

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

**AB-9650**

File: 21-477781 Reg: 15083366

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,  
dba CVS Pharmacy Store 9915  
352 University Avenue,  
Palo Alto, CA 94301-1715,  
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: David W. Sakamoto

Appeals Board Hearing: July 12, 2018  
South San Francisco, CA

**AUGUST 2, 2018**

Appearances: *Appellants:* Donna Hooper, of Solomon Saltsman & Jamieson, as counsel for Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store 9915.  
*Respondent:* Joseph J. Scoleri III as counsel for the Department of Alcoholic Beverage Control.

OPINION

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store 9915 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> suspending their license for 15 days because their clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

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1. The decision of the Department, dated May 11, 2017, is set forth in the appendix.

## FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On November 20, 2015, the Department filed an accusation charging that appellants' clerk, Jemariah Jackson (the clerk), sold an alcoholic beverage to 17-year-old Dylan T. on August 21, 2015.<sup>2</sup> Although not noted in the accusation, Dylan was working as a minor decoy in a joint operation between the Palo Alto Police Department and the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on January 31, 2017, documentary evidence was received, and testimony concerning the sale was presented by Dylan (the decoy) and by Officer Daniel Ryan of the Palo Alto Police Department. Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises alone and selected a six pack of Budweiser beer. He carried the beer to the counter and waited in line behind two patrons. When it was his turn to make his purchase, he handed the six pack of beer to the clerk.

The clerk asked the decoy questions similar to "How are you?" and "Did you find everything okay?" The decoy indicated things were fine. The clerk then asked the decoy what he was buying the beer for. The decoy stated the beer was for a "party."

The clerk then asked for the decoy's identification. The decoy handed the clerk his identification with his purchase money. The clerk appeared to examine the decoy's

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2. The decoy was a minor on the date of the operation. His surname is therefore omitted.

identification for about 30 seconds. The clerk returned the identification to the decoy along with his change and a sales receipt.

The decoy gave the clerk his valid, current California driver's license. The identification clearly stated the decoy's birthdate was 10/15/1997. In a red striped area it said "Age 21 in 2018." Within a blue striped section it stated "Age 18 in 2015." The decoy's driver's license was also in a vertical format, not a horizontal format.

Once the transaction was complete, the decoy carried the beer, the sales receipt, and his change towards the store's exit. Near the exit, he met with Officer Ryan. As the decoy remained near the store entrance with the beer, Officer Ryan approached the sales clerk. Officer Ryan informed the clerk that he was a police officer and that she had just sold an alcoholic beverage to a minor. He directed her to accompany him to the storeroom area of the premises and to get someone to replace her at the sales counter.

The decoy, Officer Ryan, the clerk, and either Officer Shaw or Department Agent Molthen gathered in the storeroom area of the premises. One of the officers asked the decoy to identify who sold him the beer. The clerk then looked in the decoy's direction. The decoy pointed his finger at the clerk and indicated she had sold the beer to him. The decoy felt embarrassed in literally pointing his finger at the clerk because to him, that would normally be an impolite gesture. The clerk was approximately five to ten feet from the decoy and she was facing him when he identified her to the officers. The decoy and the clerk had an unobstructed view of one another.

Officer Ryan asked the clerk if she had looked at the decoy's identification. She confirmed she had. The decoy removed his identification from his pocket and gave it to Officer Ryan. He, in turn, showed it to the clerk and pointed out to her that the

identification showed the decoy was not old enough to lawfully purchase alcoholic beverages.

After the clerk was shown the decoy's identification, it was returned to the decoy. A photo of the decoy and the clerk was taken, and Officer Ryan issued a citation to the clerk for selling an alcoholic beverage to a minor.

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

Appellants then filed this appeal contending the ALJ failed to consider credible evidence supporting their rule 141(b) defense, including the decoy's confidence, experience, and his 60% "success rate."

