

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

AB-9923

File: 21-569625; Reg: 20090707

GIAF ALHOSRY, INC.,
dba P and B Liquor 2
2807 East 7th Street
Long Beach, CA 90804,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: November 5, 2021
Telephonic

ISSUED NOVEMBER 9, 2021

Appearances: *Appellant:* Jeffrey S. Weiss, of Weiss Stepanian, LLP, as counsel
for Giaf Alhosry, Inc.,

Respondent: Alanna K. Ormiston, as counsel for the Department
of Alcoholic Beverage Control.

ORDER

Giaf Alhosry, Inc., doing business as P and B Liquor 2 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control (Department)¹ suspending its license for 15 days (with all 15 days stayed for a period of one year, provided no further cause for discipline arises during that time) because a delivery driver, delivering alcohol from the premises, delivered an alcoholic beverage to a Department minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

¹ The decision of the Department, dated July 6, 2021, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on June 28, 2016. There is no record of prior departmental discipline against the license.

On December 31, 2020, the Department filed a single-count accusation charging that a DoorDash driver, Joao Criscuolo De Alameida (the driver), delivered an alcoholic beverage to 17-year-old Christopher Crocker on August 28, 2020. Although not noted in the accusation, the decoy was working for the Department at the time.

At the administrative hearing held on April 8, 2021, documentary evidence was received, and testimony concerning the sale was presented by the decoy and Department Supervising Agent Randal Milloy. The driver did not testify. Ibrahim Maksoud, manager of the premises and corporate secretary for Giaf Alhosry, Inc., testified on appellant's behalf.

Testimony established that on August 28, 2020, an order was placed for a 6-pack of Budweiser beer in 12-ounce bottles through DoorDash. The decoy waited for the delivery in the parking lot of 24-Hour Fitness in Cerritos. The driver located the decoy, and confirmed he was the one who placed the order. He asked to see the decoy's identification (ID), and scanned it with his phone. The decoy was wearing a wire so that Department agents could hear his conversation with the driver and Agent Milloy observed the transaction from his vehicle.²

A copy of the decoy's vertical-format driver's license in the record shows his true date of birth — making him 17 years of age on the date of the transaction — and

² The testimonies of the decoy and Agent Milloy differed on whether the driver asked for ID. The ALJ relied on Agent Milloy's testimony for his finding that ID was requested (Findings of Fact, ¶ 7), since the agent heard the driver ask for ID through the wire and observed the scanning of the phone from his vehicle.

contains a red stripe indicating "AGE 21 IN 2023." (Exh. 2.) The driver handed the beer to the decoy without asking any age-related questions and began to leave.

The driver was contacted by Agent Milloy and informed of the violation. Agent Milloy asked the decoy who sold him the beer and the decoy pointed at the driver. A photograph of the decoy and driver was then taken (exh. 4), with the decoy wearing a mask. The driver raised no objection to the decoy's mask at the time he was being identified.

The agents asked to see the driver's phone and took a photograph of the screen which displayed:

The recipient of your latest delivery is underage or their ID has expired.
DO NOT leave the alcohol with the customer. Your delivery is now complete and you have been paid for this delivery.

Please return the order to the merchant or otherwise responsibly dispose of the order.

(Exh. 6.) The driver was subsequently issued a citation.

The agents then contacted the licensee and informed him of the violation. Mr. Maksoud showed them the screen for the transaction which indicated that the beer had been delivered. (Exh. 7.) He also informed them that all delivery drivers are instructed to ask for ID when delivering alcohol and that he has posted multiple signs in the premises with this instruction that includes a warning about negative consequences for failing to do so. (Exh. 8.)

The administrative law judge (ALJ) issued a proposed decision on May 10, 2021, sustaining the accusation and recommending a 15-day suspension, with all 15 days stayed for a period of one year provided no further cause for discipline arises during that time.

The Department adopted the proposed decision in its entirety on June 24, 2021, and issued a certificate of decision on July 6, 2021.

Appellant then filed a timely appeal contending: (1) neither DoorDash nor the driver were agents of appellant, and (2) the face-to-face identification did not comply with rule 141.1(e)³ because the decoy was wearing a mask.

