

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

AB-9967

File: 21-431097; Reg: 22092354

BASSI LIQUOR & FOODS, INC.,
dba Fuel & Food Market
4856 Old Redwood Highway
Santa Rosa, CA 95403,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: September 15, 2023
Sacramento, CA / Teleconference

ISSUED SEPTEMBER 19, 2023

Appearances: *Appellant:* Jasmine Bassi, for Parmjit Bassi, *in propria persona*, on behalf of Bassi Liquor & Foods, Inc.,

Respondent: Trisha Pal, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Bassi Liquor & Foods, Inc., doing business as Fuel & Food Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control (Department)¹ suspending its license for 25 days because its clerk sold an alcoholic beverage to a

¹ The decision of the Department, dated May 2, 2023, is set forth in the appendix.

Department minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).²

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on March 26, 2009. There is one prior instance of Departmental discipline against the license for the sale of alcohol to a minor.

On July 5, 2022, the Department filed a single-count accusation charging that appellant's clerk, Digisha Patel (the clerk), sold an alcoholic beverage to 18-year-old Dylan Hirschensohn (the decoy) on May 7, 2022. Although not noted in the accusation, the decoy was part of a decoy operation by the Department at the time.

At the administrative hearing held on February 6, 2023, documentary evidence was received and testimony concerning the sale was presented by the decoy and by Department Agent Stanley Harkness. Parmjit Bassi, corporate officer of Bassi Liquor & Foods, Inc., testified on appellant's behalf.

Testimony established that on May 7, 2022, the decoy entered the licensed premises and selected a 25-ounce can of Bud Light beer. He took the beer to the register where the clerk scanned it and asked for his identification (ID). The decoy handed the clerk his California driver's license, which had a vertical orientation, showed his correct date of birth — showing him to be 18 years of age, and contained a red stripe indicating "AGE 21 IN 2025" (exh. 3). The clerk looked at the ID and then

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

completed the sale by pressing an override button. The clerk did not scan the ID or ask any age-related questions. (Findings of Fact (FF) ¶ 6.)

The decoy exited the premises, then re-entered with two Department agents. The agents identified themselves to the clerk and explained that she had sold alcohol to a minor. Agent Harkness asked the decoy who sold him the beer and he identified the clerk. A photograph of the decoy and clerk together was taken (exh. 5) and the clerk was issued a citation. Evidence established that the previous sale to a minor at this premises, in 2021, was by the same clerk as in the instant matter. The clerk did not testify at the hearing. (FF ¶¶ 7-8.)

The administrative law judge (ALJ) submitted a proposed decision on March 17, 2023, recommending that the accusation be sustained and the license be suspended for 25 days. The Department adopted the proposed decision in its entirety on April 28, 2023 and a certificate of decision was issued four days later.

Appellant then filed a timely appeal outlining its past and present efforts to comply with the ABC Act.

DISCUSSION

Appellant raises no real issues in its opening brief, and merely outlines its efforts at compliance — presumably asking for mitigation of the penalty. In addition, in its Notice of Appeal, it asks that “the severity of the penalty be reconsidered.”

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. (Cal. Code Regs., tit. 4, § 144.)

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.

(Cal. Code Regs., tit. 4, § 144.)

The ALJ discussed the issues of aggravation and mitigation at length in the penalty portion of the decision:

The Department requested the Respondent's 10-day stayed penalty from its prior violation on October 22, 2021, be imposed concurrently with rule 144's standard penalty of 25 days for a second sale to minor violation. The Department argued that any attempt Respondent made at mitigation was ineffective, such as its posted signs, counseling employees, and failing to upgrade its POS system, given the same clerk sold alcohol to two different minor decoys within a six-month period. The Department further argued that Respondent's signs do not create any affirmative duty of a minor decoy from entering a licensed premises, opening a cooler door, and picking an alcoholic beverage for purchase.

