

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

AB-9941

File: 20-542197; Reg: 21091184

SAMMY CONVENIENCE, INC.,
dba Del Rosa Circle K
2734 Del Rosa Avenue
San Bernardino, CA 92404,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: April 8, 2022
Sacramento, CA

ISSUED APRIL 11, 2022

Appearances: *Appellant:* Letty Camarillo, of Solomon, Saltsman & Jamieson, as
counsel for Sammy Convenience, Inc.,

Respondent: Brian D. Rouse, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

Sammy Convenience, Inc., doing business as Del Rosa Circle K (appellant),
appeals from a decision of the Department of Alcoholic Beverage Control (Department)¹
suspending its license for 15 days because its clerk sold an alcoholic beverage to a
police minor decoy, in violation of Business and Professions Code section 25658,
subdivision (a).²

¹ The decision of the Department, dated November 30, 2021, is set forth in the
appendix.

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

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on June 23, 2012. There is one instance of prior departmental discipline against the license for a sale of alcohol to a minor in 2015.

On May 20, 2021, the Department filed a single-count accusation charging that appellant's clerk, Raichelle Browning (the clerk), sold an alcoholic beverage to 19-year-old Kaitlyn Luu (the decoy) on January 8, 2021. Although not noted in the accusation, the decoy was working for the San Bernardino Police Department (SBPD) at the time.

At the administrative hearing held on August 12, 2021, documentary evidence was received, and testimony concerning the sale was presented by the decoy.

Appellant presented no witnesses.

Testimony established that on January 8, 2021, SBPD Officer Ford entered the licensed premises in plain clothes, followed shortly thereafter by the decoy. The decoy went to the coolers where she selected a can of Bud Light beer. She took the beer to the register where the clerk asked the decoy for her identification (ID).

The decoy handed the clerk her California driver's license, which had a vertical orientation and contained her correct date of birth, showing her to be 19 years old. It also contained a red stripe indicating "AGE 21 IN 2022." (Exh. 3.) The clerk looked at the ID, handed it back to the decoy, then completed the sale without asking any age-related questions. Officer Ford observed the transaction from inside the store.

The decoy exited the premises, then subsequently returned to make a face-to-face identification of the clerk who sold her the beer. A photograph was taken of the clerk and decoy together (exh. 5).

The administrative law judge (ALJ) issued a proposed decision on September 10, 2021, sustaining the accusation and recommending a 15-day suspension. The Department adopted the proposed decision in its entirety on November 24, 2021, and a certificate of decision was issued six days later.

Appellant then filed a timely appeal contending that the ALJ's abused her discretion by treating the absence of mitigating factors as factors in aggravation. (Appellant's Opening Brief (AOB) at pp. 5-8.)

DISCUSSION

Appellant contends that the penalty determination constitutes an abuse of discretion. It specifically complains: "While the ALJ made clear which factors in mitigation she wished to see presented at the hearing, the ALJ abused [her] discretion when she treated the absence of these mitigating factors as aggravating factors." (AOB at p. 7.)

The Board will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) "'Abuse of discretion' in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.]" (*Brown v. Gordon* (1966) 240 Cal.App.2d 659, 666-667 [49 Cal.Rptr. 901].)

If the penalty imposed is reasonable, the Board must uphold it even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Rule 144 provides:

In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act (Bus. and Prof. Code Sections 23000, *et seq.*), and the Administrative Procedures Act (Govt. Code Sections 11400, *et seq.*), the Department shall consider the disciplinary guidelines entitled "Penalty Guidelines" (dated 12/17/2003) which are hereby incorporated by reference. Deviation from these guidelines is appropriate where the Department in its sole discretion determines that the facts of the particular case warrant such a deviation - such as where facts in aggravation or mitigation exist.

(Cal. Code Regs., tit. 4, § 144.)