DISCUSSION

I

AGENCY

Appellant contends that neither DoorDash nor its driver were agents of appellant. (AOB at pp. 5-7.)

This Board is bound by the factual findings in the Department's decision so long as those findings³ 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].)

³ References to rule 141.1 and its subdivisions are to section 141.1 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

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) 2Cal.3d 85, 94 [84 Cal.Rptr. 113]; *Harris, supra*, at p. 114.)

In appellant's opening brief it maintains "nowhere in ALJ Ainley's finding of facts does it state that the driver was an agent of the appellant." (AOB at p. 5.) However, the accusation itself states, in pertinent part:

On or about August 28, 2020, **respondent-licensee's agent** or employee, Joao Criscuolo De Alameida, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to C.C., a person under the age of 21 years, in violation of Business and Professions Code Section 25658(a).

(Accusation, emphasis added.) And, in the decision, the ALJ reaches the following conclusion:

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 28, 2020, the **Respondent's agent**, Joao Criscuolo De Alameida, sold, furnished, or gave an alcoholic beverage to Christopher Crocker, a person under the age of 21, in violation of section 25658(a). (Findings of Fact, ¶¶ 4-16.)

(Conclusions of Law, ¶ 5, emphasis added.) While it may not be specifically labeled as a finding of fact, clearly the ALJ found that the driver was an agent of appellant and refers to him as such.

As an initial matter, appellant defines “agency” and “authority” by citing to the Civil Code. (AOB at pp. 5-6.) Appellant offers no discussion or explanation as to why these definitions should control in this case, and we know of none. Accordingly, we must disregard these definitions. (See, e.g., *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 [183 Cal.Rptr.3d 654] [“. . . citing cases [or statutes] without any discussion of their application to the present case results in forfeiture.”] (*Allen*).

Both this Board and the courts have consistently found that a licensee may be held liable for the actions of his agents or employees:

The owner of a liquor license has the responsibility to see to it that the license is not used in violation of law and as a matter of general law the knowledge and acts of the employee or agent are imputable to the licensee. [Citation.]

(*Harris v. Alcoholic Beverage Control Appeals Bd.* (1961) 197 Cal.App.2d 172, 180 [17 Cal.Rptr. 315].) The *Laube* court noted:

A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly.

(*Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779].) Similarly, in *Reimel*, the court stated:

[A] licensee can draw no protection from his lack of knowledge of violations committed by his employees or from the fact that he has taken reasonable precautions to prevent such violations. There is no requirement . . . that the licensee have knowledge or notice of the facts constituting its violation. [Citations.]

(*Reimel v. Alcoholic Beverage Control Appeals Bd.* (1967) 252 Cal.App.2d 520, 522 [60 Cal.Rptr. 641], internal quotations omitted.)

Appellant cites *Garcia* for the proposition that an agency relationship is only created by some affirmative conduct on the part of the principal — contending that no such conduct exists in this case. (Citing: *Garcia v. KND Development 52, LLC* (2020) 58 Cal.App.5th 736, 743 [272 Cal.Rptr.3d 706].) However *Garcia* specifically states, “[a]n agent has such authority as the principal, actually or ostensibly, confers upon him.” (*Id.* at 744.) In this matter, the driver became appellant’s ostensible (i.e., apparent) agent when he delivered appellant’s alcohol, pursuant to a DoorDash agreement. No other conduct was required to create an agency relationship. The doctrine of *respondeat superior* provides that an employer or principal is vicariously liable for the wrongful conduct of his or her employees or agents committed within the scope of the employment or agency. (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967 [227 Cal.Rptr. 106].)

Business and Professions Code 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.

Rule 141.1 sets forth the requirements for an operation in which alcoholic beverages are delivered to a minor decoy:

(a) A law enforcement agency may only use a person under 21 years of age 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 21 years of age), 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 21 years of age, pursuant to an order made by internet, telephone, other electronic means, or any method of ordering other than in person at the licensed premises.

