

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

AB-9729

File: 21-556979; Reg: 17086266 & 18086421

JAYNESHWAR GOUNDER,
dba Dhaka Liquor & Retail
10944 Imperial Highway, Norwalk, CA 90650-2215,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: February 7, 2019
Ontario, CA

ISSUED FEBRUARY 20, 2019

Appearances: *Appellant:* Dean R. Lueders, of ACTlegally, as counsel for
Jayneshwar Gounder,

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

OPINION

Jayneshwar Gounder, doing business as Dhaka Liquor & Retail, appeals from a decision of the Department of Alcoholic Beverage Control¹ revoking his license because: (1) he possessed an illegal slot machine; (2) he purchased various alcoholic beverages for resale from entities not holding a beer manufacturer's, wine grower's, rectifier's, brandy manufacturer's or wholesaler's license; (3) on four separate occasions, he or his employees sold alcoholic beverages to individuals under the age of

¹The decision of the Department, dated July 26, 2018, is set forth in the appendix.

21; (4) the signage on the premises obstructed the view of the interior from law enforcement; (5) his employee possessed drug paraphernalia for sale; and (6) he refused to permit Department representatives to make an inspection of his records.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on July 29, 2015. There is one prior instance of departmental discipline against the license.

On December 22, 2017, the Department filed a 7-count accusation (accusation #1), as amended on January 3, 2018, charging that:

1) on February 23, 2017, appellant possessed an illegal slot machine, in violation of Penal Code sections 330a, 330.1, and 330.4;

2) between October 20, 2015 and September 8, 2017, appellant purchased various alcoholic beverages for resale from entities not holding a beer manufacturer's, wine grower's, rectifiers, brandy manufacturer's or wholesaler's license, in violation of Business and Professions Code section 23402;

3) on June 17, 2017, appellant sold an alcoholic beverage to a Department minor decoy, in violation of Business and Professions Code section 25658(a);

4) on July 28, 2017, appellant's clerk sold an alcoholic beverage to an individual under the age of 21, in violation of Business and Professions Code section 25658(a);

5) on September 21, 2017, the signage on the premises obstructed the view of the interior from law enforcement, in violation of Business and Professions Code section 25612.5(c)(7);

6) on September 21, 2017, appellant's employee possessed with the intent to deliver, furnish, or transfer, drug paraphernalia, in violation of Business and Professions Code section 11364.7(a); and

7) on October 1, 2017, appellant refused to permit Department representatives to make an inspection of his records, in violation of Business and Professions Code section 25616.

On January 31, 2018, the Department filed a 2-count accusation (accusation #2), charging that:

1) on October 19, 2017, appellant's employee sold an alcoholic beverage to an individual under the age of 21, in violation of Business and Professions Code section 25658(a); and

2) on October 20, 2017, appellant's employee sold an alcoholic beverage to an individual under the age of 21, in violation of Business and Professions Code section 25658(a);

On February 28, 2018, counsel for the appellant and the Department discussed continuing the hearing on accusation #1, and joining it with the hearing on accusation #2. The parties agreed, and set forth dates in April of 2018 that would be acceptable. The Department filed a request to consolidate the hearings on these two accusations. It was granted on March 7, 2018, and a hearing was scheduled for April 25, 2018.

On April 3, 2018, appellant submitted an application for a person-to-person transfer of the license, having located a willing buyer. Appellant was informed by the Department that the Department's policy is to place a hold on license transfers while discipline is pending against the license.

On April 4, 2018, during a telephonic settlement discussion, appellant's counsel requested a continuance of the scheduled hearing on the basis that appellant had scheduled an emergency trip to Fiji. Discovery revealed that tickets had been purchased by appellant on March 12, 2018 — for travel on April 17, 2018, returning on May 8, 2018. On April 14, 2018, appellant filed a Motion to Continue, citing the trip to Fiji as the basis for the motion. (Exh. 1D.) The motion was denied by the administrative law judge (ALJ) as untimely. (*Ibid.*)

At the administrative hearing on April 25, 2018, documentary evidence was received, and testimony concerning the accusations was presented by Department

Agents Edgardo Vega, Mark Reese, Salvador Zavala, Brian Huber, Carlos Valencia, Alberto Villanueva, Stephen Comp, and Supervising Agent Brandie Richards.

Testimony was also presented by the four minors named in the accusations: Mario Ruiz-Rodriguez, Kathering Montelon, Martin Alejandro Sotomayor, and Raymond Lopez. Appellant presented no witnesses.

Accusation #1, Count 1:

Testimony established that on February 23, 2017, Department agents entered the licensed premises, along with a Norwalk city code enforcement officer, to conduct a compliance inspection. During the inspection, Agent Reese discovered a concealed room containing five slot machines which were turned on and operating. Although the machines all had stickers on them indicating “Amusement Only” the investigation determined the slot machines were actually illegal, money-operated slot machines. (Findings of Fact, ¶¶ 5-7.) Agent Zavala spoke to the clerk, who stated that when someone wins, an employee goes to the machine and verifies the win, clears the machine, then pays the winner out of a designated cash register. (Exhs. 6A & B.) Money generated and winnings paid were recorded in a notebook (exh. 6C), and that a man comes once a week to collect the money from the machines. The slot machines were seized and transported to the Lakewood District Office. During an interview on April 11, 2017, appellant acknowledged that someone named Eddie installed the video slot machines for him approximately three months prior, that Eddie collects the money from the slot machines, and that appellant takes a 30 percent cut from the winnings — approximately \$100 per week. (Finding of Fact ¶ 10.)

Accusation #1, Count 2:

During the inspection, Agent Zavala discovered a filing box containing

approximately 200 retail receipts (exh. 7), showing sales of various distilled spirits, beer and wine from type-21 off-sale general licensed premises such as Costco and Walmart, among several other retailers. The clerk was questioned about the receipts and she acknowledged that either employees or the appellant would purchase alcohol at off-sale retail establishments to sell at the licensed premises — rather than purchasing from a wholesaler or manufacturer as required. (Finding of Fact, ¶ 8.) During an interview on April 11, 2017, appellant admitted to purchasing alcoholic beverages and distilled spirits from other off-sale retail premises. (Finding of Fact, ¶ 11.)

Accusation #1, Count 3:

On June 17, 2017, 19-year-old Kathering Montelon — a minor decoy working with the Department — entered the licensed premises by herself and went to the coolers where she selected a six-pack of Bud Light beer. She took the beer to the counter and waited in line. When it was her turn, she was waited on by the appellant, who rang up the beer without asking for her identification and without asking any age-related questions. Agent Vega was able to observe the transaction through the premises' entrance doors. Following the sale, the decoy and several agents re-entered the premises and the decoy made a face-to-face identification of appellant — the seller of the beer. Appellant was subsequently cited. (Findings of Fact ¶¶ 12-21.)

Accusation #1, Count 4:

On July 28, 2017, several Department agents arrived at the premises after 10:00 p.m. to conduct regular patrol duties. Agent Huber observed several males exit a pick-up truck. The driver, 20-year-old Martin Alejandro Sotomayor (Sotomayor), went to the front of the premises while another individual urinated on the back wall of the parking lot. The remaining occupants appeared to be holding beer cans.

Sotomayor went to the coolers and selected a 12-pack of Dos Equis beer (exh. 17) which he took to the register. The clerk scanned the beer and completed the sale without asking to see any identification. The clerk asked how old he was and he replied that he was 21. In the parking lot, Agent Huber identified himself as a police officer to Sotomayor and asked him how old he was. He said he was 20 years old.

The clerk exited the premises and asked the agents, in English, what was going on. Agent Milloy advised him that they were conducting an investigation and that they would speak to him when they were finished. The clerk went back into the store. Sotomayor subsequently identified the clerk to the agents as the individual who sold him the beer.

The agents entered the premises, approached the clerk, and asked him for his identification. The clerk asked, in English, why they needed his ID. Agent Garcia explained to the clerk that he had sold alcohol to a minor, and asked again for his identification. The clerk then told Agent Huber that he did not speak English. The clerk called someone on the telephone and spoke to someone in another language. A female came out of the back room and explained that the clerk was a family member of the owner who was just helping out. She also said that the clerk did speak English. (Findings of Fact ¶¶ 22-33.)

Accusation #1, Count 5:

On September 21, 2017, Department agents conducted an investigation at the premises, along with personnel from EDD, the California Lottery, Norwalk city code enforcement, and the L.A. County Sheriff's Department. From outside the premises it was observed that more than 33 percent of the square footage of the windows and doors were covered with advertising or signs — thereby obstructing a clear view of the

interior by law enforcement. (Findings of Fact, ¶¶ 34-36.)

Accusation #1, Count 6:

During the September 21, 2017 inspection, Agent Valencia found a cardboard box behind the sales counter containing artificial roses in glass tubes, labeled for sale on an eye-level shelf. From his training and experience, he recognized the tubes as drug paraphernalia — used to smoke crack cocaine. Appellant acknowledged receiving a copy of ABC-546, placing him on notice that such glass tubes are used as drug paraphernalia. (Findings of Fact, ¶¶ 37-38.)

Accusation #1, Count 7:

During the September 21, 2017 inspection, Agent Valencia found a black purse in the premises office, with the security tag still attached. (Exhs. 28 & 29.) Agent Beach questioned appellant's spouse about the purse, which she said someone had sold her earlier in the day. The agents requested to see video surveillance footage of the premises at the time the purported sale took place, but she did not know how to operate the system so the agents departed without the video. The following day, Agent Valencia returned to the premises with a Notice to Produce Records for the video surveillance footage related to the purse. (Exh. 30.) On September 25, 2017, Valencia telephoned the premises but was told neither appellant nor his wife were available. Agent Valencia never received a return call and the requested video surveillance footage was never produced.

