

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

AB-9671

File: 47-467576; Reg: 17085335

BARNEY'S BURBANK, L.P.,
dba Barney's Beanery
250 North 1st Street, Suite 120,
Burbank, CA 91502-1858,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: September 6, 2018
Ontario, CA

ISSUED SEPTEMBER 18, 2018

Appearances: *Appellant:* Donna J. Hooper, of Solomon, Saltsman & Jamieson, as
counsel for Barney's Burbank, L.P.,

Respondent: John P. Newton, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

Barney's Burbank, L.P., doing business as Barney's Beanery, appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 20 days because its bartender sold alcoholic beverages to two minor decoys, in violation of Business and Professions Code section 25658, subdivision (a).

¹The decision of the Department, dated October 3, 2017, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general license was issued on August 5, 2008. There is one instance of prior discipline on the license, in 2015, for a sale of alcohol to a minor, in violation of Business and Professions Code section 25658(a).

On February 9, 2017, the Department filed a two-count accusation charging that on June 30, 2016, appellant's bartender, Madison Wiesler (the bartender), sold alcoholic beverages to two under-age individuals: 18-year-old Brendan David Panosian and 18-year-old Samvel Ekimyan. Although not noted in the accusation, both Panosian and Ekimyan were working as a minor decoys for the Burbank Police Department at the time.

At the administrative hearing held on July 13, 2017, documentary evidence was received, and testimony concerning the sale was presented by Burbank Police Detective Brittany Hensley; by Panosian (decoy #1); by Ekimyan (decoy #2); and by Alexander Sacher, Regional Manager for Barney's Beanery.

Testimony established that on June 30, 2016, Det. Hensley and her partner entered the licensed premises in plain clothes and sat at the bar. The two decoys entered a few moments later and stood at the bar to the right of Det. Hensley. The bartender asked the decoys what they wanted and they ordered two beers.

The bartender asked to see their identification and they each handed her their California driver's license. Both licenses had a portrait format. Decoy #1's ID showed his correct date of birth, showing him to be 18 years of age, and contained a red stripe indicating "AGE 21 IN 2019." (Exh. 6.) Decoy #2's ID showed his correct date of birth, showing him to be 18 years of age, and contained a red stripe indicating "AGE 21 IN 2018." (Exh. 4.) The bartender looked at both IDs then handed them back to the

decoys. She then poured two beers from a tap labeled Bud Light and served them to the decoys. Decoy #2 paid for the beers and both decoys subsequently exited the premises.

Det. Hensley contacted the bartender and identified herself as a police officer. She explained the violation, then escorted the bartender outside where she asked the two decoys to identify the person who sold them the beers. Both pointed at the bartender from a distance of approximately three to five feet.

The administrative law judge (ALJ) submitted his proposed decision on August 14, 2017, sustaining the accusation and recommending a 20-day suspension of the license. On September 20, 2017, the Department adopted the decision in its entirety, and a certificate of decision was issued on October 3, 2017.

Appellant then filed a timely appeal contending the ALJ erred by concluding there was no evidence that the decoys' law enforcement training and experience impacted their appearance or behavior.

DISCUSSION

Appellant contends the ALJ failed to proceed in a manner required by law when he concluded that there was no evidence that the two decoys' experience and training in law enforcement had an impact on their appearance or behavior. (AOB at pp. 5-8.)

Rule 141(b)(2)² provides:

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

²References to Rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

This rule provides an affirmative defense, and the burden of proof lies with appellant.

(*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

Appellant maintains the Department failed to proceed in the manner required by law when it certified the ALJ's proposed decision, in which the ALJ asserted that there was no evidence presented to support a rule 141(b)(2) defense, and specifically found that there was no evidence that the decoys' experience and training in law enforcement had an impact on their appearance and behavior. Appellant argued that the decoys' training and experience in law enforcement caused them to behave and present themselves in a mature manner, inconsistent with that of typical minors. (AOB at p. 6.)

