

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

AB-9914

File: 21-541695; Reg: 20090537

CORX WINE & SPIRITS, INC.,
dba Corked
4100 Atlantic Avenue
Long Beach, CA 90807-2910,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: September 3, 2021

ISSUED SEPTEMBER 13, 2021

Appearances: *Appellant:* Joshua Kaplan, of the Law Office of Joshua Kaplan, as
counsel for Corx Wine & Spirits, Inc.,

Respondent: Matthew Gaughan, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

Corx Wine & Spirits, Inc., doing business as Corked, appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 15 days, because its agent or employee 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 April 20, 2021, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on March 28, 2014. There is no record of prior departmental discipline against the license.

On October 14, 2020, the Department filed a single-count accusation against appellant, charging that, on August 13, 2020, appellant's agent or employee, Jacob Gomez (the driver), sold, furnished, or gave an alcoholic beverage to 17-year-old Michael Z. (the decoy). Although not noted in the accusation, the decoy was working for the Department at the time.

At the administrative hearing held on January 20, 2021, documentary evidence was received, and testimony concerning the sale was presented by the decoy, Agents Michael Connolly and Sal Zavala, and Supervising agent in charge, Brandie Richard. Hani Dagher, a business consultant for appellant, testified on appellant's behalf.

Testimony established that on August 13, 2020, Agent Connolly set up an online account with Saucey, a delivery service, in the name of "Michael M." He ordered two six-packs of black cherry flavored White Claw hard seltzer. Agent Connolly checked a box indicating that the purchaser was over 21 years old. The Saucey app accepted the order and indicated that the person to whom the alcohol would be delivered might be asked to show ID.

The agents informed the decoy that a driver was coming with a delivery from the Licensed Premises. When the driver arrived, the decoy went down to the lobby to meet him. The driver got out of his vehicle and asked the decoy if he was "Michael." The decoy confirmed that he was.

The driver asked to see the decoy's ID, and the decoy handed him his valid California identification card (exh. 2). The driver scanned the ID using his mobile

phone. The driver looked at the phone for 30-40 seconds, shaking his head. The driver subsequently handed the two six-packs of White Claw to the decoy. The decoy walked back into the building and handed the alcoholic beverages to one of the agents.

Agent Zavala was inside the lobby of the building when the alcohol was delivered. He exited, contacted the driver, identified himself, and explained the violation. The driver stated that he had scanned an ID and that it indicated that the decoy was 21 years old.

The agents called the decoy back outside, where they asked him to identify the person who provided him with the White Claw. The decoy indicated that the driver was the individual who provided him with alcohol, and a photo of the two of them was taken (exh. 5). The driver was then cited.

The administrative law judge (ALJ) issued a proposed decision on March 3, 2021, sustaining the accusation and recommending a 15-day suspension. The Department adopted the proposed decision in its entirety on April 12, 2021, and issued a certificate of decision eight days later.

Appellant filed a timely appeal contending that: 1) the decoy wore a face mask which obscured his appearance and precluded compliance with rule 141.1(e)(2),² and; 2) a “face to face identification” did not occur because the requirement was “precluded by the Department’s mask mandate.” (AOB, at p. 6.)

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

DISCUSSION

I

SECTION 141.1(e)(2)

Appellant contends that the Department's finding that the decoy's appearance complied with rule 141.1(e)(2)³ is not supported by substantial evidence. (AOB, at p. 6.) Specifically, appellant argues that the decoy's mask precluded compliance with rule 141.1(e)(2). (*Ibid.*)

Rule 141.1(e)(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 person delivering the 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, ¶ 17.) Therefore, this Board is required to defer to those findings so long as they are supported by substantial evidence. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Southland)* (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652, 659] [citing *Kirby v. Alcoholic Beverage Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628] ["In considering the sufficiency of the evidence issue the court is governed by the

³ Rule 141.1 was filed as an emergency regulation on June 3, 2021, and sets forth the requirements for an operation in which alcoholic beverages are delivered to a minor. The language of rule 141.1(e)(2) is identical to rule 141(b)(2), except the word "seller" is replaced by "the person delivering" the alcoholic beverages at the time of the alleged offense.