#### DISCUSSION

Appellants contend the ALJ dismissed or ignored evidence supporting their rule 141(b)(2) defense, including the decoy's experience as an Explorer and as a decoy, his admitted confidence, and his so-called "success rate" at the five premises he visited on the day of the operation. (App.Br., at p. 6.)

Additionally, appellants call into question the conclusions the ALJ reached based on the evidence he did consider. For instance, appellants insist that a "Polo shirt and golf shorts are not typical teenage attire" and that he "wore his hair short and neat." (App.Br., at p. 7.) According to appellants, "there was nothing about [the decoy's] physical appearance that was typical of someone under 21 years of age." (*Ibid.*)

Rule 141(b)(2) states, in relevant part, "The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged

offense." (Code Regs., tit. 4, § 141(b)(2).) The rule provides an affirmative defense, and the burden of proof lies with the party asserting it. (*Chevron Stations, Inc.* (2015) AB-9445, at pp. 3-16; *7-Eleven, Inc./Lo* (2006) AB-8384, at pp. 8-11.)

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

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

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

With regard to the decoy's appearance, confidence, experience, and success rate, the ALJ made the following findings:

6. On August 21, 2015, when the decoy visited Respondents' store, he stood 5' 8" tall and weighed approximately 155 pounds. He wore a black t-shirt. Due to a back injury, he was also wearing a brace that wrapped around his stomach and back area. Over that he wore a purple colored short-sleeved polo style shirt. He wore black golfing shorts and black and white tennis shoes. On his left wrist he wore a black military style wristwatch and on his right wrist he wore a medic alert band. He also wore a pair of sunglasses. However, when he was in Respondents' store, they were spun around 180 degrees so that the bottom of the lenses were resting on the rear of his upper neck area, while the arms of the sunglass frames were on [sic] resting on top of his ears. No part of the sunglasses covered his face. He had brown hair styled with a spike in it. (Exhibit 4- a photo of decoy and clerk taken at Respondents' store) His overall appearance at the hearing was basically the same, or very similar to, his

appearance on the date of the decoy operation at Respondents' premises.<sup>[fn.]</sup>

[¶ . . . ¶]

15. The decoy was a Palo Alto police explorer for approximately 2-3 years prior to his visit to Respondents' store. As an explorer, he attended a police explorer academy which met every Sunday for nine Sundays.<sup>[fn.]</sup> In the academy they studied various police topics including, but not limited to: how traffic accidents are handled; gun safety; and even traffic flare patterns. After the academy was over, his explorer post met on the first and third Wednesdays of the month. There they continued their studies of police related matters. By the date of the decoy's visit to Respondents' store, the decoy was the senior explorer, though the unit did not utilize formal ranks. The decoy helped coordinate and organize some of the explorer activities and schedules. The decoy is no longer a police explorer.

16. In July 2015, prior to visiting Respondents' store, the decoy participated in one or two prior decoy operations visiting multiple ABC licensed businesses on each occasion. At these prior decoy operations, police had instructed the decoy to go to the premises, attempt to buy a national brand of alcoholic beverage, present his identification if a clerk asked to see it, and disclose his true age if asked by the clerk. He was told to dress like a regular teenager and, as a safety factor, remain in sight of the police officers. Also, if he needed help quickly in the store, he should give a designated signal to the awaiting police officers.

17. By the time of the operation at Respondents' CVS store, the decoy felt confident in acting as a decoy. He felt he had a "system", to wit, he would have his money and identification in his pocket, not his wallet, so that his identification would be easy to produce if requested or needed. He was also comfortable with the concept that if the clerk asked for his identification he would show it, and if asked his age, he would disclose that to the clerk.

18. The decoy purchased an alcoholic beverage at three of five licensees he visited the same night of his visit to Respondents' store.

19. The decoy herein appeared his actual age, 17, 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 the clerk that sold the decoy his beer, the decoy displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the sales clerk herein.

