

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

AB-9911

File: 20-606054; Reg: 20089848

7-ELEVEN, INC. and JS GILL ENTERPRISES, INC.,
dba 7-Eleven Store #16373D
1110 Lemoore Avenue
Lemoore, CA 93245-2348,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

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 JS Gill Enterprises, Inc.,

Respondent: Joseph J. Scoleri III, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and JS Gill Enterprises, Inc., doing business as 7-Eleven Store #16373D (appellants), appeal from a decision of the Department of Alcoholic Beverage Control (Department)¹ suspending their license for 10 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 23, 2021, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 30, 2019. There is no record of departmental discipline against the license.

On March 2, 2020, the Department filed a single-count accusation against appellants charging that, on January 8, 2020, appellants' clerk, Noah Cagney (the clerk), sold an alcoholic beverage to 17-year-old Annalyse Hunt (the decoy).² Although not noted in the accusation, the decoy was working as part of a joint operation between the Lemoore Police Department (LPD) and the Department.

At the administrative hearing held on January 20, 2021, documentary evidence was received and testimony concerning the sale was presented by the decoy and Department Agent Alba Medina. Jaspal Singh, a manager at the licensed premises, testified on appellants' behalf regarding training and mitigation measures undertaken to prevent the sale of alcohol to minors.

Testimony established that on January 8, 2020, the decoy entered the licensed premises alone and went to the cooler where she selected a 25-ounce can of Bud Light beer. She took the beer to the counter and the clerk rang up the sale without asking for identification and without asking any age-related questions.

Following the sale, the decoy exited the premises and informed the agents and officers waiting outside what had transpired. The decoy reentered the premises with Agent Medina and LPD Officer Rossi. They asked her who sold her the beer and she pointed out the clerk.

² While we ordinarily refer to minors by their initials, as the Department notes in the decision, the decoy was 18 by the time of the administrative hearing, so they referred to the decoy by her full name. We follow suit.

When the clerk was done assisting another customer, Agent Medina identified himself and informed the clerk that he had sold alcohol to a minor. The decoy made a face-to-face identification of the clerk from across the counter. The clerk admitted that he sold her the beer and failed to ask for identification. A photograph of the clerk and decoy was taken (exh. D-4) and the clerk was subsequently issued a citation.

The administrative law judge (ALJ) issued a proposed decision on January 21, 2021, sustaining the accusation and recommending a 10-day suspension. The Department adopted the proposed decision in its entirety on March 18, 2021 and a certificate of decision was issued on March 23, 2021.

Appellants then filed a timely appeal contending: (1) the ALJ's finding that the decoy's appearance complied with rule 141(b)(2)³ was not based on substantial evidence and improperly relied on her appearance at the hearing, and (2) the ALJ failed to explain his findings. These issues will be considered together.

DISCUSSION

Appellants contend that the ALJ improperly considered the decoy's in-person appearance at the hearing in determining whether her appearance during the decoy operation complied with rule 141(b)(2). (AOB at pp. 7-8.) Appellants further contend that the finding of compliance is not supported by substantial evidence and that the ALJ failed to explain how he reached this conclusion. (*Ibid.* at pp. 9-11.) Appellants assert such an explanation is necessary "particularly here, where the decoy's dress and jewelry made her appear financially wealthy and therefore older, . . ." (*Ibid.* at p. 11.)

³ 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.

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:

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:

4. Hunt appeared, via videoconference, and testified at the hearing. On January 8, 2020 her appearance was generally as depicted in an image that was taken during the operation on that date. (Exhibit D-4) Her face, as she appeared in the videoconference, was as depicted in an image of her California driver's license that was submitted into evidence. (Exhibit D-2) During the operation on January 8, 2020, Hunt wore a white, turtle-neck, long sleeve shirt under a black down style vest. She wore jeans with an ornate, western style belt buckle visible. Hunt had no visible jewelry other than an Apple watch on her wrist. Her face was fully exposed even though her hair was well below her shoulders because she wore it in a part. (Exhibit D-4) Hunt was approximately 5 feet, 2 inches tall and 150 pounds at the hearing. Hunt credibly testified that her size and appearance on January 8, 2020 were essentially the same.

¶ . . . ¶

11. Hunt had served as a decoy one time prior to January 8, 2020. Hunt became involved as a decoy as the result of her participation in an Explorer program for approximately two years. Despite her time in the Explorer program and her prior experience in being a decoy, Hunt was somewhat nervous during the transaction on January 8, 2020.