Among the mitigating factors provided by the rule are the length of licensure without prior discipline, positive actions taken by the licensee to correct the problem, cooperation by the licensee in the investigation, and documented training of the licensee and employees. Aggravating factors include, *inter alia*, prior disciplinary history, licensee involvement, lack of cooperation by the licensee in the investigation, and a continuing course or pattern of conduct. (*Ibid.*)

The Penalty Policy Guidelines further address the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

Penalty Policy Guidelines:

The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition

of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

(*Ibid.*)

The ALJ recommended a penalty of 15-days' suspension, and made the following findings in support of that recommendation:

The Department offered evidence of Respondent's prior similar discipline relating to a section 25658(a) violation on September 8, 2015. While this discipline is somewhat remote it shows the Licensee does not have a discipline-free history. On the other hand, as the Respondent pointed out, since that violation the Respondent has been discipline-free for five years and four months, which warrants some mitigation. However, that mitigation is counter-balanced by the following factors. Respondent provided no evidence of documented training of employees, or remedial measures taken to prevent future sale-to minor violations. There was no evidence as to how clerk Browning was able to proceed with the sale despite being handed a minor's ID, with its vertical orientation and red stripe indicating the decoy would be "AGE 21 IN 2022." There was no evidence Respondent's employees are trained on identifying the red flags of minors' IDs. There was no evidence Respondent's point-of-sale register has any safety protocols in place, such as requiring clerks to swipe an ID to determine a customer's age and prevent the age-restricted sale when a minor is detected. There was no evidence clerk Browning or any of Respondent's clerks receive disciplinary warnings for sale-to-minor violations.

(Decision at p. 6.)

Appellant's disagreement with the penalty imposed does not mean the Department abused its discretion. As we have said time and again, this Board's review of a penalty looks only to see whether it can be considered reasonable, and, if it is reasonable, the Board's inquiry ends there. The *extent* to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion — pursuant to rule 144 — and the Board may not interfere with that discretion absent a clear showing of abuse of discretion.

Appellant has not established that the Department abused its discretion in imposing a 15-day suspension in this matter.

ORDER

The decision of the Department is affirmed.³

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

³ This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 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.* Service on the Board pursuant to California Rules of Court (Rule 8.25) should be directed to: 400 R Street, Ste. 320, Sacramento, CA 95811 and/or electronically to: abcboard@abcappeals.ca.gov

APPENDIX

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

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

SAMMY CONVENIENCE, INC.
DEL ROSA CIRCLE K
2734 DEL ROSA AVENUE
SAN BERNARDINO, CA 92404

OFF-SALE BEER AND WINE - LICENSE

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

RIVERSIDE DISTRICT OFFICE

File: 20-542197

Reg: 21091184

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 November 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.

On or after January 10, 2022, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: November 30, 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:

Sammy Convenience, Inc.
Dbas: Del Rosa Circle K
2734 Del Rosa Avenue
San Bernardino, California 92404

Respondent

} File: 20-542197
}
} Reg.: 21091184
}
} License Type: 20
}
} Word Count: 6,208
}
} i-Depo Reporters:
} Court Reporter: Cheryl Asada
} Video Host: Scott Kitano
}
} **PROPOSED DECISION**

Off-Sale Beer and Wine License

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter by video conference in California on August 12, 2021.

Bryan Rouse, attorney, represented the Department of Alcoholic Beverage Control (the Department).

Jade Quintero, attorney, represented Respondent, Sammy Convenience, Inc.

The Department seeks to discipline the Respondent's license on the grounds that, on or about January 8, 2021, the Respondent-Licensee's agent or employee, Raichelle Browning, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Kaitlyn Luu, 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 August 12, 2021.

FINDINGS OF FACT

1. The Department filed the accusation on May 20, 2021.

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

2. The Department issued a type 20, off-sale beer and wine license to the Respondent for the above-described location on June 23, 2014 (the Licensed Premises).

3. The following is the record of prior Department discipline against the Respondent's license as established by official records introduced by the Department, which matter is final (Exhibit 2):

<u>Date of Violation</u>	<u>Reg. No.</u>	<u>Violation</u>	<u>Penalty</u>
September 8, 2015	16083552	BP §25658(a)	10-days, all stayed suspension

4. Kaitlyn Luu (hereinafter referred to as decoy Luu) was born on March 4, 2001. On January 8, 2021, she was 19 years old. On that date she served as a minor decoy in an operation conducted by the San Bernardino Police Department (San Bernardino PD).

5. Decoy Luu appeared and testified at the hearing. On January 8, 2021, she was 5 feet tall and weighed approximately 85 pounds. She wore a grey hooded sweatshirt under a tan jacket, with blue jeans and white tennis shoes. There was no evidence she wore the hood of the sweatshirt while she was in the Licensed Premises. Her hair was worn parted in the middle with the length of her hair falling past her shoulders. She wore a black face mask which covered the bulbous tip of her nose to her chin. She wore a little mascara on her eyelashes and no other make-up. (Exhibits 4-04, 4-05, and 5.) Her appearance at the hearing was the same, except she did not wear the face mask.