(Findings of Fact, ¶¶ 6, 15-19.) Based on these findings, he reached the following conclusions of law:

8. Respondents contend the 17 year old decoy did not meet the appearance standard set forth under Rule 141(b)(2) because he was confident in that he knew what to do at Respondents' store based on his decoy experiences a month or so earlier. Even if the decoy did not feel nervous about acting as a decoy in Respondents' store, the decoy's state of mind does not constitute a defense to the accusation. Respondents did not establish how the decoy's mental state had the effect of making the decoy appear any older than his 17 years to the clerk. Respondents also did not show how the decoy's explorer scout experiences made him appear any older either. The fact that he purchased at three of five licensed premises he visited on August 21, 2015 also does not necessarily prove he appeared any older than his actual age. Further, Respondents' clerk did not testify at the hearing so as to establish her state of mind regarding the decoy's appearance on the day of the investigation. Also, Respondents' manager, who was later in the storeroom and shown the decoy's identification, did not testify at the hearing so as to establish any observations she made about the decoy that made him appear any older than his 17 years. Respondents' argument the decoy did not meet the appearance standard set forth in Rule 141(b)(2) is speculative, unsupported, and has no merit.

(Conclusions of Law, ¶ 8.)

Appellants complain that these conclusions amount to a failure to proceed in the manner required by law. (App.Br., at p. 6.) Citing past Board decisions, they argue that "an ALJ must consider all aspects of the decoy," including past experience and its effect on a decoy's physical appearance. (App.Br., at p. 7, citing *7-Eleven, Inc.* (2001) AB-7631.) According to appellants, the ALJ disregarded this evidence.

As an initial matter, appellants misinterpret this Board's decisions. As we recently clarified,

This Board has indeed held that an ALJ should not focus his analysis solely on a decoy's *physical* appearance and thereby give insufficient consideration to relevant *non-physical* attributes such as poise, demeanor, maturity, and mannerisms. (See, e.g., *Circle K Stores, Inc.* (2004) AB-8169; *7-Eleven, Inc./Sahni Enterprises* (2004) AB-8083; *Circle K Stores* (1999) AB-7080.) This should not, however, be interpreted to

require that the ALJ provide a "laundry list" of factors he or she found inconsequential. (*Lee* (2014) AB-9359; *7-Eleven, Inc./Patel* (2013) AB-9237; *Circle K Stores* (1999) AB-7080.)

(*7-Eleven, Inc./Mann Convenience Stores, Inc.* (2016) AB-9564, at pp. 5-6, emphasis in original [rejecting contention that the ALJ failed to consider the decoy's experience].)

We reiterate that holding here: the ALJ is *not* required to address evidence he finds inconsequential.

In this case, however, the ALJ did address the decoy's Explorer experience, his level of confidence, and his so-called "success rate" in both his findings and conclusions of law. He did not "dismiss" the evidence, but rather found it did nothing toward proving appellants' rule 141(b)(2) defense. In particular, he noted appellants' repeated failure to show how the decoy's experience, confidence, or success rate had any bearing whatsoever on his apparent age.

The ALJ's conclusion that appellants' arguments were "speculative, unsupported," and meritless is justified. (See Conclusions of Law, ¶ 8.) Even on appeal, appellants rely on unsupported generalizations, rather than actual facts. They contend, for example, that "[c]onfidence is an attribute that tends to make someone appear older and more mature," but never explain how confidence altered the appearance of *this particular decoy*. (App.Br., at p. 8.) Similarly, they would have this Board infer that a high "success rate" necessarily implicates the decoy's apparent age, when it could equally suggest that the operation successfully targeted premises with lax age verification practices. (See App.Br., at pp. 6-7.) Appellants do not argue or show why their preferred interpretation is more valid. (See generally App.Br.) Unsupported inferences and broad generalizations are not proof. The ALJ did in fact consider the evidence, but properly found it did not prove appellants' defense.