The Respondent recommended a 10-day suspension with 15 days all-stayed, for the following reasons: (1) Respondent took every step it could to correct the sale to minor violations, posting signs and Mr. Bassi personally trained his employees, (2) clerk Patel was removed from the register after May 7, 2022, and no longer works for the Respondent, and (3) Mr. Bassi has had a number of ABC licenses with no other violations other than those of the rogue employee clerk Patel.

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. For a second violation of section 25658 within 36 months, a 25-day suspension. Rule 144 also permits imposition of a revised penalty based on the presence of aggravating or mitigating factors.

Some mitigation is warranted for Respondent's training and review of the Clerk's Affidavits with its employees. There was insufficient evidence of Mr. Bassi's other licensed premises and their length of licensure to address whether mitigation would be warranted regarding their alleged lack of disciplinary history. Further, in that latter regard, Mr. Bassi's testimony was not reliable given he initially provided evasive testimony about Respondent's POS system, describing it as being a state of the art, flawless system. It was not until after questioning by the undersigned that he later admitted that Respondent's POS system is flawed in that it has a Visual ID OK button which permits its clerks to sell age-restricted merchandise to minors.

No further mitigation is warranted. Respondent failed to correct the problem that caused both sale-to minor violations at the Licensed Premises. Respondent knew that clerk Patel used the Visual ID OK button on October 22, 2021. Respondent's argument that clerk Patel was a rogue employee fails. Respondent chose not only to retain clerk Patel and allow her to work at the cash register after the October 2021 violation, but also retained her after her blatant violation on May 7, 2022. Clerk Patel completely ignored Mr. Bassi's claimed strict instructions not to use the bypass button. There was no evidence as to why clerk Patel's employment eventually ended with Respondent. The evidence was clear that the Respondent chose to retain her despite her outright refusal to comply with Respondent's instructions. Of grave concern is that Respondent chose not to upgrade its POS system to remove the ability of its clerks to bypass the POS' safety protocol for age-restricted sales. There is no evidence the posted signs were effective in preventing sales to minors.

Aggravating factors include decoy Hirschensohn's youthful appearance and actual age, as well as Respondent's prior discipline just six months and 15 days prior to May 7, 2022, by the same clerk, using the same means to bypass safety protocol to permit a sale to another minor. There was no evidence Respondent's clerks are trained to identify the red flags of a minor's vertically oriented ID. Clerk Patel should have known decoy Hirschensohn was a minor. On May 7, 2022, clerk Patel held the decoy's vertical ID which stated he was 18 years old in 2022 and would not be 21 until the year 2025. The penalty guidelines do not require termination of an employee but given the totality of the circumstances it is quite

concerning Respondent would retain such an employee who has no regard for the rule of law, let alone Respondent's policy and instructions. The mitigation that is present is outweighed by the aggravating factors.

The penalty recommended herein complies with rule 144.

(Decision at pp. 7-8.)

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 penalty in this matter constitutes an abuse of discretion.

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:**

BASSI LIQUOR & FOODS, INC.
FUEL & FOOD MARKET
4856 PLD REDWOOD HWY.
SANTA ROSA, CA 95403

OFF-SALE GENERAL - LICENSE

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

SANTA ROSA DISTRICT OFFICE

File: 21-431097

Reg: 22092354

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on April 28, 2023. 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 12, 2023, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: May 2, 2023



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Bassi Liquor & Foods, Inc.	}	File: 21-431097
Dbas: Fuel & Food Market	}	
4856 Old Redwood Highway	}	Reg.: 22092354
Santa Rosa, California 95403	}	
	}	License Type: 21
Respondent	}	
	}	Word Count: 12,653
	}	
	}	Kennedy Court Reporters
	}	Tatiana Martindale, Court Reporter
	}	Jason Hagen, Video Host
	}	
<u>Off-Sale General License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter on February 6, 2023.

Trisha Pal, Attorney IV, represented the Department of Alcoholic Beverage Control (the Department).

Dean Lueders, Attorney, represented Bassi Liquor & Foods, Inc. Mr. Parmjit Bassi, Respondent's corporate president, was present at the hearing.