6. On January 8, 2021, San Bernardino PD Officer Ford entered the Licensed Premises, in a plain clothes capacity, followed shortly thereafter by decoy Luu. Decoy Luu walked straight to the alcoholic beverage coolers and selected a can of Bud Light beer. Decoy Luu brought the can of beer to the sales counter to purchase the alcohol.

7. Clerk Raichelle Browning (hereinafter referred to as clerk Browning) stood behind the sales counter and asked decoy Luu for her identification (ID). Decoy Luu had on her person her California Driver License, which has a vertical orientation, depicts her correct date of birth and includes a red stripe which reads, "AGE 21 IN 2022." (Exhibit 3.) Decoy Luu handed her ID to the clerk who retrieved it, looked at it and returned it to the decoy. Clerk Browning did not ask the decoy any age-related questions and did not ask the decoy to remove her mask. Clerk Browning continued with the sales transaction. Decoy Luu paid for the Bud Light beer and received change. Decoy Luu exited the store with the Bud Light beer and change. Officer Ford stood at some location behind the decoy during the transaction. While decoy Luu was inside the Licensed Premises she did not communicate or interact with anyone other than clerk Browning. Officer Ford remained in the store after the decoy exited.

8. Officer Ford made contact with clerk Browning and informed her she had sold alcohol to a minor. At that time decoy Luu re-entered² the Licensed Premises with Officer Davala. Decoy Luu was asked to identify the person who sold her the beer. Decoy Luu, while standing at the side of and slightly behind the counter, from five feet away identified clerk Browning as the person who sold the alcoholic beverage to her. A photograph of clerk Browning and decoy Luu was taken after the face-to-face identification, while they stood behind the sales counter and next to each other, with decoy Luu holding the can of Bud Light beer in her right hand, while pointing at the beer and clerk Browning with her left hand. (Exhibit 5.) After being identified as having sold alcohol to decoy Luu, clerk Browning made no objection thereto.

9. Clerk Browning did not appear at the hearing.

10. Decoy Luu appeared her age at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of clerk Browning at the Licensed Premises on January 8, 2021, decoy Luu displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk. At the hearing and in the photographs taken of her on January 8, 2021, decoy Luu appears youthful and looks her age. At the hearing, decoy Luu displayed a meek and quiet demeanor. She was nervous the entire time she was in the Licensed Premises while conducting the said minor decoy operation.

11. Prior to January 8, 2021, decoy Luu had been on approximately three minor decoy operations.³ As of January 8, 2021, decoy Luu was both a police explorer and a cadet with the San Bernardino PD. Decoy Luu was a police explorer for three years. As a police explorer she attended weekly meetings where she learned about “stuff within the department and practicing field scenarios that officers go through.” In the field scenarios the explorers’ practiced what an officer would do during a traffic stop, burglary and active shooter scenario. Part of decoy Luu’s explorer training included how to interact with the public and how to deal with feeling nervous in different scenarios. For 10 months, decoy Luu has held a part-time job as a cadet with the San Bernardino PD working in the personnel, training and records departments. She believes the explorer and cadet training and experience has made her a more confident person. During decoy operations decoy Luu usually gets nervous as soon as she enters the licensed premises and her nervousness does not dissipate until she “gets to leave” and exit the premises.

² Decoy Luu testified that she re-entered the Licensed Premises approximately one minute or so after having initially exited the store.

³ Decoy Luu approximated that she visited 10 to 15 licensed premises on each minor decoy operation prior to the decoy operation of January 8, 2021.

12. On January 8, 2021, decoy Luu visited approximately 15 licensed premises, with either one or two of those 15 establishments having sold alcohol to the minor, including the Licensed Premises. Decoy Luu had been to the Licensed Premises prior to January 8, 2021, to buy gas for her vehicle because she lives in the city, but she had not ever been inside the convenience store to purchase anything or to use the restroom.

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, 2021, the Respondent-Licensee's employee, clerk Raichelle Browning, inside the Licensed Premises, sold alcoholic beverages, to-wit: a can of Bud Light beer, to Kaitlyn Luu, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-10.)