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.

Appellant maintains that the facts in this case indicate unfairness in that the decoys appeared older than their true age of 18 because of their law enforcement experience. (AOB at p. 5.)

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

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

substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

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

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department's decision. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106 [28 Cal.Rptr.74].)

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

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

appearance, demeanor, and experience:

11. Ekimyan had been a cadet with Burbank P.D. for approximately one year prior to this operation, and an Explorer for two years before that. June 30, 2016 was his first time working as a decoy. He felt a little weird during the decoy operation since he had never entered any bars before. As a cadet, Ekimyan wore a uniform and, at times, dealt with the public. He believes that being a cadet has helped him be organized, be more responsible, learn to work as a part of a team, and develop leadership skills.

12. June 30, 2016 was Panosian's first time working as a decoy. He had been a cadet for approximately one year prior to the operation and currently works in the dispatch center. He believes he has a better concept of the law and is more mature and responsible since becoming a cadet.

¶ . . . ¶

15. Ekimyan 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 the Licensed Premises on June 30, 2016, Ekimyan displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Wiesler.

16. Panosian 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 the Licensed Premises on June 30, 2016, Panosian displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Wiesler.

(Findings of Fact, ¶¶ 11-16.) Based on these findings, the ALJ addressed appellant's

rule 141(a) and 141(b)(2) arguments:

7. The Respondent did not directly raise 141(b)(2) as a defense, at least at first. Rather, the Respondent argued that the operation violated rule 141(a) since it was not conducted in a manner which promoted fairness. The alleged unfairness, in the Respondent's view, was the decoys' appearance. The court of appeal in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (Garfield Beach CVS, LLC)*^[fn.] clearly held that:

“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.”^[fn.]

Elsewhere, the court of appeal makes clear that the notion of fairness does not authorize the creation of new defenses under rule 141 beyond those specified in rule 141(b).^[fn.] Thus, an argument that one or both of the decoys lacked the requisite appearance required by the rule must be analyzed by reference to rule 141(b)(2).

In this case, the Respondent argued that neither Ekimyan nor Panosian had the appearance generally expected of a person under the age of 21. Rather, based on their training and experience as cadets (and, in Ekimyan’s case, as an Explorer), their demeanor made them appear older than their actual age. This argument is rejected. Both Ekimyan and Panisian had the appearance of a typical 18 or 19 year old, consistent with their actual ages. There is no evidence that either one’s training and experience had any impact upon their appearance or their behavior. Moreover, since Wiesler did not testify, the impact of such training and experience upon Wiesler’s evaluation of their respective ages is speculative. (Findings of Fact ¶¶ 15-16.)

(Conclusions of Law, ¶ 7.)

The Board has repeatedly declined to substitute its judgment for that of the ALJ on this issue, and has on innumerable occasions rejected the “experienced decoy” argument. As the Board previously observed:

A decoy’s experience is not, by itself, relevant to a determination of the decoy’s apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. . . . There is no justification for contending that the mere fact of the decoy’s experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.

(Azzam (2001) AB-7631, at p. 5, emphasis in original.)

Appellant presented no evidence that the decoys' experience and training actually resulted in their displaying the appearance of persons 21 years old or older on the date of the operation in this case. The clerk did not testify. We cannot know what went through her mind in the course of the transaction, but we do know that she requested and was furnished both decoys' identification, with clear indications they were under 21, yet she made the sales anyway. Rather, appellant relies on a difference of opinion — its versus that of the ALJ — as to what conclusion the evidence in the record supports. Absent an evidentiary showing, this argument must fail. In Finding of Fact paragraphs 15-16, and Conclusions of Law paragraph 7, *supra*, the ALJ found that both decoys met the standard required by rule 141(b)(2).

We have reviewed the entire record and agree with the ALJ's determination that there was compliance with the rule. As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity to observe the decoys as they testify and to make a determination whether those decoys have an appearance which meets the requirement of rule 141 that they possess 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.

