

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

AB-9731

File: 20-540461; Reg: 18086723

7-ELEVEN, INC. and DUKAAN DOH, INC.,
dba 7-Eleven Store #2368 19600E
915 San Benito Street, Hollister, CA 95023,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: February 7, 2019
Ontario, CA

ISSUED FEBRUARY 20, 2019

Appearances: *Appellants:* Jennifer L. Oden and David Brian Washburn, of
Solomon, Saltsman & Jamieson, as counsel for 7-Eleven, Inc. and
Dukaan Doh, Inc.,

Respondent: Sean Klein, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Dukaan Doh, Inc., doing business as 7-Eleven Store #2368
19600E, appeal from a decision of the Department of Alcoholic Beverage Control¹
suspending their license for 10 days because their clerk sold an alcoholic beverage to a
Department minor decoy, in violation of Business and Professions Code section 25658,
subdivision (a).

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

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 21, 2014. There is no record of departmental discipline against the license.

On March 30, 2018, the Department filed an accusation against appellants charging that, on December 31, 2017, appellants' clerk, Edgar Manzo (the clerk), sold an alcoholic beverage to 16-year-old B.G.² (the decoy). Although not noted in the accusation, the decoy was working for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on June 6, 2018, documentary evidence was received and testimony concerning the sale was presented by the decoy, by Department Agent Ricky Barone, and by Ritu Singh, franchisee and corporate president of Dukaan Doh, Inc.

Testimony established that on December 31, 2017, the decoy entered the licensed premises and went to the coolers where he selected a 24-ounce can of Bud Light beer. He took the beer to the register and waited in line behind three to four people. When it was his turn, he handed the beer to the clerk. The clerk asked for his identification and the decoy gave him his United States passport — containing his true date of birth, showing him to be 16 years of age. (Exh. D-3.) The clerk looked at the passport for a moment then completed the sale without asking any age-related questions.

The decoy exited the premises and told the agents what had occurred. He then re-entered the premises with several Department agents. The decoy pointed out the

²Because of his age, the decoy's name is redacted throughout the record and his initials used instead.

clerk to the agents when they asked him who sold him the beer. Department Agent Ricky Barone identified himself and explained that the violation to the clerk. Barone asked the decoy how old he was and he said he was 16 years old. The clerk and decoy were photographed together (Exh. D-2) while standing approximately 3-4 feet apart, and the clerk was subsequently cited.

The administrative law judge (ALJ) submitted a proposed decision on June 8, 2018, sustaining the accusation and recommending a 10-day suspension. The proposed decision was adopted by the Department in its entirety on July 3, 2018 and a Certificate of Decision was issued on July 26, 2018.

Appellants then filed a timely appeal contending: (1) the decoy's appearance did not comply with rule 141(b)(2)³, (2) the decoy operation was not conducted in a fashion that promotes fairness, in violation of rule 141(a), because it took place on New Year's Eve, and (3) the minor's false and inconsistent testimony should be given no weight.

DISCUSSION

I

Appellants contend that the decoy did not display the appearance required by rule 141(b)(2), and that he appeared over the age of 21 because of his size and stature, his ability to grow facial hair, and his experience as a decoy. (AOB at p. 7.)

Rule 141(b)(2) provides:

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

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

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

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

Appellants maintain that the decoy's mature physical appearance and experience as a decoy undermine a finding that his appearance complied with rule 141(b)(2). They argue:

For the operation at issue in this case, the Department used a decoy that did not meet the standard mandated by Rule 141, subdivision (b)(2), because his physical appearance and clothing, coupled with his past experience and comfort serving as a minor decoy gave him the appearance of an adult male of at least 21 years of age. The Decoy was 5 feet 9 inches and 200 pounds on the date of the operation. It was even mentioned in the hearing that the Decoy was about the same size as the Administrative Law Judge. In addition, though he was clean shaven on the date of the operation, the Decoy did have the ability to grow facial hair and, overall, had the demeanor of an individual over the age of 21.

