

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

AB-9649

File: 20-531206 Reg: 16084791

7-ELEVEN, INC., SSB and JK,
dba 7-Eleven Store #20803D
21701 Lake Forest Drive,
Lake Forest, CA 92630-2792,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: D. Huebel

Appeals Board Hearing: May 3, 2018
Los Angeles, CA

ISSUED MAY 30, 2018

Appearances: *Appellants:* Donna J. Hooper, of Solomon Saltsman & Jamieson, as counsel for 7-Eleven, Inc., SSB and JK, doing business as 7-Eleven Store #20803D.
Respondent: Jonathan Nguyen as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc., SSB and JK, doing business as 7-Eleven Store #20803D (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 15 days because their clerk sold an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

1. The decision of the Department, dated May 12, 2017, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 1, 2013. On August 26, 2016, the Department filed an accusation charging that appellants' clerk, Vijay Kumar Guntkal, sold an alcoholic beverage to 19-year-old Ismael Granados on June 26, 2016. Although not noted in the accusation, Granados was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on March 22, 2017, documentary evidence was received, and testimony concerning the sale was presented by Granados (the decoy) and by Agent Vic Duong of the Department of Alcoholic Beverage Control. Appellants presented no witnesses.

Testimony established that on the date of the operation, Agent Duong entered the licensed premises, followed shortly thereafter by the decoy. The decoy went to the alcoholic beverage cooler and selected a six-pack of Bud Light beer bottles. The decoy took the six-pack of beer to the front register area for purchase. He stood in line and waited while one male clerk attended to the patrons. In front of the decoy in line were three people who were together. No one stood behind the decoy. A second male clerk, later identified as Guntkal, opened a second register and motioned for the decoy to come to his register. The decoy walked to clerk Guntkal's register.

At the counter the decoy set the six-pack of Bud Light beer down on the counter. Clerk Guntkal scanned the beer. A yellow screen appeared on the register, which read, "ID 30 and under," "Must be 21 to purchase," "1. Picture on I.D. must match the customer," and "2. Scan or swipe I.D. or if birthdate is on or before 06-26-95 press

[manual enter]," with three button options along the bottom of the screen reading "Manual Enter," "Visual ID OK," and "Exit." Clerk Guntkal pressed the "Visual ID OK" button to override the system and permit the sale of alcohol. The decoy then gave Guntkal money to pay for the beer. Guntkal gave the decoy some change and bagged the beer. Guntkal did not ask for the decoy's identification, nor did he ask the decoy his age, date of birth, or any age-related questions. There was no conversation between the decoy and clerk Guntkal. The decoy then exited the store with the change and the bagged six-pack of Bud Light beer bottles. Agent Duong was inside the licensed premises during this entire time posing as a customer and witnessed these events.

Agent Duong and the decoy did not communicate with or acknowledge each other during this time. Agent Duong exited the store after the decoy.

Agent Duong re-entered the licensed premises with the decoy and Department Agent Sarah Hutson. Agent Duong first made contact with the other male clerk, advising him of the violation and asking him to relieve clerk Guntkal, who was behind a cash register. The other male clerk relieved Guntkal. At that point, Agent Duong identified himself as a police officer to Guntkal and explained the violation to him. Guntkal stepped from behind the employee side of the counter to the customer side.

Agent Duong asked the decoy to identify the person who sold him the beer. The decoy pointed at clerk Guntkal and said, "He did." The decoy and Guntkal were standing three feet apart and were facing each other at the time of this identification. Agent Duong then asked clerk Guntkal if he understood he was being identified as a person who sold alcohol to a minor. Guntkal replied, "Yes." A photo of Guntkal and the

decoy was taken after the face-to-face identification. In that photo, the decoy held the six-pack of Bud Light beer he purchased and stood to the right of clerk Guntkal.

After the hearing, the ALJ issued a proposed decision determining that the violation charged was proved and no defense was established.

On March 30, 2017, following submission of the proposed decision, the Department's Administrative Hearing Office sent a letter to appellants and to Department counsel offering both parties the opportunity to comment on the proposed decision. That letter stated:

Administrative Records Secretary and Concerned Parties:

Enclosed is the Proposed Decision resulting from the hearing before Department of Alcoholic Beverage Control, Administrative Hearing Office in the above entitled matter.

All concerned parties and their attorneys of record are being sent a copy of this Proposed Decision. All concerned parties and attorneys of record are hereby informed that you may submit comments regarding this Proposed Decision to the Director for consideration prior to any action being taken by the Director. Comments to the Director regarding this Proposed Decision shall be mailed to the Administrative Records Secretary. Additional comments submitted for review by the Director, if any, must also be submitted to all parties and their attorneys. For the convenience of all concerned, a list of those parties and their addresses is attached.

Pursuant to General Order 2016-02, the Administrative Records Secretary will hold this Proposed Decision until 14 days after the date of this letter. After that the Administrative Records Secretary will submit this Proposed Decision along with any comments received from concerned parties to the Director for consideration.

(Letter from John W. Lewis, Chief Admin. Law Judge, Dept. of Alcoholic Bev. Control, Mar. 30, 2017 [hereinafter "Comment Letter"].) As suggested in the final paragraph, the Comment Letter reflected a comment procedure adopted by the Department pursuant to its General Order 2016-02. (Dept. of Alcoholic Bev. Control, "GO-Ex Parte and Decision

Review," Gen. Order 2016-02, at § 3, ¶¶ 5-6 (eff. Mar. 1, 2016) [hereinafter "General Order"].)

On April 14, 2017, appellants submitted "Comments to the Director re Proposed Decision," which challenged the legality of the comment procedure itself. The Department submitted no comments.

Ultimately, the Department adopted the proposed decision without changes.

Appellants then filed this appeal contending the Department's comment procedure is an underground regulation, violates the Administrative Procedure Act, and encourages illegal ex parte communications.

