

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

AB-9909

File: 20-484551; Reg: 20090257

7-ELEVEN, INC. and COSTAL CONVENIENCE
SERVICE SOLUTIONS INCORPORATED,
dba 7-Eleven Store #2174 19003D
837 South Gaffney Street
San Pedro, CA 90731-3612,
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 Costal Convenience Service
Solutions Incorporated,

Respondent: Jason T. Liu, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Costal Convenience Service Solutions Incorporated, doing
business as 7-Eleven Store #2174 19003D (appellants), appeal from a decision of the
Department of Alcoholic Beverage Control (Department)¹ suspending their license for
15 days because their 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

Appellants' off-sale beer and wine license was issued on March 23, 2010.

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

On July 20, 2020, the Department filed an accusation against appellants charging that, on February 7, 2020, appellants' clerk, Jose Duran-Lopez (the clerk), sold an alcoholic beverage to 19-year-old Jesus Reyes (the decoy). Although not noted in the accusation, the decoy was working for the Los Angeles Police Department (LAPD) at the time.

At the administrative hearing held on November 5, 2020, documentary evidence was received and testimony concerning the sale was presented by the decoy and by LAPD Officer Christopher Lindberg. Robert Lee, President of Costal Convenience Service Solutions Incorporated, testified on appellants' behalf.

Testimony established that, on February 7, 2020, a plain clothes LAPD officer entered the licensed premises, followed shortly thereafter by the decoy. The decoy went to the cooler where he selected a 25-ounce can of Bud Light beer. He took it to the sales counter and the clerk asked for his identification. The decoy handed him his California driver's license (exh. 3), which had a vertical format and contained his correct date of birth (showing him to be 19 years of age), as well as red stripe indicating "AGE 21 IN 2021." The clerk pressed the "Visual ID OK" button, which allowed the sale to proceed, and completed the sale without asking any age-related questions. The decoy exited the store with the beer.

The decoy reentered the premises with Officer Lindberg to make a face-to-face identification of the clerk. Following the identification, Officer Lindberg explained that the clerk had sold alcohol to a minor and the clerk said, "Man, I knew it!" (Finding of

Fact ¶ 9.) A photograph of the clerk and decoy standing together was taken (exh. 5) and the clerk was issued a citation.

Appellants then filed a timely appeal contending: (1) the ALJ's finding that the decoy's appearance complied with rule 141(b)(2)² improperly relied on his appearance at the hearing, and (2) the penalty is excessive because it fails to take into consideration all factors in mitigation and improperly applied a Department precedential decision.

DISCUSSION

I

DECOY'S APPEARANCE

Appellants contend 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 pp. 9-10.)

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 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.)

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:

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.

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 Reyes appeared and testified at the hearing. On February 7, 2020, he was 5' 11" tall and weighed approximately 275 pounds. He wore a black, long-sleeved shirt under a red and black t-shirt, black Adidas pants (with white stripes), and black/white khaki Adidas shoes. He wore an Apple watch on his left wrist. (Exhibits 4 and 5.) His appearance at the hearing was the same, except that he weighed 250 pounds.

¶ . . . ¶

11. Decoy Reyes 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 Lopez at the Licensed Premises on February 7, 2020, decoy Reyes displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk. Decoy Reyes has a baby-face and appears youthful.

12. Decoy Reyes had been on twelve minor decoy operations^[fn.] prior to February 7, 2020. Based on his experience he felt pretty comfortable and was not nervous when he entered the Licensed Premises but was focused on performing his duties as a decoy. Decoy Reyes learned about the decoy program through his service as a police cadet with the LAPD. He became part of the cadet youth program at the age of 11 until he turned 18 years of age. At the age of 18 he became a civilian employee with the LAPD and began volunteering as a minor decoy. As an LAPD civilian employee, he received a full day of training with the personnel department, which included instruction on how to act as a civilian employee, for example, how to greet people and make conversation with them. Decoy Reyes believes his experience with the LAPD has made him more mature, self-confident and responsible.