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 physical appearance did not comply with rule 141.1(e)(2). The Department found that the decoy:

[A]ppeared to be 18-19 years old 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 at the time the alcoholic beverages were delivered, [the decoy] displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to [the driver].

(Findings of Fact, ¶ 17.) The Department further noted that:

The use of masks to prevent the spread of COVID-19 is part of the day-to-day reality of living during a pandemic. The uncontroverted evidence established that [the decoy] wore the mask because of COVID-19; there is **no** evidence that he work the mask to obscure his appearance. Importantly, [the driver] did not ask [the decoy] to lower his mask so that he could see his face.

(Conclusions of Law, ¶ 8) (emphasis in original). As noted above, “we are bound to construe the evidence in the light most favorable to the ALJ’s decision” and will uphold

the findings so long as they are supported by substantial evidence. (*Southland, supra*, 103 Cal.App.4th at 1087.)

To support its findings, the Department relied on photographs of the decoy from the day of the operation. (Exhs. 4-5.) Photographs of a decoy from the day of the operation are “arguably the most important piece of evidence in considering whether the decoy displayed the physical appearance of someone under 21 years of age.” (*Southland, supra*, 103 Cal.App.4th at 1094.) Further, the Department relied on the ALJ’s personal observations of the decoy’s appearance at the hearing. The evidence established that the decoy was approximately 5’11” tall and weighed 180 pounds on the day of the operation. (Findings of Fact, ¶ 5.) The ALJ found “that [h]is appearance at the hearing was the same, although he was not wearing a mask.” (*Ibid.*)

The Department is entitled to rely on an ALJ’s personal observations of a decoy when the decoy testifies that his appearance and mannerisms were “the same on the stand as it was when he purchased the beer.” (*Southland, supra*, 103 Cal.App.4th at 1094.) The Board sees no error with the Department’s findings regarding the decoy’s appearance, which are supported by the photographs of the decoy from the date of the operation, as well as the ALJ’s personal observations of the decoy at the hearing. Both sources are “reasonable in nature, credible and of solid value.” (*County of Los Angeles, supra*, 32 Cal.App.4th at 814.)

Further, the Board agrees with the Department that there is no evidence supporting appellant’s assertion that the mask made the decoy appear older than 21 years old. As noted in the decision, the driver did not testify, and there are no facts to suggest that he believed the decoy appeared older than 21 years old. Rather, the evidence in the record indicates that the driver misrepresented to Department agents

that he scanned the decoy's ID with his phone and it indicated that the decoy was over 21 years of age. Additionally, the driver did not ask the decoy to pull down his face mask, and was presented with the decoy's valid California ID, which showed the decoy to be only 17 years old on the date of the operation.

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

II

SECTION 141.1(e)(5)

Appellant's contention with the face-to-face identification also stems from the fact that the decoy was wearing a mask. (AOB, at p. 6.)

Rule 141.1(e)(5)⁴ provides:

Following any completed delivery, the peace officer directing the decoy shall make a reasonable attempt to have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged person delivering the alcoholic beverages.

The rule requires "strict adherence." (See *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126] (*Acapulco*) [finding that no attempt, reasonable or otherwise, was made to identify the clerk in that case].) However, since this rule provides an affirmative defense, the burden is on appellants to show non-compliance. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

⁴ Similar to rule 141.1(e)(2), rule 141.1(e)(5) is virtually identical to its counterpart in rule 141(b)(5), replacing the context of an in-person sale with the an alcoholic beverage delivery.

In its decision, the Department rejected appellant's rule 141.1(e)(5) arguments, reasoning that the face-to-face requirement was "satisfied by bringing the two of them together in close proximity to one another." (Conclusions of Law, ¶ 9.) We agree with this assessment.