Accusation #2, Count 1:

On October 19, 2017, Department agents went to the licensed premises to conduct a compliance investigation. From a gas station directly in front of the premises, agents observed two young-looking individuals, Mario Ruiz-Rodriguez and his girlfriend,

Mayra, enter the store. Rodriguez went to the coolers and selected a six-pack of Budweiser beer in cans which he took to the counter. The clerk scanned the beer and completed the sale without asking Rodriguez for his identification and without asking any age-related questions. Rodriguez exited the premises, got in the car with Mayra, and they drove off. The agents subsequently observed Rodriguez commit several vehicle violations. They stopped and searched the vehicle, and found the plastic bag containing the six-pack of Budweiser beer. Initially, 20-year-old Rodriguez claimed someone else had purchased the beer for him, but later admitted to buying the beer himself at appellant's premises. The agents took Rodriguez back to the premises but he was not able to identify who sold him the beer. The seller of the beer was identified in the accusation as "John Doe."

Accusation #2, Count 2:

On October 20, 2017, Agents Villanueva and Comp returned to the licensed premises for a follow-up investigation on the sale to Rodriguez the previous day. They observed 20-year-old Raymond Lopez purchasing three 50-milliliter bottles of Jack Daniels Old No. 7 Tennessee Whiskey. The agents observed Lopez handing clerk Sangeet Shalini Gounder, appellant's spouse, money to complete the transaction without asking him for any identification.

The agents stopped Lopez as he exited the store and identified themselves as police officers. After a search, the three airline-sized bottles of Jack Daniels were seized. Lopez' identification showed him to be 20 years of age. Agent Villanueva then entered the premises, identified himself as a police officer to the clerk, and explained that she had sold alcohol to a minor. Agent Comp asked Lopez to identify the person who sold him the alcohol. He pointed at the clerk and said "she did."

The ALJ issued a proposed decision on June 7, 2018, sustaining all nine counts and recommending that the license be revoked. The Department adopted the proposed decision in its entirety on July 12, 2018, and a Certificate of Decision was issued on July 26, 2018.

Appellant then filed a timely appeal contending: (1) appellant's request for a continuance was wrongfully denied and deprived appellant of the ability to assist his counsel at the administrative hearing; (2) the findings regarding count 2 of accusation #1, dealing with the sale of alcohol between retail licensees, are not supported by substantial evidence; and (3) the Department's "freeze" policy — which prevents license transfers while potential discipline is pending — is an underground regulation, should have been subjected to the rulemaking requirements of the Administrative Procedures Act, and violates the due process rights of both the licensee and buyer.

DISCUSSION

I

Appellant contends his request for a continuance was wrongfully denied and deprived him of the ability to assist his counsel at the administrative hearing. (AOB at pp. 11-12.)

Pursuant to Government Code section 11524, the ALJ may grant a request for continuance for good cause. The party requesting a continuance must show that good cause exists for granting the request. There is no absolute right to a continuance; one is granted or denied at the discretion of the ALJ, and a refusal to grant a continuance will not be disturbed on appeal unless it is shown to be an abuse of discretion. (*Cooper v. Board of Medical Examiners* (1975) 49 Cal.App.3d 931, 944 [123 Cal.Rptr. 563]; *Savoy Club v. Board of Supervisors* (1970) 12 Cal.App.3d 1034, 1038 [91 Cal.Rptr.

198]; *Givens v. Department of Alcoholic Beverage Control* (1959) 176 Cal.App.2d 529, 532 [1 Cal.Rptr. 446].) The “power to determine when a continuance should be granted is within the discretion of the court, and there is no right to a continuance as a matter of law. [Citation.]” (*Mahoney v. Southland Mental Health Associates Medical Group* (1990) 223 Cal.App.3d 167, 170 [272 Cal.Rptr. 602].)

One court offered the following guidance for continuances by an ALJ:

In exercising the power to grant continuances in an administrative proceeding, an administrative law judge must be guided by the same principles applicable to continuances generally in adjudicative settings: continuances should be granted sparingly, nay grudgingly, and then only on a proper and adequate showing of good cause. In general, a continuance for a short and certain time is less objectionable than a continuance for a long and uncertain time, and there must be a substantial showing of necessity to support a continuance into the indefinite future. But the factors that influence the granting or denying of a continuance in any particular case are so varied that the judge must necessarily exercise a broad discretion. Since it is impossible to foresee or predict all of the vicissitudes that may occur in the course of a contested proceeding, the determination of a request for a continuance must be based upon the facts and circumstances of the case as they exist at the time of the determination.

(*Arnett v. Office of Admin. Hearings* (1996) 49 Cal.App4th 332 [56 Cal.Rptr.2d 774].)

In the instant case, appellant maintains the denial of the continuance had the effect of denying him a fair trial because he was unable to assist his counsel in preparing for the hearing or during the hearing itself. He maintains that the denial of his request to continue the hearing for two weeks deprived him of his day in court. (AOB at pp. 11-12.)

The ALJ in this case denied the motion to continue on the basis that appellant failed to demonstrate good cause for the continuance. As the Department points out in its brief, the “ruling was based on the the untimely nature of the request, as appellant purchased the tickets to Fiji five days after being notified of the new hearing dates,

which his counsel had agreed to.” (RRB at p. 4.) We agree. In this case, the parties agreed on February 28, 2018 that the hearing date should be in April. On March 7, 2018, the ALJ issued his order consolidating the two matters for hearing and scheduled it for April 25, 2018. A Notice of Hearing was sent the following day. On March 12, 2018, appellant purchased his ticket to Fiji — at a time when he knew, or should have reasonably known that his absence from April 17, 2018 to May 8, 2018 would cause him to be absent from the April 25, 2018 hearing.

As the Department points out, the purchase of tickets 35 days prior to the departure date negates the idea that this was “emergency travel.” In addition, no explanation was given for the failure to inform the Department of the emergency prior to purchasing the tickets. Appellant presented no evidence that any steps were taken to avoid a conflict, nor any reason why the travel could not have been delayed an additional ten days so that he could attend the hearing.

Appellant was represented by legal counsel at the hearing. The fact that appellant chose not to appear did not deprive him of his right to a hearing. Appellant has simply not shown that the denial of the Motion to Continue constituted an abuse of discretion.

II

Appellant contends that the findings regarding count 2 of accusation #1, dealing with the sale of alcohol between retail licensees, are not supported by substantial evidence. (AOB at pp. 12-14.)

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.)

Appellant argues that the findings in the decision, regarding count 2 of accusation #1 (Findings of Fact ¶ 8), dealing with the sale of alcohol between retail licensees, are not supported by substantial evidence. He contends that “all statements attributed to clerk Verduco are hearsay” (AOB at p. 14), that no exception to the hearsay rule applies, and that there is no other evidence in the record to support Finding of Fact paragraph 8. Accordingly, he argues, this count should be dismissed.

“‘Hearsay evidence’ is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.” (Evid. Code, § 1200, subd. (a).) “Except as provided by law, hearsay evidence is inadmissible.” (*Id.*, subd. (b).) Government Code section 11513, subdivision (d), addresses hearsay evidence in administrative hearings:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration. (Gov. Code, § 11513(d).) The term “administrative hearsay” is used for hearsay evidence used for supplementing or explaining other evidence.

Appellant contends the findings of fact on this count are only supported by the testimony of the clerk. However, appellant entirely ignores the fact that the count was supported by both the testimony of Agent Zavala that he inspected the premises and located a box containing approximately 200 receipts from retail licensees — matching the brands and types of alcohol for sale in appellant’s store — and the testimony of Agent Valencia about the bottle of alcohol with a receipt taped to it from Ralph’s grocery store. (RT at pp. 47; 69-81; 193-199.) The clerk’s testimony is administrative hearsay,

admissible under Government Code section 11513, subdivision (d), to supplement or explain the testimony of the two agents. Accordingly, appellant's argument that the count is not supported by substantial evidence must fail.

The ALJ properly admitted the administrative hearsay testimony of the clerk to supplement or explain the agents' testimony and the two together constitute substantial evidence to support count 2 of accusation #1. The Board may not re-weigh the evidence to make contrary findings on this point.

III

Appellant contends that the Department's "freeze" policy — which prevents license transfers while potential discipline is pending — is an underground regulation. Appellant maintains the policy should have been subjected to the rulemaking requirements of the Administrative Procedures Act (APA), and that it violates the due process rights of both the licensee and buyer. (AOB at pp. 4-11.)

The APA defines the term "regulation" broadly: "Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." (Gov. Code, § 11342.600.) "[I]f it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it." (*State Water Resources Control Bd. v. Office of Admin. Law* (1993) 12 Cal.App.4th 697, 702 [16 Cal.Rptr.2d 25].)

The APA requires that all regulations be adopted through the formal rulemaking process.

No state agency shall issue, utilize, enforce, or attempt to enforce any

guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation, as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

(Gov. Code, § 11340.5(a).) All regulations are subject to the APA rulemaking process unless expressly exempted by statute. (Gov. Code, § 11346; *Engelmann v. State Bd. of Education* (1991) 2 Cal.App.4th 47, 59 [3 Cal.Rptr.2d 264].) Compliance with the rulemaking process is mandatory; where a regulation was not properly adopted, it has no legal effect. (*Armistead v. State Personnel Bd.* (1978) 22 Cal.3d 198, 204-205 [149 Cal.Rptr. 1].)

A regulation is exempt if it “relates only to the internal management of the state agency.” (Gov. Code, § 11340.9(d).) This exception, however, is narrow. (See *Armistead, supra*; *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 736 [188 Cal.Rptr. 130].) “Where the challenged policy goes beyond merely prioritizing or allocating internal resources and may significantly affect others outside the agency . . . such a policy goes beyond the agency’s internal management and is subject to adoption as a regulation under the APA.” (*Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 234 Cal.App.4th 214, 262 [183 Cal.Rptr.3d 736].)

In *Tidewater*, cited by both parties, the California Supreme Court outlined a two-part test to determine if something is a regulation subject to the rulemaking requirements of the APA:

A regulation subject to the APA thus has two principal identifying characteristics. [Citation.] First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. [Citation.] Second, the rule must “implement, interpret, or make specific the law enforced or administered by [the agency], or . . . govern [the agency’s] procedure.” (Gov. Code,

§11342, subd. (g).)

(*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571 [59 Cal.Rptr.2d 186].)