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

6. With respect to rule 141(b)(2), Respondents argued decoy Reyes did not have the appearance of someone under the age of 21 for the following

reasons, (1) his larger stature, of 5'9"³ and 275 pounds, (2) during the said minor decoy operation he had a calm, competent, mature, and responsible demeanor, was not nervous, went directly to the cooler, retrieved the beer and directly to the counter to purchase, and (3) wore an expensive Apple watch.

7. This rule 141(b)(2) argument is rejected. The Respondents arguments are all speculative. Respondents presented no evidence as to why clerk Lopez allegedly believed decoy Reyes to be over 21 years of age, let alone 30 years of age as per store policy requiring clerks ask for the ID of anyone appearing 30 years of age or under. Clerk Lopez did not testify. In fact, the evidence indicates clerk Lopez most likely knew or at least should have known the decoy was a minor. Clerk Lopez was presented with a "baby-faced," youthful appearing decoy Reyes, and when Officer Lindberg advised clerk Lopez he had sold alcohol to a minor, clerk Lopez spontaneously replied, "Man I knew it!" Notwithstanding, there was nothing about decoy Reyes' stature, demeanor or Apple watch which made him appear older than his actual age. In other words, decoy Reyes had the appearance generally expected of a person under the age of 21. (Findings of Fact ¶¶ 5 and 11.)

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

³ This appears to be a typographical error. The decoy was 5' 11" tall. (Findings of Fact, ¶ 5; RT at p. 19.)

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 appellants' 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 appellants contend that the ALJ impermissibly based his findings on the appearance of the decoy at the hearing, rather than at the time of the decoy operation the decision very clearly states:

11. Decoy Reyes 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 Lopez at the Licensed Premises on February 7, 2020**, decoy Reyes displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk. Decoy Reyes has a baby-face and appears youthful.

(Findings of Facts, ¶ 11, emphasis added.) This argument is entirely without merit and is not supported by the record.

Ultimately, appellants are 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

Appellants contend that the penalty is excessive. (AOB at pp. 11-15.) Appellants argue that the decision should be reversed because of its failure to recite — in the penalty section of the decision — *all* the mitigating factors which were presented by appellants at the administrative hearing, thereby constituting an abuse of discretion. (*ibid.*) Appellants also contend the ALJ improperly considered a pending accusation as a factor in aggravation in determining the penalty. (*Id* at p. 12.)

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.*)

Appellants complain that the ALJ misapplied Department Precedential Decision No. 19-03-E, *7-Eleven and Yi (Yi)* (April 18, 2019) in determining the penalty in this matter. They maintain they presented evidence of mitigation which the ALJ wrongfully disregarded by viewing the pending accusation as a factor in aggravation.

In *Yi*, the Department ruled that where a similar disciplinary matter is pending against the licensee, the prior violation can be considered for purposes of notice but that it cannot be considered a “prior strike” under Section 25658. The decision in that case established that the receipt of a letter of warning or notice of a pending accusation should put a licensee on notice that: (1) the complained-of behavior is reasonably foreseeable in the premises, and (2) a responsible licensee has a duty to prevent that behavior. Failure to take adequate preventive measures, or allowing the continuation of the behavior, shows a continuing course or pattern of conduct — which is a factor in aggravation. As stated in the precedential decision:

The complete failure to take any reasonable steps to prevent alcoholic beverages being sold to minors, despite having actual notice of a problem, is an aggravating factor that counter-balances any mitigation that may be had from a lengthy history of licensure without discipline.

(*Yi*, supra at p. 5.)

We see no error in the Department’s application of factors in aggravation and mitigation in this matter. This balancing is entirely within the discretion of the ALJ. Here, as in *Yi*, there is a pending accusation against the license for a similar violation involving the sale of alcohol to a minor. The ALJ is entitled to weigh that fact as a factor in aggravation.

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.