12. Based on Hunt's overall appearance, i.e., her physical appearance, clothing, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of Cagney at the Licensed Premises on January 8, 2020 Hunt displayed the appearance which would generally be expected of a person less than 21 years of age during her interactions with Cagney. Cagney did not testify in this matter to explain his age related impressions of Hunt. Cagney did not testify as to why he sold Hunt beer, without asking age related questions or asking for identification, even though Hunt's appearance was consistent with someone who was under 21 years of age. His only remark regarding the sale to Hunt was that he took a chance and got caught.

(Findings of Fact, ¶¶ 4-12.) Based on these findings, the Department addressed appellants' rule 141(b)(2) arguments:

11. Respondent also asserted that the appearance of the decoy did not comply with rule 141(b)(2). The Respondent argued that she was "full-figured" and that her time as an LPD Explorer rendered her appearance such that she appeared over 21 years of age. As noted above, Cagney did not testify in this matter to establish that his sale to Hunt was the result of Hunt's appearance. Hunt and Cagney only had a short exchange of pleasantries at the beginning of the transaction. Cagney then rang up the beer. The overall exchange between him and Hunt was so minimal, it is unreasonable to assert that her comportment could have been a factor in a miscalculation of her age. Further, Hunt testified in this matter and her appearance matched the appearance she presented to Cagney on the date of the operation. On January 8, 2020 Hunt had the appearance "which could generally be expected of a person under 21 years of age" which is the standard required by rule 141(b)(2). Women, under the age of 21, can have figures that range from thin to full figured. Ms. Hunt's figure did not, on its own, exclude her from an appearance "which could generally be expected of a person under 21 years of age." As previously noted, the clerk did not testify to establish facts suggesting an identification issue or whether there was anything in Hunt's actions, manner, or appearance that led Cagney to reasonably conclude that Hunt was over 21. The Department has established compliance with rule 141 (b)(2) and the Respondent has failed to rebut this evidence. (Findings of Fact ¶¶ 3-12)

(Conclusions of Law, ¶ 11.) 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 4 through 12, and Conclusions of Law paragraph 11, the Department found that the decoy met this standard, notwithstanding appellants' assertion that she 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:

12. Based on Hunt's overall appearance, i.e., her physical appearance, clothing, poise, demeanor, maturity, and mannerisms shown at the hearing, **and her appearance and conduct in front of Cagney at the Licensed Premises on January 8, 2020** Hunt displayed the appearance which would generally be expected of a person less than 21 years of age during her interactions with Cagney. . . .

(Findings of Facts, ¶ 12, emphasis added.) This argument is entirely without merit and is not supported by the record.

Appellants further assert that the ALJ is required to not just make findings, but that he must explain his findings:

Prior courts have held that is important for administrative agencies to explain their reasoning in their decisions and orders. (*Garfield Beach CVS, LLC and Longs Drug Stores California, LLC v. Department of Alcoholic Beverage Control*, AB-9211 a at p. 5 (2014) (citing *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 506, 515.) By failing to provide any explanation behind his conclusion on Appellant's Rule 141(b)(2) defense, it cannot be said that ALJ Ainley's conclusion that the minor decoy's appearance complied with Rule 141 (b)(2) was supported by substantial evidence. Therefore, the Department's decision must be reversed.

(AOB at p. 11.) 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*.⁴ 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

⁴ *Topanga Assn. for a Scenic Community v. Co. of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836].

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, 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.

ORDER

The decision of the Department is affirmed.⁵

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

⁵ This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 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., JG GILL ENTERPRISES INC.
7 ELEVEN #16373D
1110 LEMOORE AVE.
LEMOORE, CA 93245-2348

OFF-SALE BEER AND WINE
- LICENSE

FRESNO DISTRICT OFFICE

File: 20-606054

Reg: 20089848

CERTIFICATE OF DECISION

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

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 18, 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 May 3, 2021, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: March 23, 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., JS Gill Enterprise Inc.,
DBA: 7 Eleven #16373D
1110 Lemoore Ave.
Lemoore, California 93245-2348

Respondent

Off-Sale Beer and Wine License

} File: 20-606054
}
} Registration: 20089848
}
} License Type: 20
}
} Page Count: 63
}
} Reporter:
} Sharon Cahn-CSR # 6210
} iDepo Reporters
}
} **PROPOSED DECISION**

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter, via videoconference, on January 20, 2021.

Roan Taylor, Attorney, represented the Department of Alcoholic Beverage Control (Department).

