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

AB-9946
File: 20-550978; Reg: 21091203

7-ELEVEN, INC. and BRARA ENTERPRISES, INC.,
dba 7-Eleven Store #36872A
6692 Indiana Avenue
Riverside, CA 92506,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: May 13, 2022
Sacramento, CA

ISSUED MAY 16, 2022

Appearances: *Appellants:* Letty Camarillo, of Solomon, Saltsman & Jamieson, as counsel for 7-Eleven, Inc. and Brara Enterprises, Inc.,

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

OPINION

7-Eleven, Inc. and Brara Enterprises, Inc., doing business as 7-Eleven Store #36872A (appellants), appeal from a decision of the Department of Alcoholic Beverage Control (Department)[1] suspending their license for 10 days because their clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).[2]

---

[1] The decision of the Department, dated December 28, 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

Appellants' off-sale beer and wine license was issued on February 20, 2015. There is no record of prior departmental discipline against the license.

On June 1, 2021, the Department filed a single-count accusation against appellants charging that, on October 1, 2020, appellants' clerk, Zaida Chavez (the clerk), sold an alcoholic beverage to 17-year-old Stephanie A. (the decoy). Although not noted in the accusation, the decoy was working for the Riverside Police Department (RPD) at the time.

At the administrative hearing held on October 5, 2021, documentary evidence was received and testimony concerning the sale was presented by the decoy and RPD Detective Joshua Sturdavant. Franchisee Amarjit Brara testified on behalf of appellants.

Testimony established that on October 1, 2020, the decoy entered the licensed premises, followed shortly thereafter by Officer Sturdavant. The decoy went to the coolers but found them locked, so she asked the clerk for a Modelo beer. The clerk went to the coolers, unlocked it, and obtained a Modelo for the decoy. The clerk rang up the beer without asking the decoy for identification, and without asking her any age-related questions. The decoy exited the premises with the beer.

Officer Sturdavant approached the clerk, identified himself, and explained the violation to her. The decoy re-entered the premises to make a face-to-face identification of the clerk. Officer Sturdavant took the clerk and decoy to a back room where he asked the decoy who sold her the beer. The decoy pointed to the clerk from a distance of approximately five feet and said that she had. A photograph was taken of the decoy and clerk together (exh. 3) and the clerk was issued a citation.

The administrative law judge (ALJ) issued a proposed decision on November 3, 2021, sustaining the accusation and recommending a 10-day suspension. The Department adopted the proposed decision in its entirety on December 20, 2021, and a certificate of decision was issued eight days later.

Appellants then filed a timely appeal contending: (1) there is insufficient evidence to support the finding that the face-to-face identification of the clerk complied with rule 141(b)(5),[3] and (2) the penalty fails to account for factors in mitigation.

DISCUSSION

I

FACE-TO-FACE IDENTIFICATION

Appellants contend in their opening brief:

> [T]he Department improperly rejected Appellants' asserted defense under California Code of Regulations section 141(c) and did so without sufficient evidence showing that a face-to-face identification occurred, as required by Rule 141(b)(5).

(AOB at p. 1.)

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for

[3] References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

> consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

> When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department's decision.

(*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106, 112 [28 Cal.Rptr. 74].)

Therefore, the issue of substantial evidence when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; *Harris*, *supra*, at p. 114.)

The ALJ made the following findings regarding the face-to-face identification:

> 7. Albarran went to the vehicle in which she had arrived and waited for the officers to tell her to come back inside. Ofcr. Sturdavant contacted Chavez, identified himself, and explained the violation to her. Albarran re-entered the Licensed Premises and they went to a back room. Ofcr. Sturdavant asked her to identify the person who sold the beer to her. She pointed to Chavez and said that she had. Albarran and Chavez were

> approximately five feet apart, with no obstructions between them. A photo of Albarran and Chavez was taken (exhibit 3), after which Chavez was cited.
>
> 8. Ofcr. Sturdavant testified, that during his conversation with Chavez, she acknowledged selling the alcohol to Albarran and stated that she was hurrying to clear the line.
>
> 9. Ofcr. Sturdavant recorded the identification. On the recording, he can be heard asking Chavez, "Do you recall, is this the person you sold alcohol to?" Chavez replied, "Yeah." Ofcr. Sturdavant then asked Albarran, "Can you point out the person who sold you alcohol?" There is no audible response, but Ofcr. Sturdavant almost immediately says, "OK." (Exhibit F.)

(Findings of Fact (FF), ¶¶ 7-9.) Based on these findings, the ALJ addressed the face-to-face identification issue, and reached the following conclusion regarding compliance with rule 141(b)(5):

> 7. With respect to rule 141(b)(5), both Albarran and Ofcr. Sturdavant testified credibly that Albarran pointed at Chavez and said that she had sold her the alcohol. The audio recording of the identification, however, does not contain any audible response from Albarran. It is unclear if the recording did not pick up the response (e.g., Albarran spoke too quietly or was too far from the microphone) or if she did not actually say anything. Regardless, an audio recording--by definition--cannot pick up any non-verbal responses. Both Albarran and Ofcr. Sturdavant testified that she pointed to Chavez when asked, testimony that is confirmed by Ofcr. Sturdavant's "OK" shortly after he asked the question. Accordingly, the evidence established that Albarran identified Chavez by pointing at her when asked to identify the person who sold her the alcohol. (Finding of Facts ¶¶ 7 & 9.)