Most tellingly, appellants' argument depends largely on shifting the burden of proof. They write, "The burden is on the Department to show adherence and conformity to its own rules," and cite as support *Southland Corporation/RAN, Inc.* (1998) AB-6967. In a detailed opinion, this Board emphatically rejected *Southland's* interpretation of the burden of proof in a rule 141 affirmative defense. (See *Chevron Stations, supra*, at pp. 3-16 [detailing *Southland's* misstatement of the law, as well as its tendency to invite purely speculative rule 141 defenses].) In this case, as in all rule 141 defenses, the burden of proof lay with the appellants, and they failed to carry it.

#### ORDER

The decision of the Department is affirmed.<sup>3</sup>

BAXTER RICE, CHAIRMAN  
PETER J. RODDY, MEMBER  
MEGAN MCGUINNESS, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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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.

# APPENDIX

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

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

GARFIELD BEACH CVS LLC  
LONGS DRUG STORES CALIFORNIA LLC  
CVS PHARMACY STORE #9915  
352 UNIVERSITY AVE  
PALO ALTO, CA 94301-1715

OFF-SALE GENERAL - LICENSE

SAN JOSE DISTRICT OFFICE

AB - 9650

File: 21-477781

Reg: 15083366

**CERTIFICATE OF DECISION**

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 April 17, 2017. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

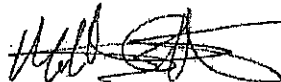
Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date 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 21, 2017, a representative of the Department will contact you to arrange to pick-up the license.

Sacramento, California

Dated: May 11, 2017



Matthew D. Botting  
General Counsel

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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:

Garfield Beach CVS LLC,  
Longs Drug Stores California, LLC  
Dba: CVS Pharmacy Store #9915  
352 University Avenue  
Palo Alto, CA 94301-1715

Respondents

Regarding Their Off-Sale General License.

} File: 21-477781  
}  
} Reg.: 15083366  
}  
} License Type: 21  
}  
} Word Count: 20,146  
}  
} Reporter: Jan C. Olivieri, CSR 5451  
} Hartsell & Olivieri Reporters  
} **PROPOSED DECISION**

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter in San Jose, California, on January 31, 2017.

Heather Hoganson, Attorney III, represented the Department of Alcoholic Beverage Control. (hereafter "the Department")

Jennifer Oden, Esq., of Solomon, Saltsman, and Jamieson, represented the co-licensees Garfield Beach CVS LLC and Longs Drug Stores California, LLC (hereafter "Respondents")

The Department seeks to discipline Respondents' license on the grounds that, on or about August 21, 2015, Respondents, through their agent or employee, Jemariah Jackson, sold, furnished, or gave, or caused to be sold, furnished, or given, an alcoholic beverage to D.T., a person under the age of 21, in violation of California Business and Professions Code section 25658(a).<sup>1</sup> (Exhibit 1-Pre-hearing pleadings for case)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing on January 31, 2017. The matter was argued by the parties and submitted thereon for decision.

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<sup>1</sup> All statutory section references are to the California Business and Professions Code unless otherwise noted. Also, to help protect the juvenile decoy's privacy, he was referred to in the accusation as D.T. and referred to at the hearing only as "Dylan".

**FINDINGS OF FACT**

1. The Department filed the accusation on November 20, 2015. (Exhibit 1)
2. The Department issued Respondents a Type-21 Off-Sale General license for the above-described location on June 22, 2009.<sup>2</sup>
3. The Respondents have the following disciplinary history since the license was issued to them:

| <u>Date of Violation</u> | <u>Type of Violation</u> | <u>Penalty Assessed</u> | <u>Reg: No.</u> |
|--------------------------|--------------------------|-------------------------|-----------------|
| March 23, 2012           | 25658(a) Bus. & Prof.    | 15 day suspension       | 12076817        |

