

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

AB-9910

File: 21-394864; Reg: 20090116

CONVENIENCE 2000, INC.,
dba C2 Food Mart
1091 West Valley Boulevard
Colton, CA 92324,
Appellant/Licensee

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: *Appellant:* Jade Quintero, of Solomon, Saltsman & Jamieson, as
counsel for Convenience 2000, Inc.,

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

OPINION

Convenience 2000, Inc., doing business as C2 Food Mart, appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for ten days, because its clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658(a).

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

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on January 24, 2003. There is no record of prior departmental discipline against the license.

On May 27, 2020, the Department filed a single-count accusation against appellant charging that, on December 12, 2019, appellant's clerk, Suresh Chakma (the clerk), sold an alcoholic beverage to 19-year-old Tyler Harlacker (the decoy). Although not noted in the accusation, the decoy was working for the Department at the time.

At the administrative hearing held on November 12, 2020, documentary evidence was received, and testimony concerning the sale was presented by the decoy and Department Agent Jeffrey Holsapple. Appellant did not present any witnesses.

Evidence established that on December 12, 2019, Agent Holsapple entered the licensed premises followed shortly thereafter by the decoy. The decoy walked straight to the alcoholic beverage cooler and retrieved a three-pack of 25-ounce cans of Bud Light Beer, which he brought to the sales counter for purchase.

The decoy placed the beer on the sales counter and the clerk proceeded with the sale of alcohol. The clerk did not ask the decoy for his identification or about his age. The decoy paid for the beer and exited the store. Agent Holsapple heard and witnessed the entire transaction from approximately ten feet away. Agent Holsapple exited the store after the decoy.

The decoy and Agent Holsapple re-entered the licensed premises and made contact with the clerk. Agent Holsapple asked the decoy to identify the person who sold him the alcohol and the decoy pointed at the clerk and identified him. A photograph of the decoy and the clerk was taken, with the decoy holding the three-pack

of Bud Light beer while standing next to the clerk. (Exh. 4.) Afterwards, the clerk was issued a citation.

The administrative law judge (ALJ) issued a proposed decision on December 29, 2020, sustaining the accusation and recommending a ten-day suspension. The Department adopted the proposed decision in full on March 16, 2021 and issued a certificate of decision the next day. Appellant filed a timely appeal contending that the Department's decision is not supported by substantial evidence and the penalty is excessive.

DISCUSSION

I

SUBSTANTIAL EVIDENCE

Appellant contends that the Department's finding that the decoy's appearance complied with rule 141(b)(2)² is not supported by substantial evidence. (AOB, at pp. 7-10.)

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 appellant.

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

Here, the Department found that the decoy's appearance complied with rule 141(b)(2). (Findings of Fact, ¶¶ 5 and 10.) Therefore, this Board is required to defer

² All references to Rule 141 and its subdivisions are to title 4 of the California Code of Regulations unless otherwise noted.

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 appellant’s arguments that the decoy’s appearance did not comply with rule 141(b)(2). The Department found that “Clerk Chakma was presented with an acne-faced, teenage appearing decoy Harlacker.” (Conclusions of Law, ¶ 7.) The Department further noted that “Clerk Chakma did not testify [and appellant] presented no evidence as to why clerk Chakma allegedly believed decoy Harlacker 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*, at p. 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 and 8.) 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*, at p. 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 six feet and two inches tall and 150 pounds on the day of the operation. (Findings of Fact, ¶ 5.) The ALJ found the decoy credibly testified that his size and appearance were the same at the hearing “except that he weighed 160 pounds, his hair was a little shorter, and his acne was worse.” (Findings of Fact, ¶ 5; RT at pp. 11:11-12:7.)

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.” (*Southland, supra*, at p. 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*, at p. 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*, at p. 1094.)

II

PENALTY

Appellant contends its 10-day penalty is unreasonable, and that the Department improperly considered mitigation factors under rule 144. (AOB, at p. 5.)

This Board may examine the issue of excessive penalty if it is raised by an appellant. (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183].) However, the Board will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) An administrative agency abuses its discretion when it "exceeds the bounds of reason." (*County of Santa Cruz v. Civil Service Commission of Santa Cruz* (2009) 171 Cal.App.4th 1577, 1582 [90 Cal.Rptr.3d 394, 397].) However, "[i]f reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

In determining disciplinary action, the Department is required to consider the penalty guidelines incorporated in California Code of Regulations, title 4, section 144. The standard penalty for a first-time violation of section 25658(a) is 15 days, which is five more days than what appellant 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.*)

In its decision, the Department stated that the mitigation of appellant's discipline-free licensure was "counter-balanced by (1) the decoy's youthful appearance, (2) no evidence of documented training of the licensee and/or employees, and (3) the lack of any evidence the Respondent took any steps, not only to determine how clerk Chakma was able to sell to a minor but, to correct any problems relating to said sale and to prevent future sales of alcohol to minors." (Decision, at p. 5.) The Board cannot say that the Department abused its discretion.