(AOB at p. 7.)

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

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

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

When findings are attacked as being unsupported by the evidence, the power of

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

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

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

4. B.G. appeared and testified at the hearing. On June 6, 2018 his appearance was generally as depicted in an image that was taken during the operation on December 31, 2017. (Exhibit D-2) The one significant difference was that B.G. had a light moustache at the hearing and he was clean shaven on the date of the operation. B.G. wore a black, long-sleeved t-shirt and blue jeans during the operation. His face was fully exposed and his hair was combed back. B.G. was approximately 5 feet, 9

inches tall and 200 pounds at the hearing. His build was heavysset, not muscular. B.G. credibly testified that his size and appearance on the date of the operation were essentially the same.

¶ . . . ¶

12. B.G. had served as a decoy on one prior operation for the Department before December 31, 2017. Because of his large size, B.G. appeared slightly older than his chronological age of 16 years old at the time of the decoy operation. However, based on his overall appearance, i.e., his physical appearance, clothing, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of Manzo at the Licensed Premises on December 31, 2017, B.G. displayed the appearance which would generally be expected of a person less than 21 years of age during his interactions with Manzo. Even though Manzo remained an employee of the Licensed Premises, Manzo did not testify in this matter to explain his age related impressions of B.G. or why he sold B.G. alcohol after B.G. presented a passport that identified him as being 16 years of age.

(Findings of Fact, ¶¶ 4-12.) Based on these findings, the ALJ reached the following conclusions on the issue of compliance with rule 141(b)(2):

11. Respondent also asserted that the appearance of the decoy did not comply with rule 141(b)(2). As noted above, Manzo did not testify in this matter to establish that his error was the result of B.G.'s appearance. Manzo, in fact, asked for B.G.'s identification which suggests that he had reason to believe that B.G. might be underage. Manzo did not ask any follow up questions after asking B.G. for identification, so the exchanges between him and B.G. were minimal. Further, B.G. testified in this matter and his appearance matched the appearance he presented to Manzo on the date of the operation. Even though B.G.'s height and heft made him appear older than 16, he had the appearance "which could generally be expected of a person under 21 years of age" which is the standard required by rule 141(b)(2). As previously noted, the clerk did not testify to establish facts suggesting an identification issue or whether there was anything in B.G.'s actions, manner, or appearance that led Manzo to reasonably conclude that B.G. was over 21. The Department has established compliance with rule 141(b)(2) and the Respondent has failed to rebut his evidence.

(Conclusions of Law, ¶ 11.)

The Board has repeatedly declined to substitute its judgment for that of the ALJ on this particular question of fact. Minors come in all shapes and sizes, and we are

reluctant to suggest, without more, that minor decoys of large stature automatically violate the rule. (See, e.g., *7-Eleven/NRG Convenience Stores* (2015) AB-9477; *7-Eleven Inc./Lobana* (2012) AB-9164.) This Board has noted that:

[a]n ALJ's task to evaluate the appearance of decoys is not an easy one, nor is it precise. To a large extent, application of such standards as the rule provides is, of necessity, subjective; all that can be required is reasonableness in the application. As long as the determinations of the ALJs are reasonable and not arbitrary or capricious, we will uphold them.

(*O'Brien* (2001) AB-7751, at pp. 6-7.) Notably, the standard is not that the decoy must display the appearance of a "childlike teenager" but "the appearance which could generally be expected of a person under 21 years of age." In Finding of Fact paragraphs 4 and 12, and Conclusions of Law paragraph 11, the ALJ found that the decoy met this standard.

We have reviewed the entire record and agree with the ALJ's determination that there was compliance with rule 141(b)(2). As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity to observe the decoy as he testifies and to make the determination whether the decoy's appearance met the requirement of rule 141 that he possess the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages.