Appellant contends the Department universally applies the policy of “freezing licenses,” prohibiting their transfer or sale while disciplinary action against the license is pending, and that this policy has been implemented to govern the licensing procedure. Accordingly, appellant maintains that under the *Tidewater* test, the “freeze policy” is a regulation subject to the rulemaking procedures of the APA. Appellant further contends the policy deprives licensees of their due process rights because the policy assumes all licensees who have an accusation brought against them will be found guilty. It maintains the policy constitutes punishment without the benefit of due process because the license is impaired while discipline is pending.

The Department argues that the policy is not an underground regulation. (RRB at p. 11.) It maintains that appellant has failed to establish that the two-prong test of *Tidewater* has been met and we agree. There is no evidence in the record to establish that this is the Department’s policy in all cases. A policy does not meet the standard for “general application” if there is discretion as to whether to apply the policy. (*Modesto City Schools v. Education Audits Appeal Panel* (2004) 123 Cal.App.4th 1365, 1382 [20 Cal.Rptr.3d 831].) As the Department points out, there is no evidence in the record to establish that no one in the Department has the discretion to allow a transfer to complete while a license is pending potential discipline — this is merely an unsupported assumption by appellant. Neither is there evidence to show who initiated the freeze in this case or who might have authority to lift the freeze should there be a pre-hearing settlement agreement.

Even if the Board were to rule that the freeze policy is an underground regulation, this conclusion alone would not necessarily merit reversal. (See *Tidewater, supra*, at pp. 576-577.) As the Court observed in *Tidewater*,

If, when we agreed with an agency's application of a controlling law, we nevertheless rejected that application simply because the agency failed to comply with the APA [rulemaking procedures], then we would undermine the legal force of the controlling law. Under such a rule, an agency could effectively repeal a controlling law simply by reiterating all its substantive provisions in improperly adopted regulations.

(*Tidewater, supra*, at p. 577.)

The Department argues that even if, *arguendo*, the policy is found to be a regulation, that it nevertheless falls under an exception to the rule called the Audit Exception in Government Code section 11340.9, subdivision (e) — the section that defines situations where the rulemaking provisions of the APA do not apply. That section provides, in pertinent part:

This chapter does not apply to any of the following:

[¶ . . . ¶]

(e) A regulation that establishes criteria or guidelines to be used by the staff of an agency in performing an audit, investigation, or inspection . . . or in the defense, prosecution, or settlement of a case, if disclosure of the criteria or guidelines would do any of the following:

- 1) Enable a law violator to avoid detection.
- 2) Facilitate disregard of requirements imposed by law.
- 3) Give clearly improper advantage to a person who is in an adverse position to the state.

[¶ . . . ¶]

(Gov. Code § 11340.9(e).)

As the Department points out in its brief, if appellant had been permitted to transfer the license prior to the hearing, he would have been able to apply for a new

license in the future — with no record of prior discipline against him — so there are strong policy reasons for exempting the Department’s freeze policy from the rulemaking requirements of the APA under the exception contained in section 11340.9(e). In the instant case, the Department’s “freeze” policy falls squarely within the exception.

Furthermore, even if we ruled that the “freeze” policy was an illegal underground regulation, not covered by the exemption in section 11340.9(e), it would nevertheless not justify reversing the underlying decision because the policy did not effect the outcome of the case. All nine counts of the accusations would still be supported by substantial evidence and, taken together, justify revocation of the license.

ORDER

The decision of the Department is affirmed.²

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
MEGAN McGUINNESS, 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:**

**JAYNESHWAR GOUNDER
DHAKA LIQUOR & RETAIL
10944 IMPERIAL HWY
NORWALK, CA 90650-2215**

OFF-SALE GENERAL - LICENSE

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

LAKWOOD DISTRICT OFFICE

File: 21-556979

Reg: 17086266 & 18086421

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on July 12, 2018. 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, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after September 5, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: July 26, 2018

RECEIVED

JUL 27 2018

**Alcoholic Beverage Control
Office of Legal Services**



**Matthew D. Botting
General Counsel**

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Jayneshwar Gounder
Dbas: Dhaka Liquor & Retail
10944 Imperial Highway
Norwalk, California 90650-2215

Respondent

} File: 21-556979
}
} Reg. Nos.: 17086266 & 18086421
}
} License Type: 21
}
} Word Count: 45,953
}
} Reporter:
} Dorothy Simpson
} California Reporting

Off-Sale General License

PROPOSED DECISION

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard these matters at Cerritos, California, on April 25, 2018.

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

Dean R. Lueders and Eliel Chemerinski, Attorneys, represented Respondent, Jayneshwar Gounder.

The Department seeks to discipline the Respondent's license on the grounds that:

- (1) on or about February 23, 2017, the Respondent possessed at the licensed premises, an illegal slot machine or gambling device, to-wit: money operated video machines, in violation of Penal Code sections 330a, 330.1 and 330.4;
- (2) on or about October 20, 2015 to September 8, 2017, Respondent-Licensee purchased various alcoholic beverages listed in the sub counts under Count 2 of the Accusation, to wit: distilled spirits, liqueur, wine, and beer, for resale from various retailers as listed in the Accusation, who did not hold a beer manufacturer's, wine grower's, rectifier's, brandy manufacturer's, or wholesaler's license, in violation of Business and Professions Code section 23402¹;
- (3) on or about June 17, 2017, the Respondent-Licensee, Jayneshwar Gounder, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Kathering Montelon, an individual under the age of 21, in violation of Business and Professions Code section 25658(a);

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

- (4) on or about July 28, 2017, the Respondent-Licensee, through his agent or employee, Mahen Chandra Naidu, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Martin Alejandro Sotomayor, an individual under the age of 21, in violation of Business and Professions Code section 25658(a);
- (5) on or about September 21, 2017, Respondent-Licensee maintained more than 33 percent of the square footage of the windows and clear doors of the off-sale premises with advertising or signs, or placed and maintained advertising and signage in a manner that obstructed the clear view of the interior of the premises by law enforcement, in violation of Business and Professions Code section 25612.5(c)(7);
- (6) on or about September 21, 2017, and while upon the licensed premises, Respondent-Licensee's agent or employee, Sangeet Shalini Gounder, possessed with intent to deliver, furnish or transfer, drug paraphernalia, as defined in Health and Safety Code section 11014.5, in violation of Business and Professions Code section 11364.7(a); while holding Alcoholic Beverage Control License number 556979, within the meaning of Health and Safety Code section 11364.7(d);
- (7) on or about October 1, 2017, Respondent-Licensee knowing or willfully filed a false license fee report with the Department, or refused to permit the Department or its representative to make an inspection or examination of the books or records required to be kept or maintained, or altered, cancelled or obliterated an entry in such books of account for the purpose of falsifying records of sales of alcoholic beverages, in violation of Business and Professions Code section 25616.
(Exhibit 1A.)

The Department further seeks to discipline the Respondent's license on the grounds that:

- (1) on or about October 19, 2017, the Respondent, through his agent or employee, John Doe, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to wit: beer, to Mario Ruiz-Rodriguez, an individual under the age of 21, in violation of Business and Professions Code section 25658(a);
- (2) on or about October 20, 2017, the Respondent, through his agent or employee, Sangeet Shalini Gounder, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to wit: whiskey, to Raymond Lopez, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).
(Exhibit 1B.)

On February 28, 2018, and March 10, 2018, the Department filed a Request to Join Hearings and a Corrected Request to Join Hearings, respectively, for Accusations bearing registration numbers 17086266 and 18086421 (both relating to file number 21-556979). On March 8, 2018, Chief Administrative Law Judge John Lewis issued an Order

Consolidating Hearings with both Accusations to be heard on April 25 and 26, 2018.
(Exhibit 1C.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matters were argued and submitted for decision April 25, 2018.

FINDINGS OF FACT

1. The Department filed the Accusation relating to registration number 17086266 on December 22, 2017, and filed a First Amendment to Accusation on January 3, 2018. The Department filed the Accusation relating to registration number 18086421 on January 31, 2018.
2. The Department issued a type 21, off-sale general license (Alcoholic Beverage Control License number 556979) to the Respondent for the above-described location on July 29, 2015 (the Licensed Premises).
3. Respondent has been the subject of the following discipline:

<u>Dates of Violation</u>	<u>Reg. No.</u>	<u>Violation</u>	<u>Penalty</u>
August 18 & 24, 2016, October 7, 2016	170852208	BP §§24200, 25658(a) & P.C. 330.1	30-day suspension, with 15 days stayed

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

(Counts Relating to Registration No. 17086266)
(Counts 1 and 2)

4. On February 23, 2017, Department Agents Mark Reese, Salvador Zavala, Edgardo Vega², Carlos Valencia, and Norwalk City Code Enforcement Officer entered the Licensed Premises to conduct a compliance check and inspection of the premises. The agents identified themselves as police officers to clerk Idalia Verdusco, who was the only employee inside the Licensed Premises. The agents informed clerk Verdusco of their purpose for being there.

5. Agent Reese began his inspection of the Licensed Premises at an ice machine located at the northwest corner of the store, located immediately to the right upon entering the

² Agent Vega had entered the Licensed Premises on January 20, 2017, and heard people talking, laughing, and the sounds of video games from the north part of the premises, but saw no one and no video games.

store³. He walked down a very narrow walkway. Behind the ice machine he found a fiber, peg board flush with the wall that ran behind the ice machine, with a hidden door affixed with a hasp and an opened lock. (Exhibits 13F(1) through 13F(3).) He opened the make-shift door and found a concealed room. Inside the room he found five, money-operated video slot machines, which were turned on and operating. (Exhibits 8, 9, 10, 11, 12, 13G(1) & 13G(2).⁴) The slot machines had various colored buttons on their table tops which read, "TAKE," "BIG," "DOUBLE," "SMALL," "START," or "BET." The slot machines also had video monitors, dollar feeds at knee level and buttons at the rear of the slot machines, which Agent Reese recognized, from his seven years' Department experience investigating cases involving illegal video slot machines, as "payout" buttons which are typically pressed when providing payouts to customers for their winnings. The slot machines had "Amusement Only" stickers adhered to them. (Exhibits 13G(1) & 13G(2).) Agent Reese observed similar stickers on all of the other illegal video slot machines of past investigations he conducted and just like his prior investigations he found the said slot machines at the Licensed Premises were not for amusement only, but were illegal, money-operated video slot machines. Agent Reese also observed in the room a fan behind one of the slot machines, and a garbage can. (Exhibits 13G(1) & 13G(2).) Agent Reese used his Department issued cellular telephone to video these observations.⁵

6. Department Agent Zavala also examined the concealed room and five slot machines. From his 21 years of Department service and extensive experience with illegal slot machine investigation cases he recognized them to be illegal slot machines, with the first four slot machines to be common slot machine games of Lucky 8 Lines, and the fifth slot machine, another common slot machine game of Master of Cherries. Flashing on the video monitors of the slot machines were Lucky 8 Lines and Master of Cherries, respectively, until the games is started. Agent Zavala also noticed in the hidden room a video camera, which fed to a laptop kept behind the sales counter near a designated slot machine cash register. (Exhibits 13H(1) & 13H(2).)