As the Board has said many times over the years, the extent to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion. Rule 144 provides a standard 15-day suspension for a section 25658(a) violation, which is five more days than what appellant received. Rule 144 also allows the Department to exercise discretion to consider aggravation and mitigation. The weight the Department gave to appellant's mitigation evidence was reasonable and not an abuse of discretion. Therefore, the penalty must stand.

ORDER

The decision of the Department is affirmed.³

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

³ This final order is filed in accordance with Business and Professions Code section 23088 and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7.

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:**

CONVENIENCE 200 INC.
C2 FOOD MART
1091 WEST VALLEY BLVD.
COLTON, CA 92324

OFF-SALE GENERAL - LICENSE

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

RIVERSIDE DISTRICT OFFICE

File: 21-394864

Reg: 20090116

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:

Convenience 2000 Inc.	}	File: 21-394864
Dbas: C2 Food Mart	}	
1091 West Valley Blvd.,	}	Reg.: 20090116
Colton, California 92324	}	
	}	License Type: 21
Respondent	}	
	}	Word Count: 6,300
	}	
	}	Court Reporter:
	}	Deborah Morin
	}	i-Depo Reporters
	}	
<u>Off-Sale General 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 12, 2020.

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

Adam Koslin, Attorney, represented Respondent, Convenience 2000 Inc.

The Department seeks to discipline the Respondent's license on the grounds that, on or about December 12, 2019, the Respondent-Licensee's agent or employee, Suresh Chakma, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Tyler Harlacker, 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 12, 2020.

FINDINGS OF FACT

1. The Department filed the accusation on or about May 27, 2020.

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

2. The Department issued a type 21, off-sale general license to the Respondent for the above-described location on January 24, 2003 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondent's license.
4. Tyler Harlacker (hereinafter referred to as decoy Harlacker) was born on April 10, 2000. On December 12, 2019, he was 19 years old. On that date he served as a minor decoy in an operation conducted by the Department.
5. Decoy Harlacker appeared and testified at the hearing. On December 12, 2019, he was 6'2" tall and weighed approximately 150 pounds. He wore a black jacket, blue pants, black shoes, and an Apple watch. His hair was styled in a comb-over. He had visible acne on his cheeks, under his chin and between his eyebrows. (Exhibits 3 and 4.) His appearance at the hearing was the same, except that he weighed 160 pounds, his hair was a little shorter, and his acne was worse.
6. On December 12, 2019, Department Agent Holsapple entered the Licensed Premises in a plain clothes capacity, followed shortly thereafter by decoy Harlacker. Decoy Harlacker walked straight to the alcoholic beverage cooler 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 Harlacker placed the Bud Light beer upon the sales counter. Clerk Suresh Chakma (hereinafter referred to as clerk Chakma) did not ask for decoy Harlacker's ID or age. Decoy Harlacker 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 2.) Clerk Chakma proceeded with the sale of alcohol to the minor. Decoy Harlacker paid for the beer and exited the store with it. Agent Holsapple was able to hear and witness the entire sales transaction with a clear, unobstructed view from approximately 10 feet away, while posing as a customer. Agent Holsapple exited the store after the decoy. While decoy Harlacker and Agent Holsapple were inside the Licensed Premises they did not communicate with or acknowledge each other.
8. Decoy Harlacker re-entered the Licensed Premises with Agent Holsapple. Agent Holsapple made contact with clerk Chakma and identified himself as a police officer. Agent Holsapple asked decoy Harlacker to identify the person who sold him the alcohol. Decoy Harlacker pointed at clerk Chakma and identified him as the person who sold him the beer. Decoy Harlacker and clerk Chakma were standing approximately three to five feet apart and facing each other, with no obstruction between them, at the time of the identification. A photograph of clerk Chakma and decoy Harlacker was taken after the face-to-face identification, with decoy Harlacker holding the three-pack of Bud Light beer while standing next to clerk Chakma. (Exhibit 4.)

9. Clerk Chakma was issued a citation after the face-to-face identification. There was no evidence that clerk Chakma 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 Harlacker. Clerk Chakma did not appear at the hearing.

