

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

AB-9716

File: 20-539290; Reg: 17085722

7-ELEVEN, INC., PATRICK JOSEPH TERO, and RAUDEBETTE LLEVA TERO,
dba 7-Eleven Store #268-27122B
1124 6th Street, Taft, CA 93268,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: January 10, 2019
Ontario, CA

ISSUED JANUARY 31, 2019

Appearances: *Appellants:* Ralph Barat Saltsman and David Brian Washburn, of
Solomon, Saltsman & Jamieson, as counsel for 7-Eleven, Inc.,
Patrick Joseph Tero, and Raudebette Lleva Tero,

Respondent: Colleen R. Villareal, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

7-Eleven, Inc., Patrick Joseph Tero, and Raudebette Lleva Tero, doing business as 7-Eleven Store #268-27122B, 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 under Government Code section 11517, subdivision (c), dated June 1, 2018, is set forth in the appendix, as is the Proposed Decision of the administrative law judge (ALJ), dated December 1, 2017.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 18, 2013 and there is no record of prior departmental discipline against the license.

On July 5, 2017, the Department filed a single-count accusation against appellants charging that, on November 1, 2016, appellants' clerk, Tali Scanlan, sold an alcoholic beverage to 18-year-old James Murphy. Although not noted in the accusation, Murphy was working as a minor decoy for the Kern County Sheriff's Department at the time.

At the administrative hearing held on November 14, 2017, documentary evidence was received and testimony concerning the sale was presented by Murphy (the decoy); by Kern County Sheriff's Deputy Corey Stacy; by Scanlan, the clerk; and by one of the co-licensees, Raudebette Lleba Tero.

Testimony established that on November 1, 2016, the decoy entered the licensed premises and went to the coolers where he selected a 3-pack of Bud Light beer. He took the beer to the counter, stood in line, and when it was his turn the clerk rang up the sale without asking for identification and without asking any age-related questions. The decoy exited the premises with the beer and met with several deputies outside.

One of the deputies entered the premises and contacted the clerk. Deputy Stacey and another deputy entered, followed immediately thereafter by the decoy. Deputy Stacey asked the decoy to identify the person who sold him the beer. The decoy pointed at the clerk and said "she did." The decoy and clerk were approximately 5 feet apart and facing each other when the identification took place. A photo of the two of them was taken (exh. 2), after which the clerk was cited.

Testimony established that the cash register prompts the clerk to ask for identification when an age-restricted product is rung up. To complete the sale, the clerk must either swipe an ID, enter a date of birth, or press a button labeled “visual ID.” After the sale to the decoy, appellants modified the register to remove the visual ID button. (FF ¶ 14.) Testimony was also submitted regarding training of appellants’ employees.

On December 1, 2017, the administrative law judge (ALJ) issued a proposed decision, dismissing the accusation on the basis that the face-to-face identification of the clerk by the decoy did not comply with rule 141(b)(5).

On December 7, 2018, the parties were advised that the proposed decision had not been adopted by the Department and that the submission of comments on the decision was invited. Counsel for appellants submitted comments arguing that the proposed decision should be adopted. Counsel for the Department submitted comments arguing that the proposed decision should be rejected, that the accusation should be sustained, and that a penalty of 15-days’ suspension should be imposed.

Thereafter, on January 23, 2018, the proposed decision was rejected by the Department. The Notice Pursuant to Government Code Section 11517(c)(E)(I), dated March 13, 2018, invited the parties to submit written argument by April 13, 2018. In particular, the parties were asked to address the issue of whether there was compliance with rule 141(b)(5). Both appellants and the Department submitted briefs.

Subsequently, on June 1, 2018, the Department issued its Decision Under Government Code Section 11517(c), sustaining the accusation and suspending appellant’s license for 15 days.

Appellants then filed a timely appeal contending: (1) The Department abused its

discretion when it failed to consider mitigating circumstances when determining the penalty, and (2) the Department failed to articulate the reasoning supporting its penalty decision. (AOB at pp. 6-11.) These issues will be discussed together.

