

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

AB-9662

File: 20-543089; Reg: 17085200

7-ELEVEN, INC. and 3MRANA CORP.,
dba 7-Eleven Store #36035A
599 North Mountain Avenue, Upland, CA 91786-5016,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: August 2, 2018
Los Angeles, CA

ISSUED AUGUST 20, 2018

Appearances: *Appellants:* Brian Washburn, of Solomon, Saltsman & Jamieson,
as counsel for 7-Eleven, Inc. and 3Mrana Corp,

Respondent: Jennifer M. Casey, as counsel for Department of
Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and 3Mrana Corp., doing business as 7-Eleven Store #36035A,
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 police
minor decoy, in violation of Business and Professions Code section 25658, subdivision
(a).

¹The decision of the Department, dated July 25, 2017, is set forth in the
appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on June 16, 2014, and there is no record of prior Department discipline against the license.

On January 5, 2017, the Department filed an accusation against appellants charging that, on September 23, 2016, appellants' clerk, Hanaa Bekhet (the clerk), sold an alcoholic beverage to 19-year-old Dominique Soto. Although not noted in the accusation, Soto was working as a minor decoy in a joint operation between the Upland Police Department and the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on May 23, 2017, documentary evidence was received and testimony concerning the sale was presented by Soto (the decoy); by Department Agent Eric Burlingame; and by Upland Police Officers, Gabriel Garcia and George Hajj.

Testimony established that on September 23, 2016, the decoy entered the licensed premises alone, followed shortly thereafter by Officer Garcia. The decoy went to the coolers and selected a 12-pack² of Bud Light beer in cans. She took the beer to the sales counter and waited in line behind two people. When it was her turn, the decoy set the beer down and offered a \$20 bill to the clerk. The clerk did not take the money, but asked the decoy for her identification.

The decoy handed the clerk her California driver's license which had a vertical orientation, contained her correct date of birth (showing her to be 19 years of age) and

²Although not significant, there is some discrepancy in the record regarding the number of cans. During the administrative hearing there were references to both a 20-pack (RT at pp. 38; 92) as well as a 12-pack (RT at pp. 19; 78). Exhibit 2 is not dispositive regarding the number of cans. However, the administrative law judge (ALJ) determined that it was a 12-pack, so we use that figure here.

contained a red stripe indicating "AGE 21 IN 2017." The clerk swiped the ID in the register and handed it back to the decoy. She then completed the sale without asking any age-related questions. Officer Garcia observed the transaction from inside the store. The decoy then exited the store, followed by Officer Garcia.

The decoy re-entered the premises with Officers Garcia, Hajj and McClullough, and Agent Burlingame. The clerk was assisting other customers so Agent Burlingame spoke first to the store manager. Burlingame identified himself to the clerk and explained the violation to her. He then asked the decoy to identify the person who sold her the alcohol. The decoy pointed at the clerk and said "she's the one who sold me the alcohol." He also asked her how old she was and she replied, "19." The decoy and clerk were standing approximately five feet apart at the time and facing each other. A photograph of the two of them was taken (exh. 2) and the decoy exited the store.

The clerk was issued a citation after the face-to-face identification. Agent Burlingame and the store manager explained the violation again to the clerk, who was distraught and crying. Agent Burlingame testified that the clerk insisted that she had scanned the identification through the system and that the cash register had permitted the sale. (RT at pp. 77; 79.) The clerk, however, did not testify.

Agent Burlingame asked the manager to scan the beer. The manager did so and an age-restricted warning popped up on the screen — asking either for the customer's date of birth or for the identification to be scanned. The manager told Agent Burlingame that if an under-aged ID is scanned, the register does not permit the sale. The decoy was no longer in the premises so Burlingame scanned his own driver's license and the register permitted the sale. No evidence was presented that the cash register was not functioning properly on the day of the decoy operation.