(c) For purposes of this section, “agent” shall mean any entity or person the licensee uses to deliver alcoholic beverages to persons who place orders by internet, telephone, other electronic means, or any method of ordering other than in person at the licensed premises, whether by contract or agreement, even if not an employee of the licensee, including but not limited to a third-party delivery person or service.

(d) For purposes of this section, “minor decoy” shall mean a person used by law enforcement pursuant to Business and Professions Code section 25658(f).

(e) The following minimum standards shall apply to actions filed pursuant to Business and Professions Code Section 25658 in which it is alleged a minor decoy has been furnished an alcoholic beverage by delivery:

(1) At the time of the alleged violation, the minor decoy shall be under 20 years of age;

(2) The minor decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to person delivering the alcoholic beverages at the time of the alleged violation;

(3) A minor decoy shall either carry their own identification showing their correct date of birth or shall carry no identification; a minor decoy who carries identification shall present it upon request of the person delivering the alcoholic beverages;

(4) A minor decoy shall answer truthfully any questions about their age, asked by the person delivering the alcoholic beverages, at the time of delivery. This requirement shall not apply to questions asked about the age of the minor decoy at the time the alcoholic beverages are ordered.

(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.

(Cal. Code Regs., tit. 4, §141.1.)

The ALJ noted in his decision,

The Respondent argued that Rule 141.1(c) improperly imposes an agency between itself and a driver employed by another company. In the Respondent's view, there is no direct agency and the underlying facts are insufficient to establish an ostensible agency under existing case law. . . .

(Conclusions of Law, ¶ 7, citation omitted.) The ALJ was not persuaded, nor are we, that it was improper to consider the driver an agent of the licensee.

The regulation itself defines "agent" in the context of a minor decoy operation:

For purposes of this section, "agent" shall mean any entity or person the licensee uses to deliver alcoholic beverages to persons who place orders by internet, telephone, other electronic means, or any method of ordering other than in person at the licensed premises, whether by contract or agreement, even if not an employee of the licensee, including but not limited to a third-party delivery person or service.

(Cal. Code Regs, tit. 4, §141.1(c).) Clearly, the driver is an agent of appellant under this definition.

As the ALJ found:

It is clear from the evidence that the sale of alcoholic beverages to Crocker was made pursuant to the Respondent's license. Door Dash, which does not hold an alcoholic beverage license, merely delivered the alcoholic beverages on behalf of the Respondent. The mere fact that Alameida, a DoorDash driver, is the person who delivered the alcoholic beverages does not vitiate the Respondent's legal obligation not to sell or furnish alcoholic beverages to minors.

(Conclusions of Law, ¶ 9.) We agree. After reviewing the entire record, we conclude that the decision is supported by substantial evidence. The misconduct of the driver

was properly imputed to appellant in this case. The Board cannot reweigh the evidence to reach a contrary conclusion.

II

FACE-TO-FACE IDENTIFICATION

Appellant contends that the face-to-face identification was improper because the decoy failed to remove his mask when he identified the driver. (AOB at p. 8.)

Appellant acknowledges that rules 141.1(e)(5) and 141(b)(5)⁴ are “virtually identical” to one another, and that there were no changes to the Department’s face-to-face identification requirements when it amended its regulations in 2020 to add rule 141.1. (AOB at p. 7.) Accordingly, the extensive case law regarding rule 141(b)(5) applies with equal force to a 141.1(e)(5) case, and we refer to these rules interchangeably. Both require the decoy to make a face-to-face identification of the person who sold, furnished, or delivered the alcohol. Notably, it is **not** the decoy who is being identified.

Appellant did not raise a 141.1(e)(5) argument at the administrative hearing. He raised the issue of the decoy’s wearing of a mask in regards to the decoy’s appearance, but not in regards to the face-to-face identification of the driver.

It is settled law that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*Araiza v. Younkin* (2010) 188 Cal.App.4th 1120, 1126-1127 [116 Cal.Rptr.3d 315]; *Hooks v. Cal. Personnel Bd.* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Bd. of Med. Examiners* (1978) 81 Cal.App.3d 564, 576 [146

⁴ Cal. Code Regs., tit. 4, § 141(b)(5).

Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Harris v. Alcoholic Bev. Control Appeals Bd.* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].) Nevertheless, we will address this issue briefly.

Rule 141.1(e)(5) 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 person delivering the alcoholic beverages.

This rule provides an affirmative defense. The burden is, therefore, on appellant to show non-compliance. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.) 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 in that case that no attempt, reasonable or otherwise, was made to identify the clerk in that case].)

In *Chun* (1999) AB-7287, this Board made the following observation about the purpose of face-to-face identifications:

The phrase “face to face” means that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other’s presence, by the decoy’s identification, and the seller’s presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

(*Id.* at p. 5.)

In *7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983, the Board clarified application of the rule in cases where, as here, an officer or agent initiates contact with the seller following the sale:

As long as the decoy makes a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error, we do not

believe that the officer's contact with the clerk before the identification takes place causes the rule to be violated.

(*Id.* at pp. 7-8; see also *7-Eleven, Inc./Morales* (2014) AB-9312; *7-Eleven, Inc./Paintal Corp.* (2013) AB-9310; *7-Eleven, Inc./Dars Corp.* (2007) AB-8590; *West Coasts Products LLC* (2005) AB-8270; *Chevron Stations, Inc.* (2004) AB-8187.)

The court of appeals has found compliance with rule 141(b)(5) even where police escorted a clerk outside the premises in order to complete the identification. (See *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Keller)* (2003) 109 Cal.App.4th 1687, 1697 [3 Cal.Rptr.3d 339] [finding that the rule leaves the location of the identification to the discretion of the peace officer].)

More recently, the court found rule 141(b)(5) was not violated when:

[T]he 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.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (CVS)* (2017) 18 Cal.App.5th 541, 547 [226 Cal.Rptr.3d 527, 531].)

The court explained that the exact moment of the identification could not be severed from the entire identification procedure, which in that case included the decoy pointing out the clerk to the police, the decoy accompanying the police officer to the counter, the officer informing the clerk she had sold beer to the minor at his side, and the clerk and decoy being photographed together. (*Id.* at p. 532.) The court said, “[t]he clerk in these circumstances certainly knew or reasonably ought to have known that she was being identified” because of the totality of the circumstances. (*Ibid.*)

Looking at the *entire identification procedure* in this case — including the agent asking the decoy who delivered the beer, the decoy pointing out the driver, and the driver and decoy being photographed together — it seems clear that the driver knew, or reasonably should have known, that he was being identified as the person who delivered alcohol to a minor. That is all that is required. As in *CVS*, the driver here “had ample opportunity to observe the minor and to object to any perceived misidentification.” (*CVS, supra*, at 547.) As the Court said, “the rule requires identification, not confrontation.” (*Ibid.*) Furthermore, as noted earlier, the issue of a mask was never raised in regards to the face-to-face identification and the driver did not protest the fact that the decoy was wearing a mask.

The decision here is supported by substantial evidence and the face-to-face identification in this matter fully complies with rule 141.1(e)(5). 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. (*Masani, supra*, at 1437.)

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:**

GIAF ALHOSRY, INC.
P AND B LIQUOR 2
2807 E. 7TH ST.
LONG BEACH, CA 90804

OFF-SALE GENERAL - LICENSE

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

LAKWOOD DISTRICT OFFICE

File: 21-569625

Reg: 20090707

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 June 24, 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.

Sacramento, California

Dated: July 6, 2021

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Alcoholic Beverage Control
Office of Legal Services



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Giaf Alhosry, Inc.	}	File: 21-569625
dba P and B Liquor 2	}	
2807 E. 7 th St.	}	Reg.: 20090707
Long Beach, California 90804	}	
	}	License Type: 21
Respondent	}	
	}	Word Count: 13,000
	}	
	}	Reporter:
	}	Sharon Cahn
	}	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 April 8, 2021.

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

Jeffrey S. Weiss, attorney-at-law, represented respondent Giaf Alhosry, Inc. Ibrahim Maksoud, Secretary of the Respondent and manager of the licensed premises, was present.