DISCUSSION

The Board will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) "Abuse of discretion" in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.] (*Brown v. Gordon*, 240 Cal.App.2d 659, 666-667 (1966) [49 Cal.Rptr. 901].) If the penalty imposed is reasonable, the Board must uphold it even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Rule 144 provides:

In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act (Bus. and Prof. Code Sections 23000, et seq.), and the Administrative Procedures Act (Govt. Code Sections 11400, et seq.), the Department shall consider the disciplinary guidelines entitled "Penalty Guidelines" (dated 12/17/2003) which are hereby incorporated by reference. Deviation from these guidelines is appropriate where the Department in its sole discretion determines that the facts of the particular case warrant such a deviation - such as where facts in aggravation or mitigation exist.

(Cal. Code Regs., tit. 4, § 144.)

Among the mitigating factors provided by the rule are the length of licensure without prior discipline, positive actions taken by the licensee to correct the problem,

cooperation by the licensee in the investigation, and documented training of the licensee and employees. Aggravating factors include, *inter alia*, prior disciplinary history, licensee involvement, lack of cooperation by the licensee in the investigation, and a continuing course or pattern of conduct. (*Ibid.*)

The Penalty Policy Guidelines further address the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

Penalty Policy Guidelines:

The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

(*Ibid.*)

In the decision, the Director addresses the issue of penalty and explains the factors considered by the Department in determining the 15-day suspension:

12. The Department requested a 15-day suspension of the license. Respondents argued that, if the accusation is sustained, a mitigated penalty of a 10-day suspension all stayed is warranted based upon the training program and actions taken subsequent to the violation occurring. This was Respondents' first offense for selling alcohol to a minor. The license had been issued for approximately 3 ½ years at the time of the offense, with no prior discipline. Despite the training provided, the clerk here did not ask for either identification or age at the time of the sale. There is no basis for either mitigation or aggravation. The following discipline is consistent with Rule 144.

(Conclusions of Law, ¶ 12.)

As we have said time and again, this Board's review of a penalty looks only to see whether it can be considered reasonable, and, if it is reasonable, the Board's inquiry ends there. The extent to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion — pursuant to rule 144 — and the Board may not interfere with that discretion absent a clear showing of abuse of discretion.

Appellants acknowledge that the decision addresses the evidence they presented in support of mitigating the penalty, but complain that the Department “did not articulate why it did not find the mitigating evidence relevant or convincing in its decision imposing the penalty.” (AOB at p. 2.) Appellants assert this violates *Topanga* which states: “[I]mplicit in [the law] is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order.” (*Topanga Assn. for a Scenic Community v. Co. of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836].)

Unless some statute requires it, an administrative agency's decision need not include findings with regard to mitigation. (*Vienna v. Cal. Horse Racing Bd.* (1982) 133 Cal.App.3d 387, 400 [184 Cal.Rptr. 64]; *Otash v. Bureau of Private Investigators* (1964) 230 Cal.App.2d 568, 574-575 [41 Cal.Rptr. 263].) Appellants have not pointed out a statute with such requirements. Findings regarding the penalty imposed are not necessary as long as specific findings are made that support the decision to impose disciplinary action. (*Williamson v. Bd. of Med. Quality Assurance* (1990) 217 Cal.App.3d 1343, 1346-1347 [266 Cal.Rptr. 520].)

This Board has repeatedly rejected the very same interpretation of *Topanga* that appellants now advocate. (See, e.g., *Mtanos Hawara & Susan Issa Hawara* (2015)

AB-9512 at pp. 7-9; *Garfield Beach CVS, LLC/Longs Drug Store Cal., LLC* (2013)

AB-9236, at pp. 3-4.) With regard to factual findings supporting the actual charges — *not* the penalty imposed — this Board has said:

If this Board observes that the evidence appears to contradict the findings of fact, it will review the ALJ's analysis — assuming some reasoning is provided — to determine whether the ALJ's findings were nevertheless proper. Should this Board be faced with evidence clearly at odds with the findings and no explanation from the ALJ as to how he or she reached those findings, this Board will not hesitate to reverse. . . . While an ALJ may better shield himself against reversal by thoroughly explaining his reasoning, he is not required to do so. The omission of analysis alone is not grounds for reversal, provided findings have been made.