The decoy's use of a mask during the face-to-face identification cannot override common sense. The uncontroverted evidence in the record establishes that the decoy was brought back outside to where the driver was, and he identified the driver as the person who provided him the White Claw. A photograph of the two was taken, and the driver never claimed that he was not the individual who made the delivery. This constitutes substantial evidence to support the Department's findings regarding rule 141.1(e)(5). Further, the Board is prohibited from reweighing the evidence or exercising its independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826, 837].) Therefore, the Department's decision regarding this issue must be affirmed.

ORDER

The decision of the Department is affirmed.⁵

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

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

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

APPENDIX

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

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

CORX WINE & SPIRITS, INC.
CORKED
4100 ATLANTIC AVE.
LONG BEACH, CA 90807-2910

OFF-SALE GENERAL - LICENSE

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

LAKWOOD DISTRICT OFFICE

File: 21-541695

Reg: 20090537

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 April 12, 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. The appeal must be filed within 40 calendar days from the date of the decision, unless the decision states it is to be "effective immediately" in which case an appeal must be filed within 10 calendar days after the date of the decision. Mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814. For further information, and detailed instructions on filing an appeal with the Alcoholic Beverage Control Appeals Board, see: <https://abcab.ca.gov> or call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

On or after May 31, 2021, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: April 20, 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:

Corx Wine & Spirits, Inc.	}	File: 21-541695
dba Corked	}	
4100 Atlantic Ave.	}	Reg.: 20090537
Long Beach, California 90807-2910	}	
	}	License Type: 21
Respondent	}	
	}	Word Count: 14,000
	}	
	}	Reporter:
	}	Diane McGivern
	}	iDepo
	}	
<u>Off-Sale General License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter by video conference on January 20, 2021.

Matthew S. Gaughan, Attorney, represented the Department of Alcoholic Beverage Control.

Joshua Kaplan, attorney-at-law, represented respondent Corx Wine & Spirits, Inc.

The Department seeks to discipline the Respondent's license on the grounds that, on or about August 13, 2020, the Respondent, through its agent or employee, sold, furnished, or gave alcoholic beverages to Michael Z., 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 January 20, 2021.

FINDINGS OF FACT

1. The Department filed the accusation on October 14, 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 March 28, 2014 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondent's license.
4. Michael Z. was born on August 16, 2002. On August 13, 2020, he served as minor decoy during an operation conducted by the Department. On that date he was 17 years old.²
5. Michael appeared and testified at the hearing. On August 13, 2020, he was 5'11" tall and weighed 180 pounds. He wore a reddish/pinkish shirt with a stripe in the middle, ripped blue jeans, sneakers, and a face mask. (Exhibits 4-5.) His appearance at the hearing was the same, although he was not wearing a mask.
6. On August 13, 2020, Agent M. Connolly set up an online account with Saucey, a delivery service, in the name "Michael M."³ He ordered two six-packs of black cherry flavored White Claw hard seltzer (5% alcohol by volume). (Exhibit 3.) Agent Connolly checked a box indicating that the purchaser was over 21 years old. The Saucey app accepted the order and indicated that the person to whom the alcohol would be delivered might be asked to show ID. Agent Connolly tracked the delivery using the app. (Exhibits 6-7.)
7. The agents informed Michael that a driver was coming with a delivery from the Licensed Premises. When the driver, Jacob Gomez, arrived, Michael went down to the lobby to meet him. Gomez, who was wearing a mask, got out of his vehicle and asked if he was Michael. Michael said that he was.
8. Gomez asked to see Michael's ID. Michael handed his California identification card (exhibit 2) to Gomez. Gomez scanned the ID using his mobile phone. Gomez looked at the phone for 30-40 seconds, shaking his head. Gomez subsequently handed the two six-packs of White Claw to Michael. Michael walked back into the building and handed the alcoholic beverages to one of the agents.
9. Agent S. Zavala was inside the lobby of the building when the alcohol was delivered. He exited, contacted the Gomez, identified himself, and explained the violation. Gomez said that he had scanned an ID and that it indicated that Michael was 21.

² Because Michael was a juvenile at the time of the decoy operation, he is referred to herein by his first name and the first letter of his last name only.