DISCUSSION

This Board recently addressed an identical argument in *7-Eleven, Inc./Gupta* (2017) AB-9583. In that case, we concluded the Department's comment procedure, as outlined in the General Order, constitutes an unenforceable underground regulation. The comment procedure was identical in this case. We therefore reach the same legal conclusion here, and refer the parties to *Gupta* for our complete reasoning. (*Id.* at pp. 12-25.)

However, we also find that the sole comment, submitted by appellants, had no effect on the outcome of the case, and that the comment procedure did not materially affect appellants' due process rights. (See *id.* at pp. 26-29.) Appellants suffered no prejudice; we therefore offer no relief.

ORDER

The decision of the Department is affirmed.²

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
JUAN PEDRO GAFFNEY RIVERA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

² This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.

APPENDIX

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

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

7-ELEVEN INC, SSB & JK
7-ELEVEN STORE #20803D
21701 LAKE FOREST DR
LAKE FOREST, CA 92630-2792

SANTA ANA DISTRICT OFFICE

AB-9649

File: 20-531206

Reg: 16084791

CERTIFICATE OF DECISION

OFF-SALE BEER AND WINE - LICENSE

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

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 3, 2017. 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. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 300 Capitol Mall, Suite 1245, Sacramento, CA 95814.

On or after June 22, 2017, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: May 12, 2017



Matthew D. Botting
General Counsel

2017 SEP 14 PM 3:45
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ABC APPEALS BOARD

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

IN THE MATTER OF THE ACCUSATION AGAINST:

7 Eleven Inc., SSB & JK	}	File: 20-531206
Dbas: 7 Eleven Store # 20803D	}	
21701 Lake Forest Drive	}	Reg.: 16084791
Lake Forest, California 92630-2792	}	
	}	License Type: 20
Respondents	}	
	}	Word Count: 9,505
	}	
	}	Reporter:
	}	Shelby Maaske
	}	Kennedy Court Reporters
	}	
<u>Off-Sale Beer and Wine License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Santa Ana, California, on March 22, 2017.

Jonathan Nguyen, Attorney, represented the Department of Alcoholic Beverage Control.

Melissa Gelbart, Attorney, represented Respondents, 7 Eleven Inc., SSB & JK.

The Department seeks to discipline the Respondents' license on the grounds that, on or about June 26, 2016, the Respondents, through their agent or employee, sold, furnished, or gave alcoholic beverages to Ismael Granados, 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 March 22, 2017.

FINDINGS OF FACT

1. The Department filed the accusation on October 4, 2016.
2. The Department issued a type 20, off-sale beer and wine license to the Respondents for the above-described location on August 1, 2013 (the Licensed Premises).

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

3. There is no record of prior departmental discipline against the Respondents' license.
4. Ismael Granados was born on December 10, 1996. On June 26, 2016, he was 19 years old. On that date he served as a minor decoy in an operation conducted by the Department.
5. Decoy Granados appeared and testified at the hearing. On June 26, 2016, he was 5'2" tall and weighed 150 pounds. He was wearing a black digital watch, blue t-shirt, black hooded sweater which he left unzipped, blue jeans, and tan shoes. He did not wear the hood of the sweater while he was inside the Licensed Premises. His hair was cut short along the sides, and he had a comb-over on the crown of his head the length of a number three clipper. (Exhibits 2, 3 & 4.) His appearance at the hearing was the same except that he wore a black t-shirt, and his hair had a buzz cut the length of a number zero clipper.
6. On June 26, 2016, at 2:15 p.m., Department agent Vic Duong entered the Licensed Premises and shortly thereafter decoy Granados entered. Decoy Granados went to the alcoholic beverage cooler and selected a six-pack of Bud Light beer bottles (Exhibit 2). Beer is an alcoholic beverage. Decoy Granados took the six-pack of beer to the front register area for purchase. He stood in line and waited while one male clerk attended to the patrons. In front of decoy Granados in line were three people who were together. No one stood behind decoy Granados. A second male clerk, Vijay Kumar Guntkal, opened a second register and motioned for decoy Granados to come to his register. Decoy Granados walked to clerk Guntkal's register.
7. At the counter decoy Granados set the six-pack of Bud Light beer down on the counter. Clerk Guntkal scanned the beer. A yellow screen appeared on the register, which instructs the clerk and reads, "ID 30 and under Must be 21 to purchase 1. Picture on I.D. must match the customer 2. Scan or swipe I.D. or if birthdate is on or before 06-26-95 press [manual enter]," with three button options along the bottom of the screen of "Manual Enter," "Visual ID OK," and "Exit." (Exhibit 5.) Clerk Guntkal pressed the "Visual ID OK" button to override the system and permit the sale of alcohol. Decoy Granados then gave clerk Guntkal money to pay for the beer. Clerk Guntkal gave decoy Granados some change and bagged the beer. Clerk Guntkal did not ask for decoy Granados' identification (ID) nor did he ask decoy Granados his age, date of birth or any age-related questions. There was no conversation between decoy Granados and clerk Guntkal. Decoy Granados then exited the store with the change and bagged six-pack of Bud Light beer bottles. Agent Duong was inside the Licensed Premises during this entire time posing as a customer and witnessed these events. Agent Duong and decoy Granados

did not communicate with or acknowledge each other during this time while in the Licensed Premises. Agent Duong exited the store after decoy Granados.

8. Agent Duong re-entered the Licensed Premises with decoy Granados and Department agent Sarah Hutson. Agent Duong first made contact with the other male clerk, advising him of the violation and asking him to relieve clerk Guntkal, who was behind a cash register. The other male clerk relieved clerk Guntkal. At that point, agent Duong identified himself as a police officer to clerk Guntkal and explained the violation to him. Clerk Guntkal stepped from behind the employee side of the counter to the customer side.

