

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

AB-9948

File: 20-292694; Reg: 21091380

7-ELEVEN, INC., DEBRA L. SEVILLE, and FRANK R. SEVILLE,
dba 7-Eleven Store #2171-13958F
1365 East Citrus Avenue
Redlands, CA 92374,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: September 2, 2022
Telephonic

ISSUED SEPTEMBER 6, 2022

Appearances: *Appellants:* Adam Koslin, of Solomon, Saltsman & Jamieson, as
counsel for 7-Eleven, Inc., Debra L. Seville, and Frank R. Seville,
doing business as 7-Eleven Store #2171-13958F,

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

OPINION

7-Eleven, Inc., Debra L. Seville, and Frank R. Seville, doing business as
7-Eleven Store #2171-13958F (appellants), appeal from a decision of the Department
of Alcoholic Beverage Control (Department)¹ suspending their license for 25 days
because their clerk sold an alcoholic beverage to a police minor decoy, in violation of
Business and Professions Code section 25658, subdivision (a).

¹ The decision of the Department, dated May 10, 2022, is set forth in the
appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 14, 1994. There are three instances of prior discipline against the license for the sale of alcohol to a minor, in 2011, 2012, and 2021. Only the previous 2021 violation was considered for purposes of determining the penalty in this matter.

On September 2, 2021, the Department filed a single-count accusation against appellants charging that, on March 12, 2021, appellants' clerk, Anthony Flores-Ortiz (the clerk), sold an alcoholic beverage to 18-year-old Briana Martinez (the decoy). Although not noted in the accusation, the decoy was working for the Redlands Police Department (RPD) in a joint operation with the Department at the time.

At the administrative hearing held on January 6, 2022, documentary evidence was received and testimony concerning the sale was presented by the decoy, and RPD Detective Michael Merriman. The clerk and co-licensee Debra Seville testified on appellants' behalf.

Testimony established that on March 12, 2021, the decoy entered the licensed premises alone, followed shortly thereafter by Department Agent Villeneuve. The decoy selected a 24-ounce can of Bud Light beer from the coolers and took it to the counter. The clerk rang up the beer without asking for identification and without asking any age-related questions. The clerk testified that he thought the decoy looked "old enough" to purchase alcohol, so he manually entered a birth date into the register which allowed the purchase to be completed. (RT at pp. 48-49; Finding of Fact, ¶ 8.)

The decoy exited the premises with the beer, then re-entered with Det. Merriman to make a face-to-face identification of the clerk. The officer asked the decoy who sold her the beer and she indicated that Flores-Ortiz had, while standing two to three feet

away from him. A photograph was taken of the clerk and decoy together (exh. 10) and the clerk was subsequently issued a citation. The clerk was suspended for several days, but the licensee did not terminate his employment as a result of this incident.

The administrative law judge (ALJ) issued a proposed decision on March 17, 2022, sustaining the accusation and recommending a 25-day suspension. The Department adopted the proposed decision in its entirety on May 4, 2022, and issued a certificate of decision six days later.

Appellants then filed a timely appeal contending: (1) the ALJ's finding that the decoy's appearance was in compliance with rule 141(b)(2)² is not supported by substantial evidence, and (2) the ALJ gave insufficient weight to factors in mitigation when determining the penalty.

DISCUSSION

I

DECOY'S APPEARANCE

Appellants contend that the decoy did not have the appearance required by rule 141(b)(2) and that the ALJ's finding that her appearance complied with the rule is not supported by substantial evidence. (AOB at pp. 7-10.)

Rule 141(b)(2) provides:

The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense.

² 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.

This rule provides an affirmative defense, and the burden of proof lies with appellants. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

Appellants maintain the police used a decoy in this case that failed to comply with the standards set forth in rule 141(b)(2) because she was wearing makeup, was not nervous, and was successful in purchasing alcohol at four of the fifteen premises visited. (AOB at pp. 7-10.)

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

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

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

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

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

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

This Board has stated many times that, in the absence of compelling reasons, it will ordinarily defer to the ALJ's findings on the issue of whether there was compliance with rule 141(b)(2). The ALJ made the following findings regarding the decoy's appearance:

5. Martinez appeared and testified at the hearing. On March 12, 2021, she wore a blue long-sleeve shirt, a black jacket, and blue jeans. She wore a mask as required by COVID regulations. She was wearing foundation, mascara, and a little bit of blush. (Exhibits 6-8 & 10.) Her appearance at the hearing was the same.