(*Garfield Beach CVS, LLC/Longs Drug Stores Cal., LLC* (2015) AB-9514, at pp. 6-7.)

However, the Board has firmly clarified that it will not widen this holding to include the penalty:

We emphasize that this above language does *not* extend to the penalty. No “analytical bridge” of any sort is required in imposing a penalty. Provided the penalty is reasonable, this Board will have no cause to retrace the ALJ's reasoning.

(*Hawara, supra* at p. 9.)

Appellants have not established that the Department abused its discretion by imposing a 15-day penalty in this matter.

ORDER

The decision of the Department is affirmed.²

MEGAN McGUINNESS, ACTING CHAIR
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This 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., Patrick Joseph Tero &
Raudebette Lleva Tero
dba 7-Eleven Store #268-27122B
1124 6th St.
Taft, California 93268

Licensee(s).

File No.: 20-539290

Reg. No.: 17085722

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Alcoholic Beverage Control
Office of Legal Services

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department on June 1, 2018, for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held on November 14, 2017, before Administrative Law Judge Matthew G. Ainley, and the written argument of the parties, and good cause appearing, the following decision is hereby adopted:

The Department seeks to discipline the Respondents' license on the grounds that, on or about November 1, 2016, the Respondents, through their agent or employee, sold, furnished, or gave alcoholic beverages to James Murphy, 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 November 14, 2017.

FINDINGS OF FACT

1. The Department filed the accusation on July 5, 2017.
2. The Department issued a type 20, off-sale beer and wine license to the Respondents for the above-described location on December 18, 2013 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.

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

4. James Murphy was born on August 6, 1997. He served as a minor decoy during an operation conducted by the Kern County Sheriff's Department on November 1, 2016. On that date he was 18 years old.
5. Murphy appeared and testified at the hearing. On November 1, 2016, he wore blue jeans, a black hooded sweatshirt with a white t-shirt beneath it, and tennis shoes. (Exhibits 2 & E.)
6. On November 1, 2016, Murphy entered the Licensed Premises. He walked to the beer coolers and selected a 3-pack of Bud Light beer. He took the beer to the front counter, where he had to stand in line. When it was his turn, the clerk, Tali Scanlon, rang up the sale. Murphy paid, Scanlon gave him some change, then Murphy exited with the beer. Scanlon did not ask to see any ID nor did she ask any age-related questions.
7. Outside, Murphy met up with various deputies. One of the deputies entered, walked over to the side of the counter (between the end of the counter and the front glass), and contacted Scanlon. Scanlon, who was helping some customers, turned toward the deputy. On the video, they appear to engage in a conversation. Dep. Corey Stacy and a uniformed deputy entered, immediately followed by Murphy. Dep. Stacy asked Murphy to identify the person who sold him the beer. Murphy pointed to Scanlon and said, "She did."
8. Murphy testified that, at the time of the identification, he was standing in the same general area where he had purchased the beer. He further testified that he and Scanlon were approximately five feet apart. Dep. Stacy testified that the identification took place at the counter.
9. Dep. Stacy asked Scanlon to come out from behind the counter, which she did. On the video, a second clerk takes over the register and completes the pending sale. Dep. Stacy took a photo of Murphy and Scanlon, after which Scanlon was cited.
10. Video file 20161102_0009_0354_119.m4v (Exhibit E) clearly shows the deputies and Murphy entering the premises and the identification process from a vantage point above the door, looking toward the counter. The first deputy approaches the side of the counter and gets Scanlon's attention. As Dep. Stacy and Murphy (together with the uniformed deputy) enter the premises, she looks toward them and places her hand over her face as she lowers her head. When she raises her head and removes her hand from her face, she is looking directly toward Dep. Stacy and Murphy as each of them point toward her. Dep. Stacy and Murphy then move to the side of the counter where the other plain-clothed deputy, who first contacted Scanlon, was standing, as Scanlon walks from behind the counter to meet with them. This all occurs within close proximity to the cash register, and general area, where the transaction occurred.