9. Agent Duong asked decoy Granados to identify the person who sold him the beer. Decoy Granados looked and pointed at clerk Guntkal and said, "He did." Decoy Granados and clerk Guntkal were standing three feet apart, facing each other at the time of this identification. Agent Duong then asked clerk Guntkal if he understood he was being identified as a person who sold alcohol to a minor. Clerk Guntkal replied, "Yes." A photo of clerk Guntkal and decoy Granados was taken after the face-to-face identification. (Exhibit 2.) In that photo, decoy Granados held the six-pack of Bud Light beer he purchased and stood to the right of clerk Guntkal.

10. Agent Duong issued a citation to clerk Guntkal after the face-to-face identification. Clerk Guntkal did not appear and did not testify at the hearing. There is no evidence clerk Guntkal was distracted, did not understand, or that anyone interfered during the sales transaction or the face-to-face identification.

11. June 26, 2016, was the 10th day decoy Granados had been involved in minor decoy operations. He had also been involved, prior to June 26, 2016, in 10 days of shoulder tap operations. Each operation day involved visiting eight to 10 locations per day. On June 26, 2016, decoy Granados felt comfortable in his role as a minor decoy and was not nervous. He had worked with the same agents in the past. He has been in the City of Bell Gardens Police Explorer Program since he was 14 years old. His police explorer rank as of June 26, 2016, was that of captain. His responsibilities as captain include mentoring/supervising the police explorers under him, assisting with paperwork and at community events. He has been on 50 ride-alongs. He attends physical training once monthly in which he goes on runs and performs calisthenics.

12. Decoy Granados appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of clerk Guntkal at the Licensed Premises on June 26, 2016, decoy Granados displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to clerk Guntkal. Decoy Granados looks his age.

13. Agent Duong appeared and testified at the hearing. Agent Duong said that on June 26, 2016, he questioned clerk Guntkal after the face-to-face identification, asking him how he completed the sale of alcohol to decoy Granados. Clerk Guntkal said that he pressed the "Visual ID OK" button to override the register system in order to complete the sale of alcohol. Clerk Guntkal demonstrated on the cash register how he completed the sales transaction with decoy Granados using the same six-pack of Bud Light beer bottles.

14. 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 June 26, 2016, the Respondents' clerk, Vijay Kumar Guntkal, inside the Licensed Premises, sold alcoholic beverages to Ismael Granados, 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 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).
6. With respect to Respondents' rule 141(b)(2) argument, the Respondents argued decoy Granados did not have the appearance generally expected of an individual under the age

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

of 21 because of certain factors: he was comfortable and not nervous when he approached clerk Guntkal, he wore a watch similar to what law enforcement wear, his demeanor, his law enforcement experience as a police explorer since the age of 14, his rank as captain and responsibilities, and his experience conducting minor decoy and shoulder tap operations. Respondents' counsel opined that decoy Granados had a "shadow of a mustache" which made him appear to be older. Respondents' counsel further contended the decoy testified the transaction "was one seamless movement between putting the beer on the counter and giving the money," which leant to something someone 21 or older would do in "not waiting for any tentative approval by the clerk."

This rule 141(b)(2) argument is rejected. First of all, the decoy testified that he did not recall the "exact movements," and that he "went with the flow as the transaction occurred." Agent Duong had a clear recollection and credibly testified that clerk Guntkal first scanned the beer, then pressed the override button, then decoy Granados paid clerk Guntkal, who then gave change to the decoy along with the bagged beer. Secondly, the decoy looked clean shaven to the undersigned. If there was peach fuzz under decoy Granados' nose, it would be consistent with that grown by teens, and nothing like that of a grown adult male's mustache. Furthermore, the Respondent presented no evidence that any of these factors actually resulted in decoy Granados appearing 21 or older to clerk Guntkal. Finally, there is no evidence that decoy Granados' law enforcement experience, training, watch, comfort or lack of nervousness had any impact on clerk Guntkal. There was nothing about decoy Granados's demeanor or his experience as a police explorer or decoy which made him appear older than his actual age. Decoy Granados looks his age. In other words, decoy Granados had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 12.)

PENALTY

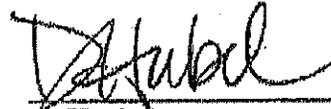
The Department requested the Respondents' license be suspended for a period of 15 days, based on the short licensure and rule 144 penalty guidelines for a first-time minor decoy violation. The Respondent argued that, if the accusation were not dismissed, a 15-day, all stayed suspension was appropriate since the licensee has been discipline-free since 2013. The penalty recommended herein complies with rule 144.

7 Eleven Inc., SSB & JK
Dbu: 7 Eleven Store #20803D
File #20-531206
Reg. #16084791
Page 6

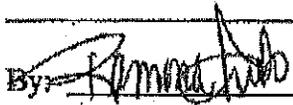
ORDER

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

Dated: March 24, 2017



D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: 5/3/17

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

<p>IN THE MATTER OF THE ACCUSATION AGAINST:</p> <p>7-ELEVEN INC, SSB & JK 7-ELEVEN STORE #20803D 21701 LAKE FOREST DR LAKE FOREST, CA 92630-2792</p> <p>OFF-SALE BEER AND WINE - LICENSE under the Alcoholic Beverage Control Act.</p>	<p>File: 20-531206</p> <p>Reg: 16084791</p> <p style="text-align: center;">DECLARATION OF SERVICE BY MAIL</p>
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The undersigned declares:

I am employed at the Department of Alcoholic Beverage Control. I am over 18 years of age and not a party to this action. My business address is 3927 Lennane Drive, Suite 100, Sacramento, California 95834. On May 12, 2017, I served, by CERTIFIED mail (unless otherwise indicated) a true copy of the following documents:

DECISION AND CERTIFICATE OF DECISION

on each of the following, by placing them in an envelope(s) or package(s) addressed as follows:

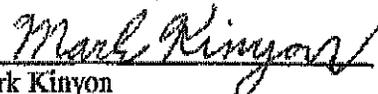
7-ELEVEN INC, SSB & JK
7-ELEVEN STORE #20803D
21701 LAKE FOREST DR
LAKE FOREST, CA 92630-2792

SOLOMON, SALTSMAN & JAMIESON
426 CULVER BLVD
PLAYA DEL REY, CA 90293

Jonathan Nguyen
Southern Division, Legal – Inter Office Mail

and placing said envelope or package for collection and mailing, following our ordinary business practices. I am readily familiar with this department's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, County of Sacramento, State of California, in an envelope with the postage fully prepaid. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 12, 2017 at Sacramento, California.