7. Agent Zavala spoke to clerk Verduco about the slot machines. Clerk Verduco said she knew about the slot machines in the said room. She explained that if someone wins an employee goes to the winning machine, verifies the winning, clears the machine then pays the winner out of a cash register designated solely for the five slot machines. Clerk Verduco showed Agent Zavala the location of the said slot machine cash register (Exhibits 6A & 6B), which was behind the sales counter near another cash register. Agent Zavala observed a small piece of notebook paper taped below the slot machine cash register upon which was written the name, Mike, and a telephone number, to call if

³ Exhibit 3, ABC-257 Licensed Premises Diagram

⁴ The Department seized and later opened the slot machines, inside which the Department found various amounts of money. (Exhibits 13A through 13E.)

⁵ Exhibit 4, DVD of said video.

the slot machines were low on money or there was a problem with them. (Exhibits 6A & 6C.) Clerk Verusco further explained that the proceeds from the slot machines were held solely in the designated cash register (Exhibit 6B, depicting US currency in the register till) and that money generated from store sales was kept in a separate cash register. Clerk Verusco showed Agent Zavala a black and white notebook, in which was recorded all the money either placed in or removed from the slot machines. (Exhibit 5.) Clerk Verusco said that a man comes to the Licensed Premises on a weekly basis to collect the money from the machines.

8. During Agent Zavala's inspection of the Licensed Premises he found a plastic filing box with approximately 200 retail receipts therein, depicting sales of various distilled spirits, beer and wine from type 21 off-sale general licensed premises including, but not limited to, Food4Less, Rite Aid Pharmacy, Costco, Walmart, Stater Bros., CVS Pharmacy, Smart & Final Warehouse and Market, all of which were located in Norwalk, California, with the exception of a Rite Aid store in Perris, California. Off-sale general licensed premises are permitted to sell beer, wine and distilled spirits to the public. From Agent Zavala's experience with prior investigations he found off-sale licensees will purchase alcoholic beverages and distilled spirits from other off-sale retail establishments rather than wholesalers because the product is cheaper at retail, and the owner will turn around and sell the said product at their own off-sale retail establishment. Agent Zavala questioned clerk Verusco, who acknowledged that she knew about the receipts because Jayneshwar Gounder assigned to her the job of filing all of the said receipts per retail establishment for accounting purposes. Clerk Verusco further explained that employees or Jayneshwar Gounder would purchase alcohol at off-sale retail establishments to sell at the Licensed Premises. Agent Zavala examined the types of alcohol listed on the receipts and found them to include various bottles, sizes and brands of distilled spirits, including, but not limited to, Jack Daniel's Whiskey, Remy Martin Cognac, Buchanan Whiskey gifts sets, Jagermeister liquor, Johnnie Walker Scotch Whiskey - Red, Blue and Black labels, Ciroc Vodka, and New Amsterdam Vodka. Agent Zavala seized the receipts, photocopied them, numbered and placed them in a white binder, which he brought to the hearing. (Exhibit 7.) The last sales receipt in the binder is from a Ralphs grocery store in Norwalk, which holds a type 21 off-sale general license. The said Ralphs receipt was seized by Agent Carlos Valencia on September 21, 2017, while he was conducting an inspection at the Licensed Premises. Agent Valencia found the Ralphs receipt taped to a bottle of distilled spirits. (Exhibit 25.) The Ralphs receipt lists purchases of Jim Beam, Jagermeister Cordial, and Captain Morgan Rum, all brands of which Agent Valencia noticed were displayed for sale inside the Licensed Premises.

9. Agent Zavala seized all five slot machines, and had them transported to the Lakewood District Office. Agent Zavala plugged two of the machines in, with one video screen depicting the flashing Lucky 8 Lines logo and the other the Master of Cherries logo. The second screen depicted a poker table with an offer to double-up winnings. Agent Zavala

played the Lucky 8 Lines slot machine by inserting \$3 into the money feed at his knee level, causing the video screen to display 12 credits. Each credit was worth 25 cents. He pressed the "START" button, bet four credits, and pressed the "TAKE" button, which caused the reels to spin. Three reels, consisting of three squares each, spun on the screen in opposite direction. He could not control the spinning of the reels or how they aligned. At some point the reels stopped spinning by themselves and displayed various fruits (lemon, oranges, grapes, watermelon, and cherries), 7's, bar symbols and bells. He did not win on the sequence displayed. He bet another four credits, pressed the "TAKE" button, causing the reels to spin on their own, and when they stopped spinning the video screen displayed a winning sequence on the third line of two "7s," an orange and a message stating 8 credits were won. Agent Zavala employed no skill or strategy to play or win the 8 credits.

10. On April 11, 2017, Agent Zavala interviewed Jayneshwar Gounder at the Lakewood District Office. Mr. Gounder acknowledged that he had a man named Eddie install the five video slot machines in the Licensed Premises approximately three months prior, that he allows local people he knows to play the said machines, and when someone wins employees verify the winnings, clear the machine, and pay winnings to the customer from the said designated slot machine cash register. Mr. Gounder further explained that Eddie collects the money from the slot machines and takes a split from the winnings. Mr. Gounder acknowledged taking a 30 percent cut from the winnings, which totals approximately \$100 per week. The handwritten note below the designated slot machine cash register with the name Mike thereon, is Eddie's cousin. (Exhibit 6C.)

11. During Agent Zavala's interview with Jayneshwar Gounder on April 11, 2017, Mr. Gounder acknowledged the said receipts seized from the Licensed Premises. Mr. Gounder admitted to purchasing alcoholic beverages and distilled spirits from other off-sale retail premises. He initially claimed he donated the alcoholic beverages and distilled spirits to flood victims in Fiji. Agent Zavala inquired as to a license to export alcohol outside of the state, and Mr. Gounder later recanted the Fiji donation claim. Mr. Gounder thereafter claimed that he donates alcohol to various soccer organizations.

(Count 3)

12. Kathering Montelon (hereinafter referred to as decoy Montelon) was born on November 4, 1997. On June 17, 2017, she was 19 years old. On that date she served as a minor decoy in an operation conducted by the Department.

13. Decoy Montelon appeared and testified at the hearing. On June 17, 2017, she was approximately 5'3" tall and weighed 140 pounds. She wore a navy blue shirt, blue jeans, and white Converse shoes. She wore her hair down, with the length to her mid-back.

(Exhibits 15 and 16.) Her appearance at the hearing was similar except that she wore a black shirt, navy blue jeans, with black and white Vans shoes.

14. On June 17, 2017, decoy Montelon entered the Licensed Premises alone. She walked straight to the alcoholic beverage section and selected a six-pack of Bud Light beer bottles. (Exhibit 16.) Beer is an alcoholic beverage. Decoy Montelon took the six-pack of beer to the front sales counter for purchase and waited in line.

15. Agent Vega was standing outside the Licensed Premises' front entrance doors and witnessed the decoy's movements as described above, with an unobstructed view.

16. Decoy Montelon placed the six-pack of Bud Light beer and money upon the sales counter, behind which stood Respondent-Licensee Jayneshwar Gounder. Jayneshwar Gounder did not ask for the decoy's identification (ID) or age. Jayneshwar Gounder picked up the money, placed the six-pack of Bud Light beer inside a bag and handed the beer to decoy Montelon. Decoy Montelon took the six-pack of Bud Light beer and exited the store.

17. Agent Vega observed decoy Montelon exit the Licensed Premises with the six-pack of Bud Light beer.

18. Decoy Montelon re-entered the Licensed Premises with Department Agents Vega, Zavala and Valencia. The agents identified themselves as Department agents to Jayneshwar Gounder, with Agent Vega informing Mr. Gounder of the violation. Agent Vega asked decoy Montelon to identify the person who sold her the beer. Decoy Montelon pointed at Jayneshwar Gounder and said, "He did." Decoy Montelon and Jayneshwar Gounder were standing four feet apart at the time of this identification. Agent Vega informed Jayneshwar Gounder that he has been identified as the person who sold alcohol to a minor. A photo of Jayneshwar Gounder and decoy Montelon was taken after the face-to-face identification, with decoy Montelon holding the six-pack of Bud Light beer while standing next to Jayneshwar Gounder. (Exhibit 16).

19. Agent Vega issued a citation to Jayneshwar Gounder.

20. Decoy Montelon appeared her age at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of Jayneshwar Gounder at the Licensed Premises on June 17, 2017, decoy Montelon displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Jayneshwar Gounder. At the hearing decoy Montelon appeared her age, as a teenager.

21. On June 17, 2017, decoy Montelon visited nine locations, with two of those locations selling alcoholic beverages to her, including the Licensed Premises.

(Count 4)

22. On July 28, 2017, after 10:00 p.m., Department Agents Brian Huber, Garcia, Milloy, Comp, Delatorre and Delaza arrived at the Licensed Premises parking lot, at the rear of the store, conducting regular patrol activities. Agent Huber observed a silver pick-up truck park in the same parking lot, and saw several males exit the truck. Agent Huber then observed the male driver, later identified as Martin Alejandro Sotomayor, walk to the front of the Licensed Premises. Agent Huber could not see the front of the Licensed Premises and held his position and observed while one of the truck occupants urinated on the back wall of the parking lot and the remaining occupants who stayed near the truck appeared to be holding beer cans.

23. Martin Alejandro Sotomayor was born on July 16, 1997 (hereinafter referred to as Sotomayor). On July 28, 2017, he was 20 years old.