¶ . . . ¶

13. March 12, 2021 was the only time Martinez acted as a decoy. On that date she visited approximately 15 locations, four of which sold alcohol to her. She did not have any prior law enforcement experience. While at the register, she was not nervous or fidgeting.

14. Martinez's appearance was consistent with her actual age, 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 March 12,

2021, Martinez displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Flores Ortiz.

(Findings of Fact, ¶¶ 5, 13-14.) Based on these findings, the ALJ addressed appellants' rule 141(b)(2) arguments:

5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)^[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). This argument is rejected.

6. In support of this argument, the Respondents note that Martinez was not nervous, that she wore make-up, and that she was able to purchase alcohol at four of the 15 locations she visited. There is nothing which prohibits a decoy from wearing make-up. Both in the photos taken the day of the operation and at the hearing, Martinez's appearance-with make-up-was consistent with that of a person who was 18 years old. Additionally, Martinez was confident while testifying, consistent with her lack of nervousness while inside the Licensed Premises. This did not impact her appearance, which was consistent with her actual age. (Finding of Fact ¶14.)

(Conclusions of Law, ¶¶ 5-6.) We agree.

Appellants presented no evidence that the decoy's wearing of makeup, lack of nervousness, or success rate *actually resulted* in her displaying the appearance of a person 21 years old or older on the date of the operation in this case. We have only the clerk's statement that he thought the decoy looked "old enough" to purchase alcohol. However, a clerk's mistaken belief that the decoy is over the age of 21 is not a defense if, in fact, the decoy's appearance is one which could generally be expected of a person under the age of 21.

The Board has on numerous occasions rejected the proposition that wearing makeup automatically makes a decoy appear to be over the age of 21. "Anyone who has walked around with eyes open would know that the use of makeup is not restricted to women over 21 years of age. . . ." (*7-Eleven/Said* (2011) AB-9118, at p. 6.) "[T]he

fact that the decoy wore makeup has never been found by this Board to be justification for claiming the decoy appeared to be older than 21.” (*7-Eleven/Johal Stores, Inc.* (2014) AB-9403, at p. 5.) “[W]ith regard to the decoy’s makeup, appellant appears to argue that individuals under the age of 21 do not ordinarily wear ‘heavy make-up.’ Perhaps appellant is privy to a populace of ‘ordinary’ teenagers to which the Board is not.” (*Masoud Zaighami* (2016) AB-9522, at p. 6.)

The Board has likewise routinely found that neither a confident demeanor nor a certain success rate automatically violate rule 141(b)(2). As we said in *7-Eleven/Ali/Kurlawala* (2019) AB-9781, at p. 6, “confidence and lack of nervousness are simply not disqualifying characteristics for a decoy.” Similarly, while this Board has reversed a handful of cases in which the decoy’s success rate was notably high, in all of them, the success rate merely supplemented other indicia of error. As we said in *7-Eleven/Patel* (2013) AB-9237, at p. 4, “an unusually high success rate may trigger suspicion that the decoy’s appearance does not comply with rule 141(b)(2) . . . [but] a decoy’s success rate alone cannot establish a rule 141(b)(2) violation.”

As the Board has noted in regards to evaluating compliance with rule 141(b)(2):

[a]n ALJ’s task to evaluate the appearance of decoys is not an easy one, nor is it precise. To a large extent, application of such standards as the rule provides is, of necessity, subjective; all that can be required is reasonableness in the application. As long as the determinations of the ALJs are reasonable and not arbitrary or capricious, we will uphold them.

(*O’Brien* (2001) AB-7751, at pp. 6-7.) Notably, the standard is *not* that the decoy must display the appearance of a “childlike teenager” but “the appearance which could generally be expected of a person under 21 years of age.” (Rule 141(b)(2).) In Findings of Fact paragraphs 5 through 14, and Conclusions of Law paragraphs 5 and 6, the ALJ found that the decoy met this standard.

In a similar minor decoy case, where the Court of Appeal was tasked with assessing whether an ALJ's assessment of the decoy's appearance was correct, the Court said that under the facts before them, while:

one could reasonably look at the photograph [of the decoy] and reasonably conclude that the decoy appeared to be older than 21 years of age, we cannot say that, as a matter of law, a trier of fact could not reasonably have concluded otherwise.

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (2002) 103

Cal.App.4th 1084, 1087 [127 Cal.Rptr.2d 652].) The instant case is no different. Even

if we disagreed with the ALJ's assessment of the decoy's appearance, we do not

believe the evidence supports a finding that the ALJ "could not reasonably have

concluded otherwise." (*Ibid.*) As stated above, case law instructs us that when, as

here, "two or more competing inferences of equal persuasion can be reasonably

deduced from the facts, the Board is without power to substitute its deductions for those

of the Department—all conflicts in the evidence must be resolved in favor of the

Department's decision." (*Kirby, supra.*)

Ultimately, appellants are simply asking this Board to second guess the ALJ and reach a different conclusion, despite substantial evidence to support the findings in the decision. This we cannot do.