10. Decoy Harlacker 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 Chakma at the Licensed Premises on December 12, 2019, decoy Harlacker 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 Harlacker has a youthful appearance and appears his age, that of a teenager.

11. December 12, 2019, was the second day of decoy operations in which decoy Harlacker had participated. He visited 17 premises that date, with five clerks asking his age and 13 clerks asking for his ID. After entering 16 other licensed premises that date as part of the minor decoy operation, he was not nervous when he entered the Licensed Premises because he became familiar with the duties he was required to perform as a decoy. Decoy Harlacker learned about the decoy program through his volunteer service as a police explorer with the San Bernardino County Sheriff's Department. He had joined the explorer program in approximately 2014. In 2017 he reached the rank of captain. He believes he was chosen for the position of captain due to his maturity, responsibility and leadership skills. As a captain in the explorer program his duties are primarily in an administrative capacity and include being responsible for running the meetings in accordance with the deputy advisors. As an explorer he participates in community outreach events, competitions against other explorer program agencies, and receives training in law enforcement activities such as how to conduct traffic stops, building searches, officer rescues and domestic disturbance responses. Decoy Harlacker believes his experience in the explorer program has made him a confident, self-assured and mature person.

12. 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 December 12, 2019, the Respondent-Licensee's employee, clerk Suresh Chakma, inside the Licensed Premises, sold alcoholic beverages, to-wit: a three-pack of 25 ounce Bud Light beer cans, to Tyler Harlacker, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-10.)
5. The Respondent 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), Respondent argued decoy Harlacker did not have the appearance of someone under the age of 21 for the following reasons: (1) his large stature of 6'2" and 150 pounds is not indicative of a teenager; although Respondent admits the decoy is a teenager, Respondent argues his stature is not generally what is expected of a younger person, (2) his extensive law enforcement training, having been a captain of the explorer program for two years at the time of the operation, and the fact he was singled out for the position of captain based on his responsibility, maturity and leadership skills; additionally, his training in presenting himself to the public made him a more confident, mature and responsible person, and (3) of the 17 premises decoy Harlacker visited on December 12, 2019, only five clerks asked his age, which shows the remaining clerks were not put on their guard as to the decoy's youthfulness; and while 13 clerks looked at his ID that is the standard store policy for just about every seller of alcoholic beverages.
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 Chakma allegedly believed decoy Harlacker to be over 21 years of age. Clerk Chakma did not testify. In fact, the evidence indicates clerk Chakma most likely knew or at least should have known the decoy was a minor. Clerk Chakma was presented with an acne-faced, teenage-appearing decoy Harlacker. There is no evidence in the record as to Respondent's

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

argument that since only five premises asked the decoy his age it leads to a presumption the other clerks believed the decoy to appear old enough to purchase alcohol. The Department pointed out the opposite presumption, that because the other clerks asked for his age and/or ID the decoy appeared youthful to them. One could also argue that it was simply the other licensed premises' general policy to ask for a customer's ID and/or age, regardless of appearance. There was simply no evidence regarding the circumstances surrounding decoy Harlacker's purchases at the other licensed premises which he visited; there is no way to tell if the decoy's appearance played any role at the other licensed premises. Notwithstanding, there was nothing about decoy Harlacker's stature, demeanor or law enforcement experience which made him appear older than his actual age. In other words, decoy Harlacker 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 10 days, taking into consideration Respondent's discipline-free history, and based on the following factors: (1) the minor decoy's age and youthful appearance, while tall he is of thin build, and (2) the lack of effort by clerk Chakma to ascertain whether decoy Harlacker was of majority, failing to ask for decoy Harlacker's age or ID.

The Respondent recommended an all-stayed suspension based on Respondent's over 16-year discipline-free history, emphasizing that it represents a substantial history of good and lawful conduct.

The Respondent is correct that its approximate 16-year, 10-month discipline-free operation warrants mitigation. However, that mitigation is counter-balanced by (1) the decoy's youthful appearance, (2) no evidence of documented training of the licensee and/or employees, and (3) the lack of any evidence the Respondent took any steps, not only to determine how clerk Chakma was able to sell to a minor but, to correct any problems relating to said sale and to prevent future sales of alcohol to minors.

The penalty recommended herein complies with rule 144.

ORDER

The Respondent's off-sale general license is hereby suspended for a period of 10 days.

Dated: December 29, 2020



D. Huebel
Administrative Law Judge

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

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03/14/21