Mark Kinyon

SANTA ANA DISTRICT OFFICE (INTEROFFICE MAIL)
 DIVISION OFFICE (INTEROFFICE MAIL)

1 RALPH BARAT SALTSMAN (59959)
2 MELISSA GELBART (302010)
3 SOLOMON, SALTSMAN & JAMIESON
4 426 Culver Boulevard
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6 Telephone: (310) 822-9848
7 Facsimile: (310) 822-3512
8 mgelbart@ssilaw.com

9 Attorneys for Respondents:
10 7-ELEVEN INC., SSB & JK
11 DBA: 7-Eleven Store #20803D

12 BEFORE THE Alcoholic Beverage Control
13 Office of Legal Services
14 DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE
15 STATE OF CALIFORNIA

16 IN THE MATTER OF THE ACCUSATION)
17 AGAINST:)

18 7-ELEVEN INC., SSB & JK
19 DBA: 7-Eleven Store #20803D
20 21701 Lake Forest Drive
21 Lake Forest, CA 92630

22 Respondents

23 FILE NO. 20-531206

24 REG. NO. 16084791

25 COMMENTS TO THE DIRECTOR RE
26 PROPOSED DECISION

27 L. **There Is No Authority Which Authorizes The Department To Permit The
28 Parties In Disciplinary Procedures To Comment On A Proposed Decision.**

29 There is currently no law that authorizes the Department of Alcoholic Beverage Control
30 ("Department") to permit the parties to comment on an Administrative Law Judge's ("ALJ")
31 Proposed Decision. The Administrative Procedure Act ("APA") does not authorize this process.
32 The ABC Act does not authorize this process. Procedures for review and adoption of Proposed
33 Decisions are clearly stated by administrative law. These procedures do not include the process
34 outlined by the Department herein. The Department's protocol herein is therefore improper.

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Alcoholic Beverage Control
Administrative Records Office

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MAY 24 2017

Alcoholic Beverage Control
Office of Legal Services

1 **A. California Government Code Section 11517.**

2 California Government Code ("Cal. Gov. Code") § 11517 does not give the Department
3 the authority to permit the parties in an accusation to submit comments on a proposed decision to
4 the Director of the Department.

5 Cal. Gov. Code § 11517 states in part that upon "receipt by the agency of the
6 administrative law judge's proposed decision, the agency may . . . do any of the following:"

7
8 (A) Adopt the proposed decision in its entirety.

9
10 (B) Reduce or otherwise mitigate the proposed penalty and adopt the balance of the
11 proposed decision.

12 (C) Make technical or other minor changes in the proposed decision and adopt it as the
13 decision. Action by the agency under this paragraph is limited to a clarifying change or
14 a change of a similar nature that does not affect the factual or legal basis of the
15 proposed decision.

16 (D) Reject the proposed decision and refer the case to the same administrative law judge if
17 reasonably available, otherwise to another administrative law judge, to take additional
18 evidence. . . .

19 (E) Reject the proposed decision, and decide the case upon the record, including the
20 transcript, or upon an agreed statement of the parties, with or without taking additional
21 evidence. . . .

22 Cal. Gov. Code § 11517(c)(2).

23 Under Cal. Gov. Code § 11517(c)(2), subparagraphs (A) to (E), when the Department
24 receives the ALJ's Proposed Decision, the Department, itself, is limited to either adopting the
25 Proposed Decision, reducing or mitigating the proposed penalty, making technical or minor
26 clarifying changes, or rejecting the proposed decision. Cal. Gov. Code § 11517(c)(2) therefore
27 does not provide the Department with any authority to permit the parties to an accusation to
28 submit comments on an ALJ's Proposed Decision for the Director's review.

1. In comparison, the Federal Administrative Procedure Act, at 5 U.S. Code § 557, provides
2 that the parties may submit comments. The two concepts, state and federal, are quite similar.
3 However, the federal process is authorized by statute. The Department's process is not.
4

5 5 U.S. Code § 557 states in relevant part:

6
7 Before a recommended, initial, or tentative decision, or a decision
8 on agency review of the decision of subordinate employees, the
9 parties are entitled to a reasonable opportunity to submit for the
10 consideration of the employees participating in the decisions—

- 11 (1) Proposed findings and conclusions; or
- 12 (2) Exceptions to the decisions or recommended decisions of
13 subordinate employees or a tentative agency decisions; and
- 14 (3) Supporting reasons for the exceptions or proposed findings
15 or conclusions.

16 5 U.S. Code § 557(c), subparagraphs (1) to (3).

17 California's Administrative Procedure Act must be adhered to by California applicable
18 agencies. The APA's requirements are clearly set forth, and these "requirements prevail over any
19 conflicting provisions." (Roger P. Freeman, *Parker's 1997 California Administrative Procedure*
20 *Act 1* (Lexis Law Publishing) (1997).) The mandates of Cal. Gov. Code § 11517(c)(2) must
21 therefore be strictly complied with; thus, when the Department receives an ALJ's proposed
22 decision, they are limited to either adopting the Proposed Decision, reducing or mitigating the
23 proposed penalty, making technical or minor clarifying changes, or rejecting the proposed
24 decision. Accordingly, the Department does not have authority to permit the parties to submit
25 comments on an ALJ's Proposed Decision. The Department's actions are therefore improper.
26

27 //

28

1 **B. California Government Code Section 11518.5**

2
3 Similarly to Cal. Gov. Code § 11517, California Government Code § 11518.5 does not
4 provide the Department with the authority to permit parties to an accusation to comment on an
5 ALJ's proposed decision for the Department Director's consideration.