II

PENALTY

Appellants contend that the penalty is excessive because it fails to give sufficient weight to the factors in mitigation noted by the ALJ in Findings of Fact paragraphs 9 through 11, or explain why these mitigating factors were negated by factors in aggravation. (AOB at p. 11.)

In the penalty section, the ALJ found:

The Department requested that the Respondents' license be suspended for 25 days. As aggravation, the Department noted that this was the Respondents' second sale of alcohol to a minor within 36 months and the clerk had overridden the point of sale system's prompts. The Respondents argued that, if the accusation were to be sustained, a mitigated penalty would be appropriate based on, among other things, the additional training the Respondents provided to their employees, the additional modifications they made to the point of sale system, and their history of not selling alcohol to decoys.

To some degree, the mitigating and aggravating factors offset one another. Accordingly, there is no reason to deviate from the standard penalty set forth in rule 144 for a second-strike sale-of-alcohol-to-minors violation.

(Decision at pp. 5-6.)

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.*)

Appellants fault the decision for failing to give greater weight to the factors noted in mitigation and not explaining more fully how the factors were weighed. 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. Furthermore, as we have said many times, the ALJ is not required to explain his or her reasoning.

Appellants' disagreement with the penalty imposed does not mean the Department abused its discretion. This Board's review of a penalty looks only to see whether it can be considered reasonable, not what considerations or reasons led to it. Appellants have not established that the Department abused its discretion by imposing a 25-day penalty in this matter.

ORDER

The decision of the Department is affirmed.³

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
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:**

7-ELEVEN INC., DEBRA L. SEVILLE & FRANK
R. SEVILLE
7-ELEVEN #2171-13958F
1365 E. CITRUS AVE.
REDLANDS, CA 92374

OFF-SALE BEER AND WINE - LICENSE

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

RIVERSIDE DISTRICT OFFICE

File: 20-292694

Reg: 21091380

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 May 4, 2022. 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, 400 R St, Suite 320, Sacramento, CA 95811. 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 June 20, 2022, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: May 10, 2022



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., Debra L. Seville & Frank R. Seville
dba 7-Eleven #2171-13958F
1365 E. Citrus Ave.
Redlands, California 92374

Respondents

} File: 20-292694

} Reg.: 21091380

} License Type: 20

} Word Count: 14,000

} Reporter:

} Zoanne Williams

} 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 video on January 6, 2022.

Bryan D. Rouse, Attorney, represented the Department of Alcoholic Beverage Control.

Jade D. Quintero attorney-at-law, represented respondents 7-Eleven Inc., Debra L. Seville, and Frank R. Seville. Debra Seville was present.

The Department seeks to discipline the Respondents' license on the grounds that, on or about March 12, 2021, the Respondents, through their agent or employee, sold, furnished, or gave alcoholic beverages to Briana Martinez, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on January 6, 2022.

FINDINGS OF FACT

1. The Department filed the accusation on September 2, 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 March 14, 1994 (the Licensed Premises).

3. The Respondents' license has been the subject of the following discipline:

<u>Date Filed</u>	<u>Reg. No.</u>	<u>Violation</u>	<u>Penalty</u>
12/13/2011	11076141	BP § 25658(a)	10 day susp., all stayed
08/07/2012	12077329	BP § 25658(a)	25 day susp. w/5 days stayed
01/27/2021	21090782	BP § 25658(a)	15 day susp.

The foregoing disciplinary matters are final. (Exhibits 2-4.)

4. Briana Martinez was born on May 6, 2002. On March 12, 2021, she served as a minor decoy during an operation conducted by the Redlands Police Department. On that date she was 18 years old.

5. Martinez appeared and testified at the hearing. On March 12, 2021, she wore a blue long-sleeve shirt, a black jacket, and blue jeans. She wore a mask as required by COVID regulations. She was wearing foundation, mascara, and a little bit of blush. (Exhibits 6-8 & 10.) Her appearance at the hearing was the same.

6. On March 12, 2021, Martinez entered the Licensed Premises. Agent Villanueva entered shortly behind her. Martinez went to the cooler and selected a Bud Light beer, which she took to the counter. The clerk, Anthony Flores Ortiz, rang up the beer. He did not ask to see her ID, nor did he ask her how old she was. Martinez paid, then exited with the beer.

