

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

AB-9577

File: 20-408729 Reg: 15082796

7-ELEVEN, INC., HADY NAWABI, and NAZANIN NAWABI,
dba 7-Eleven #2237-16459E
2255 East Gerard Avenue,
Merced, CA 95340,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: June 7, 2018
Los Angeles, CA

ISSUED JULY 16, 2018

Appearances: *Appellants:* Donna J. Hooper, of Solomon Saltsman & Jamieson, as counsel for 7-Eleven, Inc., Hady Nawabi, and Nazanin Nawabi, doing business as 7-Eleven #2237-16459E.
Respondent: Colleen R. Villarreal as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc., Hady Nawabi, and Nazanin Nawabi, doing business as 7-Eleven #2237-16459E (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for five days because their clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

1. The decision of the Department, dated March 18, 2016, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 1, 2004. On July 21, 2015, the Department filed an accusation charging that appellants' clerk, Jesus Vega (the clerk), sold an alcoholic beverage to 19-year-old Donald King III on May 6, 2015. Although not noted in the accusation, King was working as a minor decoy for the Merced Police Department at the time.²

At the administrative hearing held on January 6, 2016, documentary evidence was received and testimony concerning the sale was presented by King (the decoy). Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises and went to a beer cooler. He removed a single 24-ounce can of Bud Light beer and took it to the sales counter area. When it was time to make his purchase, the decoy set his beer on the sales counter. The clerk asked the decoy for his identification. The decoy presented his identification to the clerk. Upon examining the identification, the clerk told the decoy he recalled the decoy from school. The decoy said "Really?" There was no further discussion between them. The clerk did not ask the decoy any questions regarding the decoy's age. The decoy paid for his beer, received some change, and exited the store.

2. At several points in his testimony, the decoy—the only witness—seemed uncertain whether the operation was conducted by the Department of Alcoholic Beverage Control or the Merced Police Department. (Compare, e.g., RT at p. 12 [stating he was working with the Department] with RT at p. 14 [report produced by Merced PD].) Upon questioning by Department counsel, however, the decoy stated the operation was conducted by the Merced Police Department. (RT at p. 33.)

Once outside the store, the decoy gave the can of beer and the change he received from the clerk to an awaiting police officer. The decoy remained outside the store as that officer entered the store. Within a few minutes, the decoy was escorted back inside the store by a different officer.

Upon his reentry, the decoy went to an office area inside the store where the store clerk and one or two officers were already present. The decoy came to hold his identification and the beer he purchased. He told the clerk that he, the decoy, was 19 years old and that the clerk had sold him a beer. Either immediately prior to or just after the decoy identified the clerk, a photo of the decoy and the clerk was taken.

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 record does not support the ALJ's finding that a face-to-face identification took place.

DISCUSSION

Appellants contend no face-to-face identification took place. They claim the decoy testified that "rather than identifying the clerk he posed for a picture and 'gave his line,'" which they argue is insufficient to satisfy the rule. (App.Br., at p. 4.) Appellants draw a distinction between the delivery of the decoy's so-called "line" and a legitimate face-to-face identification. (See App.Br., at p. 5.)

Appellants claim there is a "split of opinion" in the courts regarding rule 141(b)(5). (App.Br., at p. 6.) They compare the Second District Court of Appeal's decision in *Acapulco* and its much-cited "strict adherence" language with the Third District's decision in *Garfield Beach CVS*, which held, according to appellants, that the face-to-

face identification "could be done in pieces" provided the clerk knew or ought to have known he was being pointed out as the seller. (App.Br., at p. 7, comparing *Acapulco Restaurants, Inc. v. Alcoholic Bev. Control Appeals Bd.* (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126] with *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Garfield Beach CVS, LLC)* (2017) 18 Cal.App.5th 541 [226 Cal.Rptr.3d 527].)

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].)

Rule 141(b)(5) provides:

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.

(Code Regs., tit. 4, § 141(b)(5).) The rule provides an affirmative defense. The burden of proof is on the licensee to show noncompliance.