6
7 Cal. Gov. Code § 11518.5 states in relevant part:

8
9 Within 15 days after service of a copy of the decision on a party, but
10 not later than the effective date of the decision, the party may apply
11 to the agency for correction of a mistake or clerical error in the
12 decision, stating the specific ground on which the application is
13 made.

14 Cal. Gov. Code § 11518.5 sets forth a procedure in which a party must comply with in
15 order to correct a mistake or clerical error in the decision, which is through an application process.
16 Thereafter, the application may be either denied, granted and the decision modified, or granted and
17 set the matter for hearing. The code section, however, does not give the Department the authority
18 to permit "comments" on an ALJ's proposed decision as they have done here. The "invitation for
19 comments" herein goes well past clerical error corrections and beyond the authority under the
20 APA.

21 The Department has taken it upon itself to craft its own procedure when dealing with a
22 decision from the ALJ without any authority and which is contrary to the APA. Cal. Gov. Code
23 § 11518.5 does not provide the Department with the authority to permit the parties to submit
24 comments on an ALJ's proposed decision. The APA also allows for reconsideration of a decision,
25 but this is after certification. *See* Cal. Gov. Code § 11521.

26
27 Accordingly, the Department's creation of a new regulation is improper.
28

1 II. The Department's Protocol Allowing Parties to Send Comments to the
2 Director Regarding a Proposed Decision is Void for Failure to Follow the
3 Administrative Procedure Act.

4 The Department violated the law by creating a new policy without complying with the
5 procedures mandated by the APA, *Gov. Code* § 11340, *et seq.* The policy, which allows parties to
6 submit comments to the Director regarding a Proposed Decision is thus invalid as an
7 "underground regulation." *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557,
8 576.

9 As provided by the Court of Appeal in *Dep't of Alcoholic Beverage Control v. Alcoholic*
10 *Beverage Control Appeals Bd.* (2006), "[t]he Department may structure its decisionmaking
11 however it sees fit, so long as it complies with the APA and related statutory and constitutional
12 minimums." 40 Cal. 4th 1, 14. The APA provides that:

13 *No state agency shall issue, utilize, enforce, or attempt to enforce*
14 *any guideline, criterion, bulletin, manual, instruction, order, standard*
15 *of general application, or other rule, which is a regulation ... , unless*
16 *the guideline, criterion, bulletin, manual, instruction, order, standard*
17 *of general application, or other rule has been adopted as a regulation*
18 *and filed with the Secretary of State pursuant to this chapter." (Gov.*
19 *Code, § 11340.5(a). italics added.)*

20 The APA applies "to the exercise of *any quasi-legislative power* conferred by any statute
21 heretofore or hereafter enacted," and the APA's provisions "shall not be superseded or modified by
22 any subsequent legislation except to the extent that the legislation shall do so expressly." (*Gov.*
23 *Code, § 11346, italics added.)*

24 The Department failed to comply with the rulemaking provisions of the APA. Thus, where
25 the Department's new policy allowing the submission of comments to the Director was enacted
26 outside of the APA, it is illegal, unenforceable, and invalid as an underground regulation.

1 A. The Department's Protocol Allowing Parties to Send Comments to the Director
2 Regarding a Proposed Decision is a Regulation because it is Generally Applicable
3 and Implements Agency Procedure.

4 "Regulation" is defined broadly by the APA to include "every rule, regulation, order; or
5 standard of general application or the amendment, supplement, or revision of any rule, regulation,
6 order, or standard adopted by any state agency to implement, interpret, or make specific the law
7 enforced or administered by it, or to govern its procedure." *Gov. Code* § 11342.600. The Supreme
8 Court has adopted a two-part test to determine whether a rule is an APA regulation. *Tidewater* at
9 570-71. First, a regulation must be "generally applicable" meaning that it applies generally rather
10 than in a specific case. *Id.* Second, a regulation must "implement, interpret, or make specific the
11 law enforced or administered by [the agency], or ... govern [the agency's] procedure[s]." *Id.* at
12 574-77; *Gov. Code* § 11340.5. This includes a statement of policy or interpretive regulation that
13 "an agency intends to apply generally, that is unrelated to a specific case, and that predicts how the
14 agency will decide future cases." *Tidewater* at 574-77.
15

16 The protocol at issue in this case is expressly intended as a rule of general application.
17 General Order 2016-02, explaining the new protocol, provides that "the procedures described
18 herein are intended to apply to all cases..." *Department of Alcoholic Beverage Control General*
19 *Order* 2016-02.
20

21 The protocol interprets the law: The procedures set forth in General Order 2016-02 are not
22 found in the California Government Code nor are they restatements of any other applicable statute.
23 Indeed, the Department's new protocol creates rights that otherwise did not exist: Pursuant to *Gov.*
24 *Code* section 11518.5, parties were entitled to apply to the agency "for correction of a mistake or
25 clerical error in the decision." Under the Department's new protocol, parties are entitled to submit
26 comments regarding the proposed decision for the Director's consideration, without any limitation
27 of the breadth or scope of such comments.
28

1 Moreover, California courts have specifically held that when an agency adopts a proposed
2 decision pursuant to Section 11517(c)(2)(A), the APA does not require service of the Proposed
3 Decision on parties prior to the agency's adoption, nor does it require that respondent be given an
4 opportunity to argue before the agency head:

5 There is nothing in the procedure wherein the Board refers the case
6 back to the hearing officer under subdivision (c) and (b) that
7 requires a copy of the proposed decision to be served on respondent
8 prior to its adoption by the Board; there is nothing therein that
9 permits a respondent to argue orally or in writing before the Board
10 ... the right to present oral or written argument before the Board and
11 the necessity for it to read the record, refer solely to the situation in
12 which the 'agency itself' decides the case instead of referring it back
13 to the hearing officer. *Strode v. Bd. of Med. Examiners of California*
14 (1961) 195 Cal. App. 2d 291, 295-96.