The ALJ submitted a proposed decision on June 12, 2017, sustaining the accusation and recommending a penalty of 15-days' suspension. Thereafter, on June 22, 2017, the Department's Administrative Hearing Office sent a letter from its Chief ALJ to both appellants and Department counsel, inviting the submission of comments on the proposed decision and stating that the proposed decision and any comments submitted would be submitted to the Director of ABC in 14 days.

Appellants submitted comments to the Director, arguing that neither the Administrative Procedure Act (APA) nor the ABC Act authorize the Department to permit the parties in a disciplinary procedure to comment on a proposed decision, and that by requesting submission of these comments, the Department exceeded the authority granted to it by the APA. The Department did not submit comments.

On July 17, 2017, the Department adopted the decision in its entirety and on July 25, 2017 it issued its Certificate of Decision.

Appellants then filed a timely appeal contending that law enforcement failed to conduct the operation in a manner that promotes fairness, in violation of rule 141(a).³

DISCUSSION

Appellants contend that law enforcement failed to conduct the operation in a manner that promotes fairness, in violation of rule 141(a), when they failed to investigate the clerk's assertion that she scanned the decoy's identification and that the cash register permitted the sale. (AOB at pp. 4-9.) Appellants contend it was incumbent upon law enforcement to test the decoy's ID in the point of sale system to verify whether the system was working properly and to test whether the magnetic strip

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

on the decoy's ID might be defective. (*Ibid.*)

Rule 141(a) provides:

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.**

(Cal. Code Regs., tit. 4, § 141(a), emphasis added.) Appellants maintain that the facts in this case indicate unfairness in that law enforcement failed to conduct a thorough investigation into the functionality of appellants' point of sale system utilizing the actual ID offered by the decoy.

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

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

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004)

118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

In her decision the ALJ found as follows on this issue:

If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust. (Evidence Code, section 412.)

The undersigned disbelieves and finds incredulous both Respondents' contention and clerk Bekhet's hearsay statement that when clerk Bekhet swiped decoy Soto's driver license on the cash register on September 23, 2016, the cash register allowed the said sale of alcohol to go through; inferring the cash register was malfunctioning. It was within the Respondents' power to produce stronger more satisfactory evidence of this fact than relying on clerk Bekhet's hearsay statement as introduced through the testimony of agent Burlingame. Respondents failed to present any credible evidence that the cash register was not functioning properly on September 23, 2016. Respondents could have produced the point of sale receipt or testimony from its store manager to say whether the cash register was not working properly and/or was allowing alcohol sales transactions to proceed despite the swiping of a minor's identification. Agent Burlingame credibly testified that Respondent's store manager indicated that the alcohol sales transaction would have been stopped by swiping a minor's identification. It is more probable clerk Bekhet was trying to preserve her employment by making said claim. Regardless, clerk Bekhet had in her hand decoy Soto's valid California Driver License which was in the vertical format and had a red stripe indicating "Age 21 in 2017," both of which are clear red flags she was still a minor. If for any reason clerk Bekhet was confused when seeing the identification, which the record does not indicate she was, she could easily have asked decoy Soto her age.

(Conclusions of Law, at pp. 8-9.)

Even though the clerk did not testify, appellants would have this Board accept her hearsay statements to Agent Burlingame as evidence that she actually swiped the decoy's ID through the register and that the register gave her the go-ahead to make a sale. It is the province of the ALJ, as trier of fact, to make determinations as to credibility. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) Here, since the clerk did not testify, it was the ALJ's prerogative to assess the credibility of her statements to the agent — and, as seen in the decision, the ALJ found her statements to be self-serving and not credible. The Appeals Board cannot interfere with that determination.

In a recent case, the Court of Appeals rejected this Board's contention that rule

141 was ambiguous because it failed to define fairness — citing *Nava v. Mercury Casualty Co.* (2004) 118 Cal.App.4th 803, 805 [13 Cal.Rptr.3d 816] for the proposition that lack of definition does not render a term ambiguous. The Court found:

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, subd. (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. [Citation.] Consequently, Rule 141's use of the word “fairness” does not render the rule ambiguous or confusing.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd./ Garfield Beach* (2017) 7 Cal.App.5th 628, 638 [213 Cal.Rptr.3d 130].) In other words, the Court made it very clear that the word “fairness” in rule 141(a) is not subject to enlargement, allowing the Appeals Board to add fairness requirements to decoy operations. Rather, the five factors enumerated in rule 141(b) lay out specifically what is required to make a decoy operation “fair.”