Appellants see a split of opinion where none exists. In *Acapulco*, it was undisputed that no face-to-face identification took place. (*Acapulco, supra*, at p. 579.)

The court rejected this Board's decision, which found that the rule applied "only when it is necessary to prevent a mistake in the description of the seller" and that no face-to-face identification was therefore required where "the officer was present at the time of the sale." (*Ibid.*) In essence, the Department, and the Board in upholding the Department's decision, had concluded that rule 141(b)(5) "applies in some situations but not others," and it was this position that the court overruled with its "strict adherence" language. (See *id.* at p. 581 [holding that the Department "does not have the right to ignore a duly adopted rule"].)

In *Garfield Beach CVS*, the court discussed *Acapulco* and its inapplicability to the facts of the case before it. As the *Garfield Beach CVS* court observed,

We do not disagree with the holding in *Acapulco*, based, as it is, on the dispositive and indisputable fact that the minor decoy did not identify the seller as plainly required by rule 141. Our disagreement is not with *Acapulco*, but with CVS's application of the case to the facts presented here. Indeed, the court in *Acapulco* acknowledged the limited scope of its holding. The court explicitly stated, "The concession in this case that no attempt was made to comply with rule 141, subdivision (b)(5), makes it unnecessary to decide what would constitute a sufficient effort to reenter or what would constitute a face-to-face identification by the decoy."

(*Garfield Beach CVS*, *supra*, at pp. 545-546.)

The court went on to reject the notion that rule 141(b)(5) requires any rigidly specific set of circumstances in order to satisfy the rule. It referred to the Fourth District Court of Appeal's decision in *7-Eleven, Inc.*, which held,

[Rule] 141, subdivision (b)(5), ensures—admittedly not as artfully as it might—that the seller will be given the opportunity, soon after the sale, to come "face-to-face" with the decoy. For reasons left to the sound discretion of the peace officer alone, or in conjunction with the business owner, [Rule] 141, subdivision (b)(5), does not require the identification be done on the premises where the sale occurred.

(*Garfield Beach CVS, supra*, at p. 531, quoting *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (7-Eleven, Inc.)* (2003) 109 Cal.App.4th 1687, 1698 [1 Cal.Rptr.3d 339].) The court adopted this interpretation and further held the rule "does not require the identification to be done within a certain distance." (*Garfield Beach CVS, supra*, at p. 531.)

Notably, the *Garfield Beach CVS* court emphasized the function of identification over the formality. The court wrote,

Here there is no violation of Rule 141, as explained above, because the decoy made a face-to-face identification by pointing out the clerk to the officer inside the store while approximately 10 feet from her, standing next to her when the officer informed her she had sold alcohol to a minor, and taking a photograph with her as the minor held the can of beer he purchased from her. She had ample opportunity to observe the minor and to object to any perceived misidentification. *The rule requires identification, not confrontation.*

(*Id.* at p. 547, emphasis added.)

On direct examination, the decoy testified to the events following the sale:

[BY MR. LEUDERS:] [D]id you ever go back into the store?

[THE DECOY:] Yes.

Q. And what did you do when you went back into the store?

A. Went into the office there and showed my ID again with the beer I had.

Q. And to whom did you show that ID and the beer?

A. To the clerk and told him what my line was.

Q. What did you tell him?

A. I told him I'm 19 and he just sold me a beer.

Q. And that occurred in the offices?

A. Yes.

Q. Was there anyone else inside the offices other than you and the clerk when you told him that?

A. Just the officers.

(RT at p. 10.) Based on this testimony, the ALJ made the following factual findings:

Upon his reentry, the decoy went to an office area inside the store where the store clerk and one or two officers were already present. The decoy came to hold his identification and the beer he purchased. He told the clerk that he, the decoy, was 19 years old and that the clerk had sold him a beer. Either immediately prior to or just after the decoy identified the clerk, a photo of the decoy and the clerk was taken.