4. D.T. (hereafter "the decoy") was born on October 15, 1997. On August 21, 2015, he was 17 years old.
5. On August 21, 2015 the decoy was working with the Palo Alto Police Department to determine if he could purchase an alcoholic beverage at Respondents' store, known as CVS Pharmacy Store #9915, at 352 University Avenue in Palo Alto, California.<sup>3</sup>
6. On August 21, 2015, when the decoy visited Respondents' store, he stood 5'8" tall and weighed approximately 155 pounds. He wore a black t-shirt. Due to a back injury, he was also wearing a brace that wrapped around his stomach and back area. Over that he wore a purple colored short-sleeved polo style shirt. He wore black golfing shorts and black and white tennis shoes. On his left wrist he wore a black military style wristwatch and on his right wrist he wore a medic alert band. He also wore a pair of sunglasses. However, when he was in Respondents' store, they were spun around 180 degrees so that the bottom of the lenses were resting on the rear of his upper neck area, while the arms of the sunglass frames were resting on top of his ears. No part of the sunglasses covered his face. He had brown hair styled with a spike in it. (Exhibit 4- a photo of decoy and clerk taken at Respondents' store) His overall appearance at the hearing was basically the same, or very similar to, his appearance on the date of the decoy operation at Respondents' premises.<sup>4</sup>

<sup>2</sup> A Type-21 license permits the holder to retail in beer, wine, and distilled spirits for off premises consumption.

<sup>3</sup> Palo Alto Police Officer Dan Ryan was also working with ABC Agent Monica Molthen and Stanford University Police Officer Braden Shaw.

<sup>4</sup> At the hearing, the decoy wore the same purple shirt, a similar undershirt, and long pants rather than short pants. He also wore a similar style watch, medic alert band, and pair of sunglasses. His hair was also in a similar style as the night of the investigation.

7. The decoy entered Respondents' store alone and selected a six pack of Budweiser beer to purchase.<sup>5</sup> He carried the beer to the counter and waited in line behind two patrons. When it was his turn to make his purchase, he handed the six pack of beer to the salesclerk, Ms. Jemariah Jackson. (hereafter, "the clerk")

8. The clerk asked the decoy questions similar to "How are you?" and "Did you find everything okay?" The decoy indicated things were fine. The clerk then asked the decoy what he was buying the beer for. The decoy stated the beer was for a "party".

9. The clerk then asked for the decoy's identification. The decoy handed the clerk his identification with his purchase money. The clerk appeared to examine the decoy's identification for about 30 seconds. The clerk returned the identification to the decoy along with his change and a sales receipt.

10. The decoy gave the clerk his valid current California Driver License. (Exhibit 3-copy of decoy's identification, a California Driver License) The identification clearly stated the decoy's birthdate was 10/15/1997. In a red striped area it said "Age 21 in 2018". Within a blue striped section it stated "Age 18 in 2015". The decoy's driver license was also in a vertical format not a horizontal format.

11. Once the sales transaction was completed, the decoy carried the beer, the sales receipt, and his change towards the store's exit. Near the exit, he met with Palo Alto Police Officer Dan Ryan.<sup>6</sup> As the decoy remained near the store entrance with the beer, Officer Ryan approached the sales clerk. Officer Ryan informed the clerk that he was a police officer and that she had just sold an alcoholic beverage to a minor. He directed her to accompany him to the storeroom area of the store and that she would need to get someone to replace her at the sales counter.

12. The decoy, Officer Ryan, the clerk, and either Officer Shaw or ABC Agent Molthen gathered in the storeroom area of the store. One of the officers asked the decoy to identify who sold him the beer. The clerk then looked in the decoy's direction. The decoy pointed his finger at the clerk and indicated she had sold the beer to him. The decoy felt embarrassed in literally pointing his finger at the clerk because to him, that would normally be an impolite gesture. The clerk was approximately 5-10 feet from the decoy and she was facing him when he identified her to the officers. The decoy and clerk had an unobstructed view of one another.