The evidence presented at the hearing, including the presence of the decoys themselves, clearly provided substantial evidence for finding that the decoys' appearance complied with the requirements of rule 141(b)(2). Ultimately, appellant is asking this Board to consider the same set of facts and reach a different conclusion, despite substantial evidence to support those findings. This we cannot do.

ORDER

The decision of the Department is affirmed.³

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

³This 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:**

**BARNEY'S BURBANK L. P.
BARNEY'S BEANERY
250 N. 1ST ST, STE 120
BURBANK, CA 91502-1858**

ON-SALE GENERAL EATING PLACE - LICENSE

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

VAN NUYS DISTRICT OFFICE

File: 47-467576

Reg: 17085335

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 September 20, 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 November 13, 2017, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: October 3, 2017



Matthew D. Botting
General Counsel

RECEIVED

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**Alcoholic Beverage Control
Office of Legal Services**

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Barney's Burbank L. P.
dba Barney's Beanery
250 N. 1st St., Ste. 120
Burbank, California 91502-1858

Respondent

On-Sale General Eating Place License

} File: 47-467576
}
} Reg.: 17085335
}
} License Type: 47
}
} Word Count: 19,000
}
} Reporter:
} Barbara Small
} California Reporting
}

PROPOSED DECISION

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Van Nuys, California, on July 13, 2017.

John P. Newton, Attorney, represented the Department of Alcoholic Beverage Control.

Donna J. Hooper, attorney-at-law, represented respondent Barney's Burbank L. P.

The Department seeks to discipline the Respondent's license on the grounds that, on or about June 30, 2016, the Respondent, through its agent or employee, sold, furnished, or gave alcoholic beverages to Brendan Panosian and Samvel Ekimyan, individuals 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 July 13, 2017.

FINDINGS OF FACT

1. The Department filed the accusation on February 9, 2017

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

2. The Department issued a type 47, on-sale general eating place license to the Respondent for the above-described location on August 5, 2008 (the Licensed Premises).

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

<u>Date Filed</u>	<u>Reg. No.</u>	<u>Violation</u>	<u>Penalty</u>
9/9/2015	15083032	BP § 25658(a)	10-day susp.

The foregoing disciplinary matter is final. (Exhibit 2.)

4. Samvel Ekimyan was born on July 29, 1997. He served as a minor decoy during an operation conducted by Burbank P. D. on June 30, 2016. On that date he was 18 years old.

5. Ekimyan appeared and testified at the hearing. On June 30, 2016, he was 6 feet tall and weighed 175 pounds. He wore dark blue jeans and a charcoal-gray polo shirt with a black t-shirt underneath. He wore a watch on his left wrist. (Exhibit 3.) His appearance at the hearing was the same, except that he weighed 10 pounds more.

6. Brendan Panosian was born on May 13, 1998. He served as a minor decoy during an operation conducted by Burbank P. D. on June 30, 2016. On that date he was 18 years old.

7. Panosian appeared and testified at the hearing. On June 30, 2016, he was 5'8" tall and weighed 170 pounds. He wore a red t-shirt, dark blue jeans, and Vans. His hair was cut short on the sides and longer on top. He wore a watch on his left wrist. (Exhibit 5.) At the hearing his appearance was the same.

8. On June 30, 2016, Det. Brittany Hensley (nee Henneberque) and her partner entered the Licensed Premises. They sat down at the bar counter. Ekimyan and Panosian entered a few moments later and approached the bar counter, standing to the right of Det. Hensley.

9. The bartender, Madison Wiesler, approached Ekimyan and Panosian and asked what they wanted. They ordered two beers. Wiesler asked to see their IDs. Ekimyan and Panosian handed their IDs (exhibits 4 & 6, respectively) to her. Wiesler looked at both IDs, then handed them back to Ekimyan and Panosian. Wiesler poured two beers from a tap labeled Bud Light and served them to Ekimyan and Panosian. Ekimyan paid for both beers. They subsequently exited the Licensed Premises.