24. Sotomayor entered the Licensed Premises to purchase alcohol because his friends, who were under 21 years of age, had been there before and purchased alcohol at the Licensed Premises. Sotomayor walked to the refrigerators, selected a 12-pack of Dos Equis beer (Exhibit 17), which is an alcoholic beverage. Sotomayor took the beer to the front sales counter for purchase.

25. Sotomayor placed the beer on the counter. Clerk Mahen Chandra Naidu (hereinafter referred to as clerk Naidu) scanned the 12-pack of Dos Equis, and Sotomayor handed money to clerk Naidu, who accepted the money and counted it. Clerk Naidu did not ask to see Sotomayor's ID. Sotomayor had on his person his valid California Driver License, which had his correct date of birth. Sotomayor did not have a fake ID on him and never has been in possession of a fake ID. Sotomayor took possession of the 12-pack of Dos Equis beer. Clerk Naidu asked Sotomayor his age, to which Sotomayor replied he was 21. Sotomayor exited the Licensed Premises with the 12-pack of Dos Equis beer.⁶

26. Agent Huber saw Sotomayor, carrying a 12-pack of Dos Equis beer, walking from the direction of the Licensed Premises' front door to the parking lot. Agent Huber

⁶ This finding is based off a combination of testimony from Sotomayor and Agent Huber, in addition to the undersigned viewing Exhibit 21. Exhibit 21 is referred to more fully below, and is a DVD which depicts the said sales transaction. Agent Huber testified that it did not appear in the said video that Sotomayor showed clerk Naidu any ID and that Agent Huber did not obtain any information that Sotomayor showed his ID to the clerk. While Sotomayor testified that he handed his ID to clerk Naidu, Exhibit 21, clip "Sotomayor 2," does not depict this act. It is understandable that Sotomayor may forget that he did not so hand his ID to the clerk, since the violation occurred approximately eight months prior. Sotomayor's testimony is otherwise credible. Agent Huber testified that it did not appear in the said video that Sotomayor showed clerk Naidu any ID.

stopped Sotomayor in the parking lot and identified himself as a police officer. Agent Huber asked Sotomayor how old he was. Sotomayor said that he was 20 years old. Agent Delaza searched Sotomayor, specifically looking for a fake ID, and found none. Sotomayor showed Agent Huber his true and correct valid California Driver License. Agent Huber subsequently identified Sotomayor and confirmed him to be 20 years old.

27. Clerk Naidu exited the Licensed Premises, walked toward the agents. Clerk Naidu, speaking in English, inquired as to what was going on. Agent Milloy confirmed that clerk Naidu was an employee at the Licensed Premises and advised him the agents were conducting an investigation and would talk to clerk Naidu inside the store when they were finished. Clerk Naidu went back into the Licensed Premises.

28. Agent Huber continued to interview Sotomayor, who said he had never been to the Licensed Premises prior to July 28, 2017. Sotomayor admitted to visiting the Licensed Premises because his under-aged friends told him the employees do not check for IDs. Sotomayor described clerk Naidu as the person who sold the 12-pack of Dos Equis to him.

29. Agents Garcia and Huber entered the Licensed Premises to determine who it was that sold alcohol to Sotomayor. Agent Huber, seeing only one employee inside, approached clerk Naidu and, speaking in English, identified himself to clerk Naidu as a police officer. Agent Huber asked clerk Naidu for his ID. Clerk Naidu responded in English and asked why the agent needed his ID. Agent Garcia explained to clerk Naidu that he had just sold beer to someone under the age of 21. Agent Garcia asked clerk Naidu if he knew that it was illegal to sell alcohol to someone under 21 years of age, to which clerk Naidu responded that he did not know that. Agent Huber asked, a second time, for clerk Naidu's ID. Clerk Naidu told Agent Huber that he did not speak English. Agent Huber thought it seemed strange as clerk Naidu had already been speaking in English with himself and other agents.

30. Clerk Naidu then called someone on the telephone and spoke in a different language other than English. A female came out from a back room of the store and introduced herself as a family member of the owner, and explained that clerk Naidu was also a family member of the owner helping the owner by working at the store. Agent Huber asked her for clerk Naidu's ID because he did not speak English. The female said clerk Naidu does speak English. Clerk Naidu retrieved his passport from a back room and handed it to Agent Huber. There were no other employees in the Licensed Premises. A color photograph of clerk Naidu was taken inside the Licensed Premises. (Exhibit 22.)

31. Agent Huber saw the Licensed Premises had video surveillance but was unable to seize it, so he took a video recording of the said sales transaction from the playback monitor of the video surveillance with his Department issued cellular telephone.⁷

32. The video clip named "Sotomayor 2" depicts Sotomayor placing the 12-pack of Dos Equis beer on the sales counter, clerk Naidu scanning the same, Sotomayor handing money to clerk Naidu, who accepts the money and counts it. Sotomayor takes possession of the 12-pack of Dos Equis beer. It looks like Sotomayor says something to clerk Naidu, who replies, and they both make a head gesture to end their interaction. Sotomayor then leaves with the 12-pack of Dos Equis beer. The video does not depict Sotomayor either retrieving or handing a Driver License to clerk Naidu. It appears the entire sales transaction occurred within 13 seconds. (Exhibit 21.)

33. On July 28, 2017, Sotomayor wore a blue polo shirt, dark pants, white shoes, black-rimmed eyeglasses and a watch on his right wrist. He appeared his age on the video of Exhibit 21. Sotomayor appeared and testified at the hearing. His appearance was similar at the hearing; he appeared youthful, and appeared his age.⁸

(Count 5)

34. On September 21, 2017, Agent Carlos Valencia visited the Licensed Premises to conduct an inspection, with Supervising Agents Brad Beach and Brandie Richard, personnel from Employment Development Department, the Department of Lottery, Norwalk City Code Enforcement and Los Angeles County Sheriff's Norwalk Station.

35. Standing outside the Licensed Premises Agent Valencia immediately noticed a violation—more than 33 percent of the square footage of the windows and clear doors of the off-sale premises were covered with advertising or signs, in such a way that obstructed the clear view of the interior of the premises by law enforcement. Pictures were taken of the overall exterior view of the front windows to the Licensed Premises and a closer shot of the store's entrance, depicting all the signs on the glass windows of the Licensed Premises' store front.(Exhibits 23 and 24.)

36. The Department agents and other above-referenced personnel entered the Licensed Premises. Agent Valencia contacted Sangeet Shalini Gounder, Respondent-Licensee Jayneshwar Gounder's wife, who was in charge of the store that date. The Department agents identified themselves as police officers to Sangeet Shalini Gounder.

⁷ The Department presented at the hearing a DVD of the said video recording, which was marked and admitted as Exhibit 21. During the hearing the Department attorney played two videos clips from the DVD, "Sotomayor 1" (referred to at the hearing as S1) and "Sotomayor 2" (referred to at the hearing as S2). Both Martin Sotomayor and Agent Huber identified Martin Sotomayor and clerk Naidu in the said videos.

⁸ While neither party asked questions about Sotomayor's appearance, this finding is based off the undersigned's observations of Sotomayor at the hearing and the video (Exhibit 21).

(Count 6)

37. On September 21, 2017, while conducting an inspection inside the Licensed Premises Agent Valencia found, behind the sales counter, a cardboard box labeled, "Love Roses," containing faux roses in glass tubes. The rose tubes were displayed for sale at eye-level on a clear shelf, with the price listed as "\$1.59" each. (Exhibits 26 and 27.) From Agent Valencia's and Supervising Agent Richard's extensive training and experience they recognized the rose tubes from prior investigations as drug paraphernalia. Agent Valencia testified that the purpose of the rose tubes is to use them to smoke crack cocaine. He described that the rose is removed from the clear glass tube and a copper wire filter is placed in the glass tube, from which a person would smoke crack cocaine.

38. Respondent-Licensee signed on May 5, 2015, an ABC-203 form entitled, "Acknowledgment of ABC Laws, Rules and/or Regulations," wherein he acknowledged receiving a copy of the ABC-546 form, entitled, "Impact – Drug Paraphernalia." (Exhibits 36 and 37.) The ABC-546 form put the Respondent on notice of laws pertaining to drug paraphernalia and what drug paraphernalia is. Supervising Agent Richard testified that ABC-546 placed Respondent on notice that the rose tubes he was displaying in his Licensed Premises are used as drug paraphernalia, specifically at page 3, second column, under the sub-heading (A), which describes drug paraphernalia as "metal, wooden, acrylic, glass, stone, plastic or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls."

(Count 7)

39. On September 21, 2017, Agent Valencia also found in the office of the Licensed Premises a black purse, to which was still attached a security tag. (Exhibits 28 and 29.) The purse attracted Agent Valencia's attention because the purse appeared new and still had a security tag, which usually would be removed prior to leaving a retail store. Supervising Agent Beach questioned Sangeet Shalini Gounder about the purse. Mrs. Gounder said the purse belonged to her and that a man had walked into the Licensed Premises and sold the purse to her earlier that day. The Department Agents requested video surveillance footage to provide the time frame when Mrs. Gounder received the purse. Mrs. Gounder said she did not know how to work the video surveillance system because she relied upon a technician who was not available, and so she was not able to turn the requested footage over to the agents. The agents left the premises.

40. On September 22, 2017, Agent Valencia returned to the Licensed Premises and served upon Jayneshwar Gounder and Sangeet Shalini Gounder a Notice to Produce Records for the video surveillance relating to the said black purse. (Exhibit 30.) The notice requested video surveillance footage from Thursday, September 21, 2017, from 7:00 a.m. to 4:00 p.m. The notice further notified the Respondent that if he failed or

refused to furnish the requested information within 10 days of the date of the letter the Department would have no choice but to file an accusation against his license. Agent Valencia also verbally advised Jayneshwar Gounder of the 10 day compliance requirement. Agent Valencia's contact information was provided on the Notice to Produce Records. Agent Valencia further informed Mr. and Mrs. Gounder he would contact them the following Tuesday regarding the said requested video surveillance.