(Findings of Fact, ¶ 8.) Based on this finding, the ALJ reached the following conclusion of law:

Respondents argued the decoy did not make an appropriate face-to-face identification of the clerk as required by Rule 141(b)(5). That contention has no merit. The evidence was that after the decoy purchased his beer, he exited the store. A few minutes later, he, escorted by a police officer, re-entered the store and went directly to an office area in the store. At that point, he informed the clerk that he was nineteen years old, and that he, the clerk, had just sold him, the decoy, the single can of beer. A photo of the decoy and clerk was taken immediately prior to or just after the decoy made his identification. (Exhibit 3.) Under these circumstances, the clerk knew, or should have known, that he was being identified by the decoy as a person who sold beer to the decoy. The clerk did not testify at the hearing so as to provide any evidence to support a contrary finding. During his testimony, the decoy did indicate that he did not identify the clerk when he re-entered the store. However, in the context of his entire testimony, it was clear the decoy meant that he did not immediately identify the selling clerk upon his re-entering the store, but that the face-to-face identification occurred a few moments later when the decoy, police officers, and clerk were all gathered together in the office of the 7-Eleven store.

(Conclusions of Law, ¶ 7.)

Appellants maintain that no identification took place. They argue,

Here we have a situation where there is no evidence that [the] decoy ever actually identified the clerk at all. It remains a mystery how the officer knew what clerk sold the decoy the beer and ended up in the office with him. Indeed, it is unclear that they had the correct clerk. [The decoy] testified very clearly that he did not describe the clerk to the officers or

give the officers the clerk[']s name. He also testified that he did not identify the clerk to the officers ever after re-entering the premises. He testified that he posed for a picture and delivered a "line" but he never testified that he identified the clerk.

(App.Br., at p. 7.) Appellants demand the rigid formality rejected in *Garfield Beach CVS*.

There is no evidence the clerk was misidentified, and appellants made no such contention at the administrative hearing. Moreover, there is no evidence that the clerk objected to the decoy's "line" identifying him as the seller. In fact, this so-called "line," which brought the decoy and the clerk face-to-face *and* clearly identified the clerk as the seller, was itself sufficient to satisfy the requirements of the rule. Appellants' insistence otherwise is without merit.

ORDER

The decision of the Department is affirmed.³

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

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

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

APPENDIX

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

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

7-ELEVEN INC., HADY NAWABI AND NAZANIN
NAWABI
7-ELEVEN STORE 2237-16459E
2255 E. GERARD AVE
MERCED, CA 95340

OFF-SALE BEER AND WINE - LICENSE

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

STOCKTON DISTRICT OFFICE

AB-9577

File: 20-408729

Reg: 15082796

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 January 27, 2016. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

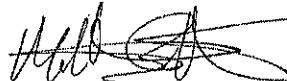
Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date 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 April 28, 2016, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: March 18, 2016



Matthew D. Botting
General Counsel

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ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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

IN THE MATTER OF THE ACCUSATION AGAINST:

7-Eleven Inc., Hady Nawabi, and Nazanin Nawabi	}	File: 20-408729
dba 7-Eleven Store 2237-16459E	}	
2255 E. Gerard Ave.	}	Reg.: 15082796
Merced, CA 95340	}	
	}	License Type: 20
Respondents	}	
	}	Word Count: 8,600
	}	
	}	Reporter:
	}	Laura D. Fowler, CSR 7054
	}	Fowler Reporting Service
	}	
<u>Regarding Their Off-Sale Beer and Wine License.</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter in Merced, California, on January 6, 2016.

Dean Lueders, Attorney III, represented the Department of Alcoholic Beverage Control.

Michaelangelo Tatone, Esq., of Solomon, Saltsman, and Jamieson, represented all co-licensees, including Hady Nawabi, who was present at the hearing.

The Department seeks to discipline the Respondents' license on the grounds that, on or about May 6, 2015, the Respondents, through their agent or employee, Jesus Vega, sold, furnished, or gave, or caused to be sold, furnished, or given, an alcoholic beverage to Donald King III, a person under the age of 21, in violation of California 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 by the parties and submitted for decision on January 6, 2016.