Adam Koslin, Attorney, represented Respondent 7 Eleven Inc. and Gill Enterprise Inc. (Respondent)

The Department seeks to discipline the Respondent's license on the grounds that, on or about January 8, 2020 the Respondent-Licensee's agent or employee, Noah Cagney, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to A.H.¹ an individual under the age of 21 years, in violation of Business and Professions Code section 25658(a)² (Exhibit D-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 January 20, 2021.

¹ At the time of the investigation by the Department, the Decoy was still a minor. During the hearing in this matter, the Decoy was identified by her full name because she was over the age of 18.

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

FINDINGS OF FACT

1. The Department filed the accusation on March 2, 2020. (Exhibit D-1)
2. On July 30, 2019 the Department issued a type 20, off-sale beer and wine license to the Respondent for the above-described location (the Licensed Premises). There is no record of prior Department discipline against the Respondent's license.
3. Annalyse Hunt (Hunt) was born on October 28, 2002 and was 17 years old on January 8, 2020. On that date, Hunt served as a decoy in an operation conducted by the Lemoore Police Department (LPD) and the Department at various locations, including the Licensed Premises.
4. Hunt appeared, via videoconference, and testified at the hearing. On January 8, 2020 her appearance was generally as depicted in an image that was taken during the operation on that date. (Exhibit D-4) Her face, as she appeared in the videoconference, was as depicted in an image of her California driver's license that was submitted into evidence. (Exhibit D-2) During the operation on January 8, 2020, Hunt wore a white, turtle-neck, long sleeve shirt under a black down style vest. She wore jeans with an ornate, western style belt buckle visible. Hunt had no visible jewelry other than an Apple watch on her wrist. Her face was fully exposed even though her hair was well below her shoulders because she wore it in a part. (Exhibit D-4) Hunt was approximately 5 feet, 2 inches tall and 150 pounds at the hearing. Hunt credibly testified that her size and appearance on January 8, 2020 were essentially the same.
5. On January 8, 2020 Hunt was taken to the Licensed Premises by officers from the LPD and Department for the purpose of trying to buy alcohol. They arrived in an unmarked vehicle. Hunt was generally instructed about the requirements of rule 141³. Before they left the LPD station for the decoy operation, Hunt was told to be truthful regarding her age, if asked. Hunt carried her California driver's license and she was to produce it, if asked. Hunt was given a \$10 bill to attempt an alcohol purchase. There was another decoy in the vehicle with her and the officers, but that decoy did not participate in the Licensed Premises investigation.
6. Hunt entered the Licensed Premises on January 8, 2020 during the evening hours. She entered alone and no officers went in before her. After entering, Hunt went to the cooler where beer was on display. Hunt selected a single 25 ounce Bud Light beer can. Hunt took the beer to the register and presented it to the clerk for purchase.
7. This clerk was the same individual in the image that was later taken of Hunt standing next to the person who sold her beer. (Exhibit D-4) The clerk briefly exchanged pleasantries with Hunt by asking her how her night was going. The clerk then took the beer and began to process the purchase. After ringing up the beer, the clerk did not ask Hunt for identification or any age related questions. Hunt then paid the clerk for the beer with the \$10 cash she was provided by the officers. Hunt took possession of the beer and the change she was handed from the clerk. Hunt

³ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

left the Licensed Premises with the beer and the change. Hunt approached the vehicle where the officers were waiting.

8. Hunt relayed to the officers what happened in the Licensed Premises. Hunt then reentered the Licensed Premises accompanied by Department Agent A. Medina (Medina) and LPD Officer S. Rossi (Rossi). Hunt was asked about who made the sale. She pointed to the clerk working at the register where she made the beer purchase. Medina saw that the clerk was with a customer, so she waited for him to finish. After the clerk was done, Medina approached him, identified herself, and told the clerk about the investigation and that he had sold beer to a minor. Hunt and Rossi walked up to the register area while this occurred. Hunt positioned herself next to Medina and across the counter from the clerk, so she was fully visible to him. Medina asked Hunt her age while she was standing across from clerk. Hunt responded that she was 17 years old. During the questioning by Medina, Hunt stated that the clerk had sold her the beer.

9. Medina obtained the identification of the clerk. He was named Noah Cagney (Cagney). He admitted to the sale and admitted that he did not check her identification. During the investigation in the Licensed Premises, Hunt was asked to stand with the clerk who sold her the beer. Hunt then stood directly next to Cagney, the clerk who sold her the beer.