The evidence presented at the hearing, including the presence of the decoy himself, clearly provided substantial evidence for finding that the decoy's appearance complied with the requirements of rule 141(b)(2). We see no flaw in the ALJ's findings or determinations. Ultimately, appellants are asking this Board to consider the same set of facts and reach a different conclusion, despite substantial evidence to support those findings. This we cannot do.

II

Appellants contend that the decoy operation was not conducted in a fashion that promotes fairness, under rule 141(a), because it was conducted on New Year's Eve, at a time the Department knew the clerk would be busy and distracted. (AOB at p. 8.)

Rule 141(a) requires "fairness" in the use of minor decoys:

A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors . . . and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

As appellants note, the requirements of rule 141 must be strictly obeyed: "The Department's increasing reliance on decoys demands strict adherence to the rules adopted for the protection for the licensees, the public, and the decoys themselves."

(Acapulco Restaurants, Inc. v. Alcoholic Bev. Control Appeals Bd. (1998) 67

Cal.App.4th 575, 580 [79 Cal.Rptr.2d 126, 129].)

The ALJ considered appellants' contention that the operation was unfair because the store was busy and rejected it:

14. Similarly, the Respondent has asserted, without authority, that the Department's investigation on December 31, 2017 was "unfair" since it happened to be a particularly busy day because it was New Year's Eve. The evidence received in this matter was that the investigation occurred during a period of time when the Licensed Premises was exercising off-sale beer and wine privileges. It is one of the core law enforcement missions of the Department to ensure that licensees are exercising their privileges in a lawful manner. Licensees are subject to inspection and regulation pursuant to the California Alcoholic Beverage Control Act. An inspection or investigation during the normal operation hours of a business is, on its face, unremarkable. Given the nature of the New Year's holiday and its strong association with revelry and alcohol consumption, one would expect the Department to be more vigilant during this holiday period as was the case in this matter. The Respondent has failed to offer any facts or authorities that establish that the decoy operation was unlawful because it fell on the eve of a holiday that made the business busier than usual.

(Conclusions of Law, ¶ 14.)

Appellants disagree, and cite one of our previous cases in which we said “this Board has noted that there may be circumstances where a truly incapacitating level of activity, coupled with an intent on the part of officers to take advantage of the situation, might merit relief.” (*Garfield Beach CVS, LLC* (2014) AB-9373, at p. 4.)

It is conceivable that, where an unusual level of patron activity that truly interjects itself into a decoy operation to such an extent that a seller may be legitimately distracted or confused, and the law enforcement officials seek to take advantage of such distraction or confusion, relief might be appropriate.

(*Ibid.*, quoting *Circle K Stores, Inc.* (2000) AB-7476 , at p. 5.) Notably, we are unaware of any case where such an abuse has been proven and this case is no exception.

Under the facts of this case, we see no “truly incapacitating level of activity” nor do we see any “intent on the part of officers to take advantage of the situation.” There was simply no evidence presented to support this argument. Indeed, the number of customers seems to have had absolutely no effect on the course of the transaction beyond the decoy's relatively short wait in line. It is undisputed that the clerk took the time to request and examine the decoy's identification. Moreover, the clerk did not testify — any claim that the clerk was “legitimately distracted or confused” is rank speculation. Appellants' arguments on this point are therefore unsupported by any evidence, and the ALJ was entitled to reject them.

Moreover, as we have said many times before, this Board has little sympathy for the “rush hour” defense because the policy concerns weighing against it are too great:

When commerce reaches the point where the desire not to inconvenience customers overrides the importance of preventing sales of alcoholic beverages to minors, the public safety and morals of the people of the State of California will be irreparable injured. Such an unacceptable result will not occur on this Board's watch.

(*The Vons Company, Inc.* (2001) AB-7788, at p. 4.) Appellants have certainly given us no cause to look beyond those concerns in this case and we find no cause to reconsider the ALJ's conclusion that appellants failed to establish that the decoy operation was unfair.