Appellants have 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. & COASTAL CONVENIENCE
SERVICE SOLUTIONS INCORPORATED
7 ELEVEN STORE 2174 19003D
837 S GAFFEY STREET
SAN PEDRO, CA 90731-3612

OFF-SALE BEER AND WINE - LICENSE

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

LAKESWOOD DISTRICT OFFICE

File: 20-484551

Reg: 20090257

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 Coastal Convenience Service	}	File: 20-484551
Solutions Incorporated	}	
Dbas: 7-Eleven Store 2174 19003	}	Reg.: 20090257
837 South Gaffey Street	}	
San Pedro, California 90731-3612	}	License Type: 20
	}	
Respondents	}	Word Count: 18,507
	}	
	}	i-Depo Reporters:
	}	Court Reporter: Jackie Sienski
	}	Video Host: Addison Green
	}	
<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 by stipulation of the parties via video/audio hearing, for Cerritos, California, on November 5, 2020.

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

Adam Koslin, Attorney, represented Respondents, 7-Eleven, Inc., and Coastal Convenience Service Solutions Incorporated. Also present at the hearing was Robert Lee, the corporate president of Coastal Convenience Service Solutions Incorporated.

The Department seeks to discipline the Respondents' license on the grounds that, on or about February 7, 2020, the Respondents-Licensees' agent or employee, Jose Duran-Lopez, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Jesus Reyes, 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 5, 2020.

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

FINDINGS OF FACT

1. The Department filed the accusation on or about July 20, 2020.
2. The Department issued a type 20, off-sale beer and wine license to the Respondents for the above-described location on March 23, 2010 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.²
4. Jesus Reyes (hereinafter referred to as decoy Reyes) was born on June 17, 2000. On February 7, 2020, he was 19 years old. On that date he served as a minor decoy in an operation conducted by the Los Angeles Police Department (LAPD).
5. Decoy Reyes appeared and testified at the hearing. On February 7, 2020, he was 5'11" tall and weighed approximately 275 pounds. He wore a black, long-sleeved shirt under a red and black t-shirt, black Adidas pants (with white stripes), and black/white khaki Adidas shoes. He wore an Apple watch on his left wrist. (Exhibits 4 and 5.) His appearance at the hearing was the same, except that he weighed 250 pounds.
6. On February 7, 2020, an LAPD officer entered the Licensed Premises in a plain clothes capacity, followed shortly thereafter by decoy Reyes. Decoy Reyes walked straight to the alcoholic beverage section and retrieved a 25-ounce can of Bud Light beer. He brought the beer to the sales counter for purchase. There was no line of customers.
7. Decoy Reyes placed the Bud Light beer upon the sales counter. Clerk Jose Duran-Lopez (hereinafter referred to as clerk Lopez) scanned the beer. The point of sale (POS) system notified clerk Lopez to ask for the customer's ID. Clerk Lopez did not ask for decoy Reyes' ID or age. Decoy Reyes 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 2021." (Exhibit 3.) Clerk Lopez pressed the "Visual ID OK" button, which bypassed the POS safety feature and allowed the sale of alcohol to the minor. Decoy Reyes paid for the beer and exited the store with it. While decoy Reyes and the LAPD officer were inside the Licensed Premises they did not communicate with or acknowledge each other.
8. Decoy Reyes re-entered the Licensed Premises with LAPD Officer Lindberg and other officers, all of whom walked to the sales counter, behind which stood clerk Lopez.

² The accusation cites, "For purposes of imposition of penalty, if any arising from this accusation, it is further alleged the respondent-licensee(s) has/have suffered the following disciplinary history: Violation Date 12/20/2018; Violation B&P 25658(a), Reg. Date 05/09/2019, Reg. Number 19088814, Penalty pending." (Exhibit 2.)

Decoy Reyes was asked to identify the person who sold him the alcohol. Decoy Reyes pointed at clerk Lopez and identified him as the person who sold him the beer. Decoy Reyes and clerk Lopez were standing approximately three feet apart and facing each other, with the sales counter between them, at the time of this identification. A photograph of clerk Lopez and decoy Reyes was taken after the face-to-face identification, with decoy Reyes standing next to clerk Lopez while holding the Bud Light beer in his right hand and pointing at the clerk with his left index finger. (Exhibit 5.)