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<sup>5</sup> The decoy and retired Palo Alto Police Sergeant Ryan testified at the hearing. Respondent called no witnesses to testify.

<sup>6</sup> Officer Ryan, sometimes also referred to as Sergeant Ryan, observed the decoy purchase the beer through a store window near its entrance. For purposes of the hearing and this decision, he will be referred to as Officer Ryan.

13. Officer Ryan asked the clerk if she had looked at the decoy's identification. She confirmed she had. The decoy removed his identification from his pocket and gave it to Officer Ryan. He, in turn, showed it to the clerk and pointed out to her that the identification showed the decoy was not old enough to lawfully purchase alcoholic beverages.<sup>7</sup>

14. After the clerk was shown the decoy's identification, it was returned to the decoy. After a photo of the decoy and clerk was taken (Exhibit 4), Officer Ryan issued a citation to the clerk for selling an alcoholic beverage to a minor.

15. The decoy was a Palo Alto police explorer for approximately 2-3 years prior to his visit to Respondents' store. As an explorer, he attended a police explorer academy which met every Sunday for nine Sundays.<sup>8</sup> In the academy they studied various police topics including, but not limited to: how traffic accidents are handled; gun safety; and even traffic flare patterns. After the academy was over, his explorer post met on the first and third Wednesdays of the month. There they continued their studies of police related matters. By the date of the decoy's visit to Respondents' store, the decoy was the senior explorer, though the unit did not utilize formal ranks. The decoy helped coordinate and organize some of the explorer activities and schedules. The decoy is no longer a police explorer.

16. In July 2015, prior to visiting Respondents' store, the decoy participated in one or two prior decoy operations visiting multiple ABC licensed businesses on each occasion. At these prior decoy operations, police had instructed the decoy to go to the premises, attempt to buy a national brand of alcoholic beverage, present his identification if a clerk asked to see it, and disclose his true age if asked by the clerk. He was told to dress like a regular teenager and, as a safety factor, remain in sight of the police officers. Also, if he needed help quickly in the store, he should give a designated signal to the awaiting police officers.

17. By the time of the operation at Respondents' CVS store, the decoy felt confident in acting as a decoy. He felt he had a "system", to wit, he would have his money and identification in his pocket, not his wallet, so that his identification would be easy to produce if requested or needed. He was also comfortable with the concept that if the clerk asked for his identification he would show it, and if asked his age, he would disclose that to the clerk.

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<sup>7</sup> During this process, the store manager appeared, was informed what had occurred, and was also shown the decoy's identification.

<sup>8</sup> However, the decoy missed two of the nine Sundays.

18. The decoy purchased an alcoholic beverage at three of five licensees he visited the same night of his visit to Respondents' store.

19. The decoy herein appeared his actual age, 17, 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 the clerk that sold the decoy his beer, the decoy displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the sales clerk herein.

### CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and Business and Professions 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. Business and Professions Code 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. Business and Professions Code 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. Business and Professions Code Section 25658(f) permits law enforcement officials to use persons under 21 years old to apprehend licensees, employees or agents or other persons who sell or furnish alcoholic beverages to minors. Pursuant to that same section, the Department enacted formal guidelines when using decoys. Those guidelines are found in California Code of Regulations, Title 4, Division 1, Article 22, section 141, commonly referred to as "Rule 141".

5. Under Rule 141,

(a) A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.



(b) The following minimum standards shall apply to actions filed pursuant to Business and Professions Code Section 25658 in which it is alleged that a minor decoy has purchased an alcoholic beverage:

(1) At the time of the operation, the decoy shall be less than 20 years of age;

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

(3) A decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages;

(4) A decoy shall answer truthfully any questions about his or her age;

(5) Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

(c) Failure to comply with this rule shall be a defense to any action brought pursuant to Business and Professions Code Section 25658.

