER]." There are three buttons at the bottom of the yellow screen, "Manual Enter," "Visual ID OK," and "Exit." Clerks are given discretion to use the "Visual ID Ok" button if in their judgment a customer appears older than 30 years of age, by looking for physical markers such as hair color, skin complexion or physical facial features. Employees are taught that if they are ever in doubt of a customer's age to ask for ID. It was Mr. Ma's understanding that the POS system at the Licensed Premises has not

⁴ As of the date of the hearing Claudia Hernandez was working at another corporate store as a store manager and Laura Chambers was the current store manager at the Licensed Premises as of August 15, 2020.

⁵ This date updates automatically each day and informs the clerk what date a customer must be born on or before to legally purchase the age-restricted item.

changed since January 24, 2020. There was no evidence that the “Visual ID Ok” option was removed.

20. The corporate stores have multiple signs around the store, including at the register and behind the counter, which inform employees the minimum age requirement to purchase age-restricted merchandise. Usually there is an age-verification sign-in sheet by the credit card/pin pad. Mr. Ma explained that the easiest manner for employees to verify a customer’s age is to simply scan the customer’s ID in the POS system, which will verify the customer’s age.

21. The corporate stores participate in a secret shopper program to verify whether store clerks are asking for customers’ IDs for age-restricted sales. A green card is issued to a clerk who asks for an ID, and a red card is issued when the clerk fails to do so. If an employee receives a red card, they are asked to revisit the compliance training for age-restricted sales as a refresher.

22. After the said violation of January 24, 2020, Mr. Ma said corporate made sure that all employees were compliant trained in age-restricted sales and reminded team members of both the policy and laws, to ensure there was heightened awareness.

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

CONCLUSIONS OF LAW

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

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

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

4. Cause for suspension or revocation of the Respondent’s license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on January 24, 2020, the Respondent-Licensee’s employee, clerk Anthony Escudero, inside the Licensed Premises, sold alcoholic beverages, to-wit: a three-pack of 25 ounce Bud Light beer cans, to Ibrahim Sarkis, a person under the age of 21, in

violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-11, and 19.)

5. The Respondent argued the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)⁶ and, therefore, the accusation should be dismissed pursuant to rule 141(c).

6. With respect to rule 141(b)(2), Respondent argued decoy Sarkis did not have the appearance that could generally be expected of someone under the age of 21 for the following reasons, (1) decoy Sarkis' four years' experience as a police explorer with training in de-escalation techniques and how to present himself to the public, and (2) his work attire of work boots, heavy jeans and athlete gear, especially coming into the store late in the evening, he may well have appeared to the clerk as someone coming off of a job site rather than his true nature as a minor under 21.

7. This rule 141(b)(2) argument is rejected. The Respondent's arguments are all speculative. The Respondent presented no evidence as to why clerk Escudero allegedly believed decoy Sarkis to be over 21 years of age. Clerk Escudero did not testify. There was nothing about decoy Sarkis' police explorer experience, training, demeanor or attire which made him appear older than his actual age. In other words, decoy Sarkis had the appearance generally expected of a person under the age of 21. (Findings of Fact ¶¶ 5 and 10.)

PENALTY

The Department requested the Respondent's license be suspended for a period of 15 days, based on the following factors: (1) the minor decoy's actual age and youthful appearance, in fact wearing braces at the time, (2) the perfunctory effort by clerk Escudero to ascertain decoy Sarkis' age, ignoring all the training he received the day prior, and failing to scan the ID, which is the simplest method of verifying age, per Mr. Ma, and (3) the Respondent has only been licensed since August 23, 2019 with a violation already occurring on January 24, 2020.

The Respondent recommended a substantially mitigated penalty, a 5-day suspension, based on the following factors: (1) the extensive training 7-Eleven corporate puts its sales associates through, (2) the signs throughout the store reminding clerks of the legal age to purchase age-restricted products, (3) the requirement clerks check the ID of anyone appearing 30 years of age and under, (4) the POS yellow screen prompt reminding clerks to ask for ID and verify age, by either swiping the ID, manually

⁶ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

entering the date of birth or visually looking at the customer, (5) on October 30, 2020, the Licensed Premises had a 90.91% compliance training record, (6) clerk Escudero was suspended on January 24, 2020, and later terminated on January 27, 2020, and (7) remedial steps were taken, including retraining sales associates in age-restricted sales and reminding them of the importance of checking IDs.

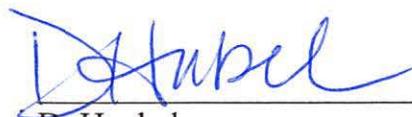
While the Respondent is commended for having its sales associates re-take the age-restricted sales training and providing reminders to them to ask for IDs to verify customer ages for age-restricted sales, that mitigation is counter-balanced by (1) the decoy's youthful appearance, as that of a teenager, (2) no evidence the Respondent took steps to correct the problem at hand, specifically the bypass key, which enabled the sales transaction in the first place. The "Visual ID Ok" option remains a viable option to Respondent's clerks, which is of grave concern, since Mr. Ma testified the sales associates can use their discretion whether to use said key. Unfortunately, despite the training, the signs throughout the store, the requirement to ask for IDs, the yellow screen prompt, the frequent monthly flyer reminders, and the secret shopper program, none of this prevented the sale at hand. While Mr. Escudero was suspended, he was terminated not for the sale but for failing a background check. There was no evidence why he was suspended.

The penalty recommended herein complies with rule 144.

ORDER

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

Dated: December 18, 2020



D. Huebel

Administrative Law Judge

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<input type="checkbox"/> Non-Adopt: _____
By: _____
Date: _____

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03/10/21