10. Cagney was then photographed while standing next to Hunt while Hunt held the Bud Light beer can she was sold. (Exhibit D-4) From the initial law enforcement contact with Cagney until after this photograph was taken; Hunt was in the immediate presence of Cagney, Medina and Rossi. Cagney was subsequently issued a citation for the sale. The beer and change were returned to the Licensed Premises and Medina retrieved the \$10 bill used by Hunt for the purchase.

11. Hunt had served as a decoy one time prior to January 8, 2020. Hunt became involved as a decoy as the result of her participation in an Explorer program for approximately two years. Despite her time in the Explorer program and her prior experience in being a decoy, Hunt was somewhat nervous during the transaction on January 8, 2020.

12. Based on Hunt's overall appearance, i.e., her physical appearance, clothing, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of Cagney at the Licensed Premises on January 8, 2020 Hunt displayed the appearance which would generally be expected of a person less than 21 years of age during her interactions with Cagney. Cagney did not testify in this matter to explain his age related impressions of Hunt. Cagney did not testify as to why he sold Hunt beer, without asking age related questions or asking for identification, even though Hunt's appearance was consistent with someone who was under 21 years of age. His only remark regarding the sale to Hunt was that he took a chance and got caught.

13. Jaspal Singh (Singh) testified for the Respondent. He was the manager of the Licensed Premises at the time of this incident and remains in that position. At the time of the sale, the Licensed Premises' policy was to check the identification of anyone who appeared under 30 years of age. That is still the Respondent's policy. The register did trigger an on screen warning

to check identification when age restricted sales were scanned, and the register did have the ability to scan driver's licenses. At the time of the sale to Hunt, the register did have an override feature that allowed the bypassing of scanning an identification or inputting a date of birth. After the Respondent became aware of the incident, Cagney's employment was ended. In addition, the Respondent removed the override feature from the register in the period after the incident and prior to the hearing in this matter. Identifications now have to be scanned or a specific date of birth has to be entered in order for a restricted sale to proceed. (Exhibit L-1)

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 8, 2020 the Respondent's agent or employee, Noah Cagney inside the Licensed Premises, sold an alcoholic beverage to Annalyse Hunt, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 2-13)
5. The Respondent argued that the decoy operation at the Licensed Premises generally failed to comply with rule 141 and, therefore, the accusation should be dismissed. Specifically, the Respondent argued that the appearance of the decoy did not comply with rule 141(b)(2). Any violation of rule 141, if established, would be an affirmative defense and require dismissal of the accusation pursuant to rule 141(c).
6. There is no credible evidence supporting the assertions by the Respondent that there was a failure to comply with rule 141. Regarding rule 141(b)(5), *Acapulco Restaurants, Inc. v. Alcoholic Beverages Control Appeals Board* (1998) 67 Cal.App.4th 575 confirmed that a face to face must occur for compliance, but that case never established a baseline standard for what was a compliant face to face identification. The subsequent decision in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1687 held that the regulation at "section 141, subdivision (b)(5), ensures-admittedly not as artfully as it might-that the seller will be given the opportunity, soon after the sale, to come "face-to-face" with the decoy." *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1687, 1698. This decision confirmed that the purpose of the face to face was to give the seller notice of who the decoy was.

7. Further clarification of what constituted a compliant face to face occurred in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2017) 18 Cal.App.5th 541. This case is particularly helpful since the identification by Hunt of Cagney in this matter was substantively similar to the identification that was found to be compliant with rule 141(c) in that case. In finding that identification compliant, that court ruled:

“Here there is no violation of Rule 141, as explained above, because the decoy made a face-to-face identification by pointing out the clerk to the officer inside the store while approximately 10 feet from her, standing next to her when the officer informed her she had sold alcohol to a minor, and taking a photograph with her as the minor held the can of beer he purchased from her. She had ample opportunity to observe the minor and to object to any perceived misidentification. The rule requires identification, not confrontation. The identification here meets the letter and the spirit of Rule 141.” *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2017) 18 Cal.App.5th 541, 547

8. While general due process considerations demand a fair identification be facilitated by law enforcement, these cases make clear that this particular regulation is focused on the narrower concern of allowing the *seller* the opportunity to be aware of the identity of the decoy. It stands to reason that compliance with Rule 141, subdivision (b)(5) occurs if the clerk and the decoy, during the process of the investigation, prior to the citation being issued or departure of the decoy, are brought in reasonable proximity to each other to assure that the seller knows (or reasonably ought to know) that he or she is being identified as the seller by the decoy.