6. Cause for suspension or revocation of Respondents' license exists under Article XX, section 22 of the California State Constitution and Business and Professions Code sections 24200(a) and (b) because on August 21, 2015 Respondents' employee, agent or sales clerk, Jamariah Jackson, inside the Licensed Premises, sold beer, an alcoholic beverage, to D.T. aka "Dylan", a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4 through 11)

7. The evidence established that the clerk did ask for and inspect the decoy's identification that clearly stated he would not be 21 until 2018. It also stated the decoy was "Age 18 in 2015. This violation occurred in 2015. The clerk in this case had all the reliable information she needed to determine the decoy was not yet 21 years old and properly deny the sale of beer to him, yet she proceeded to make the sale.

8. Respondents contend the 17 year old decoy did not meet the appearance standard set forth under Rule 141(b)(2) because he was confident in that he knew what to do at Respondents' store based on his decoy experiences a month or so earlier.

Even if the decoy did not feel nervous about acting as a decoy in the Respondents' store, the decoy's state of mind does not constitute a defense to the accusation. Respondents did not establish how the decoy's mental state had the effect of making the decoy appear any older than his 17 years to the clerk. Respondents also did not show how the decoy's explorer scout experiences made him appear any older either. The fact he purchased at three of five licensed premises he visited on August 21, 2015 also does not necessarily prove he appeared any older than his actual age. Further, Respondents' clerk did not testify at the hearing so as to establish her state of mind regarding the decoy's appearance on the day of the investigation. Also, Respondent's manager, who was later in the storeroom and shown the decoy's identification, did not testify at the hearing so as to establish any observations she made about the decoy that made him appear any older than his 17 years. Respondents' argument the decoy did not meet the appearance standard set forth in Rule 141(b)(2) is speculative, unsupported, and has no merit.

9. Respondents argued the decoy did not make an appropriate face-to-face identification of the clerk as described in Rule 141(b)(5). The decoy and the officer did give slightly differing testimony concerning some details about the face-to-face identification. The primary difference was that Officer Ryan, now retired, recalled the identification occurred at the sales counter while the decoy recalled it occurred in the storeroom. As to this discrepancy, the decoy's testimony was overall more credible and he clearly had a better recollection of the details of his role in the investigation. The officer's testimony was more tentative and less certain on the details. The decoy testified that when the officer asked him to identify the seller in the premises storeroom, the clerk raised her head and looked in the decoy's direction. The decoy specifically recalled he had a clear view of clerk, being only 5-10 feet from her. He also testified he felt uncomfortable as he pointed his finger right at the sales clerk because to him that would otherwise be an impolite or "rude" gesture. After the identification occurred, both the decoy and officer consistently testified the clerk was again shown the decoy's identification so she could see it indicated the decoy was not old enough to purchase beer. After that, Officer Ryan issued a citation to the clerk. The clerk did not testify at the hearing to present her version of the sequence of events. Under this state of the evidence, there was sufficient evidence establishing the face-to-face identification was carried out in a proper fashion and also in a manner where the clerk knew or should have known the decoy identified her as the seller of beer to him. There was proper compliance with Rule 141(b)(5).

10. Respondents asserted the mention of "fairness" in Rule 141(a) created a distinct added criterion to assess the propriety of a decoy operation in addition to the five specific decoy operation standards set forth in Rule 141(b)(1)-(5). Respondents claimed that under Rule 141(a), this operation was not conducted in a manner that promoted "fairness" because the decoy told the clerk the beer was for a party, which was obviously not true. Respondents' argument has no merit.