12 Pursuant to the Department's new protocol, parties are now entitled to receive a notification and to
13 submit comments regarding the proposed decision.

14 Accordingly, the Department's protocol is a regulation within the meaning of Government
15 Code section 11342(g), and is therefore void because the Department failed to follow APA
16 procedures.

18 **B. The Department's Protocol Allowing Parties to Submit Comments to the Director
19 Was Not Adopted Pursuant to the APA.**

20 The APA specifically prohibits any state agency from making use of a rule which is a
21 "regulation" as defined in Government Code section 11342.600; that was not (but should have
22 been) adopted pursuant to the detailed procedures set forth in the APA. *Gov. Code § 11340.5(a)*.

23 The APA involves the regulated public in the administrative process to ensure that "those
24 persons or entities whom a regulation will affect have a voice in its creation," *Armistead v. State*
25 *Personnel Board* (1978) 22 Cal.3d 198, 204-205, to allow the public to inform the agency about
26 possible unintended consequences of a proposed regulation, and to protect against "bureaucratic
27 tyranny," *Cal. Advocates for Nursing Home Reform v. Bonta* (2003) 106 Cal.App.4th 498, 507-

1 508. Therefore, mandatory procedures include providing adequate notice to the public of proposed
2 regulations and an opportunity for public comment. *Gov. Code* §§ 11346.2, 11346.4, 11346.5,
3 11346.8. The agency must provide reports of detailed reasons for a proposed regulation, the
4 alternatives considered, and the effect on the proposed regulation is projected to have on
5 individuals. *Gov. Code* §§ 11346.2, 11346.9. The APA also requires all proposed regulations to be
6 presented to the Office of Administrative Law, which reviews the regulation for necessity,
7 authority, clarity, consistency, reference, and nonduplication. *Gov. Code* § 11349.1(a). The
8 Department's failure to submit a proposed regulation to the Office of Administrative Law is itself
9 reason to invalidate the regulation and return it to the agency to adopt it in compliance with the
10 APA. *See Gov. Code* §§ 11349.1(g), 11349.4(a).

12 A regulation that was not adopted according to the APA procedures is invalid unless it
13 qualifies for one of the nine, narrow exceptions found in *Gov. Code* section 11340.9.9.¹ Because
14 of the statute's importance, all doubts as to the applicability of the APA are to be resolved in its
15 favor. *See Californians for Pesticide Reform*, 184 Cal. App. 4th at 907. *Stamison*, 63 Cal. App. 4th
16 at 1010; *Morales*, 168 Cal. App. 4th at 735.

18 The Court of Appeals' message to the Department from ten years ago bears repeating here:
19 "[t]he Department may structure its decisionmaking however it sees fit, so long as it complies with
20 the APA and related statutory and constitutional minimums." *Dep't of Alcoholic Beverage Control*
21 *v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal. 4th 1, 14. Here, the Department wholly
22 and completely failed to comply with the APA. There was no formal notice, a period for oral or
23 written comment, any explanation for the regulations or alternatives that were considered, nor a
24

25
26 ¹ These exceptions are: (a) for an agency in the judicial or legislative branch; (b) a legal ruling issued by the
27 Franchise Tax Board or State Board of Equalization; (c) the mere use of a form prescribed by a state agency; (d)
28 a regulation that relates only to the internal management of the state agency; (e) a defined list of enforcement
regulations if necessary to enable enforcement; (f) a regulation that embodies the only legally tenable
interpretation of a provision of law; (g) a rate fixing regulation; (h) a public works regulation involving signage
or traffic control; and (i) a regulation directed at a specifically named person or group that does not apply
generally throughout the state.

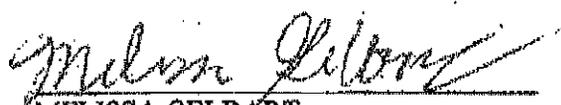
1 consideration of the effect the regulations would have on the affected public. Therefore, the
2 Department failed to comply with the APA's procedural requirements to adopt regulations, and
3 the Department's protocol permitting comments to be submitted to the Director regarding a
4 Proposed Decision is invalid.

5
6 Without waiving any constitutional, statutory and/or factual defenses, Respondents submit
7 the within response to the Department's invitation for comments on the Proposed Decision.

8 Respondents hereby restate all constitutional, legal and factual arguments raised during the
9 administrative hearing below and incorporate these arguments by reference as though fully set
10 forth herein.

11
12 DATED: April 14, 2017

SOLOMON, SALTSMAN & JAMIESON

13
14 
15 MELISSA GELBART
16 Attorneys for Respondents
17 7-ELEVEN INC., SSB & JK
18 DBA: 7-Eleven Store #20803D
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 426 Culver Boulevard, Playa del Rey, California 90293.

On April 14, 2017, I served on all interested parties in this action the foregoing document, described as:

COMMENTS TO THE DIRECTOR RE PROPOSED DECISION

[X] by placing [X] the original [] true copies thereof enclosed in (a) sealed envelope(s) addressed as follows:

Mark Kinyon, Administrative Records Secretary
Department of Alcoholic Beverage Control
Administrative Records Office
3927 Lennane Drive, Suite 100, Sacramento, CA 95834

[X] by placing [] the original [X] a true copy thereof enclosed in (a) sealed envelope(s) addressed as follows:

Jacob Rambo, Chief Counsel, Office of Legal Services
Department of Alcoholic Beverage Control
3927 Lennane Drive, Suite 100, Sacramento, CA 95834

Jonathan Nguyen, Department Attorney, Office of Legal Services
Department of Alcoholic Beverage Control
12750 Center Court Dr., Suite #700, Cerritos, CA 90703

[X] BY MAIL. I caused (each) such envelope to be deposited in the mail at Playa del Rey, California, as follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business with postage thereon fully prepaid. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on April 14, 2017, at Playa Del Rey, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.