³ Michael M. was a pseudonym for Michael Z., the first initial of the last name having been changed to protect Michael's privacy as a juvenile.

10. The agents called Michael back outside. They asked him to identify the person who provided him with the White Claw. He indicated that Gomez had. A photo of the two of them was taken (exhibit 5), after which Gomez was cited.

11. Gomez informed the agents that he gets an alert on his phone when an order is ready to be picked up. The store gets a similar alert. Gomez goes to the store in question, picks up the order, and delivers it to the person indicated. For alcoholic beverages, he is supposed to scan an ID using the app, which indicates that the person is of age with a checkmark/thumbs up.

12. Before the operation commenced, Agent Zavala told Michael to stand six feet away from people and wear a mask due to COVID-19. He provided Michael with an all-black face mask which he was to use. The mask covered Michael's face from his chin to just below his eyes. Gomez did not ask Michael to pull down his mask at any time. Gomez informed Agent Zavala that it was company policy not to ask customers to pull down their masks due to COVID-19.

13. Supv. Agent-in-Charge B. Richard was overseeing this operation. She went to the Licensed Premises and contacted Wisam Khezam, who was working behind the register. She identified herself and explained the violation. Khezam was able to identify the transaction and printed out a copy of the receipt. (Exhibit 9.)

14. Khezam further explained the process by which the Licensed Premises receives orders via the Saucey app. He showed SAC Richard the iPad on which orders are received. He pulled up the order for two six-packs of White Claw on the iPad. (Exhibit 8.)

15. Orders were placed with eight different locations during this operation. Michael was able to purchase from three of them.

16. Hani Dagher is a business consultant for the Respondent. Among other things, he advises the Respondent on contracts and licensing. On October 21, 2019, the Respondent entered into an agreement with Saucey for delivery services. With respect to alcoholic beverages, the contract provides that Saucey "shall be responsible for the customer service, dispatch, handling and delivery of any beverage orders." The contract further provides that Saucey's "contracted delivery drivers will properly check for and scan valid ID to verify that the customer accepting the order is 21 years of age or older" and that, "[w]ith no exceptions, no orders will be delivered by Saucey without valid ID verification." (Exhibit A.)

17. Michael appeared to be 18-19 years old 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 at the time the alcoholic beverages were delivered, Michael displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Gomez.

18. 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. Rule 141.1⁴ sets forth the requirements for an operation in which alcoholic beverages are delivered to a minor decoy. Specifically, rule 141.1 provides that:

- (a) A law enforcement agency may only use a person under the age of 21 to attempt to purchase alcoholic beverages for delivery to apprehend licensees or employees or agents of licensees who deliver alcoholic beverages to minors (persons under the age of 21) and to reduce deliveries of alcoholic beverages to minors in a fashion that promotes fairness. For purposes of this section, fairness is defined as compliance with all the conditions set forth in subdivision (e).
- (b) For purposes of this section, "delivery" shall mean any transfer of alcoholic beverages by a licensee, or an employee or agent of a licensee, to a person under the age of 21, subsequent to an order made by way of the Internet, telephone, or other electronic means.
- (c) For purposes of this section, "agent" shall mean any entity or person the licensee uses or contracts or agrees with, who is not an employee of the licensee, including but not limited to a third-party delivery person or service, to deliver alcoholic beverages to persons who place orders by way of the Internet, telephone, or other electronic means.

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

- (d) This section shall not apply to questions asked about the age of the minor at the time the minor orders the alcoholic beverages by way of the Internet, telephone, or other electronic means.
- (e) The following minimum standards shall apply to actions filed pursuant to Business and Professions Code Section 25658 in which it is only alleged that a minor decoy has received an alcoholic beverage by delivery:
 - (1) At the time of the operation, the decoy shall be less than 20 years of age;
 - (2) 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 person delivering the alcoholic beverages at the time of the alleged offense;
 - (3) A decoy shall either carry their own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to the person delivering the alcoholic beverages;
 - (4) At the time of delivery, the decoy shall answer truthfully any questions about their age asked by the person delivering the alcoholic beverages at the time of delivery.
 - (5) Following any completed delivery, the peace officer directing the decoy shall make a reasonable attempt to have the minor decoy who purchased alcoholic beverages make a face to face identification of the person delivering the alcoholic beverages.
- (f) Failure to comply with this rule shall be a defense to any action brought pursuant to Business and Professions Code Section 25658.