Here, appellants would have this Board go against the holding in *Garfield Beach, supra*, and have us find unfairness in how law enforcement personnel executed their job, as well as asking us to impose new and additional fairness requirements on this decoy operation. This the Board cannot do. The scope of this Board’s review is clearly defined:

The power of the appeals board in reviewing license decisions of the department is ‘limited to the questions whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record.’ (Cal. Const., art. XX,

§ 22; Bus. & Prof. Code, §§ 23084, 23085.)

(*Rice v. Alcoholic Bev. Control Appeals Bd.* (1978) 79 Cal.App.3d 372, 374 [144 Cal.Rptr. 851].)

Disagreement with the Department's decision constitutes neither error nor an abuse of discretion. Here, the Department made its case — that alcohol was sold to a minor in violation of Business and Professions Code section 25658(a) — and having failed to rebut that case at the administrative hearing, appellants would like this Board to reweigh the evidence and reach a different conclusion. This we cannot do.

ORDER

The decision of the Department is affirmed.⁴

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

⁴This 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 AND 3MRANA CORPORATION
7-ELEVEN STORE #36035A
599 NORTH MOUNTAIN AVE
UPLAND, CA 91786-5016

OFF-SALE BEER AND WINE - LICENSE

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

RIVERSIDE DISTRICT OFFICE

File: 20-543089

Reg: 17085200

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on July 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 September 4, 2017, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: July 25, 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:

7-Eleven Inc. and
3Mrana Corporation
dba 7-Eleven Store #36035A
599 North Mountain Avenue
Upland, California 91786-5016

Respondents

Off-Sale Beer & Wine License

} File: 20-543089

} Reg.: 17085200

} License Type: 20

} Word Count: 14,459

} Reporter:

} Chere Davis

} Kennedy Court Reporters

} **PROPOSED DECISION**

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at San Bernardino, California, on May 23, 2017.

Jennifer Casey, Attorney, represented the Department of Alcoholic Beverage Control (the Department).

Donna Hooper, Attorney, represented Respondents, 7-Eleven Inc. and 3Mrana Corporation.

The Department seeks to discipline the Respondents' license on the grounds that, on or about September 23, 2016, the Respondents, through their agent or employee, sold, furnished, or gave alcoholic beverages to Dominique Soto, 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 May 23, 2017.