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

FINDINGS OF FACT

1. The Department filed the accusation on July 21, 2015. (Exhibit 1.)
2. The Department issued a type 20 off-sale beer and wine license to the Respondents for the above-described location on March 1, 2004.
3. There is no record of any prior departmental discipline against the Respondents under this license since its issuance.
4. Donald King III (hereafter "the decoy") was born on October 26, 1995. On May 6, 2015 he was 19 years old. On that date, he served as a minor decoy for law enforcement.
5. On May 6, 2015 the decoy was 5'7" tall and weighed approximately 220 pounds.² He wore a blue colored t-shirt with a "Make-A-Wish" logo on it, a darker blue or black jacket with the word "Merced" on or near the left breast pocket area, blue jeans, and shoes. His hair was medium blonde with medium length. He had a slightly receding hairline. (Exhibit 3.) He had a faintly appearing moustache. His overall appearance at the hearing was basically the same, or very similar to, his appearance on the date of the decoy operation.
6. On May 6, 2015, the decoy entered the Respondents' store at 2255 E. Gerard Avenue, Merced, California and went to a beer cooler. He removed a single 24 ounce can of Bud Light beer and took it to the sales counter area. When it was time to make his purchase, the decoy set his beer on the sales counter. The clerk, Jesus Vega, asked the decoy for his identification. The decoy presented his identification to the clerk. (Exhibit 2.) Upon examining the identification, the clerk told the decoy he recalled the decoy from school. The decoy said "Really?" There was no further discussion between them. The clerk did not ask the decoy any questions regarding the decoy's age. The decoy paid for his beer, received some change, and exited the store.³
7. Once outside the store, the decoy gave the can of beer and the change he received from the clerk to an awaiting police officer. The decoy remained outside the store as that officer entered the store. Within a few minutes, the decoy was escorted back inside the store by a different officer.

² The decoy, Donald King III, appeared and testified at the hearing about his part in the investigation.

³ The decoy did not immediately recognize the clerk as a former classmate when he was at the store. At the administrative hearing, the decoy tentatively thought that he and the clerk may have attended the same junior high school, and that the clerk may have been one or two years older than he.

8. Upon his reentry, the decoy went to an office area inside the store where the store clerk and one or two officers were already present. The decoy came to hold his identification and the beer he purchased. He told the clerk that he, the decoy, was 19 years old and that the clerk had sold him a beer. Either immediately prior to or just after the decoy identified the clerk, a photo of the decoy and clerk was taken. (Exhibit 3.)

9. As of May 6, 2015, the decoy was a police explorer for about five months. He was asked by the Merced Police Department to serve as a decoy, and he agreed. This was the decoy's first decoy operation. On May 6, 2015 he went to over five stores, and believed Respondents' store was the third one he visited. He did not feel nervous when acting as a decoy that day. He believed that a citation was issued to the selling clerk, but was not sure of that fact. He does not regularly shave. He may shave every two weeks to one month.

10. The decoy, Donald King III, appeared his actual age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of 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.

11. 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 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. Under California Code of Regulations, Title 4, Division 1, Article 22, section 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.

5. Cause for suspension or revocation of Respondent's license exists under Article XX, section 22 of the California State Constitution and Business and Professions Code sections 24200(a) and (b) because on May 6, 2015, Respondents' employee, agent or sales clerk, Jesus Vega, inside the Licensed Premises, sold beer, an alcoholic beverage, to Donald King III, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-7.)

6. Respondents contended the decoy did not meet the appearance standard set forth under Rule 141(b)(2) because on the date of the investigation, he appeared to have a receding hairline, was 5'7" tall, weighed 220 pounds, was not particularly nervous when in the store, had explorer scout experience, and possessed some element of facial hair. However, this was also the decoy's first occasion acting as a decoy.

He had only been a police explore for about five months prior to the date of the operation. His height and weight alone did not, in this case, make him look particularly older than his age. Whatever facial hair he had was of such subtle degree to be immaterial to his outward appearance. Lastly, upon viewing the decoy in person as he testified at the hearing and upon examination of the photograph taken of him and the clerk the night of the operation, the individual factors Respondents noted did not cumulatively result in the decoy having a disqualifying appearance. As the selling clerk did not testify at the hearing, there was no evidence presented as to his perspective of the decoy's appearance the night of the violation. When all of the elements of the decoy's appearance are weighed together, including such added factors as his demeanor, mannerisms, persona, and poise, the decoy's overall appearance met the appearance standard set forth in Rule 141(b)(2). (Finding of Fact ¶ 10.)