9. Medina approached Cagney at the counter, got his attention, and identified herself as a law enforcement officer investigating the sale of alcohol to a minor. Hunt was immediately present while this occurred. The sale to Hunt was discussed between Cagney and Medina while Hunt and Rossi stood next to her. While directly across the counter from Cagney, Hunt was asked by Medina to identify the seller. Hunt then did so and stated that she was 17. Based on this, Cagney was clearly made aware that the decoy was Hunt. Further, before Cagney was cited on January 8, 2020, Hunt and Cagney were photographed next to each other. (Findings of Fact ¶ 10 and Exhibit D-4) Cagney clearly came face to face with Hunt under circumstances that made it clear that Cagney had been identified as the person who sold Hunt beer and that Hunt was the minor at issue. (Findings of Fact ¶¶ 3-12)

10. None of the evidence presented by the Respondent rebutted the credible evidence presented by the Department that this was a fully compliant identification that allowed Cagney to become aware that Hunt was the decoy. Respondent has offered no evidence or argument suggesting that the identification violated state or federal due process considerations. Given the totality of the evidence presented by the Department credibly establishing compliance with rule 141(b)(5), the Respondent’s assertions that compliance did not occur are unsupported. (Findings of Fact ¶¶ 3-12)

11. Respondent also asserted that the appearance of the decoy did not comply with rule 141(b)(2). The Respondent argued that she was “full-figured” and that her time as an LPD Explorer rendered her appearance such that she appeared over 21 years of age. As noted above, Cagney did not testify in this matter to establish that his sale to Hunt was the result of Hunt’s appearance. Hunt and Cagney only had a short exchange of pleasantries at the beginning of the transaction. Cagney then rang up the beer. The overall exchange between him and Hunt was so minimal, it is unreasonable to assert that her comportment could have been a factor in a miscalculation of her age. Further, Hunt testified in this matter and her appearance matched the appearance she presented to Cagney on the date of the operation. On January 8, 2020 Hunt had the appearance “which could generally be expected of a person under 21 years of age” which is the standard required by rule 141(b)(2). Women, under the age of 21, can have figures that range from thin to full figured. Ms. Hunt’s figure did not, on its own, exclude her from an appearance “which could generally be expected of a person under 21 years of age.” As previously noted, the clerk did not testify to establish facts suggesting an identification issue or whether there was anything in Hunt’s actions, manner, or appearance that led Cagney to reasonably conclude that Hunt was over 21. The Department has established compliance with rule 141(b)(2) and the Respondent has failed to rebut this evidence. (Findings of Fact ¶¶ 3-12)

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

PENALTY

The standard penalty for a violation of section 25658(a) is 15 days, absent mitigation or aggravation.

The Department recommended that the Respondent’s license be suspended for an aggravated penalty of 20 days because of the short period of licensure and because the sale appeared to be part of a continuing pattern of conduct. Alone, the extremely short period of licensure is more an argument against mitigation than a factor in aggravation. Further, no evidence of a continuing pattern of behavior was shown. This was an individual incident and the Respondent has no prior violations. There was no credible evidence that the clerk had sold alcoholic beverages to other minors or that the behavior he engaged in with Hunt was condoned by the Respondent.

The Respondent argued for a 10 day penalty, if the Accusation were sustained, based on the lack of prior incidents and the Respondent’s efforts to avoid sales to minors, in general, and the effort made, after the incident, to prevent future occurrences.

The Respondent has been licensed since July 30, 2019 and this is their first incident. This fact does not support significant mitigation because it was such a short period of licensure. However, the mitigation sought by the Respondent is supported by other factors in mitigation. Credible evidence was presented regarding the Respondent’s policies to prevent sales of alcoholic beverages to underage individuals. There was an in-place policy to check identifications of all persons who appeared under 30 years old. The register was set up to compel clerks to go through

the age verification process when restricted sales were occurring. Cagney deviated from the policy and his employment was ended.

The Respondent also presented evidence of subsequent positive action to prevent the problem that led to the underage sale that occurred here. The override function in the register was removed so that identifications now have to be scanned or a specific date of birth has to be entered in order for a restricted sale to proceed.

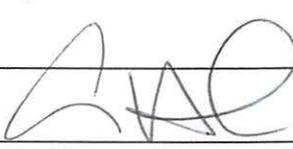
There appear to be no specific factors in aggravation applicable to this violation. Mitigation is supported. The penalty recommended herein complies with rule 144.

ORDER

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

Dated: January 21, 2021


Alberto Roldan
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By:  _____
Date: <u>03/18/21</u> _____