FINDINGS OF FACT

1. The Department filed the accusation on January 5, 2017.

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

2. The Department issued a type 20, off-sale beer and wine license to the Respondents for the above-described location on June 16, 2014 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Dominique Soto was born on November 19, 1996. On September 23, 2016, she was 19 years old. On that date she served as a minor decoy in an operation conducted by the Upland Police Department (Upland PD) in conjunction with the Department.
5. Decoy Soto appeared and testified at the hearing. On September 23, 2016, she was 5'8" tall and weighed 140 pounds. She was wearing a black short-sleeved t-shirt, blue jeans, and black Adidas sneakers. She wore earrings, mascara and no other make-up. She wore her hair down, a little past shoulder length and parted to the side; she had no bangs, so no hair was on her forehead. (Exhibits 2 and 3.) Her appearance at the hearing was the same, except she wore no make-up and her bangs were cut short and swept to the side.
6. On September 23, 2016, at approximately 1:20 p.m., decoy Soto entered the Licensed Premises and shortly thereafter officer Gabriel Garcia (officer Garcia) of the Upland PD entered. Decoy Soto went to the back of the store to the beer coolers and selected a 12-pack of Bud Light beer cans. (Exhibit 2.) Beer is an alcoholic beverage. Decoy Soto brought the 12-pack of beer to the front sales counter for purchase and waited in line. There were two people in front of her.
7. At the counter decoy Soto set down the 12-pack of Bud Light beer and handed \$20 to the female clerk, Hanaa Bekhet. Clerk Bekhet did not take the money but asked decoy Soto for her identification (ID). Decoy Soto handed her valid California Driver License to clerk Bekhet, who took possession of it, and looked at it for a second. Decoy Soto's California Driver License has a vertical orientation, shows her correct date of birth and includes a red stripe which reads, "Age 21 in 2017." (Exhibit 3.) Clerk Bekhet slid the ID once along the right side of the cash register and then handed the ID back to decoy Soto. Clerk Bekhet proceeded with the sale of alcohol to decoy Soto. Decoy Soto gave \$20 to clerk Bekhet, who gave change to the decoy. Decoy Soto exited the store carrying the 12-pack of Bud Light beer and her change. Clerk Bekhet did not ask decoy Soto questions about the ID, her age, date of birth, or any age-related questions. Officer Garcia was inside the store posing as a customer and witnessed these events. Officer Garcia exited the store soon after decoy Soto exited.
8. Decoy Soto re-entered the Licensed Premises with officers Garcia, Hajj and McCullough of the Upland PD, along with Department agent Eric Burlingame.

As decoy Soto entered she saw clerk Bekhet behind the cash register assisting a customer. The cash register is just inside the door to the left. Agent Burlingame continued to walk along the counter (with the decoy following) and asked who was in charge. The store manager appeared on the employee side of the counter. Agent Burlingame met with the store manager, identified himself as an officer, using his badge which hung from a corded necklace, and explained the violation to the store manager. While agent Burlingame was speaking with the store manager at one end of the counter, decoy Soto was standing a short distance from them and within five feet of clerk Bekhet, who was at the cash register at the other end of the counter. Agent Burlingame then approached decoy Soto and introduced himself to clerk Bekhet, whose attention turned to agent Burlingame and decoy Soto. Agent Burlingame identified himself as an officer and explained the violation to clerk Bekhet. Agent Burlingame then asked decoy Soto to point out and identify the person who sold her the alcohol. Decoy Soto pointed at clerk Bekhet and said, "She's the one who sold me the alcohol." Agent Burlingame asked decoy Soto her age, to which she replied, "19." Decoy Soto and clerk Bekhet were standing approximately five feet apart, facing and looking at each other, with an unobstructed view of each other, at the time of this identification. A photograph of clerk Bekhet and decoy Soto was taken after the face-to-face identification, with decoy Soto holding the 12-pack of beer and her ID while standing next to clerk Bekhet. (Exhibit 2.) Agent Burlingame again, along with the store manager, explained the violation to clerk Bekhet, who was distraught and crying. Decoy Soto then exited the store.

9. Clerk Bekhet was issued a citation after the face-to-face identification. Clerk Bekhet did not appear and did not testify at the hearing. There is no evidence clerk Bekhet was distracted or that anyone interfered during the sales transaction or the face-to-face identification. Clerk Bekhet spoke English throughout the minor decoy operation.

10. September 23, 2016, was decoy Soto's first day of decoy operations. Decoy Soto became involved in the minor decoy program through the Upland PD's Police Explorer Program, in which she has four years' experience. She has a rank of sergeant. Her once a week training as an explorer includes studying codes, physical training, and learning to be respectful and act mature while in uniform. She volunteers, once a month if she can, at community events, such as the Lemon Festival and cleaning up parks. At community events she walks around and notifies the officers if there is a problem. As a sergeant she takes attendance and does as the captain instructs her, including teaching the younger explorers how to march and behave. She's been on ride-alongs maybe once every three months. During the giving of her testimony she was nervous.