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

6. With respect to rule 141(b)(2), the Respondent argued decoy Luu did not have the appearance of someone under the age of 21 because of certain factors including that the decoy, (1) wore eye make-up which typically gives the appearance of appearing older and could have had the effect of making her appear older to the clerk, (2) wore a face mask partially covering her face, (3) had a history of training as an explorer and cadet, with training in various scenarios and how to deal with situations including active shooter and burglary scenarios, both of which are high-intense situations. The Respondent argued

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

that although decoy Luu testified she felt nervous on January 8, 2021 she received training on how to handle nervousness in those situations.

7. This rule 141(b)(2) argument is rejected. There was no evidence that any of these alleged factors had any effect on clerk Browning discerning the decoy's appearance or had any impact in the performance of her duties. Clerk Browning did not testify. There was nothing about decoy Luu's appearance, mask, demeanor or experience as a decoy, an explorer or cadet which made her appear older than her actual age. In-person and in the photographs taken of her on January 8, 2021, decoy Luu appears youthful and looks her age. In other words, decoy Luu had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶¶ 5 and 10.)

8. With respect to rule 141(b)(5), the Respondent argued that the Department failed to establish the citation was issued after the face-to-face identification, if at all. This argument misconstrues the burden of proof. Rule 141(b) offers an affirmative defense. As with all affirmative defenses, the burden of proof rests with the party asserting it—here, the Respondent. Thus, in order to establish that the citation was not issued as required by rule 141(b)(5), the Respondent must offer evidence that the citation was issued prematurely (i.e., before the face-to-face identification). The Respondent did not. Rather, the record is silent as to the citation and the timing of the citation and, therefore, the Respondent failed to meet their burden of proof. Furthermore, there is no requirement that a citation be issued. Rule 141(b)(5) states: "Following any completed sale, but not later than the time a citation, *if any*, is issued, 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 of the alleged seller of the alcoholic beverages." (Emphasis added by italics.)

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

PENALTY

The Department requested the Respondent's license be suspended for a period of 15 days. The Department noted there was no mitigating evidence relating to any subsequent measures taken by the licensee to prevent future sale-to-minor violations. The Respondent did not recommend a penalty should the accusation be sustained. The Respondent argued, that if the accusation were not dismissed, a mitigated penalty was warranted based on it having not received any discipline between its last sale-to-minor violation on September 8, 2015 until the current sale of January 8, 2021.

In assessing an appropriate measure of discipline, the Department's penalty guidelines are in California Code of Regulations, Title 4, Division 1, Article 22, section 144,

commonly referred to as rule 144. Under rule 144, the presumptive penalty for a first violation of selling or furnishing an alcoholic beverage to a minor in violation of section 25658 is a 15-day license suspension. Rule 144 also permits imposition of a revised penalty based on the presence of aggravating or mitigating factors.

The Department offered evidence of Respondent's prior similar discipline relating to a section 25658(a) violation on September 8, 2015. While this discipline is somewhat remote it shows the Licensee does not have a discipline-free history. On the other hand, as the Respondent pointed out, since that violation the Respondent has been discipline-free for five years and four months, which warrants some mitigation. However, that mitigation is counter-balanced by the following factors. Respondent provided no evidence of documented training of employees, or remedial measures taken to prevent future sale-to minor violations. There was no evidence as to how clerk Browning was able to proceed with the sale despite being handed a minor's ID, with its vertical orientation and red stripe indicating the decoy would be "AGE 21 IN 2022." There was no evidence Respondent's employees are trained on identifying the red flags of minors' IDs. There was no evidence Respondent's point-of-sale register has any safety protocols in place, such as requiring clerks to swipe an ID to determine a customer's age and prevent the age-restricted sale when a minor is detected. There was no evidence clerk Browning or any of Respondent's clerks receive disciplinary warnings for sale-to-minor violations.

The penalty recommended herein complies with rule 144.

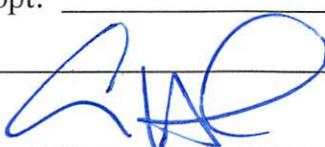
ORDER

Respondent's off-sale beer and wine license is hereby suspended for a period of 15 days.

Dated: September 10, 2021



D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By:  _____
Date: <u>11/24/21</u>