III

Appellants contend that the decoy provided inconsistent and false testimony during the administrative hearing. (AOB at p. 9.) Specifically, appellants allege that the decoy did not testify credibly about two points: whether or not he was asked for identification, and whether anyone was in line in front of him prior to purchasing the beer. (*Id.* at p. 10.) It is appellant's position that the decoy's "inconsistent testimony and lack of credibility in this matter are not supported by substantial evidence and should be given no weight." (*Ibid.*)

The trier of fact is accorded broad discretion in ruling on the admissibility of evidence, and the ruling will be reversed only if there is a clear showing of an abuse of discretion. (*Aguayo v. Crompton & Knowles Corp.* (1986) 183 Cal.App.3d 1032, 1038 [228 Cal.Rptr. 768].) It is a firmly established principal that it is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]); *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].)

Appellants have provided no evidence that any of the decoy's testimony was "false" — only that his memory had to be refreshed as to this particular decoy operation, and, considering that he participated in 19 operations that day, this is not surprising. Needing to have one's memory refreshed certainly does not negate the validity of one's testimony nor make it in any way "false."

The ALJ made no findings on the decoy's credibility because his credibility was not challenged at the administrative hearing. Instead, based on both the testimony of the decoy and the testimony of Agent Barone, evidence was established to the satisfaction of the ALJ to support his findings that the decoy presented his passport to the clerk during the transaction, and that three to four people were in line ahead of the decoy prior to the sale. The Board is not empowered to reweigh the evidence or make its own findings on these points.

As the Department notes in its brief, it is not uncommon for the trier of fact to have to piece together the whole picture from the various testimonies presented in a kind of "weaving a cloth of truth." (RRB at p. 4.)

It is well settled that the trier of fact may accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted. [Citations.] As was said in *Nevarov v. Caldwell* (1958) 161 Cal. App. 2d 762, 777 [327 P.2d 111], "the jury properly may reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected available material. [Citations.]"

(*Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 67-68 [107 Cal.Rptr. 45].) We concur with this assessment.

In this case, the testimony of the decoy, taken together with the testimony of Agent Barone, supports the ALJ's findings with substantial evidence. We find no problem with the decoy's testimony nor any error by the ALJ in establishing the facts of this case.

ORDER

The decision of the Department is affirmed.⁴

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

⁴This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

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

APPENDIX

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

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

7-ELEVEN, INC., DUKAAN DOH, INC.
7-ELEVEN STORE 2368 19600E
915 SAN BENITO STREET
HOLLISTER, CA 95023

OFF-SALE BEER AND WINE - LICENSE

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

SALINAS DISTRICT OFFICE

File: 20-540461

Reg: 18086723

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 3, 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 6, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: July 26, 2018



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

7-Eleven, Inc., Dukaan Doh, Inc.
DBA: 7-Eleven Store 2368 19600E
915 San Benito Street
Hollister, California 95023

Respondent

Off-Sale Beer and Wine License

} File: 20-540461
}
} Registration: 18086723
}
} License Type: 20
}
} Page Count: 110
}
} Reporter:
} TimiAnne Bourell-CSR # 2845
} Absolute Court Reporters, LLC
}
} **PROPOSED DECISION**

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Hollister, California, on June 6, 2018.

Sean Klein, Attorney, represented the Department of Alcoholic Beverage Control (Department).

Donna Hooper, Attorney, represented Respondents 7-Eleven, Inc. and Dukaan Doh, Inc. (Respondent). Ritu Singh, the President of Dukaan Doh, Inc. was also present for the Respondent's case in chief.

The Department seeks to discipline the Respondent's license on the grounds that, on or about December 31, 2017 the Respondent, through their agent or employee, Edgar Manzo, sold, furnished, or gave alcoholic beverages to B.G.¹, an individual under the age of 21 in violation of Business and Professions Code section 25658(a)² (Exhibit D-1).