41. On Tuesday, September 25, 2017, Agent Valencia telephoned the Licensed Premises and was advised by a female that Mr. and Mrs. Gounder were not available. Agent Valencia advised the female he was requesting video surveillance from the prior week, left his contact information and asked that Mr. and Mrs. Gounder get back to him and provide the video. Agent Valencia never received a return call. As of the date of the hearing Respondent-Licensee did not provide to the Department the requested video surveillance footage.

(Counts Relating to Registration No. 18086421)
(Count 1)

42. On October 19, 2017, Department Agents Stephen Comp, Alberto Villanueva, Milloy, and Kuhn went to the Licensed Premises to conduct a compliance investigation because the premises is known to Department agents as a "problem location" that frequently sells alcoholic beverages to minors. The agents stationed themselves at a gas station directly in front of the Licensed Premises. From their vantage point they could see through the entrance doors into the interior of the store, straight to the back rear area of the store where the alcoholic beverage refrigerators are located. The agents' attention was drawn to a male and female, whom the agents "immediately noticed how young they looked," and who were entering the Licensed Premises.

43. Mario Ruiz-Rodriguez (hereinafter referred to as Mario Rodriguez), 20 years old at the time, entered the Licensed Premises with his girlfriend, Mayra, to purchase alcohol because people he knew said the store clerks did not check identification and sold alcohol to minors. Mario Rodriguez walked straight to the alcoholic beverage section, selected a six-pack of Budweiser beer cans, and took it to the sales counter. The clerk scanned the beer, for which the minor paid. The clerk did not ask Mario Rodriguez for his ID or any age-related questions. Mario Rodriguez exited the Licensed Premises with the six-pack of Budweiser beer. (Exhibit 14.)

44. The agents observed Mario Rodriguez and Mayra get into their car and drive off. The agents followed the car and observed several vehicle violations. The agents stopped and searched the vehicle. They found the plastic bag containing a six-pack of Budweiser beer cans. Agent Villanueva asked Mario Rodriguez about the said alcoholic beverages.

Mario Rodriguez initially claimed he asked a person at McDonald's to purchase the six-pack of beer for him and paid him \$5 to do so. Mario Rodriguez then admitted to having purchased the six-pack of Budweiser beer cans himself from a dark, skinned, Indian, male clerk at the Licensed Premises. The agents found no fake ID's inside the vehicle. The agents also searched Mario Rodriguez and Mayra, and found no fake IDs on their persons.

45. The agents took Mario Rodriguez back to the Licensed Premises. When they entered Jayneshwar Gounder was working behind the sales counter. The agents asked Mario Rodriguez to identify the person who sold him the six-pack of Budweiser beer. Mario Rodriguez was not able to identify the clerk who had sold him the alcohol.⁹ A photograph was taken of Mario Rodriguez. (Exhibit 35.)

46. On October 19 2017, Mario Rodriguez wore a gray, pullover sweatshirt and dark pants. (Exhibit 35.) Mario Rodriguez had a youthful appearance at the time of the said violation. Mario Rodriguez appeared and testified at the hearing. His appearance at the hearing was similar; he appeared youthful and appeared his age at the hearing.¹⁰

(Count 2)

47. On October 20, 2017, Agents Villanueva and Comp returned to the Licensed Premises to conduct a follow-up investigation to their investigation on October 19, 2017, to identify the clerk who sold alcohol to Mario Rodriguez. At the entrance to the Licensed Premises the agents' attention was immediately drawn to a "very youthful appearing" male, later identified as Raymond Lopez (hereinafter referred to as Raymond), at the sales counter with a female clerk (later identified as Sangeet Shalini Gounder) conducting a sales transaction. While Raymond was at the sales counter, Agent Villanueva observed as Raymond passed money to Sangeet Shalini Gounder, who completed the sales transaction selling him three 50 milliliter sized plastic bottles of Jack Daniels Old No. 7 Tennessee Whiskey 40% alcohol by vol.(80 proof), (Exhibits 32, 33, and 34), without asking Raymond for his ID.

48. Raymond, who was 20 years old at the time, entered the Licensed Premises to purchase cigarettes and three airline-sized bottles of Jack Daniel's Whiskey. Raymond went to the Licensed Premises because it was known to him and his under-aged friends as a store that sells alcohol to minors. Raymond has been a frequent customer at the Licensed Premises since he was 18 years old. It has been his experience that none of the

⁹ The Accusation relating to Registration Number 18086421 identifies the Respondent-Licensee's agent or employee as John Doe.

¹⁰ While neither party asked questions about Mario Ruiz-Rodriguez' appearance, this finding is based off the undersigned's observations of Mario Ruiz-Rodriguez at the hearing, Exhibit 35, and Agent Villanueva's credible testimony.

Respondent's employees, including Jayneshwar Gounder and Sangeet Shalini Gounder, would ask for his ID when he purchased alcohol, except only one elderly clerk. Raymond has never possessed a fake ID and never presented a fake ID in the Licensed Premises. Prior to October 20, 2017, Sangeet Shalini Gounder sold alcoholic beverages to Raymond on multiple occasions.

49. On October 20, 2017, the agents observed and stopped Raymond as he exited the Licensed Premises carrying a black, plastic bag containing the three airline-sized bottles of Jack Daniel's Whiskey. The agents identified themselves as police officers. Agent Villanueva conducted a search of Raymond and found in the plastic bag two cartons of cigarettes and the said three plastic, airline-sized bottles of Jack Daniel's Whiskey, the latter of which were seized. Raymond did not have a fake ID on his person, but did have his true and valid California Driver License, which listed his correct date of birth of March 13, 1997.

50. Agent Villanueva then entered the Licensed Premises and identified himself as a police officer to Sangeet Shalini Gounder, who was behind the sales counter. Agent Villanueva explained that he was conducting an investigation and that she had just sold alcohol to a minor. Sangeet Shalini Gounder initially claimed that Raymond appeared to be old and that he did not appear to be young. Agent Villanueva explained that in California a licensed premise cannot sell alcohol to anyone under the age of 21. Sangeet Shalini Gounder claimed that she did not know that someone had to be 21 years of age or older to purchase alcohol.

51. Agent Villanueva asked Sangeet Shalini Gounder for video surveillance, to which Sangeet Shalini Gounder replied they had a video surveillance system, but it did not record.

52. Agent Comp took Raymond into the Licensed Premises and conducted a modified face-to-face identification. Agent Comp had Raymond stand, facing Sangeet Shalini Gounder, and asked Raymond to identify the person who sold him the alcohol. Raymond raised his right hand, pointed with his right index finger at Sangeet Shalini Gounder, and stated aloud, "She did." Agent Comp was familiar with Respondent's wife, Sangeet Shalini Gounder. A photograph was taken of Sangeet Shalini Gounder inside the Licensed Premises. (Exhibit 31.)

53. Agent Comp then questioned Sangeet Shalini Gounder about the sale of alcohol to Raymond. Sangeet Shalini Gounder initially claimed Raymond looked old enough. Agent Comp asked her if she saw his ID, to which Sangeet Shalini Gounder replied that she did not check his ID. She then claimed the Licensed Premises always checks ID.

54. On October 20, 2017, Raymond Lopez had a very youthful appearance at the time of the said violation. Raymond Lopez appeared and testified at the hearing. He has a youthful appearance and appeared his age at the hearing.¹¹

(Supervising Agent Brandie Richard)

55. The Department's Lakewood District Office Supervising Agent Brandie Richard appeared and testified at the hearing. She has been a supervising agent for 14 years and with the Department in total for approximately 20 years. She is responsible for the territory from El Segundo on the west side, to the east to La Mirada, including Norwalk, Long Beach on the south and Compton and Lynnwood on the north. With her extensive training and experience she is familiar with how crime rates are tracked and calculated by the Department. Supervising Agent Richard is familiar with the Licensed Premises, which is in reporting district 451 and which is considered high crime pursuant to Business and Professions Section code 23958.4.

56. Supervising Agent Richard explained the purpose of forms ABC-203 and ABC-546, as described above in paragraph 38.

57. In Supervising Agent Richard's opinion the type 21 license should not be permitted to continue at the Licensed Premises regardless of who owns the license because since August of 2016, there have been a high percentage of incidents of sales of alcoholic beverages to minors. The Licensed Premises is well known by under-aged persons that the store will sell alcoholic beverages and cartons of cigarettes to minors no matter who is behind the sales counter.

58. 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.

¹¹ While neither party asked questions about Raymond Lopez' appearance, this finding is based off the undersigned's observations of Raymond Lopez at the hearing, and Agent Villanueva's credible testimony.

3. Penal Code section 330a provides..., "(a) Every person, who has in his or her possession or under his or her control, either as owner, lessee, agent, employee, mortgagee, or otherwise, or who permits to be placed, maintained, or kept in any room, space, enclosure, or building owned, leased, or occupied by him or her, or under his or her management or control, any slot or card machine, contrivance, appliance or mechanical device, upon the result of action of which money or other valuable thing is staked or hazarded, and which is operated, or played, by placing or depositing therein any coins, checks, slugs, balls, or other articles or device, or in any other manner and by means whereof, or as a result of the operation of which any merchandise, money, representative or articles of value, checks, or tokens, redeemable in or exchangeable for money or any other thing of value, is won or lost, or taken from or obtained from the machine, when the result of action or operation of the machine, contrivance, appliance, or mechanical device is dependent upon hazard or chance, and every person, who has in his or her possession or under his or her control, either as owner, lessee, agent, employee, mortgagee, or otherwise, or who permits to be placed, maintained, or kept in any room, space, enclosure, or building owned, leased, or occupied by him or her, or under his or her management or control, any card dice, or any dice having more than six faces or bases each, upon the result of action of which any money or other valuable thing is staked or hazarded, or as a result of the operation of which any merchandise, money, representative or article of value, check or token, redeemable in or exchangeable for money or any other thing of value, is won or lost or taken, when the result of action or operation of the dice is dependent upon hazard or chance, is guilty of a misdemeanor."