11. On September 23, 2016, decoy Soto visited a total of 14 locations, with two of those 14 locations, including the Licensed Premises, having sold alcoholic beverages to her.
12. Decoy Soto had visited the Licensed Premises on rare occasion prior to September 23, 2016, and had never before purchased any alcoholic beverage therein.
13. Decoy Soto appeared her age at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of clerk Bekhet at the Licensed Premises on September 23, 2016, decoy Soto displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk; decoy Soto appeared her true age.
14. Agent Burlingame appeared and testified at the hearing. Agent Burlingame said that on September 23, 2016, he questioned clerk Bekhet after the face-to-face identification. He asked clerk Bekhet for her ID and if she understood she was being identified as a person who sold alcohol to a minor. Clerk Bekhet, visibly distraught and crying, said she had checked the ID, scanned it through the system and claimed the cash register permitted the sale. Agent Burlingame asked the manager to scan the 12-pack of Bud Light beer the decoy had purchased. The manager did so and an age-restricted warning popped up on the screen requesting the date of birth of the customer and/or to scan the ID. The manager said that if an under-aged ID is scanned, the cash register would not permit the sale of the age-restricted item. Since the decoy was no longer in the store, agent Burlingame, who is over 21 years of age, scanned his own driver license and the cash register permitted the sale. There was no evidence presented that the cash register was not functioning as it should on September 23, 2016.
15. Officer Hajj appeared and testified at the hearing. He said that on September 23, 2016, he entered the Licensed Premises after decoy Soto purchased the 12-pack of Bud Light beer. He said he did not participate in the face-to-face identification and that it had been completed prior to his getting involved. The extent of his involvement included issuing the citation to clerk Bekhet after the face-to-face identification.
16. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.
2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.
3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.
4. Cause for suspension or revocation of the Respondents' license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on September 23, 2016, the Respondents' clerk, Hanaa Bekhet, inside the Licensed Premises, sold alcoholic beverages to Dominique Soto, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-13.)
5. The Respondents argued the decoy operation at the Licensed Premises failed to comply with rules 141(a), 141(b)(2), and 141(b)(5), therefore, the accusation should be dismissed pursuant to rule 141(c).

With respect to rule 141(b)(2), Respondents argued decoy Soto did not have the appearance of someone under 21 because of several factors which made her appear to be older than 21. Those factors included the decoy's four years' explorer experience, including as a "security guard patrolling crowds," her general demeanor, along with Respondents' counsel's belief the decoy was a "rather tall young woman," with poise, maturity and an ability to answer questions. This rule 141(b)(2) argument is rejected. There is no evidence that decoy Soto's explorer experience, height, ability to answer questions, or demeanor had any impact on clerk Bekhet. There was nothing about decoy Soto's demeanor, her experience or "brief training" on how to deal with crowds, which made her appear older than her actual age. In fact, during the hearing, decoy Soto admitted to being nervous while testifying, and had to be reminded to speak up, as she was soft-spoken and her voice tapered off at times. September 23, 2016, was the first time she served as a minor decoy. Decoy Soto appears her true age. In other words, decoy Soto had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 13.)

As to rule 141(b)(5), the Respondents argued the evidence “does not show a clear face-to-face identification where the clerk knew what was going on,” “in a way that was meant to educate the clerk.” Respondents gave examples, arguing that at the time of the identification the clerk was “extremely distraught, distracted and very upset,” the decoy and agent Burlingame gave different accounts which contradict each other of the distance between the clerk and decoy during the face-to-face identification. The Respondents’ counsel mentioned agent Burlingame not recalling the decoy’s position relating to where the decoy was standing while the agent was speaking with the store manager prior to the face-to-face identification. Respondents’ counsel further argued she was not permitted to clarify the details of the face-to-face identification in questioning officer Hajj.