Norma Marquez



Ramona Prieto
Acting Director



Edmund G. Brown Jr
Governor

Department of Alcoholic Beverage Control
Administrative Hearing Office
PO BOX 348210
Sacramento, CA 95834-8210

March 30, 2017

In the Matter of the Accusation Against:

7-Eleven Inc., SSB & JK
Dba: 7-Eleven Store # 20803D
21701 Lake Forest Drive
Lake Forest, CA 92630-2792

File: 20-531206
Reg: 16084791

Administrative Records Secretary and Concerned Parties:

Enclosed is the Proposed Decision resulting from the hearing before Department of Alcoholic Beverage Control, Administrative Hearing Office in the above entitled matter.

All concerned parties and their attorneys of record are being sent a copy of this Proposed Decision. All concerned parties and attorneys of record are hereby informed that you may submit comments regarding this Proposed Decision to the Director for consideration prior to any action being taken by the Director. Comments to the Director regarding this Proposed Decision shall be mailed to the Administrative Records Secretary. Additional comments submitted for review by the Director, if any, must also be submitted to all parties and their attorneys. For the convenience of all concerned, a list of those parties and their addresses is attached.

Pursuant to General Order 2016-02, the Administrative Records Secretary will hold this Proposed Decision until 14 days after the date of this letter. After that the Administrative Records Secretary will submit this Proposed Decision along with any comments received from concerned parties to the Director for consideration.

If you have any questions you may contact me at (916) 928-7629.

Respectfully,

John W. Lewis
Chief Administrative Law Judge

Enclosure



Ramona Prieto
Acting Director



Edmund G. Brown Jr
Governor

Department of Alcoholic Beverage Control
Administrative Hearing Office
PO BOX 348210
Sacramento, CA 95834-8210

ADDRESS LIST FOR SUBMITTING COMMENTS
REGARDING PROPOSED DECISION

Mark Kinyon, Administrative Records Secretary
Department of Alcoholic Beverage Control
Administrative Records Office
3927 Lennane Drive, Suite 100
Sacramento, CA 95834

Jacob Rambo, Chief Counsel, Office of Legal Services
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Jonathan Nguyen, Department Attorney, Office of Legal Services
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12750 Center Court Drive, Suite 700
Cerritos, CA 90703

Melissa Gelbart, Attorney at Law
Solomon, Saltsman & Jamieson
426 Culver Boulevard
Playa del Rey, CA 90293

7-Eleven Inc., SSB & JK
7-Eleven Store # 20803D
21701 Lake Forest Drive
Lake Forest, CA 92630-2792

7-Eleven Inc., SSB & JK
Attn: 7-Eleven Licensing
P.O. Box 219088
Dallas, TX 75221-9088

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

IN THE MATTER OF THE ACCUSATION AGAINST:

7 Eleven Inc., SSB & JK	}	File: 20-531206
Dbas: 7 Eleven Store # 20803D	}	
21701 Lake Forest Drive	}	Reg.: 16084791
Lake Forest, California 92630-2792	}	
	}	License Type: 20
Respondents	}	
	}	Word Count: 9,505
	}	
	}	Reporter:
	}	Shelby Maaské
	}	Kennedy Court Reporters
	}	
<u>Off-Sale Beer and Wine License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Santa Ana, California, on March 22, 2017.

Jonathan Nguyen, Attorney, represented the Department of Alcoholic Beverage Control.

Melissa Gelbart, Attorney, represented Respondents, 7 Eleven Inc., SSB & JK.

The Department seeks to discipline the Respondents' license on the grounds that, on or about June 26, 2016, the Respondents, through their agent or employee, sold, furnished, or gave alcoholic beverages to Ismael Granados, 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 March 22, 2017.

FINDINGS OF FACT

1. The Department filed the accusation on October 4, 2016.
2. The Department issued a type 20, off-sale beer and wine license to the Respondents for the above-described location on August 1, 2013 (the Licensed Premises).

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

3. There is no record of prior departmental discipline against the Respondents' license.
4. Ismael Granados was born on December 10, 1996. On June 26, 2016, he was 19 years old. On that date he served as a minor decoy in an operation conducted by the Department.
5. Decoy Granados appeared and testified at the hearing. On June 26, 2016, he was 5'2" tall and weighed 150 pounds. He was wearing a black digital watch, blue t-shirt, black hooded sweater which he left unzipped, blue jeans, and tan shoes. He did not wear the hood of the sweater while he was inside the Licensed Premises. His hair was cut short along the sides, and he had a comb-over on the crown of his head the length of a number three clipper. (Exhibits 2, 3 & 4.) His appearance at the hearing was the same except that he wore a black t-shirt, and his hair had a buzz cut the length of a number zero clipper.
6. On June 26, 2016, at 2:15 p.m., Department agent Vic Duong entered the Licensed Premises and shortly thereafter decoy Granados entered. Decoy Granados went to the alcoholic beverage cooler and selected a six-pack of Bud Light beer bottles (Exhibit 2). Beer is an alcoholic beverage. Decoy Granados took the six-pack of beer to the front register area for purchase. He stood in line and waited while one male clerk attended to the patrons. In front of decoy Granados in line were three people who were together. No one stood behind decoy Granados. A second male clerk, Vijay Kumar Guntkal, opened a second register and motioned for decoy Granados to come to his register. Decoy Granados walked to clerk Guntkal's register.
7. At the counter decoy Granados set the six-pack of Bud Light beer down on the counter. Clerk Guntkal scanned the beer. A yellow screen appeared on the register, which instructs the clerk and reads, "ID 30 and under Must be 21 to purchase 1. Picture on I.D. must match the customer 2. Scan or swipe I.D. or if birthdate is on or before 06-26-95 press [manual enter]," with three button options along the bottom of the screen of "Manual Enter," "Visual ID OK," and "Exit." (Exhibit 5.) Clerk Guntkal pressed the "Visual ID OK" button to override the system and permit the sale of alcohol. Decoy Granados then gave clerk Guntkal money to pay for the beer. Clerk Guntkal gave decoy Granados some change and bagged the beer. Clerk Guntkal did not ask for decoy Granados' identification (ID) nor did he ask decoy Granados his age, date of birth or any age-related questions. There was no conversation between decoy Granados and clerk Guntkal. Decoy Granados then exited the store with the change and bagged six-pack of Bud Light beer bottles. Agent Duong was inside the Licensed Premises during this entire time posing as a customer and witnessed these events. Agent Duong and decoy Granados

did not communicate with or acknowledge each other during this time while in the Licensed Premises. Agent Duong exited the store after decoy Granados.