11. The next video file in sequence (20161102_0009_0354_120.m4v) shows Scanlon returning to a room behind the counter to retrieve her identification, which she is holding in her hand as she returns to stand between Dep. Stacy and Murphy. The next video file in sequence (20161102_0009_0354_121.m4v) shows Dep. Stacy speaking with Scanlon, Scanlon turning toward Murphy, and the three of them moving out of frame to an area to the left of the counter. This same activity is shown from a different angle in video file 20161102_0009_0354_136.m4v. In that video, Dep. Stacy is seen taking a photo of Murphy and Scanlon, who are out of the frame.

12. Co-licensee Raudebette Tero testified about the training all employees receive when first hired. This includes computer-based training, followed by a test which the employees must pass. (Exhibit C.) All employees also undergo on-the-job training, which she sometimes conducts.

13. The Respondents have posted signs throughout the Licensed Premises (a) informing customers that they check ID and (b) reminding employees to check ID. (Exhibit B.) The Respondents use a secret shopper program and reward employees with a \$20 cash bonus each time they pass a secret shopper visit.

14. The register prompts the clerks to check ID whenever an age-restricted product is rung up. To complete the sale, the clerk must swipe an ID, enter a date of birth, or press a button labeled "visual ID." After the sale to Murphy, the Respondents modified the register to remove the visual ID button.

15. On November 1, 2016, Murphy visited four locations, two of which sold alcoholic beverages to him (including the Licensed Premises). Prior to November 1, 2016, he had been on 30 to 35 different operations (both decoy and shoulder tap), visiting six to ten locations each time.

16. Murphy learned of the decoy program through his role as an Explorer. As of the hearing, Murphy had been an Explorer for approximately 3½ years and had risen to the rank of sergeant. Murphy's duties as an Explorer included volunteering at least eight hours a month at the station and working various community events.

17. Murphy 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 November 1, 2016, Murphy displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Scanlon.²

² The Department did not ask any questions about Murphy's appearance. The Respondents asked only a couple of questions about Murphy's appearance, both relating to the sweatshirt he was wearing. The Department introduced a photo of Murphy and Scanlon (exhibit 2), while the Respondent introduced a video of the incident

18. 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 November 1, 2016, the Respondents' clerk, Tali Scanlan, inside the Licensed Premises, sold an alcoholic beverage to James Murphy, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-11.)
5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(5)³ and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that, based on the video, there was no face-to-face identification.
6. The testimony makes clear that Murphy identified Scanlon when he re-entered. The video supports this testimony—Murphy and Dep. Corey Stacy speak to each other, Murphy appears to point, then Dep. Stacy points; Scanlon is looking directly toward them when this identification occurs. While this identification occurs near the door, it is close to the sales counter. In addition, when the three of them stand together at the side of the counter, the video shows that Scanlon looks toward Murphy as Dep. Stacy is speaking with her. Murphy and Scanlon then move to the side while Dep. Stacy takes a photo of the two of them together. The video clearly

(exhibit E). Neither party asked any questions about Murphy's height, weight, clothing (other than the sweatshirt), mannerisms, or behavior. Accordingly, this finding is based on the photograph, the video, and the ALJ's observations of Murphy at the hearing.

³ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

shows that Murphy identified Scanlon. Further, although Scanlon testified that she did not see the decoy come back into the store or identify her, she also testified that she realized she had sold alcohol to a minor when she saw the deputies enter the store, effectively acknowledging her awareness of the situation. Similarly, Scanlon was well aware that she had been identified as the seller of the alcoholic beverages when she and Murphy were photographed standing next to each other. Finally, at no time did Scanlon indicate or assert that she had been misidentified as the seller. Notwithstanding some minor differences in testimony, the totality of circumstances further establish that the entirety of the process, from the identification by Murphy as he entered the premises to the interaction at the counter to the photograph of Murphy and Scanlon together, is compliant with Rule 141(b)(5). (Findings of Fact ¶¶ 4-11.)

7. Upon review of the proposed decision, Respondents argue that the identification process is inconsistent with rulings from the Courts of Appeal. Most recently, in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board; Garfield Beach CVS, LLC* (2017) 226 Cal.Rptr.3d 527, the Court of Appeal upheld the Department's determination that there was compliance with the identification process required by Rule 141 in facts similar to those here. The Court described the identification process there as follows:

“The peace officer accompanied Christian [the decoy] back inside the store and asked him to identify the clerk. Christian identified the clerk standing behind the counter when he was about 10 feet away from her. He believed the clerk was either helping a customer or just finishing helping a customer. He did not speak to her.