The Department seeks to discipline the Respondent's license on the grounds that, on or about May 7, 2022, the Respondent-Licensee's agent or employee, Digisha Patel, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: Bud Light beer, to Dylan Hirschensohn, 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 February 6, 2023.

FINDINGS OF FACT

1. The Department filed the accusation on or about July 5, 2022.

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

2. The Department issued a type 21, off-sale general license to the Respondent for the above-described location on March 26, 2009 (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 6):

<u>Date of Violation</u>	<u>Reg. No.</u>	<u>Violation</u>	<u>Penalty</u>
October 22, 2021	22091791	BP §25658(a)	10-day susp. all-stayed one year

4. Dylan Hirschensohn (hereinafter referred to as decoy Hirschensohn) was born on February 2, 2004. On May 7, 2022, he was 18 years old. On that date he served as a minor decoy in an operation conducted by the Department. Prior to the operation that date Department Agent Harkness advised the decoy of the requirements under Rule 141, including that if he has his identification (ID) on his person to present it when asked for it, and to answer any age-related questions truthfully; not to misrepresent his age or birthdate.

5. Decoy Hirschensohn appeared and testified at the hearing. On May 7, 2022, he was 5'8" tall and weighed approximately 230 pounds. He wore a grey t-shirt and grey shorts. His hair was long, past his shoulders, and parted on the left side. He wore a face mask covering his nose, mouth and chin. (Exhibits 2, 4 and 5.) His appearance at the hearing was the same, except that he weighed 215 pounds and did not wear a face mask. He has a youthful, teenage appearance, both in the photographs taken of him on the day of the operation and at the hearing. He appears younger than his actual age.

6. On May 7, 2022, at approximately 12:30 p.m., decoy Hirschensohn entered the Licensed Premises and walked to the alcoholic beverage coolers, where he selected a 25-ounce can of Bud Light beer. He then walked to the sales counter and placed the beer can on the sales counter. A female clerk, who was later identified as Digisha Patel (hereinafter referred to as clerk Patel), stood behind the sales counter and assisted the decoy. Clerk Patel scanned the Bud Light beer and asked the decoy for his ID, which the decoy handed to her. Decoy Hirschensohn's California Driver License, has a vertical orientation, depicts his correct date of birth, and includes a bold, red stripe which reads, "AGE 21 IN 2025" and a bold blue stripe which reads, "PROVISIONAL UNTIL AGE 18 IN 2022." (Exhibit 3.) Clerk Patel looked at the ID for approximately two seconds and then handed it back to the decoy without asking any age-related questions or scanning the ID into the point of sale (POS) system. Clerk Patel pressed the Visual ID OK override button, to permit the sale of alcohol to the decoy. Decoy Hirschensohn paid for the beer, took the Bud Light beer can and exited the premises. The decoy walked across the street to Agent Harkness, who was standing outside his unmarked vehicle in a

plain clothes capacity. Agent Harkness immediately took a photograph of decoy Hirschensohn to capture how he appeared after exiting the Licensed Premises holding the can of Bud Light beer. (Exhibit 4.) Decoy Hirschensohn did not recall seeing any signs regarding an age limit for alcohol or tobacco sales while he was inside the Licensed Premises.

7. Agents Harkness and Baird entered the Licensed Premises with decoy Hirschensohn, who was still holding the 25-ounce can of Bud Light beer he had just purchased from clerk Patel. Agents Harkness and Baird approached clerk Patel, who was standing behind the sales counter, and identified themselves as police officers while displaying their Department issued badges. Agent Harkness asked decoy Hirschensohn to identify who had sold him the alcohol. Decoy Hirschensohn pointed at clerk Patel and identified her as the person who sold him the Bud Light beer. Decoy Hirschensohn and clerk Patel were approximately eight feet apart and facing each other at the time of this identification. Clerk Patel walked around the sales counter to the customer side and Agent Baird advised her of the sale-to-minor violation. At that time, Agent Harkness took a photograph of decoy Hirschensohn and clerk Patel, after the face-to-face identification, with clerk Patel speaking to Agent Baird and the decoy looking down at the Bud Light beer can he held in his right hand. (Exhibit 5.) Clerk Patel acknowledged she had sold alcohol to the decoy and said she had checked his ID. Agent Harkness recognized clerk Patel as the same clerk who had also sold alcohol to a minor decoy at the Licensed Premises on October 22, 2021. (Exhibit 6.) Agent Harkness did not recall seeing any signs regarding an age limit for alcohol or tobacco sales while he was inside the Licensed Premises.