This rule 141(b)(5) argument is rejected and without merit. The Respondents failed to present clerk Bekhet at the hearing. There was no evidence clerk Bekhet was distracted. The evidence clearly established by agent Burlingame’s sworn, direct testimony that prior to the face-to-face identification he not only introduced himself to both the store manager and clerk Bekhet, but explained to each of them that clerk Bekhet had sold alcohol to a minor. Decoy Soto credibly testified that the store manager (whom she believed was the store owner) also explained the violation to clerk Bekhet and that clerk Bekhet spoke English. The credible testimony further makes clear that decoy Soto said she was 19 years old, pointed at clerk Bekhet and said, “She’s the one who sold me the alcohol,” when the two were standing five feet apart, facing and looking at each other, with an unobstructed view of each other. A photograph was thereafter taken of clerk Bekhet and the decoy, with the decoy holding the 12-pack of Bud Light beer clerk Bekhet sold her along with the decoy’s California Driver License, which she had handed to the clerk during the sales transaction. Under these circumstances, clerk Bekhet knew or reasonably should have known she was being identified as the person who sold alcohol to the minor decoy, Soto. It is understandable that clerk Bekhet, after being told, in the presence of her store manager, as well as being told by her store manager, she had violated store policy in selling alcohol to a minor, that she would be distraught and upset.

Respondents’ argument about the differing testimony relating to the distance the decoy and clerk were standing at the time of the face-to-face identification, and agent Burlingame’s inability to recall where the decoy was standing while the agent spoke with the store manager prior to the face-to-face identification, is a distinction without a difference. Some witnesses have better recall than others. It should be noted that no two persons will use the exact distances when describing the same event; their choice of words and recollection will naturally vary. Nevertheless, whether the distance was five feet or 10 feet, both decoy Soto and agent Burlingame credibly testified that a face-to-face identification was conducted as required by the rule. The minor differences in their testimony do not call into question their credibility. The testimony of either witness,

alone, is sufficient to establish a valid face-to-face identification took place. Nonetheless, using the factors set forth in evidence code section 780, decoy Soto's testimony relating to the five foot distance and pointing to the clerk is given more weight and was the more credible than agent Burlingame's estimate of 10 feet and supposition that the decoy did not point at the clerk, for the following reasons. Decoy Soto was consistent with the distance of five feet and pointing at the clerk upon repeated questioning by both Department and Respondents' counsel and she presented a better recollection without the need for refreshing her recollection. Agent Burlingame had to refresh his recollection a few times during the giving of his testimony. It would seem since this was decoy Soto's first decoy operation it would make a bigger impact on her recollection, which would be more clear as to certain details and the distance between herself and the clerk, than agent Burlingame's, who has been involved in numerous prior decoy operations. Furthermore, while agent Burlingame could not recall where the decoy was located at the time his attention was directed toward the store manager, that was prior to the face-to-face identification and the decoy herself had a clear recollection of her position at that time and all relevant times.

Lastly, the undersigned will address Respondents' counsel's assertion she was not permitted to clarify the details of the face-to-face identification while questioning officer Hajj. Upon cross-examination, the first question Respondents' counsel asked officer Hajj was whether he witnessed the face-to-face identification. Officer Hajj replied that he "was not involved in it" and that the face-to-face identification "was done prior to [his] getting involved" in issuing the citation. Respondents' counsel later asked officer Hajj to give any detail about the face-to-face identification. The Department's attorney objected based on officer Hajj's response to Respondents' counsel's having already asked whether he witnessed the identification, stating, "He said he was there but did not pay attention. I don't know what 'detail' means" and adding, "It calls for a narrative." The Department attorney's initial two objections were functionally equivalent to making the classic-traditional objections of asked and answered and vague. The undersigned sustained the objections (asked and answered, vague and narrative), though the Department attorney expressed her initial two objections explaining the basis for the objection without first stating the classic terminology associated with the objections. Officer Hajj had already testified that he was not involved in the face-to-face identification, and that it had already been completed "prior" to his getting involved in issuing the citation. Despite the undersigned having sustained the Department's objections to Respondents' counsel's said question, Respondents' counsel was free to follow-up with better crafted questions of officer Hajj to get at what she was seeking from him. Counsel was not foreclosed from further questioning of the said witness, nor had the undersigned ruled that officer Hajj's testimony of what he saw or heard was irrelevant. In fact, the undersigned expected such further questioning, prompting Respondents' counsel if she had no further questions, and

was surprised when Respondents' counsel chose not to pursue additional questions. Nonetheless, Respondents' counsel had every opportunity to thoroughly question the two Department witnesses who were actually involved in the face-to-face identification, agent Burlingame and decoy Soto.