The Department seeks to discipline the Respondent's license on the grounds that, on or about August 28, 2020, the Respondent, through its agent or employee, sold, furnished, or gave alcoholic beverages to Christopher Crocker, 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 April 8, 2021.

FINDINGS OF FACT

1. The Department filed the accusation on December 31, 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 June 28, 2016 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondent's license.
4. Christopher Crocker was born on November 11, 2000. On August 28, 2020, he participated in a minor decoy operation conducted by the Department. On that date he was 17 years old.
5. Crocker appeared and testified at the hearing. On August 28, 2020, he was 5'6" tall and weighed 155 pounds. He was wearing a white t-shirt, black board shorts, white tennis shoes, and a necklace. His hair was long and parted in the middle. (Exhibits 3-4.) His appearance at the hearing was the same, except that he was 10 pounds lighter and his hair was not as long.
6. On August 28, 2020, an order for a 6-pack of Budweiser beer was placed from the Licensed Premises via Door Dash. (Exhibit 5.²) Crocker waited in the parking lot of a 24-Hour Fitness gym. Joao Criscuolo De Alameida, the driver, entered the parking lot and contacted Crocker. He confirmed that Crocker was the person to whom the beer was to be delivered.
7. At one point in his testimony, Crocker said that Alameida did not ask to see his ID; at another point he said that Alameida did. Agent R. Milloy testified that Crocker was wearing a wire so that the agents could hear the interaction.³ Agent Milloy testified that he heard Alameida ask to see Crocker's ID. He further testified that Crocker did so and that Alameida scanned the ID with his phone.⁴
8. Alameida handed the Budweiser beer to Crocker, then attempted to leave. Agent Milloy and his partners approached Alameida, identified themselves, and explained the violation.
9. Agent Milloy asked Crocker to identify the person who delivered the beer to him. Crocker pointed to Alameida and said that he was. Crocker and Alameida were a few feet apart at the time, facing each other. A photo of the two of them was taken. (Exhibit 4.)

² Exhibit 5 consists of the three columns. The first and third columns relate to the delivery at issue here. The middle column was accidentally included during printing.

³ No recording was made from the wire.

⁴ Given that Crocker was unsure if Alameida had asked to see his identification or not, and using the factors set forth in Evidence Code section 780, the testimony of Agent Milloy is relied upon in this decision.

10. The agents asked to see Alameida's phone. They took a photo of the screen, which indicated:

"The recipient of your latest delivery is underage or their ID has expired. DO NOT leave the alcohol with the customer. Your delivery is now complete and you have been paid for this delivery.

Please return the order to the merchant or otherwise responsibly dispose of the order."

(Exhibit 6.)

11. Crocker wore a mask at all times during his interaction with Alameida.

12. The agents went to the Licensed Premises and contacted Ibrahim Maksoud. Maksoud indicated that the order had come from the Licensed Premises. He further indicated that all drivers are instructed to check the ID of the person to whom the alcohol is delivered. Maksoud pointed out various signs posted inside the Licensed Premises instructing drivers to check IDs. (Exhibit 8.)

13. Agent Milloy took a photo of the tablet on which orders are displayed. The screen indicated that the beer in this case had been delivered. (Exhibit 7.)

14. Maksoud testified about the training he provides to his employees concerning the sale of alcoholic beverages and checking ID. He reminds them every day to check IDs.

15. The Respondent does not employ any delivery drivers. Rather, it uses Door Dash and Postmates. Maksoud posted a number of signs inside the Licensed Premises instructing drivers to check IDs and informing them that they can be cited if they deliver alcoholic beverages to minors. (Exhibit 8.)

16. After learning of the delivery at issue in this case, Maksoud began attaching cards to the bags reminding drivers to check IDs, to ensure that all customers are over 21, and not to leave alcoholic beverages at the door.

17. 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 141.1⁵ 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.
 - (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

⁵ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

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 28, 2020, the Respondent's agent, Joao Criscuolo De Alameida, sold, furnished, or gave an alcoholic beverage to Christopher Crocker, a person under the age of 21, in violation of section 25658(a). (Findings of Fact ¶¶ 4-16.)