8. Clerk Patel was issued a citation after the face-to-face identification. Clerk Patel did not appear at the hearing.

9. Decoy Hirschensohn appeared younger than his actual age at the time of the decoy operation, having a very youthful, teenage appearance. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing and in the photographs taken of him during the said decoy operation, as well as his appearance and conduct in front of clerk Patel at the Licensed Premises on May 7, 2022, decoy Hirschensohn 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, decoy Hirschensohn appeared as a youthful teenager, younger than his age of 19.

10. Decoy Hirschensohn participated in his first decoy operation when he was 17 years old. In total he has participated in approximately eight minor decoy operations. During the minor decoy operation conducted on May 7, 2022, he visited 11 licensed premises,

where seven premises asked for his ID and two premises asked for his age. On that date, four premises sold alcohol to decoy Hirschensohn, including the Licensed Premises. Decoy Hirschensohn said that when he entered the Licensed Premises he felt comfortable and confident being a minor decoy.

11. Parmjit Bassi appeared and testified at the hearing. Mr. Bassi is the corporate officer of Respondent/Licensee Bassi Liquor & Foods, Inc. He described the Licensed Premises as a convenience store, selling groceries, including liquor, beer, wine and tobacco. He said the Licensed Premises is branded to sell gasoline along with Krispy Krunch Chicken (KKC) franchise fast food. Mr. Bassi said that since 1997 he has “from time to time” had a total of eight licensed premises. Mr. Bassi claimed he has had no other discipline against his other licensed premises.

12. Clerk Patel began working for the Respondent at the Licensed Premises in October of 2016. She received licensee education training on alcohol sales and drugs. Mr. Bassi personally reviewed with clerk Patel a Clerk’s Affidavit and the laws recited therein, which form she signed. Her training was translated in the Hindi language, which is her first language. Clerk Patel speaks and understands English. Mr. Bassi has had every one of his seven employees at the Licensed Premises receive the same training. Every morning and at the change of shift Mr. Bassi reminds his employees that selling alcohol and tobacco to minors is against the law. He advises them to ask for customers’ IDs and either scan the ID or enter the customer’s date of birth into the POS system. The POS system has a “Visual ID OK” override button, which serves to bypass the safety protocol of the POS system relating to age-restricted sales. In other words, a clerk does not have to scan an ID or enter a birthdate in the POS system, but instead can press the Visual ID OK button to permit the sale of age-restricted products. Mr. Bassi instructs his clerks not to use the Visual ID OK button. Mr. Bassi learned that clerk Patel pressed the Visual ID Ok button on October 22, 2021, and on May 7, 2022, which enabled the sale of alcohol to the minor decoys on those dates. Mr. Bassi said he has had no problem with any of his employees, other than clerk Patel, relating to age-restricted sales to minors.

13. After the sale-to minor violation of October 22, 2021, Mr. Bassi contacted the POS company to inquire about having the Visual ID OK button removed from his system at the Licensed Premises. He was informed the button could not be removed from his POS system because his system did not allow for it. He was advised he would have to purchase a POS system which enables removal of the Visual ID OK button. Mr. Bassi chose not to purchase a new POS system. He instead provides verbal instruction to his clerks, including clerk Patel, to be disciplined and not use the Visual ID OK button with age-restricted sales. Mr. Bassi provided these instructions to clerk Patel in both Hindi and English.

14. After the said violation of October 22, 2021, Mr. Bassi disciplined clerk Patel, including: (1) suspending her from work for one week, (2) re-training her, (3) reviewing the Clerk's Affidavit with clerk Patel, which Mr. Bassi translated in her Hindi language, after which clerk Patel signed the form, and (4) Mr. Bassi warned clerk Patel not to press the Visual ID OK button again. He instructed her that with age-restricted sales she is to only scan the customer's ID or enter the customer's birthdate from the ID.