With respect to Respondents' 141(a) argument, Respondents argued that "the five requirements under 141(b) are just the minimum standards to be applied" and "are not the only standards that need to be applied," that the decoy operation as a whole was conducted unfairly, citing such factors, which included, but are not limited to, the decoy residing in the neighborhood of the Licensed Premises, and agent Burlingame's failure to swipe the decoy's driver license to determine whether the cash register would allow the sale of alcohol to a minor as the clerk asserted. Respondents further claimed it unfair agent Burlingame did not ask decoy Soto on September 23, 2016, whether she was carrying an identification other than her California Driver License, marked as Exhibit 3, to determine the validity of the clerk's claim. Respondents' argument has no merit and is rejected.

In *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2017) 7 Cal. App.5th 628, 638 [213 Cal.Rptr.3d 130], the Court of Appeal determined, "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." Accordingly, the court did not recognize the separate criteria of "fairness" to be applied when assessing whether individual decoy operations comply with rule 141(a). The Court of Appeal was clear that "fairness" is achieved by adhering to the five standards set forth in Rule 141(b)(1)-(5). In the matter at hand, the record made clear that all five of the standards set forth in Rule 141(b)(1)-(5) were complied with during the said decoy operation.

If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust. (Evidence Code, section 412.)

The undersigned disbelieves and finds incredulous both Respondents' contention and clerk Bekhet's hearsay statement that when clerk Bekhet swiped decoy Soto's driver license on the cash register on September 23, 2016, the cash register allowed the said sale

of alcohol to go through; inferring the cash register was malfunctioning. It was within the Respondents' power to produce stronger more satisfactory evidence of this fact than relying on clerk Bekhet's hearsay statement as introduced through the testimony of agent Burlingame. Respondents failed to present any credible evidence that the cash register was not functioning properly on September 23, 2016. Respondents could have produced the point of sale receipt or testimony from its store manager to say whether the cash register was not working properly and/or was allowing alcohol sales transactions to proceed despite the swiping of a minor's identification. Agent Burlingame credibly testified that Respondent's store manager indicated that the alcohol sales transaction would have been stopped by swiping a minor's identification. It is more probable clerk Bekhet was trying to preserve her employment by making said claim. Regardless, clerk Bekhet had in her hand decoy Soto's valid California Driver License which was in the vertical format and had a red stripe indicating "Age 21 in 2017," both of which are clear red flags she was still a minor. If for any reason clerk Bekhet was confused when seeing the identification, which the record does not indicate she was, she could easily have asked decoy Soto her age.

Also lacking merit is Respondents' counsel's alternative assertion that decoy Soto may have had another identification on her on September 23, 2016, other than her California Driver License presented at the hearing, a copy of which was marked as Exhibit 3; making an inference decoy Soto gave clerk Bekhet a fake identification which indicated she was 21 or older and which would corroborate clerk Bekhet's claim the cash register permitted the sale to go through when she swiped the identification. Using the factors set forth in evidence code section 780, decoy Soto credibly testified that the original California Driver License she presented at the hearing, a copy of which was marked Exhibit 3, was the same identification she handed to clerk Bekhet during the said sales transaction on September 23, 2016. Decoy Soto's sworn, direct testimony is more credible than Respondents' counsel's assumption and the hearsay statement asserted by clerk Bekhet. The Respondents' speculation, unsupported by any evidence, is insufficient to establish that the operation was conducted unfairly.

PENALTY

The Department requested the Respondents' license be suspended for a period of 15 days, in light of the short length of licensure since June 16, 2014. The Respondents did not recommend a penalty in the event the accusation was sustained. The penalty recommended herein complies with rule 144.

ORDER

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

Dated: June 12, 2017



D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: <u>James A. [Signature]</u>
Date: <u>7/17/17</u>