(Conclusions of Law, ¶ 7.)

In *Chun* (1999) AB-7287, at p. 5, 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.

In *7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983, at pp. 7-8, the Board clarified application of the rule in cases where, as here, an officer 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.

(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 Appeal 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* — including the officer asking the decoy who sold her the beer, the decoy identifying the clerk by pointing at her, and the decoy and clerk being photographed together — it seems clear that the clerk knew, or reasonably should have known, that she was being identified as the person who sold alcohol to a minor decoy, even if the clerk did not hear what the decoy said while she was being pointed out. Indeed, the clerk admitted to the officer that she had sold alcohol to the minor. (FF ¶ 8.) Nothing more is required by law for compliance with rule 141(b)(5). As in *CVS*, the clerk 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*.)

The ALJ's finding that the face-to-face identification in this matter fully complies with rule 141(b)(5) is supported by substantial evidence. 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.)

II

PENALTY

Appellants contend "the Department utterly ignored ample evidence of mitigating factors" in determining the penalty. (AOB at p. 1.)

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 10-day suspension, saying:

> PENALTY
>
> The Department requested that the Respondents' license be suspended for a period of 15 days, arguing that any mitigation (e.g., five years of discipline-free operation) was offset by the aggravating factors (e.g., the clerk did not make any inquiry into Albarran' s age or ask to see ID). The Respondents argued that a mitigated penalty was appropriate if the accusation were sustained based on their training program, the signage, the secret shopper program, and Chavez's termination. Both parties are correct, to a point. Five years without discipline indicates that the Respondents' programs are working, at least to some degree. One clerk's failure to follow those procedures, while notable, does not vitiate them. The penalty recommended herein complies with rule 144.

(Decision, at p. 5.)

Appellants fault the Department for failing to mitigate the penalty further. However, 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 by imposing a 10-day penalty in this matter. The standard 15-day penalty was reduced, in recognition of various factors in mitigation. The fact that appellant believes a greater reduction would have been more appropriate does not constitute error.

ORDER

The decision of the Department is affirmed.[4]

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

[4] 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:

7-ELEVEN, INC. & BRARA ENTERPRISES, INC.
7-ELEVEN #36872A
6692 INDIANA AVE.
RIVERSIDE, CA 92506

OFF-SALE BEER AND WINE - LICENSE

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

RIVERSIDE DISTRICT OFFICE

File: 20-550978

Reg: 21091203

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 December 20, 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 February 7, 2022, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: December 28, 2021

Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

7-Eleven, Inc. & Brara Enterprises, Inc. dba 7-Eleven #36872A 6692 Indiana Ave. Riverside, California 92506 Respondents	}	File: 20-550978 Reg.: 21091203 License Type: 20 Word Count: 12,000 Reporter: Shirley Casilan iDepo
Off-Sale Beer and Wine License	}	**PROPOSED DECISION**

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter by videoconference on October 5, 2021.

Jason Liu, Attorney, represented the Department of Alcoholic Beverage Control.

Jade Quintero, attorney-at-law, represented respondents 7-Eleven, Inc. and Brara Enterprises, Inc. Amarjit Brara, president and shareholder of Brara Enterprises, Inc., was present.

The Department seeks to discipline the Respondents' license on the grounds that, on or about October 1, 2020, the Respondents, through their agent or employee, sold, furnished, or gave alcoholic beverages to Stephanie Albarran, 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 October 5, 2021.

FINDINGS OF FACT

1. The Department filed the accusation on June 1, 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 Respondents for the above-described location on February 20, 2015 (the Licensed Premises).

3. There is no record of prior departmental discipline against the Respondents' license.

4. Stephanie Albarran was born on May 24, 2003. On October 1, 2020, she served as a minor decoy during an operation conducted by the Riverside Police Department. On that date she was 17 years old.

5. Albarran appeared and testified at the hearing. On October 1, 2020, she was 5'2" tall. She wore a Levi's t-shirt, dark blue jeans, and Vans. Her hair was parted just to the right of center and pulled back. She had a bracelet on her left wrist. (Exhibits 2-3.) Her appearance at the hearing was the same, except that she wore some fake eyelashes

6. On October 1, 2020, Albarran entered the Licensed Premises, followed by Ofcr. J. Sturdavant. She went to the back of the store where the coolers were located. They were locked, so she walked to the counter. She asked the clerk, Zaida Chavez, for a Modelo. Chavez went to the cooler, unlocked it, and grabbed a Modelo beer. Chavez returned to the counter and rang up the beer. Albarran paid, then exited with the beer.