5. 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 August 13, 2020, the Respondent's agent, Jacob Gomez, sold, furnished, or gave an alcoholic beverage to Michael Z., a person under the age of 21, in violation of section 25658(a). (Findings of Fact ¶¶ 4-17.)

6. It is clear from the evidence that the sale of alcoholic beverages to Michael was made pursuant to the Respondent's license. Saucey, which does not hold an alcoholic beverage license, merely delivered the alcoholic beverages on behalf of the Respondent. Saucey's failure to properly check Michael's ID as required by the contract does not vitiate the Respondent's legal obligation not to sell or furnish alcoholic beverages to minors.

7. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141.1(e)(2) and rule 141.1(e)(5) and, therefore, the accusation should be dismissed pursuant to rule 141.1(f). In making these arguments, the Respondent emphasized that Michael was wearing a face mask at all times he interacted with Gomez.

8. With respect to rule 141.1(e)(2), the Respondent argued that Michael did not have the appearance generally expected of a person under the age of 21 because he wore a mask which covered the lower portion of his face (from his chin to his eyes), thereby preventing his appearance from being seen. This argument is rejected. The use of masks to prevent the spread of COVID-19 is part of the day-to-day reality of living during a pandemic. The uncontroverted evidence established that Michael wore the mask because of COVID-19; there is **no** evidence that he wore the mask to obscure his appearance. Importantly, Gomez did not ask Michael to lower his mask so that he could see his face.

9. With respect to rule 141.1(e)(5), the Respondent argued that Michael should have pulled his mask down so that the identification was “face to face,” not “face to mask.” In making this argument, the Respondent noted that Michael and Gomez could have been positioned six feet apart to protect against the spread of COVID-19. This argument is also rejected.

Rule 141(b)(5), dealing with minor decoy operations in all contexts other than via delivery services, provides that, after the sale, “*the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification.*” The emphasized language is identical to the language used in rule 141.1(e)(5). As the Court of Appeal in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* makes clear, the purpose of the face-to-face identification requirement is to ensure that, soon after the sale, the seller be provided with the opportunity to come face to face with the decoy.⁵ Since rule 141.1(e) is derived from rule 141(b), the same reasoning is applicable here. Thus, it is irrelevant whether Michael pulled down his mask or not during the identification since the purpose of the rule—to provide Gomez with the opportunity to be brought face to face with Michael—has been satisfied by bringing the two of them together in close proximity to one another.

PENALTY

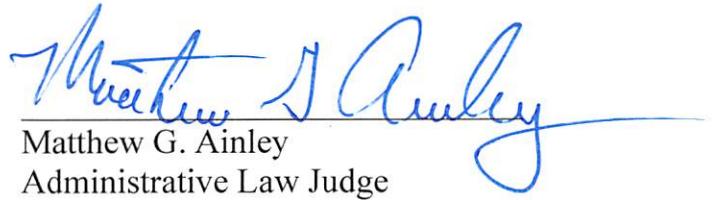
The Department requested that the Respondent’s license be suspended for a period of 15 days. The Respondent argued that a mitigated penalty was appropriate if the accusation were sustained, noting in part that the Respondent contractually requires delivery personnel to check ID and verify the age of the person to whom the alcohol is being delivered and that, in this case, Gomez scanned Michael’s ID. It is unclear if the failure in this case was due to a problem with the app or if Gomez made a mistake; either way, no mitigation is warranted for the mere attempt to check ID. The penalty recommended herein complies with rule 144.

⁵ 109 Cal. App. 4th 1687, 1698, 1 Cal. Rptr. 3d 339, 347 (2003).

ORDER

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

Dated: March 3, 2021


Matthew G. Ainley
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By:  _____
Date: <u>04/12/21</u> _____