15. After the May 7, 2022, sale to decoy Hirschensohn, Mr. Bassi removed clerk Patel permanently from the cash register and placed her at the KKC fast food counter and stocking groceries. When asked if clerk Patel currently works at the Licensed Premises, Mr. Bassi said no. There was no evidence as to when and why clerk Patel no longer is employed with Respondent.

16. Mr. Bassi said that on May 7, 2022, he had four signs posted at the Licensed Premises. Two signs state, "UNDER 21 NO TOBACCO OR ALCHOL The sale of alcohol, tobacco, or electronic cigarettes to persons under the age of 21 is strictly prohibited;" one such sign is on the plexiglass divider at the sales counter and another on the glass exterior of the front door. (Exhibits C and D.) Two additional signs are posted, one each on the alcoholic beverage glass cooler doors, at approximately 5 feet 9 inches high, stating, "Under 21-year-old PLEASE do not open this Door AND ask clerk for nonalcoholic beverages Thank you Actually, we sell MILK Too." (Exhibits A and B.)

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 May 7, 2022, the Respondent-Licensee's employee, clerk Digisha Patel, inside the Licensed Premises, sold an alcoholic beverage, to-wit: a 25-ounce can of Bud

Light beer, to Dylan Hirschensohn, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 2, 4 to 9.)

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

6. With respect to rule 141(b)(2), the Respondent argued decoy Hirschensohn did not have the appearance of someone under the age of 21 because of certain factors including, (1) the furrowed line on his forehead in Exhibit 4,³ a photograph taken of him outside after exiting the premises, which Respondent surmised could be referred to as “age lines;” (2) the face mask he wore; (3) his long hair; (4) his minor decoy experience; and (5) the decoy’s testimony he was comfortable and confident when conducting the decoy operation at the Licensed Premises on May 7, 2022.

7. This rule 141(b)(2) argument is rejected. Exhibit 4, the photograph taken of the decoy after he exited the Licensed Premises was of him standing facing the sun, slightly squinting, causing a furrow in his brow. He clearly has no “age lines.” There was nothing about decoy Hirschensohn’s comfortable, confident demeanor, decoy experience, hair length, furrowed brow, appearance, or the mask he wore which made him appear older than his actual age. In fact, the photographs taken of decoy Hirschensohn on the day of the operation depict a youthful teenager who appeared younger than his age, 18. At the hearing decoy Hirschensohn had a youthful appearance. In other words, decoy Hirschensohn had the appearance generally expected of a person under the age of 21. (Findings of Fact ¶¶ 5 and 9.)

8. With respect to rule 141(b)(4) Respondent argued the decoy did not truthfully comply with the Respondent’s signs depicted in Exhibits A and B, which instruct persons, “Under 21-year-old, PLEASE do not open this Door AND ask clerk for nonalcoholic beverages.” Respondent argued decoy Hirschensohn ignored the direct question posed to him by the signs, he, “did not answer what those signs were asking of him and opened the cooler doors, retrieved a 25-ounce can of Bud Light beer” in violation of rule 141(b)(4).

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

³ In making this argument the Respondent’s counsel erroneously referred to Exhibit 5, however, the decoy’s forehead is not visible in that photograph. The only photograph that the decoy’s forehead is clearly visible in a close-up shot is Exhibit 4, which Agent Harkness said he took immediately after the decoy exited the Licensed Premises.

9. This rule 141(b)(4) argument is rejected. As the California Court of Appeal in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (Garfield Beach)*⁴ states Rule 141(b)(4)'s "guidance is clear and unambiguous. Minor decoys do not need to respond to statements of any kind nor do they need to respond truthfully to questions other than those concerning their ages....the minor decoy in this case was not required to respond to the clerk's statement that might have related to the decoy's age." In the matter at hand, all four of the posted signs Mr. Bassi testified about in the Licensed Premises were statements, not questions. Furthermore, clerk Patel did not ask decoy Hirschensohn any age-related questions. The minor decoy operation here meets the letter and the spirit of rule 141.