4. Penal Code section 330.1(a) provides that it is a misdemeanor for anyone to manufacture, own, store, keep, possess, sell, rent, lease, let on shares, lend or give away, transport, or expose for sale or lease, or offer to sell, rent, lease, let on shares, lend or give away or to permit the operation of or to permit to be placed, maintained, used, or kept in any room, space, or building owned, leased, or occupied by him or her or under his or her management or control, any slot machine or device as defined. Section 330.1(a) further provides that it is a misdemeanor to make or permit to be made any agreement with reference to any slot machine or device as defined, pursuant to which agreement the user thereof, as a result of any element of hazard or chance, may become entitled to receive anything of value or additional chance or right to use that slot machine or device, or to receive any check, slug, token, or memorandum, whether of value or otherwise, entitling the holder to receive anything of value.

5. Penal Code section 330.1(f) provides that a "slot machine or device within the meaning of [s]ections 330.1 to 330.5, inclusive, of this code is one that is, or may be, used or operated in such a way that, as a result of the insertion of any piece of money or coin or other object the machine or device is caused to operate or may be operated or played, mechanically, electrically, automatically, or manually, and by reason of any element of hazard or chance, the user may receive or become entitled to receive anything

of value or any check, slug, token, or memorandum, whether of value or otherwise, which may be given in trade, or the user may secure additional chances or rights to use such machine or device, irrespective of whether it may, apart from any element of hazard or chance, also sell, deliver, or present some merchandise, indication of weight, entertainment, or other thing of value.”

6. Penal Code section 330.4 states, “It is specifically declared that the mere possession or control, either as owner, lessee, agent, employee, mortgagor, or otherwise of any slot machine or device, as defined in Section 330.1 of this code, is prohibited and penalized by the provisions of Sections 330.1 to 330.5, inclusive, of this code. It is specifically declared that every person who permits to be placed, maintained or kept in any room, space, enclosure, or building owned, leased or occupied by him, or under his management or control, whether for use or operation or for storage, bailment, safekeeping or deposit only, any slot machine or device, as defined in Section 330.1 of this code, is guilty of a misdemeanor and punishable as provided in Section 330.1 of this code. It is further declared that the provisions of this section specifically render any slot machine or device as defined in Section 330.1 of this code subject to confiscation as provided in Section 335a of this code.”

7. 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 February 23, 2017, the Respondent possessed at the Licensed Premises illegal slot machines or gambling devices, to-wit: money operated video machines, in violation of Penal Code sections 330a, 330.1, and 330.4 (Count 1, relating to Registration No. 17086266). (Findings of Fact ¶¶ 4 through 7, 9 and 10.)

8. Section 23402 provides that, “[n]o retail on- or off-sale licensee, except a daily on-sale general licensee holding a license issued pursuant to Section 24045.1, shall purchase alcoholic beverages for resale from any person except a person holding a beer manufacturer’s, wine grower’s, rectifier’s, brandy manufacturer’s, or wholesaler’s license.”

9. 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 or about October 20, 2015, to September 8, 2017, the Respondent-Licensee purchased various alcoholic beverages listed in the sub counts under Count 2 of the Accusation (relating to Registration No. 17086266), to wit: distilled spirits, liqueur, wine, and beer, for resale from various retailers as listed in the said Accusation, who did not hold a beer manufacturer’s, wine grower’s, rectifier’s, brandy manufacturer’s, or wholesaler’s license, in violation of Business and Professions Code section 23402. (Findings of Fact ¶¶ 4, 8 and 11.)

10. 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.

11. 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 17, 2017, the Respondent-Licensee, Jayneshwar Gounder, inside the Licensed Premises, sold alcoholic beverages, to-wit: a six-pack of Bud Light beer, to Kathering Montelon, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Count 3 relating to Registration No. 17086266.) (Findings of Fact ¶¶ 12 through 21.)

12. The Respondent argued the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2), therefore, the accusation should be dismissed pursuant to rule 141(c).

13. With respect to rule 141(b)(2), Respondent argued decoy Kathering Montelon did not have the appearance of someone under 21 because of one factor, which made her appear to be older than 21. That factor included Respondent's counsel's opinion that "she does have the appearance of someone over 21."

14. This rule 141(b)(2) argument is rejected. Respondent's counsel's unsupported assertion is nothing but assumption and conjecture. There was nothing about decoy Montelon's appearance, stature or demeanor which made her appear older than her actual age. Decoy Montelon appeared her age, as a teenager. In other words, decoy Montelon had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 20.)

15. 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 July 28, 2017, Respondent-Licensee's employee, clerk Mahen Chandra Naidu, inside the Licensed Premises, sold alcoholic beverages, to wit: a 12-pack of Dos Equis beer, to Martin Alejandro Sotomayor, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Count 4 relating to Registration No. 17086266.) (Findings of Fact ¶¶ 22 through 33.)

16. 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 October 19, 2017, Respondent-Licensee's employee, inside the Licensed Premises, sold alcoholic beverages, to wit: a six-pack of Budweiser beer cans, to Mario Ruiz-Rodriguez, a person under the age of 21, in violation of Business and Professions

Code section 25658(a). (Count 1 relating to Registration No. 18086421.) (Findings of Fact ¶¶ 42 through 46.)

17. 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 October 20, 2017, Respondent-Licensee's employee, clerk Sangeet Shalini Gounder, inside the Licensed Premises, sold an alcoholic beverage, to wit: Jack Daniels Whiskey, to Raymond Lopez, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Count 2 relating to Registration No. 18086421.) (Findings of Fact ¶¶ 47 to 49, 52, and 54.)

18. Section 25660 provides a defense to any person who was shown and acted in reliance upon bona fide evidence of majority in permitting a minor to enter and remain in a public premises in contravention of section 25665, in making a sale forbidden by section 25658(a), or in permitting a minor to consume in an on-sale premises in contravention of section 25658(b).

19. The defense offered by this section is an affirmative defense. As such, the licensee has the burden of establishing all of its elements, namely, that evidence of majority and identity was demanded, shown, and acted on as prescribed.¹² To provide a defense, reliance on the document must be reasonable, that is, the result of an exercise of due diligence. This section applies to identifications actually issued by government agencies as well as those which purport to be.¹³ A licensee or his or her employee is not entitled to rely upon an identification if it does not appear to be a bona fide government-issued identification or if the personal appearance of the holder of the identification demonstrates above mere suspicion that the holder is not the legal owner of the identification.¹⁴ The defense offered by section 25660 is not established if the appearance of the minor does not match the description on the identification.¹⁵ Thus, reasonable reliance cannot be established unless the appearance of the person presenting identification indicates that he or he could be 21 years of age and the seller makes a reasonable inspection of the identification offered.

¹² *Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control*, 261 Cal. App. 2d 181, 189, 67 Cal. Rptr. 734, 739 (1968); 27 Ops. Atty. Gen. 233, 236 (1956).

¹³ *Dept. of Alcoholic Beverage Control v. Alcoholic Control Appeals Bd. (Masani)*, 118 Cal. App. 4th 1429, 1444-45, 13 Cal. Rptr. 3d 826, 837-38 (2004).

¹⁴ *Masani*, 118 Cal. App. 4th at 1445-46, 13 Cal. Rptr. 3d at 838; *5501 Hollywood, Inc. v. Department of Alcoholic Beverage Control*, 155 Cal. App. 2d 748, 753, 318 P.2d 820, 823-24 (1957); *Keane v. Reilly*, 130 Cal. App. 2d 407, 411-12, 279 P.2d 152, 155 (1955); *Conti v. State Board of Equalization*, 113 Cal. App. 2d 465, 466-67, 248 P.2d 31, 32 (1952).

¹⁵ *5501 Hollywood*, 155 Cal. App. 2d at 751-54, 318 P.2d at 822-24; *Keane*, 130 Cal. App. 2d at 411-12, 279 P.2d at 155 (construing section 61.2(b), the predecessor to section 25660).

20. In the present case, the Respondent failed to meet his burden of proof in establishing all of the elements of the affirmative defense for Count 4 (relating to Registration No. 17086266) and Counts 1 and 2 (relating to Registration No. 18086421). With regard to Martin Alejandro Sotomayor, Mario Ruiz-Rodriguez, and Richard Lopez the Respondent failed to show that evidence of majority and identity was demanded, shown, and acted on as prescribed. Each of Respondent's clerks on July 28, 2017, October 19, 2017, and October 20, 2017, failed to demand documentary proof of the minor's majority. In other words each clerk failed to request each of the said minors' IDs.

21. It would have been incumbent upon each of the clerks to demand to see the minors' IDs given the minors appeared youthful, and their age (under 21, and did not appear 21 years old or older, at the time of the said violations). At the hearing, Martin Alejandro Sotomayor, Mario Ruiz-Rodriguez, and Richard Lopez appeared youthful to the undersigned. (Findings of Fact ¶¶ 24, 25, 26, and 33; 46; 54.) In fact, sworn, direct testimony by Agent Villanueva confirmed when the agents saw Mario Ruiz-Rodriguez and his girlfriend the agents "immediately noticed how young they looked," on October 19, 2017, and Raymond Lopez was a "very youthful appearing" male on October 20, 2017, so much so that it caused Agents Villanueva and Comp to stop and search each minor. (Findings of Fact ¶¶ 42 and 44; 47 and 49.)

22. Respondent argued all the clerks believed the minors were 21 years of age. This argument is rejected. The Department properly cited *In Re Jennings*, 34 Cal. 4th 254, for the proposition that sale to minor violations are strict liability offenses. To negate the strict liability under section 25658(a) the Respondent must prove his affirmative defense under section 25660. As discussed above, the Respondent failed to meet his burden of proof in establishing the elements of the affirmative defense available to him under Section 25660.

23. Section 25612.5(c)(7) provides, "[n]o more than 33 percent of the square footage of the windows and clear doors of an off-sale premises shall bear advertising or signs of any sort, and all advertising and signage shall be placed and maintained in a manner that ensures that law enforcement personnel have a clear and unobstructed view of the interior of the premises, including the area in which the cash registers are maintained, from the exterior public sidewalk or entrance to the premises. However, this latter requirement shall not apply to premises where there are no windows, or where existing windows are located at a height that precludes a view of the interior of the premises to a person standing outside the premises."