9. After the face-to-face identification Officer Lindberg explained to clerk Lopez that he had sold alcohol to a minor, to which clerk Lopez spontaneously replied, "Man I knew it!"

10. Clerk Lopez was issued a citation after the face-to-face identification. There was no evidence that clerk Lopez was distracted during the sales transaction or the face-to-face identification. Clerk Lopez did not appear at the hearing.

11. Decoy Reyes 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 Lopez at the Licensed Premises on February 7, 2020, decoy Reyes displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk. Decoy Reyes has a baby-face and appears youthful.

12. Decoy Reyes had been on twelve minor decoy operations³ prior to February 7, 2020. Based on his experience he felt pretty comfortable and was not nervous when he entered the Licensed Premises but was focused on performing his duties as a decoy. Decoy Reyes learned about the decoy program through his service as a police cadet with the LAPD. He became part of the cadet youth program at the age of 11 until he turned 18 years of age. At the age of 18 he became a civilian employee with the LAPD and began volunteering as a minor decoy. As an LAPD civilian employee, he received a full day of training with the personnel department, which included instruction on how to act as a civilian employee, for example, how to greet people and make conversation with them. Decoy Reyes believes his experience with the LAPD has made him more mature, self-confident and responsible.

³ Decoy Reyes testified that a minor decoy operation involves visiting, on average, 12 to 15 licensed premises. He estimated that prior to February 7, 2020, he had been to 144 licensed establishments as a minor decoy.

(Respondents' Witness)

13. Robert Lee appeared and testified at the hearing. Mr. Lee is the corporate president for the Respondent corporation. Mr. Lee said he operates the Licensed Premises on a day-to-day basis, which includes training employees, and providing operational support, etc. Employees are required to take and pass an interactive computer-based module training. The training underscores the importance of asking for the ID of anyone appearing 30 years of age and under, and not selling age-restricted products to minors. After completing the training, the employees receive a certificate of completion. The Respondent presented 24 Certificates of Completion for the age-restricted sales modules issued to its current employees. (Exhibits B1 to B24.) Employees are required to take this computer-based training annually. The Respondents also produced at the hearing a five-page "All Activity Report," detailing which computer-based training modules the current employees passed and when. (Exhibit E.)

14. The Respondents' POS system provides a warning screen upon scanning an age-restricted product advising the clerks to check the customer's ID. Mr. Lee guessed that the warning screen was red. He claimed to work the cash register on a daily basis. Every clerk is trained to swipe the ID along the side of the cash register. The POS system will verify whether the customer is of legal age to purchase the age-restricted merchandise. If the customer is of legal age the POS system will allow the sale to proceed. The "Visual ID OK" option button permitted clerks to bypass the safety protocol system upon a supposed visual inspection of the ID and customer.

15. Mr. Lee spoke to clerk Lopez after the said violation of February 7, 2020. Mr. Lee chose not to fire clerk Lopez, but to "give him another shot," because clerk Lopez was a new employee at the time of the violation, and Mr. Lee believed clerk Lopez was a "very conscientious employee." It was Mr. Lee's understanding that clerk Lopez used the "Visual ID OK" option to bypass the safety protocol and sell the alcoholic beverage to decoy Reyes on February 7, 2020. On February 8, 2020, Mr. Lee removed the "Visual ID OK" button on the Respondents' POS system based on this understanding.

16. On February 8, 2020, Mr. Lee issued to all current employees a memorandum entitled, "Must Check ID" to hi-light the importance of the clerks complying with the policy to check customers' IDs for age-restricted sales. All employees were required to place their initials on the memorandum to acknowledge they would adhere "at all times" to such policy. (Exhibit C.) If an employee fails to verify a customer's age, Mr. Lee said he will handle such circumstances "generally, it's on a case-by-case basis." Mr. Lee explained that, "If the employee is more or less a good employee, meaning the person was concerned about what was going on and why,...then [he tries] to work with the

employee; otherwise, if the employee has an attitude that's like, 'I don't care,'" Mr. Lee will terminate that employee's employment.