6. The widespread use of delivery services is a byproduct of the pandemic. The Respondent emphasized that it does not hire delivery personnel, including the driver in this case. Rather, it noted that its role was to fill an order placed via Door Dash, after which it turned the alcohol over to a driver employed by Door Dash.

7. The Respondent argued that Rule 141.1(c) improperly imposes an agency between itself and a driver employed by another company. In the Respondent's view, there is no direct agency and the underlying facts are insufficient to establish an ostensible agency under existing case law.⁶ As such, it believes that rule 141.1(c) is overbroad and should be struck down. The undersigned does not have the authority to rule on either (1) whether rule 141.1(c) was properly enacted or not or (2) whether rule 141.1(c) is unconstitutionally overbroad. Nonetheless, the Respondent has raised these issues in order to preserve its right to assert them on appeal.

8. Additionally, the Respondent argued that the Department is engaged in selective enforcement by filing this action but not taking any action against Door Dash (which was neither cited nor warned). As such, the Respondent believes that this proceeding violates its rights of due process and equal protection. This argument is rejected. The

⁶ See, e.g., *Garcia v. KND Development 52, LLC*, 58 Cal App. 5th 736, 743-746, 272 Cal. Rptr. 3d 706, 711-714 (2020).

Department does not license Door Dash or other such delivery services. Accordingly, the Department cannot file any action against them—it can only take action against licensees such as the Respondent.⁷

9. It is clear from the evidence that the sale of alcoholic beverages to Crocker was made pursuant to the Respondent's license. Door Dash, which does not hold an alcoholic beverage license, merely delivered the alcoholic beverages on behalf of the Respondent. The mere fact that Alameida, a Door Dash driver, is the person who delivered the alcoholic beverages does not vitiate the Respondent's legal obligation not to sell or furnish alcoholic beverages to minors.

10. Finally, the Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141.1(e)(2) and, therefore, the accusation should be dismissed pursuant to rule 141.1(f). In making this argument, the Respondent emphasized that Crocker was wearing a face mask at all times he interacted with Alameida, effectively preventing Alameida from being able to evaluate Crocker's appearance.

11. 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. Accordingly, virtually everyone wears masks when interacting with others and Crocker was no different. There is **no** evidence that Crocker wore the mask to obscure his appearance. Since Alameida did not testify, there also is **no** evidence that Alameida had any trouble actually evaluating Crocker's appearance.

PENALTY

The Department requested that the Respondent's license be suspended for 15-days, with all 15 days stayed. The Respondent argued that it had done all it could to prevent drivers from delivering alcohol to minors and noted that it had no control over the driver's actions. As such, the Respondent requested that a mitigated penalty be imposed. The all-stayed penalty recommended by the Department represents substantial mitigation; no further mitigation is warranted. The penalty recommended herein complies with rule 144.

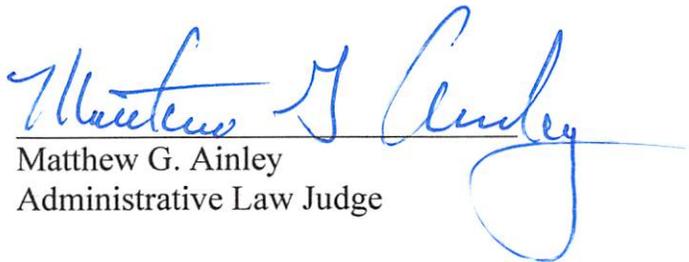
ORDER

The Respondent's off-sale general license is hereby suspended for a period of 15 days, with execution of all 15 days of the suspension stayed, upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within one year from the effective date of this

⁷ Whether charges should be filed against Door Dash or any other such delivery service by another body is beyond the scope of this proceeding.

decision; that should such determination be made, the Director of the Department of Alcoholic Beverage Control may, in his or her discretion and without further hearing, vacate this stay order and reimpose the stayed penalty; and that should no such determination be made, the stay shall become permanent.

Dated: May 10, 2021


Matthew G. Ainley
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By:  _____
Date: <u>06/24/21</u> _____