“The peace officer informed the clerk she had sold alcohol to a minor. Christian was standing next to the peace officer at the time. According to Christian, she kind of ‘freaked out’ and apologized. The peace officer took Christian’s picture with the clerk, beer in Christian’s hand. There was no evidence Christian misidentified the clerk and she never claimed she did not sell alcohol to the minor decoy. She did not testify.” (*Id.*, at 528.)

8. Respondent’s argument here of non-compliance with Rule 141(b)(5) is erroneous in light of the CVS decision. In the CVS decision, the Court directly addressed the contention that *Acapulco (Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board* (1998) 67 Cal.App.4th 575) compels a finding of non-compliance under the facts presented there and made the following observations:

“CVS attempts to divorce the facts of *Acapulco* from the harsh language it extracts from the holding. But the facts, of course, are determinative. First and foremost, CVS ignores the dispositive fact that in *Acapulco* the decoy minor did not identify the clerk who sold him the beer. [Citation.] The question was not, as it is here, whether the identification was face-to-face because there was no identification at all. . . .

“Thus, on these facts, the court stated, ‘Since it is undisputed that the required face-to-face identification by the decoy was not made in this case, it follows ineluctably that Acapulco’s defense was established as a matter of law. As Acapulco puts it, when a rule requires certain affirmative acts by law enforcement, law enforcement must comply.’ [Citation.] . . . Because it was undisputed there was no face-to-face identification and that Rule 141, subdivision (b)(5) provides a defense when there is a failure to comply, Acapulco’s suspension could not stand. [Citation.]

“CVS, ostensibly applying *Acapulco*, insists that the rule ‘means what it says’ and it plainly says the minor decoy must make a face-to-face identification of the person who sells the minor the alcohol. 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.’ [Citation.]” (*CVS, supra*, 226 Cal.Rptr.3d at 529-530; underlining added; italics in original.)

9. While Respondents continue to advance the argument that *Acapulco* is the appropriate standard, they further argue that the identification process here fails even under the *CVS* standard. The position advanced is that the testimony is in conflict, that the clerk testified that she was not identified by the decoy, and that the video shows non-compliance. As stated above, the video clearly establishes that the clerk was aware that the decoy was identifying her, or at least in a position that she should have been aware. Moreover, looking at the entirety of the process, it is clear that the minor decoy identified clerk Scanlon.

10. The purposes behind the identification requirement of Rule 141(b)(5) are twofold. First, it ensures that the law enforcement officer conducting the investigation is made aware of who sold or furnished the alcoholic beverage to the minor decoy. Second, it affords the seller/furnisher of the alcohol an opportunity to object to any misidentification. Both of these purposes serve a sound policy justification within the context of minor decoy operations to advance the principal that they are conducted in a fair manner, and it is one of the five enumerated standards of fairness as required by Rule 141(a). The face-to-face identification requirement is not, however, to be viewed as a slice of time within a decoy operation. Rather, it is to be considered in the context of the entirety of the post-sale/furnishing interaction between officers, the minor decoy, and the seller/furnisher. Similarly, nothing in the Rule requires even that the identification process involve the minor decoy physically pointing out the person who sold or furnished the alcoholic beverages. As the Court in *CVS* held, “The rule requires identification, not

confrontation.” (CVS, *supra*, 226 Cal.Rptr3d, at 531.) The identification here meets the letter and the purposes of Rule 141.

11. Unusually for a decoy case, the Respondents did not raise the decoy’s appearance as an issue in their closing argument. While the Appeals Board, in multiple cases, has indicated that ALJs should make findings about the decoy’s appearance in their proposed decisions, this is not required when it has been waived as an issue. Notwithstanding this, the ALJ included Finding of Fact ¶ 17 in this decision. However, since the Respondents did not raise rule 141(b)(2) during the course of the hearing, it has been waived and Murphy’s appearance is **not** at issue.