7. Outside, Martinez met with Det. M. Merriman. She re-entered the Licensed Premises with him. Det. Merriman asked her to identify the person who sold her the beer. She indicated that Flores Ortiz had. They were two to three feet apart with a clear view of each other at the time. A photo of the two of them was taken. (Exhibit 10.)

8. Flores Ortiz testified that he thought Martinez looked old enough to purchase alcohol. When he scanned the beer, a prompt appeared asking for a date of birth. He pressed the manual enter button and entered a date of birth old enough to allow the sale to go through. He had figured out that this was faster, even though he had been trained to scan or swipe the purchaser's ID.

9. Flores Ortiz still works at the Licensed Premises. Now, he scans or swipes every ID. Additionally, the licensees have instituted a procedure requiring the employees to write down the time of sale of any alcohol product along with the customer's date of birth. The

licensees subsequently check the log against the point of sale system to ensure that everything is working properly.

10. Debra Seville testified that she has been the franchisee and co-licensee at the Licensed Premises for 28 years. She works at the Licensed Premises and oversees its operations. She described the training all employees must undergo, including the computer-based training and on-the-job training. Employees were required to repeat the computer-based training every year; since this incident she requires it more often. The Licensed Premises' policy is to ask for ID from anyone who looks to be under 40 years of age. The licensees use a secret shopper program to ensure that the employees are following the proper procedure. They had a 100% pass rate for 2020 and 2021. (Exhibit C.)

11. Seville suspended Flores Ortiz after this incident. She also required him to retake the computer-based training and to attend the Department's LEAD classes. Additionally, she sent all of her other employees to LEAD training. (Exhibits A-B.) Finally, she modified the register so that the manual enter button is no longer an option.

12. Det. Merriman testified that, between March 14, 2020 and January 16, 2021, Redlands P. D. conducted four decoy operations at the Licensed Premises. Each time, the clerk did not sell alcohol to the decoy. (Exhibit E.)

13. March 12, 2021 was the only time Martinez acted as a decoy. On that date she visited approximately 15 locations, four of which sold alcohol to her. She did not have any prior law enforcement experience. While at the register, she was not nervous or fidgeting.

14. Martinez's appearance was consistent with her actual age, 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 March 12, 2021, Martinez displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Flores Ortiz.

15. 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 March 12, 2021, the Respondents' employee, Anthony Flores Ortiz, inside the Licensed Premises, sold an alcoholic beverage to Briana Martinez, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-8 & 13-14.)
5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)² and, therefore, the accusation should be dismissed pursuant to rule 141(c). This argument is rejected.
6. In support of this argument, the Respondents note that Martinez was not nervous, that she wore make-up, and that she was able to purchase alcohol at four of the 15 locations she visited. There is nothing which prohibits a decoy from wearing make-up. Both in the photos taken the day of the operation and at the hearing, Martinez's appearance—with make-up—was consistent with that of a person who was 18 years old. Additionally, Martinez was confident while testifying, consistent with her lack of nervousness while inside the Licensed Premises. This did not impact her appearance, which was consistent with her actual age. (Finding of Fact ¶ 14.)

PENALTY

The Department requested that the Respondents' license be suspended for 25 days. As aggravation, the Department noted that this was the Respondents' second sale of alcohol to a minor within 36 months and the clerk had overridden the point of sale system's prompts. The Respondents argued that, if the accusation were to be sustained, a mitigated penalty would be appropriate based on, among other things, the additional training the Respondents provided to their employees, the additional modifications they made to the point of sale system, and their history of not selling alcohol to decoys.

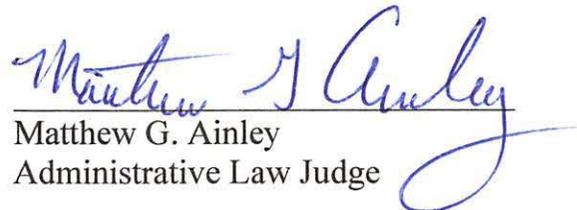
² All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

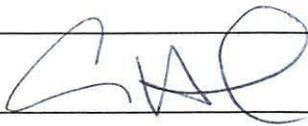
To some degree, the mitigating and aggravating factors offset one another. Accordingly, there is no reason to deviate from the standard penalty set forth in rule 144 for a second-strike sale-of-alcohol-to-minors violation.

ORDER

The Respondents' off-sale beer and wine license is hereby suspended for a period of 25 days.

Dated: March 17, 2022


Matthew G. Ainley
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By:  _____
Date: <u>05/04/22</u>