8. Agent Duong re-entered the Licensed Premises with decoy Granados and Department agent Sarah Hutson. Agent Duong first made contact with the other male clerk, advising him of the violation and asking him to relieve clerk Guntkal, who was behind a cash register. The other male clerk relieved clerk Guntkal. At that point, agent Duong identified himself as a police officer to clerk Guntkal and explained the violation to him. Clerk Guntkal stepped from behind the employee side of the counter to the customer side.

9. Agent Duong asked decoy Granados to identify the person who sold him the beer. Decoy Granados looked and pointed at clerk Guntkal and said, "He did." Decoy Granados and clerk Guntkal were standing three feet apart, facing each other at the time of this identification. Agent Duong then asked clerk Guntkal if he understood he was being identified as a person who sold alcohol to a minor. Clerk Guntkal replied, "Yes." A photo of clerk Guntkal and decoy Granados was taken after the face-to-face identification. (Exhibit 2.) In that photo, decoy Granados held the six-pack of Bud Light beer he purchased and stood to the right of clerk Guntkal.

10. Agent Duong issued a citation to clerk Guntkal after the face-to-face identification. Clerk Guntkal did not appear and did not testify at the hearing. There is no evidence clerk Guntkal was distracted, did not understand, or that anyone interfered during the sales transaction or the face-to-face identification.

11. June 26, 2016, was the 10th day decoy Granados had been involved in minor decoy operations. He had also been involved, prior to June 26, 2016, in 10 days of shoulder tap operations. Each operation day involved visiting eight to 10 locations per day. On June 26, 2016, decoy Granados felt comfortable in his role as a minor decoy and was not nervous. He had worked with the same agents in the past. He has been in the City of Bell Gardens Police Explorer Program since he was 14 years old. His police explorer rank as of June 26, 2016, was that of captain. His responsibilities as captain include mentoring/supervising the police explorers under him, assisting with paperwork and at community events. He has been on 50 ride-alongs. He attends physical training once monthly in which he goes on runs and performs calisthenics.

12. Decoy Granados appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of clerk Guntkal at the Licensed Premises on June 26, 2016, decoy Granados displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to clerk Guntkal. Decoy Granados looks his age.

13. Agent Duong appeared and testified at the hearing. Agent Duong said that on June 26, 2016, he questioned clerk Guntkal after the face-to-face identification, asking him how he completed the sale of alcohol to decoy Granados. Clerk Guntkal said that he pressed the "Visual ID OK" button to override the register system in order to complete the sale of alcohol. Clerk Guntkal demonstrated on the cash register how he completed the sales transaction with decoy Granados using the same six-pack of Bud Light beer bottles.

14. 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 June 26, 2016, the Respondents' clerk, Vijay Kumar Guntkal, inside the Licensed Premises, sold alcoholic beverages to Ismael Granados, 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 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).

6. With respect to Respondents' rule 141(b)(2) argument, the Respondents argued decoy Granados did not have the appearance generally expected of an individual under the age

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

of 21 because of certain factors: he was comfortable and not nervous when he approached clerk Guntkal, he wore a watch similar to what law enforcement wear, his demeanor, his law enforcement experience as a police explorer since the age of 14, his rank as captain and responsibilities, and his experience conducting minor decoy and shoulder tap operations. Respondents' counsel opined that decoy Granados had a "shadow of a mustache" which made him appear to be older. Respondents' counsel further contended the decoy testified the transaction "was one seamless movement between putting the beer on the counter and giving the money," which leant to something someone 21 or older would do in "not waiting for any tentative approval by the clerk."

This rule 141(b)(2) argument is rejected. First of all, the decoy testified that he did not recall the "exact movements," and that he "went with the flow as the transaction occurred." Agent Duong had a clear recollection and credibly testified that clerk Guntkal first scanned the beer, then pressed the override button, then decoy Granados paid clerk Guntkal, who then gave change to the decoy along with the bagged beer. Secondly, the decoy looked clean shaven to the undersigned. If there was peach fuzz under decoy Granados' nose, it would be consistent with that grown by teens, and nothing like that of a grown adult male's mustache. Furthermore, the Respondent presented no evidence that any of these factors actually resulted in decoy Granados appearing 21 or older to clerk Guntkal. Finally, there is no evidence that decoy Granados' law enforcement experience, training, watch, comfort or lack of nervousness had any impact on clerk Guntkal. There was nothing about decoy Granados's demeanor or his experience as a police explorer or decoy which made him appear older than his actual age. Decoy Granados looks his age. In other words, decoy Granados had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 12.)

PENALTY

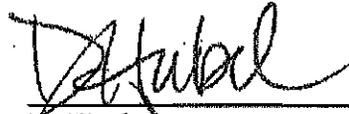
The Department requested the Respondents' license be suspended for a period of 15 days, based on the short licensure and rule 144 penalty guidelines for a first-time minor decoy violation. The Respondent argued that, if the accusation were not dismissed, a 15-day, all stayed suspension was appropriate since the licensee has been discipline-free since 2013. The penalty recommended herein complies with rule 144.

7 Eleven Inc., SSB & JK
Dba: 7 Eleven Store #20803D
File #20-531206
Reg. #16084791
Page 6

ORDER

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

Dated: March 24, 2017



D. Huebel
Administrative Law Judge

<input type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____

By: _____
Date: _____