7. Albarran went to the vehicle in which she had arrived and waited for the officers to tell her to come back inside. Ofcr. Sturdavant contacted Chavez, identified himself, and explained the violation to her. Albarran re-entered the Licensed Premises and they went to a back room. Ofcr. Sturdavant asked her to identify the person who sold the beer to her. She pointed to Chavez and said that she had. Albarran and Chavez were approximately five feet apart, with no obstructions between them. A photo of Albarran and Chavez was taken (exhibit 3), after which Chavez was cited.

8. Ofcr. Sturdavant testified, that during his conversation with Chavez, she acknowledged selling the alcohol to Albarran and stated that she was hurrying to clear the line.

9. Ofcr. Sturdavant recorded the identification. On the recording, he can be heard asking Chavez, "Do you recall, is this the person you sold alcohol to?" Chavez replied, "Yeah." Ofcr. Sturdavant then asked Albarran, "Can you point out the person who sold you alcohol?" There is no audible response, but Ofcr. Sturdavant almost immediately says, "OK." (Exhibit F.)

10. This was Albarran's third decoy operation. She visited six locations, of which only one (the Licensed Premises) sold alcohol to her. (Exhibit 4.) During the previous operations, she visited between four and six locations.

11. Albarran had been an Explorer for two years. As an Explorer, she received physical training. She also received training on how to handle different situations and how to interact with people, including the public. She also participated in some ride-alongs. She testified that she did not rely on her training during the decoy operation because it was different; rather, she relied upon her prior experience as a decoy.

12. Albarran's appearance was consistent with that of a person who was 17 or 18 years old. 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 the Licensed Premises on October 1, 2020, Albarran displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Chavez.

13. Amarjit Brara testified that Brara Enterprises is the franchisee at this location. Among his duties is the training and supervision of employees. He identified a printout of the video training which all employees must undergo. (Exhibit D.) This training covers, among other things, the sale of age-restricted products, acceptable forms of ID, improper forms of IDs, counterfeit IDs, and how to refuse a sale. Employees must pass a test at the end of the training. The training also advised employees that they will be terminated for violating these policies. Chavez was terminated as a result of this sale.

14. The Licensed Premises uses a secret shopper program to ensure that all rules and procedures are being followed by its employees. From January 1, 2020 through July 8, 2021, secret shoppers visited the Licensed Premises eight times. In all eight cases, the employees followed the proper procedure.

15. The Licensed Premises has a series of signs posted on the coolers advising patrons that its employees check the ID of anyone who appears under 30. There is also a sign on the counter reminding the employees of the year in which a patron must be born in order to purchase an age-restricted product.

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

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.

4. Cause for suspension or revocation of the Respondents' license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that, on October 1, 2020, the Respondents' employee, Zaida Chavez, inside the Licensed Premises, sold an alcoholic beverage to Stephanie Albarran, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-12.)

5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)[2] and rule 141(b)(5) and, therefore, the accusation should be dismissed pursuant to rule 141(c). Both of these arguments are rejected.

6. First, with respect to rule 141(b)(2), the Respondents argued that Albarran had the appearance of a person who was old enough to purchase alcohol based on her training as an Explorer and her prior experience as a decoy. This argument is rejected. Both in the photos taken the day of the operation and at the hearing, Albarran's appearance was consistent with that of a person who was 17 or 18 years old. (Finding of Fact ¶ 12.) There is no evidence that her training or experience as an Explorer made her appear older than her actual age; indeed, Albarran testified that she did not rely upon her training during the decoy operation. Also, there is no evidence that her experience as a decoy during the two prior operations had any impact upon her appearance. Rather, Chavez told Ofcr. Sturdavant that she was hurrying in order to clear the line.

7. With respect to rule 141(b)(5), both Albarran and Ofcr. Sturdavant testified credibly that Albarran pointed at Chavez and said that she had sold her the alcohol. The audio recording of the identification, however, does not contain any audible response from Albarran. It is unclear if the recording did not pick up the response (e.g., Albarran spoke too quietly or was too far from the microphone) or if she did not actually say anything. Regardless, an audio recording—by definition—cannot pick up any non-verbal responses. Both Albarran and Ofcr. Sturdavant testified that she pointed to Chavez when asked, testimony that is confirmed by Ofcr. Sturdavant's "OK" shortly after he asked the question. Accordingly, the evidence established that Albarran identified Chavez by

---

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

pointing at her when asked to identify the person who sold her the alcohol. (Finding of Facts ¶¶ 7 & 9.)

PENALTY

The Department requested that the Respondents' license be suspended for a period of 15 days, arguing that any mitigation (e.g., five years of discipline-free operation) was offset by the aggravating factors (e.g., the clerk did not make any inquiry into Albarran's age or ask to see ID). The Respondents argued that a mitigated penalty was appropriate if the accusation were sustained based on their training program, the signage, the secret shopper program, and Chavez's termination. Both parties are correct, to a point. Five years without discipline indicates that the Respondents' programs are working, at least to some degree. One clerk's failure to follow those procedures, while notable, does not vitiate them. The penalty recommended herein complies with rule 144.

ORDER

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

Dated: November 3, 2021

Matthew G. Ainley
Administrative Law Judge

☑ Adopt

☐ Non-Adopt: _____

_____

By: _____

Date: 12/20/21