17. The Respondents participate in the BARS secret shopper program on a monthly basis to verify their 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. Mr. Lee relies on the clerks to notify him when they receive a red or green card. Mr. Lee has no other means by which to determine whether an employee receives a red card other than by their informing him of the same. The Respondents presented at the hearing four green cards for 2019 and four green cards for 2020. (Exhibit D.) Mr. Lee explained that if a clerk were to receive a red card, he would speak with them one-on-one to find out why the secret shopper was not asked for their ID, and to stress the importance going forward to ask for customers' IDs on age-restricted sales.

18. The Respondents received a letter from the LAPD for successfully preventing a sale of tobacco products to a minor decoy on December 1, 2019. (Exhibit F.) The Respondents have signs throughout the Licensed Premises to remind their clerks and advise their customers that "We Check I.D." and "We Card," for age-restricted product sales. (Exhibits A1 through A30.) After the said violation of February 7, 2020, the Respondents added more such signs. Mr. Lee estimated that half the signs in Exhibit A represent the new signs he posted after the said violation.

19. 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 February 7, 2020, the Respondents-Licensees' employee, clerk Jose Duran-

Lopez, inside the Licensed Premises, sold alcoholic beverages, to-wit: a Bud Light beer, to Jesus Reyes, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-11.)

5. The Respondents argued the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)⁴ and, therefore, the accusation should be dismissed pursuant to rule 141(c).

6. With respect to rule 141(b)(2), Respondents argued decoy Reyes did not have the appearance of someone under the age of 21 for the following reasons, (1) his larger stature, of 5'9" and 275 pounds, (2) during the said minor decoy operation he had a calm, competent, mature, and responsible demeanor, was not nervous, went directly to the cooler, retrieved the beer and directly to the counter to purchase, and (3) wore an expensive Apple watch.

7. This rule 141(b)(2) argument is rejected. The Respondents arguments are all speculative. Respondents presented no evidence as to why clerk Lopez allegedly believed decoy Reyes to be over 21 years of age, let alone 30 years of age as per store policy requiring clerks ask for the ID of anyone appearing 30 years of age or under. Clerk Lopez did not testify. In fact, the evidence indicates clerk Lopez most likely knew or at least should have known the decoy was a minor. Clerk Lopez was presented with a "baby-faced," youthful appearing decoy Reyes, and when Officer Lindberg advised clerk Lopez he had sold alcohol to a minor, clerk Lopez spontaneously replied, "Man I knew it!" Notwithstanding, there was nothing about decoy Reyes' stature, demeanor or Apple watch which made him appear older than his actual age. In other words, decoy Reyes 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 20 days, based on the following factors: (1) the minor decoy's youthful appearance, and (2) the Respondents were on notice there was a problem with sales to minors based on the prior alleged accusation, after which there was no evidence the Respondents took any steps to prevent future sales to minors.⁵ The Department further rebutted the mitigation argued by the Respondents, pointing out that (1) despite the signs throughout the store and Respondents' policies already in place as of February 7, 2020, that did not prevent the sale to decoy Reyes as clerk Lopez still failed to ask for the decoy's ID and instead

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

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

pressed the “Visual ID OK” button, (3) there is no evidence that adding signs throughout the premises would prevent future sales since they were not effective for the sale at hand (4) the majority of the training occurred six to seven months after the violation of February 7, 2020, which demonstrates it was not prompted by that violation but as part of the annual re-training, or in anticipation of trial, and (5) the majority of the steps Respondents took appeared to be in anticipation of the original hearing date of October 7, 2020 for the matter at hand.