12. The Department requested a 15-day suspension of the license. Respondents argued that, if the accusation is sustained, a mitigated penalty of a 10-day suspension all stayed is warranted based upon the training program and actions taken subsequent to the violation occurring. This was Respondents’ first offense for selling alcohol to a minor. The license had been issued for approximately 3 ½ years at the time of the offense, with no prior discipline. Despite the training provided, the clerk here did not ask for either identification or age at the time of the sale. There is no basis for either mitigation or aggravation. The following discipline is consistent with Rule 144.

ORDER

The accusation is sustained. Respondents’ off-sale beer and wine license is suspended for 15 days.

Sacramento, California

Dated: June 1, 2018



for Jacob A. Appelsmith
Director

Pursuant to Government Code section 11521(a), any party may petition for reconsideration of this decision. The Department’s power to order reconsideration expires 30 days after the delivery or mailing of this decision, or on the effective date of the decision, whichever is earlier.

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9, of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

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

IN THE MATTER OF THE ACCUSATION AGAINST:

7-Eleven Inc., Patrick Joseph Tero & Raudebette Lleva Tero dba 7-Eleven Store #268-27122B 1124 6 th St. Taft, California 93268	}	File: 20-539290
	}	Reg.: 17085722
	}	License Type: 20
Respondents	}	Word Count: 18,000
	}	Reporter:
	}	Justyne Johnson
	}	Kennedy Court Reporters
<u>Off-Sale Beer and Wine License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Bakersfield, California, on November 14, 2017.

Colleen R. Villarreal, Attorney, represented the Department of Alcoholic Beverage Control.

Donna J. Hooper, attorney-at-law, represented respondents 7-Eleven Inc., Patrick Joseph Tero, and Raudebette Lleva Tero. Raudebette Tero was present at the hearing.

The Department seeks to discipline the Respondents' license on the grounds that, on or about November 1, 2016, the Respondents, through their agent or employee, sold, furnished, or gave alcoholic beverages to James Murphy, 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 November 14, 2017.

FINDINGS OF FACT

1. The Department filed the accusation on July 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 December 18, 2013 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. James Murphy was born on August 6, 1997. He served as a minor decoy during an operation conducted by the Kern County Sheriff's Department on November 1, 2016. On that date he was 18 years old.
5. Murphy appeared and testified at the hearing. On November 1, 2016, he wore blue jeans, a black hooded sweatshirt with a white t-shirt beneath it, and tennis shoes. (Exhibits 2 & E.)
6. On November 1, 2016, Murphy entered the Licensed Premises. He walked to the beer coolers and selected a 3-pack of Bud Light beer. He took the beer to the front counter, where he had to stand in line. When it was his turn, the clerk, Tali Scanlon, rang up the sale. Murphy paid, Scanlon gave him some change, then Murphy exited with the beer. Scanlon did not ask to see any ID nor did she ask any age-related questions.
7. Outside, Murphy met up with various deputies. One of the deputies entered, walked over to the side of the counter (between the end of the counter and the front glass), and contacted Scanlon. Scanlon, who was helping some customers, turned toward the deputy. On the video, they appear to engage in a conversation. Dep. Corey Stacy and a uniformed deputy entered, immediately followed by Murphy. Dep. Stacy asked Murphy to identify the person who sold him the beer. Murphy pointed to Scanlon and said, "She did."
8. Murphy testified that, at the time of the identification, he was standing in the same general area where he had purchased the beer. He further testified that he and Scanlon were approximately five feet apart. Dep. Stacy testified that the identification took place at the counter. A video of the incident (exhibit E), shows Murphy standing near the front door immediately after re-entering. Dep. Stacy turns toward Murphy and appears to talk to him. Murphy is slightly behind Dep. Stacy. Murphy appears to raise his arm to point in Scanlon's direction (the view of his arm is partially obscured); Dep. Stacy then raises his arm and points at Scanlon. Murphy is at least 10 feet from Scanlon, who is still talking to the first deputy. Scanlon testified that she did not see Murphy come back to the counter and did not recall him identifying her.
9. Dep. Stacy asked Scanlon to come out from behind the counter, which she did. On the video, a second clerk takes over the register and completes the pending sale. One of the deputies took a photo of Murphy and Scanlon, after which Scanlon was cited.