24. 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 September 21, 2017, Respondent-Licensee maintained more than 33 percent of the square footage of the windows and clear doors of the off-sale premises with

advertising or signs, or placed and maintained advertising and signage in a manner that obstructed the clear view of the interior of the premises by law enforcement, in violation of Business and Professions Code section 25612.5(c)(7). (Count 5 relating to Registration No. 17086266.) (Findings of Fact ¶¶ 34 through 36.)

25. Health and Safety Code section 11364.7(a) provides, in part, that “any person who delivers, furnishes, or transfers, possesses with intent to deliver, furnish, or transfer, or manufactures with the intent to deliver, furnish, or transfer, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance . . . in violation of this division, is guilty of a misdemeanor.”

26. Health and Safety Code section 11364.7(d) provides that “[t]he violation, or the causing or the permitting of a violation, of subdivision (a), (b), or (c) by a holder of a business or liquor license issued by a city, county, or city and county, or by the State of California, and in the course of the licensee’s business shall be grounds for the revocation of that license.”

27. Health and Safety Code section 11014.5(a) contains a broad definition of drug paraphernalia as “all equipment, products and materials of any kind which are designed for use or marketed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this division.” A non-exclusive list of items is set forth immediately after this definition

28. Health and Safety Code section 11014.5(b) provides that “the phrase ‘marketed for use’ means advertising, distributing, offering for sale, displaying for sale, or selling in a manner which promotes the use of equipment, products, or materials with controlled substances.”

29. Health and Safety Code section 11014.5(c) provides that, “[i]n determining whether an object is drug paraphernalia, a court or other authority may consider, in addition to all other logically relevant factors, the following: (1) Statements by an owner or by anyone in control of the object concerning its use. (2) Instructions, oral or written, provided with the object concerning its use for ingesting, inhaling, or otherwise introducing a controlled substance into the human body. (3) Descriptive materials accompanying the object which explain or depict its use. (4) National and local advertising concerning its use. (5) The manner in which the object is displayed for sale. (6) Whether the owner, or anyone in

control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products. (7) Expert testimony concerning its use.

30. Cause for suspension or revocation of the Respondent's license exists for the violation of section 11364.7(a) alleged in Count 6 of the Accusation (relating to Registration No. 17086266), while holding Alcoholic Beverage Control License number 556979, within the meaning of Health and Safety Code section 11364.7(d). (Findings of Fact ¶¶ 2, 37 and 38.) Continuance of the license without imposition of discipline would be contrary to public welfare and morals.

31. Respondent argued there was no testimony that Sangeet Shalini Gounder had any idea for what the rose tubes were used, and there was no testimony the agents actually attempted to make a purchase of the said rose tubes inside the Licensed Premises.

32. These arguments are rejected. Respondent was furnished on May 5, 2015, with an ABC-546 notice from the Department alerting him that said rose glass tubes could be used as drug paraphernalia. Thusly having been placed on such notice, under the circumstances the Respondent reasonably should have known the rose tubes could be used as drug paraphernalia when they were placed in his store for sale. The Respondent was not charged with selling drug paraphernalia, but charged under Health and Safety Code section 11364.7(a), relating to possession with intent to deliver, furnish or transfer drug paraphernalia. The rose glass tubes were displayed for sale at eye-level on a clear shelf inside the Licensed Premises, with the price listed as "\$1.59" each. (Exhibits 26 and 27.) (Findings of Fact ¶¶ 37 and 38.)

33. Business and Professions Code section 25616 provides that "Any person who knowingly or willfully files a false license fee report with the department, and any person who refuses to permit the department or any of its representatives to make any inspection or examination for which provision is made in this division, or who fails to keep books of account as prescribed by the department, or who fails to preserve such books for the inspection of the department for such time as the department deems necessary, or who alters, cancels, or obliterates entries in such books of account for the purpose of falsifying the records of sales of alcoholic beverages made under this division is guilty of a misdemeanor and shall be punished by a fine of not less than two hundred dollars (\$200) nor more than one thousand dollars (\$1,000), or by imprisonment in the county jail for not less than one month nor more than six months, or by both such fine and imprisonment."

34. 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) for the violations of Business and Professions Code section 25616 alleged in Count 7 of the

Accusation (relating to Registration No. 17086266). On September 22, 2017, Agent Valencia hand-delivered to Respondent a Notice to Produce Records of the video surveillance, and verbally explained to Respondent he had to comply with the request within 10 days. The notice placed the Respondent on notice that if he failed to comply or refused to furnish the requested information within 10 days of the date of the letter the Department would have no choice but to file an accusation against his license. Agent Valencia even followed-up on September 25, 2017, by calling the Respondent and leaving a detailed message to provide the video surveillance to the Department. As of the date of the hearing, seven months after first being given notice, the Respondent failed, despite repeated notice and opportunity, to provide the requested video surveillance footage, let alone make any effort to contact Agent Valencia. (Findings of Fact ¶¶ 39 through 41.)

35. In determining the credibility of a witness, as provided in section 780 of the Evidence Code, the administrative law judge may consider any matter that has any tendency in reason to prove or disprove the truthfulness of the testimony at the hearing, including the manner in which the witness testifies, the extent of the capacity of the witness to perceive, to recollect, or to communicate any matter about which the witness testifies, a statement by the witness that is consistent or inconsistent with any part of the witness's testimony at the hearing, the extent of the opportunity of the witness to perceive any matter about which the witness testifies, the existence or nonexistence of any fact testified to by the witness, and the existence or nonexistence of a bias, interest, or other motive.

36. Any contention by the Respondent that: (1) the Licensed Premises always checks IDs (pursuant to Sangeet Shalini Gounder's claim to Agent Comp on October 20, 2017), and (2) Sangeet Shalini Gounder's inconsistent claim to Agent Villanueva on the same date that she did not know a person had to be 21 years of age or older to be sold alcohol, and (3) Jayneshwar Gounder asked decoy Montelon for her ID on June 17, 2017, are disbelieved and found to be self-serving statements that are not truthful for the following reasons.

37. Sangeet Shalini Gounder made inconsistent claims to Agents Comp and Villanueva on October 20, 2017, as referenced above. If she always checks IDs then why would she do so if she did not know a person had to be 21 years of age or older to be sold alcohol? The sworn, direct, credible testimony of Mario Ruiz-Rodriguez and Raymond Lopez indicated that the clerks did not ask for their IDs when they purchased alcohol at the Licensed Premises. Decoy Montelon's sworn, direct, and credible testimony convincingly indicated that Jayneshwar Gounder did not ask for her ID or age. Agent Vega corroborated decoy Montelon's testimony when he credibly testified that on June 17, 2017, when he asked decoy Montelon whether Jayneshwar Gounder had asked her for ID, the decoy replied that he did not ask for her ID. Raymond further credibly

testified that he has been a frequent customer at the Licensed Premises since he was 18 years old and it has been his experience that none of the Respondent's employees, including Jayneshwar Gounder and Sangeet Shalini Gounder, would ask for his ID when he purchased alcohol, except only one elderly clerk. Decoy Montelon's, Mario and Raymond's sworn, direct testimony are deemed more credible than the Respondent's contentions.

38. The preponderance of the evidence established that it is custom and practice for all of Respondent's clerks, including Jayneshwar Gounder and Sangeet Shalini Gounder (except for an elderly clerk), to sell alcoholic beverages to minors without asking for their IDs. Even if the undersigned gave Mr. Gounder the benefit of the doubt, which I am not, if he had asked to see decoy Montelon's ID (or even asked her age), he would have learned she still would not be old enough to purchase alcoholic beverages. On June 17, 2017, decoy Montelon was only 19 years old, and on November 4, 2017, she would only have been 20 years old. She will not be 21 years old until November 4, 2018.

39. Respondent's further contentions that the said alcoholic beverages and distilled spirits listed on the said receipts (Exhibit 7) were not purchased by the Respondent for resale but that he donated them to flood victims in Fiji, and thereafter recanting that claim, his later contention he donates alcohol to various soccer organizations are disbelieved. Jayneshwar Gounder's inconsistent claims and retractions of at least one such claim disproves his truthfulness regarding the matter. Furthermore, he has a bias and motive to fabricate his story as the owner of the Licensed Premises subject to revocation. Agent Zavala's sworn, direct testimony credibly indicated that Respondent's own employee, clerk Verdusco, who was put in charge of filing all of the said receipts per retail establishment for accounting purposes, admitted that employees or Jayneshwar Gounder would purchase alcohol at off-sale retail establishments to sell at the Licensed Premises. Agent Zavala further credibly maintained that Mr. Gounder admitted to purchasing alcoholic beverages and distilled spirits from other off-sale retail premises. It is found the Respondent purchased the said alcoholic beverages and distilled spirits listed on the said receipts for resale in the Licensed Premises.

PENALTY

The Department requested the Respondent's off-sale general license be revoked based on a number of aggravating factors. Those factors included (1) Respondent's prior discipline for similar violations under Business and Professions Code sections 24200 and 25658(a) for sales to three minors over a course of two dates, August 18 and 24, 2016, and a Penal Code Section 330.1 violation on October 7, 2016; (2) the Licensee's response to that discipline with continuing course or pattern of conduct, by finding a better way to hide five slot machines on the Licensed Premises, selling to four minors various brands of alcohol and distilled spirits without checking their IDs, retail to retail sales and other

ancillary violations; (3) Licensee involvement and his family involvement, with every clerk involved in selling alcohol to minors except one lone brave elderly clerk; (4) lack of Licensee cooperation in investigation, exhibited by Respondent's failure to comply with the request to produce records, clerk Naidu pretending he does not speak English, and after Sangeet Shalini Gounder's admission she did not check Raymond's ID she claimed they always check IDs; (5) the Licensed Premises is located in a high crime area, and the Licensed Premises itself is a crime magnate with the said various violations.

The Respondent requested to be allowed to transfer the license out of Respondent's hands to another operator.

The penalty recommended herein complies with rule 144.

ORDER

Counts 1 through 7 of the Accusation relating to Registration No. 17086266 are sustained. Counts 1 and 2 of the Accusation relating to Registration No. 18086421 are sustained. In light of these violations, the Respondent's off-sale general license is hereby revoked.

Dated: June 7, 2018



D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: <u><i>[Handwritten Signature]</i></u>
Date: <u>7/12/18</u>