10. 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 10-day stayed penalty from its prior violation on October 22, 2021, be imposed concurrently with rule 144's standard penalty of 25 days for a second sale to minor violation. The Department argued that any attempt Respondent made at mitigation was ineffective, such as its posted signs, counseling employees, and failing to upgrade its POS system, given the same clerk sold alcohol to two different minor decoys within a six-month period. The Department further argued that Respondent's signs do not create any affirmative duty of a minor decoy from entering a licensed premises, opening a cooler door, and picking an alcoholic beverage for purchase.

The Respondent recommended a 10-day suspension with 15 days all-stayed, for the following reasons: (1) Respondent took every step it could to correct the sale to minor violations, posting signs and Mr. Bassi personally trained his employees, (2) clerk Patel was removed from the register after May 7, 2022, and no longer works for the Respondent, and (3) Mr. Bassi has had a number of ABC licenses with no other violations other than those of the rogue employee clerk Patel.

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. For a second violation of section 25658 within 36

⁴ 7 Cal. App. 5th 628, 637, [213 Cal.Rptr.3d 130] (2017).

months, a 25-day suspension. Rule 144 also permits imposition of a revised penalty based on the presence of aggravating or mitigating factors.

Some mitigation is warranted for Respondent's training and review of the Clerk's Affidavits with its employees. There was insufficient evidence of Mr. Bassi's other licensed premises and their length of licensure to address whether mitigation would be warranted regarding their alleged lack of disciplinary history. Further, in that latter regard, Mr. Bassi's testimony was not reliable given he initially provided evasive testimony about Respondent's POS system, describing it as being a state of the art, flawless system. It was not until after questioning by the undersigned that he later admitted that Respondent's POS system is flawed in that it has a Visual ID OK button which permits its clerks to sell age-restricted merchandise to minors.

No further mitigation is warranted. Respondent failed to correct the problem that caused both sale-to minor violations at the Licensed Premises. Respondent knew that clerk Patel used the Visual ID OK button on October 22, 2021. Respondent's argument that clerk Patel was a rogue employee fails. Respondent chose not only to retain clerk Patel and allow her to work at the cash register after the October 2021 violation, but also retained her after her blatant violation on May 7, 2022. Clerk Patel completely ignored Mr. Bassi's claimed strict instructions not to use the bypass button. There was no evidence as to why clerk Patel's employment eventually ended with Respondent. The evidence was clear that the Respondent chose to retain her despite her outright refusal to comply with Respondent's instructions. Of grave concern is that Respondent chose not to upgrade its POS system to remove the ability of its clerks to bypass the POS' safety protocol for age-restricted sales. There is no evidence the posted signs were effective in preventing sales to minors.

Aggravating factors include decoy Hirschensohn's youthful appearance and actual age, as well as Respondent's prior discipline just six months and 15 days prior to May 7, 2022, by the same clerk, using the same means to bypass safety protocol to permit a sale to another minor. There was no evidence Respondent's clerks are trained to identify the red flags of a minor's vertically oriented ID. Clerk Patel should have known decoy Hirschensohn was a minor. On May 7, 2022, clerk Patel held the decoy's vertical ID which stated he was 18 years old in 2022 and would not be 21 until the year 2025. The penalty guidelines do not require termination of an employee but given the totality of the circumstances it is quite concerning Respondent would retain such an employee who has no regard for the rule of law, let alone Respondent's policy and instructions. The mitigation that is present is outweighed by the aggravating factors.

The penalty recommended herein complies with rule 144.

ORDER

The Respondent's off-sale general license is hereby suspended for a period of 25 days. Any reimposition of a prior stayed penalty is at the sole discretion of the Director of the Department of Alcoholic Beverage Control. Therefore, the Director of the Department may, in the Director's discretion and without further hearing, reimpose the prior 10-day stayed penalty.

Dated: March 17, 2023



D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By:  _____
Date: <u>04/28/23</u> _____