10. Co-licensee Raudebette Tero testified about the training all employees receive when first hired. This includes computer-based training, followed by a test which the employees must pass. (Exhibit C.) All employees also undergo on-the-job training, which she sometimes conducts.

11. The Respondents have posted signs throughout the Licensed Premises (a) informing customers that they check ID and (b) reminding employees to check ID. (Exhibit B.) The Respondents use a secret shopper program and reward employees with a \$20 cash bonus each time they pass a secret shopper visit.

12. The register prompts the clerks to check ID whenever an age-restricted product is rung up. To complete the sale, the clerk must swipe an ID, enter a date of birth, or press a button labeled "visual ID." After the sale to Murphy, the Respondents modified the register to remove the visual ID button.

13. On November 1, 2016, Murphy visited four locations, two of which sold alcoholic beverages to him (including the Licensed Premises). Prior to November 1, 2016, he had been on 30 to 35 different operations (both decoy and shoulder tap), visiting six to ten locations each time.

14. Murphy learned of the decoy program through his role as an Explorer. As of the hearing, Murphy had been an Explorer for approximately 3½ years and had risen to the rank of sergeant. Murphy's duties as an Explorer included volunteering at least eight hours a month at the station and working various community events.

15. Murphy 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 November 1, 2016, Murphy displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Scanlon.²

16. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

² The Department did not ask any questions about Murphy's appearance. The Respondents asked only a couple of questions about Murphy's appearance, both relating to the sweatshirt he was wearing. The Department introduced a photo of Murphy and Scanlon (exhibit 2), while the Respondent introduced a video of the incident (exhibit E). Neither party asked any questions about Murphy's height, weight, clothing (other than the sweatshirt), mannerisms, or behavior. Accordingly, this finding is based on the photograph, the video (which the undersigned watched from start to finish multiple times), and the undersigned's observations of Murphy at the hearing.

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 November 1, 2016, the Respondents' clerk, Tali Scanlan, inside the Licensed Premises, sold an alcoholic beverage to James Murphy, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-9.)
5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(5)³ and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that, based on the video, there was no face-to-face identification.

The testimony makes clear that Murphy identified Scanlon when he re-entered. The video supports this testimony—Murphy and Dep. Corey Stacy speak to each other, Murphy appears to point, then Dep. Stacy points. The video, however, clearly establishes that Murphy is standing by the door when he identifies Scanlon. He is not, as Murphy and Dep. Stacy testified, across the counter from her. Importantly, Scanlon is facing a different direction at the time, speaking to another deputy. Under the circumstances, there was no face-to-face identification as required by rule 141(b)(5).

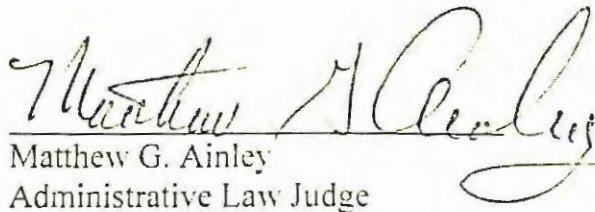
6. Unusually for a decoy case, the Respondents did not raise the decoy's appearance as an issue in their closing argument. The Appeals Board, in multiple cases, has indicated that ALJs should make findings about the decoy's appearance in their proposed decisions. Accordingly, the undersigned included Finding of Fact ¶ 15 in this decision. However, since the Respondents did not raise rule 141(b)(2) during the course of the hearing, Murphy's appearance is **not** at issue.

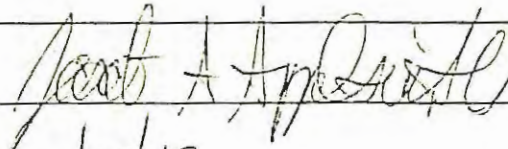
³ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

ORDER

The accusation is dismissed.

Dated: December 1, 2017


Matthew G. Ainley
Administrative Law Judge

<input type="checkbox"/>	Adopt
<input checked="" type="checkbox"/>	Non-Adopt: _____
By:	
Date:	1/23/18