11. Rule 141(a) states, "A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness."

12. In *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (Jan. 17, 2017, C078574) \_\_\_ Cal. App.4<sup>th</sup> \_\_\_ [2017 WL 167916, at page \*1], the Court of Appeal stated, "We conclude Rule 141 is not ambiguous in requiring minor decoys to answer truthfully only questions about their ages." The court explained that, "Rule 141(b)(4) provides that '[a] decoy shall answer truthfully any question about his or her age.' The Rule'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. Thus, Rule 141 does not require minor decoys to correct mistakes articulated by licensed alcohol sellers. Instead, the minor decoys need to respond truthfully only to questions about their ages." (*Id* at p. \*4)

13. In this instance, the clerk neither asked the decoy any question concerning his age nor uttered any comment or statement to the decoy about or concerning his age or appearance. Rather, the clerk merely asked the decoy what the beer was for. Therefore, the decoy was not under any obligation to respond truthfully to her question. There was no violation of Rule 141(b)(4) when he told her the beer was for a party. His answer did not make this operation "unfair".

14. Also, the Court of Appeal did not construe "fairness" as mentioned in Rule 141(a) as establishing a distinct standard by which to judge the propriety of individual decoy investigations. Rather, the court determined that, "Contrary to the Appeals Board's contention, Rule 141 provides specific guidance regarding how to preserve fairness in minor decoy operations. Subdivision (b) of Rule 141 implements the goal of fairness by imposing five specific requirements for every minor decoy operation. Decoys must be under the age of 20; have the appearance of a person under 21; carry their own actual identification and present that identification upon request; truthfully answer any questions about their ages; and make face-to-face identifications of the persons who sold the alcoholic beverages. (Rule 141(b)(1)-(5).) Fairness under Rule 141 is assured by a set of five expressly defined safeguards, all of which must be fulfilled during a minor decoy operation." (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board, supra*, \_\_\_ Cal. App.4<sup>th</sup> \_\_\_ [2017 WL 167916, at page \*5]. Therefore, the court did not recognize "fairness" to be a separate criteria to be applied when assessing the propriety of individual decoy investigations. Fairness is achieved by adherence to the five standards set forth in Rule 141(b)(1)-(5). In the case at hand, as all five of the

standards set forth in Rule 141(b)(1)-(5) were met in the decoy investigation at Respondents' store, the "fairness" of the investigation was preserved despite the fact the decoy told the clerk the beer was for a party.

15. Lastly, even though the decoy was not under any duty to respond truthfully about what the beer was for and the investigation fulfilled the standards set forth in Rule 141(b)(1)-(4), Respondents did not explain why or how the decoy's response that the beer was for a "party" otherwise improperly or wrongly caused the sale. Respondent did not establish the decoy's response unjustly pressured, compelled, or tricked the clerk to sell beer to the decoy. In fact, the clerk did not testify to even establish whether she actually heard and understood the decoy's response. Even if she heard the decoy's response, it was not proven what effect, if any, the decoy's response had on the clerk's decision to sell him beer after she had just inspected his driver license indicating he was only 17 years old.

16. Except as set forth in this decision, all other allegations in the accusation and all other contentions that were raised by the parties in the pleadings, during the hearing or elsewhere are without merit.

### **PENALTY**

1. 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 that rule, the presumptive penalty for giving, furnishing, or selling an alcoholic beverage to a minor with no prior sale-to-minor violations within 36 months of the current violation is a 15 day license suspension. However, the rule also permits imposition of a different penalty based on the presence of aggravating or mitigating factors.

2. In this instance, Respondents had one prior sale-to-minor violation that occurred more than 36 months prior to the violation herein. Pursuant to Rule 144, the Department recommended a 15 day license suspension.

3. As to penalty, Respondents neither made a specific penalty recommendation in the event the accusation were to be sustained nor did Respondents specify what evidence warranted a penalty less than the 15 day license suspension specified in Rule 144.

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Longs Drug Stores California, LLC  
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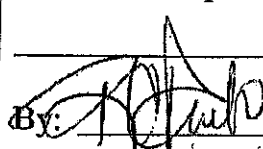
**ORDER**

The accusation is sustained. Respondents' off-sale general license is suspended for 15 days.

Dated: February 17, 2017



David W. Sakamoto  
Administrative Law Judge

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