10. Det. Hensley contacted Wiesler and identified herself. She explained the violation and escorted Wiesler outside. Det. Hensley asked Ekimyan and Panosian to identify the

person who sold them the beers. Both pointed to Wiesler. Ekimyan and Panosian were three to five feet from Wiesler at the time.

11. Ekimyan had been a cadet with Burbank P. D. for approximately one year prior to this operation, and an Explorer for two years before that. June 30, 2016 was his first time working as a decoy. He felt a little weird during the decoy operation since he had never entered any bars before. As a cadet, Ekimyan wore a uniform and, at times, dealt with the public. He believes that being a cadet has helped him be more organized, be more responsible, learn to work as a part of a team, and develop leadership skills.

12. June 30, 2016 was Panosian's first time working as a decoy. He had been a cadet for approximately one year prior to the operation and currently works in the dispatch center. He believes he has a better concept of the law and is more mature and responsible since becoming a cadet.

13. Det. Hensley helped select both decoys for use in the June 30, 2016 operation. She selected them because they were cadets in the right age range and were available on June 30, 2016. She indicated that she would not select a decoy who, in her opinion, appeared too old.

14. During the course of the operation, Ekimyan and Panosian visited a total of 28 locations. The Licensed Premises was the last of these. Both decoys entered all of the on-sale locations; they traded off entering the off-sale locations. A total of five locations sold alcoholic beverages to them during the course of the operation; no evidence was presented breaking down the sales by decoy. At least one of the other sales was made to Ekimyan.

15. Ekimyan 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 the Licensed Premises on June 30, 2016, Ekimyan displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Wiesler.

16. Panosian 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 the Licensed Premises on June 30, 2016, Panosian displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Wiesler.

17. Alexander Sacher, a regional manager for the Respondent, described the training provided to all employees when first hired, both in-house and using outside resources. (Exhibit B.) The employees who will be serving alcoholic beverages must undergo responsible beverage training and pass a written test and a practical test. The practical test includes having to ask for ID. A trainee who fails to ask for ID automatically fails the practical test. The Respondent's policy is to ask for ID from anyone who appears to be under 40. On busy nights, security personnel are posted at the door to check ID. The Respondent pays a bonus to any employee who spots a fake ID.

18. The Respondent has security cameras positioned to cover the Licensed Premises. The security company spot-checks the footage to ensure that the employees are complying with the law. The security company provides regular audit reports to management.

19. The Respondent's policy is to terminate any employee who sells alcoholic beverages to a minor. Wiesler was terminated as a result of this incident.

20. On March 30, 2017, Burbank P. D. conducted another decoy operation at the Licensed Premises. The Respondent did not sell alcohol to the decoy on that date. (Exhibit A.)

21. 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 Respondent's license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that, on June 30, 2016, the Respondent's employee, Madison Wiesler, inside the Licensed Premises, sold an alcoholic beverage to Brendan Panosian, a person under the

age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 6-10, 12-14, & 16.)

5. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that, on June 30, 2016, the Respondent's employee, Madison Wiesler, inside the Licensed Premises, sold an alcoholic beverage to Samvel Ekimyan, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-5, 8-11, & 13-15.)

6. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rules 141(b)(2)² and 141(b)(5) and, therefore, the accusation should be dismissed pursuant to rule 141(c). With respect to rule 141(b)(5), the Respondent argued that an effective face-to-face identification was not conducted since no one could recall where Wiesler was looking at the exact moment the decoys identified her. In this regard, the Respondent also argued that, because Wiesler was crying, she may not have been aware that she was being identified.

First, the evidence established that Det. Hensley explained the violation to Wiesler before escorting her outside to the location where Ekimyan and Panosian were waiting. Ekimyan and Panosian then identified her from a distance of three to five feet. (Finding of Fact ¶ 10.) All of the evidence indicates that Wiesler was aware that she had sold alcohol to two minors and that these were the minors in question.