7. Respondents argued the decoy did not make an appropriate face-to-face identification of the clerk as required by Rule 141(b)(5). That contention has no merit. The evidence was that after the decoy purchased his beer, he exited the store. A few minutes later, he, escorted by a police officer, re-entered the store and went directly to an office area in the store. At that point, he informed the clerk that he was nineteen years old, and that he, the clerk, had just sold him, the decoy, the single can of beer. A photo of the decoy and clerk was taken immediately prior to or just after the decoy made his identification. (Exhibit 3.) Under these circumstances, the clerk knew, or should have known, that he was being identified by the decoy as a person who sold beer to the decoy. The clerk did not testify at the hearing so as to provide any evidence to support a contrary finding. During his testimony, the decoy did indicate that he did not identify the clerk when he re-entered the store. However, in the context of his entire testimony, it was clear the decoy meant that he did not immediately identify the selling clerk upon his re-entering the store, but that the face-to-face identification occurred a few moments later when the decoy, police officers, and clerk were all gathered together in the office of the 7-Eleven store.

8. Respondents contended there was a violation of Rule 141(b)(4) which states, "A decoy shall answer truthfully any questions about his or her age." Respondents argue that when the clerk mentioned to the decoy that he knew him from school, the decoy was under a duty to reveal his age to the clerk. This argument clearly lacks merit. The clerk never asked the decoy any question to specifically ascertain the decoy's age. At most, the sales clerk merely conveyed to the decoy that he recognized the decoy as a fellow student from some point in their history. The clerk's comment could not be reasonably construed a question designed to have the decoy convey his age to the clerk. Therefore, it did not trigger the decoy's obligation under Rule 141(b)(4) to reveal his age to the clerk.⁴

⁴ The clerk had already asked for, and had the decoy's identification in hand. That identification plainly stated the decoy would be 21 in 2016. Therefore, there was no particular reason for the clerk herein to verbally ask the decoy his age.

PENALTY

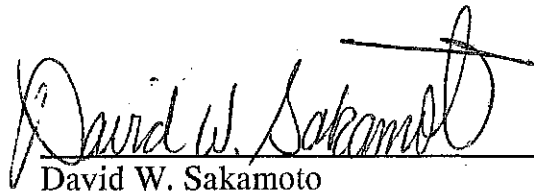
1. In assessing an appropriate measure of discipline, the Department's penalty guidelines are in California Code of Regulations, Title 4, Division 1, Article 22, section 144, commonly referred to as Rule 144. Under that rule, the presumptive penalty for giving, furnishing, or selling an alcoholic beverage to a minor 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. Under Rule 144, the length of licensure at the premises without prior discipline or problems is a specifically mentioned factor in mitigation. In this instance, Respondents have been licensed since 2004 with no prior disciplinary history. Noting this factor, the Department recommended a mitigated penalty of a 10 day license suspension. Respondents pointed out no added factor in mitigation, but asserted a 5 day suspension, with all 5 days stayed, was an appropriate penalty, if the accusation was sustained. In assessing and weighing the mitigating factor present in this case, the penalty recommendation below reflects an appropriate measure of adjustment downward from the presumptive penalty set forth in Rule 144.

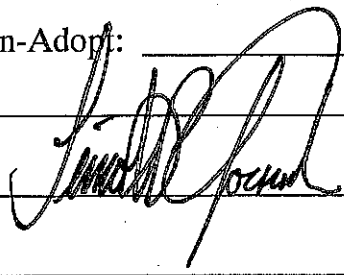
ORDER

Respondents' off-sale beer and wine license is hereby suspended for 5 days.

Dated: January 27, 2016

A handwritten signature in cursive script, reading "David W. Sakamoto", is written over a horizontal line. The signature is written in dark ink and is positioned to the right of the center of the page.

David W. Sakamoto
Administrative Law Judge

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