The Respondents recommended a 10-day suspension should the accusation be sustained. The Respondents argued for a substantially mitigated penalty based on the following: (1) Respondents’ nearly 10-year discipline-free history before the alleged prior in 2018,⁶ as well as the LAPD letter for successfully preventing the sale of tobacco to a minor on December 1, 2019, the existing signs in the store at the time of the sale in question as well as the red warning screen advising clerks to check IDs upon scanning age-restricted products, (2) documented training of Respondents’ employees at hire and periodically thereafter, (3) Respondents’ participation in the BARS program and four green cards received by employees in 2019 and four in 2020, and (4) positive action taken by Respondents’ to prevent future sales to minors by speaking with clerk Lopez after the sale, adding more signs, removing the “Visual ID OK” button on February 8, 2020, re-training employees on age-restricted products, and requiring they sign a sheet acknowledging the ID check policy.

The Respondents are correct that their approximate nine-year, 10-month discipline-free operation,⁷ documented training, LAPD successful prevention letter and removal of the “Visual ID Ok” button warrant mitigation. Although the Respondents point to their participation in the BARS program and four green cards received by employees in 2019 and 2020, respectively, merely asking for an ID without more does not ensure the prevention of future sales to minors. There was no evidence the Respondents instruct their clerks on the red flags of minors’ IDs. Additionally, based on Mr. Lee’s testimony the secret shopper visits the Licensed Premises on a monthly basis, and yet the Respondents only produced four green cards for the entire year of 2019 and four for 2020. This could possibly mean some clerks received red cards which they did not hand over to Mr. Lee, since Mr. Lee has no other means by which to determine whether employees receive red cards and relies upon the clerks informing him of the same.

The Department is correct that pursuant to *7-Eleven and Yi*, Precedential Decision No. 19-03-E (*Yi*) the prior accusation, while not final, alleges the same sale-to-minor violation

⁶ Counting the days from March 23, 2010 to December 20, 2018, there are eight years, eight months and 27 days. Counting the days from March 23, 2010, to February 7, 2020, there are nine years, 10 months and 15 days.

⁷ From March 23, 2010, to February 7, 2020.

under section 25658(a) on December 20, 2018, as the current matter, and as such provides notice to the Respondents “of a problem concerning alcoholic beverages being sold to minors,” at the Licensed Premises “such that it may be used in the instant case for purposes of penalty consideration.” *Yi* provides that, “Nothing in section 25658.1, or elsewhere, precludes the use of prior actual notice of an alleged violation of section 25658(a), whether by way of verbal or written warning, or of a *pending* accusation, as an aggravating factor in determining the appropriate level of discipline following a determination that the licensee has subsequently violated the same law.” (Emphasis added.) *Yi* goes on to state that, “For purposes of notice, it does not matter that the prior accusation is not final, or even whether it is sustained. Nor is the Department under any obligation to ‘prove-up’ the prior alleged violation before an accusation on file, and served upon the licensee, may be considered as notice in a subsequent matter.”

In the current matter, the Department pointed out that the prior accusation was litigated by the Respondents so they were well-aware there may be a problem with sales-to minors at the Licensed Premises. It is of grave concern that despite that prior notice of an alleged violation of the same law, the Respondents took no steps whatsoever to prevent future sales to minors until after the current violation of February 7, 2020. Had the Respondents taken some measures, including, removing the “Visual ID OK” button, after receiving notice of the prior accusation, it is quite possible clerk Lopez would not have sold alcohol to decoy Reyes. Especially, since it is the Respondents’ understanding clerk Lopez used the “Visual ID OK” button to bypass the safety protocol in place at the time. As such, Respondents’ complete failure to take any reasonable steps in 2019 to prevent sales of alcoholic beverages to minors, despite having actual notice of a problem counter-balances any mitigation for the steps Respondents took after February 7, 2020, as well as for any lengthy history of discipline-free history. While the preventive measures the Respondents did take were a good start; unfortunately, they were too little, too late.

The penalty recommended herein complies with rule 144.

ORDER

The Respondents’ off-sale beer and wine license is hereby suspended for a period of 15 days.

Dated: December 18, 2020



D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: _____
Date: _____ 03/10/21