Second, Rule 141(b) creates an affirmative defense, the burden of proof of which is on the Respondent. In this case, the Respondent did not present any evidence that Wiesler was unaware that she was being identified. The three witnesses who testified did not recall where Wiesler was looking during the identification process. In other words, she may or may not have been looking at the decoys—there is no evidence one way or another. Such ambiguous testimony falls well short of that required to prove an affirmative defense. Wiesler, the person best able to testify about her level of awareness, was not called as a witness. As such, the Respondent failed to meet its burden of proof on this issue.

7. The Respondent did not directly raise 141(b)(2) as a defense, at least at first. Rather, the Respondent argued that the operation violated rule 141(a) since it was not conducted in a manner which promoted fairness. The alleged unfairness, in the Respondent's view, was the decoys' appearance. The court of appeal in *Department of Alcoholic Beverage*

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

*Control v. Alcoholic Beverage Control Appeals Board (Garfield Beach CVS, LLC)*³
clearly held that:

“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.”⁴

Elsewhere, the court of appeal makes clear that the notion of fairness does not authorize the creation of new defenses under rule 141 beyond those specified in rule 141(b).⁵ Thus, an argument that one or both of the decoys lacked the requisite appearance required by the rule must be analyzed by reference to rule 141(b)(2).

In this case, the Respondent argued that neither Ekimyan nor Panosian had the appearance generally expected of a person under the age of 21. Rather, based on their training and experience as cadets (and, in Ekimyan's case, as an Explorer), their demeanor made them appear older than their actual age. This argument is rejected. Both Ekimyan and Panosian had the appearance of a typical 18 or 19 year old, consistent with their actual ages. There is no evidence that either one's training and experience had any impact upon their appearance or their behavior. Moreover, since Wiesler did not testify, the impact of such training and experience upon Wiesler's evaluation of their respective ages is speculative. (Findings of Fact ¶¶ 15-16.)

PENALTY

The Department requested that the Respondent's license be suspended for a period of 25 days on the basis that the violation at hand was the Respondent's second such violation in just over 13 months. The Respondent argued that its policies, training, and procedures (Findings of Fact ¶¶ 17-20) should be considered as mitigation. As such, if the accusation were to be sustained, the Respondent requested that its license be suspended for no more than 15 days.

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

⁴ *Id.* at 638, 213 Cal. Rptr. 3d at 138.

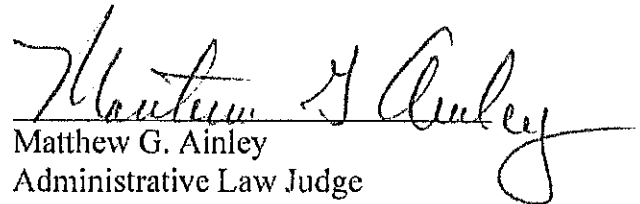
⁵ *Id.* at 640, 213 Cal. Rptr. 3d at 140.

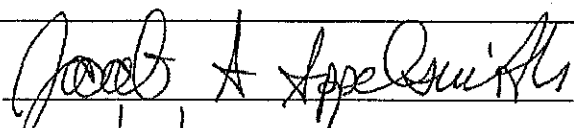
The Respondent has undertaken significant measures to prevent the sale of alcohol to minors—measures which should be recognized in formulating a penalty. Some of these measures have been in place for an extended period of time; some have been established or revised more recently. Unfortunately, no policy is effective unless it is followed. Two violations in the span of 13 months indicates that implementation and follow-through is a problem at the Licensed Premises. The penalty recommended herein complies with rule 144.

ORDER

The Respondent's on-sale general eating place license is hereby suspended for a period of 20 days.

Dated: August 14, 2017


Matthew G. Ainley
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: 9/20/17