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on June 6, 2018.

¹ In this matter, the Decoy used by the Department was under 18 years of age at the time of the hearing. He is referred to by his initials in this proposed decision to protect his privacy. His identity was revealed to the Respondent during the course of proceedings.

² All statutory references are to the Business and Professions Code unless otherwise noted.

FINDINGS OF FACT

1. The Department filed the accusation on March 30, 2018. (Exhibit D-1)
2. On July 21, 2014 the Department issued a type 20, off-sale beer and wine license to the Respondent for the above-described location (the Licensed Premises). There is no record of prior Department discipline against the Respondent's license.
3. B.G. was born on March 18, 2001 and was 16 years of age at the time of the investigation on December 31, 2017. On that date, B.G. served as a minor decoy in an operation conducted by the Department at multiple locations, including at the Licensed Premises.
4. B.G. appeared and testified at the hearing. On June 6, 2018 his appearance was generally as depicted in an image that was taken during the operation on December 31, 2017. (Exhibit D-2) The one significant difference was that B.G. had a light moustache at the hearing and he was clean shaven on the date of the operation. B.G. wore a black, long-sleeved t-shirt and blue jeans during the operation. His face was fully exposed and his hair was combed back. B.G. was approximately 5 feet, 9 inches tall and 200 pounds at the hearing. His build was heavysset, not muscular. B.G. credibly testified that his size and appearance on the date of the operation were essentially the same.
5. On December 31, 2017 B.G. went to the Licensed Premises with agents of the Department for the purpose of trying to buy alcohol. Prior to entering, he was told to make an attempt at purchasing an alcoholic beverage. B.G. was instructed to carry his identification, show it if requested, and to be truthful regarding his age if asked. B.G. wore an iPod type device that allowed the agents to listen to what was occurring for safety purposes. The device did not record but it allowed for the interactions of B.G. to be monitored in real time since he was entering the Licensed Premises alone.
6. B.G. went into the Licensed Premises and proceeded to the refrigerated coolers. He selected a 24 ounce Bud Light beer can as depicted in a later image taken of B.G. and the clerk he interacted with. (Exhibit D-2) B.G. took his selection to the line for the register. Approximately three to four people were in front of him. After they were assisted, B.G. approached the clerk behind the counter. B.G. presented the Bud Light beer can to the clerk for purchase.
7. This clerk was the same individual in the image that was later taken of B.G. standing in front of the clerk that served him. (Exhibit D-2) The clerk had B.G. produce identification. B.G. presented his United States passport to the clerk. The clerk took the identification and appeared to examine it.

8. The passport B.G. presented showed his picture to the left of lines that had his full name and nationality. Below these lines was an entry that said "Date of Birth" with his birthdate of "18 Mar 2001" directly below. (Exhibit D-3) Despite this information, the clerk asked no questions of B.G. about his age during any of their interaction. The clerk rang up the beer. B.G. paid for the beer, took possession of it from the clerk, and then left.

9. B.G. exited the Licensed Premises with the Bud Light beer. He approached the vehicle where the Department agents were waiting. B.G. told the agents what happened. After this, the agents went into the Licensed Premises with B.G. Upon entering, B.G. identified the clerk when one of them asked if the person working behind the counter was the one who sold him the beer. They were approximately 10 feet away from the clerk when this occurred and he was in the process of helping other customers. After this initial identification, Department Agent Ricky Barone (Barone) approached the clerk and explained why they were present by telling him that he had sold beer to a minor. Barone and the other agents were in plain clothes but they had their Department badges hanging around their necks on lanyards. Barone stood across the counter from the clerk when he engaged with him.

10. After Barone told the clerk they were there because he had sold alcohol to a minor, B.G. was asked how old he was. B.G. was standing next to Barone when this question was asked. B.G. responded by saying he was 16 years old. B. G. was standing just across the counter from the clerk when B.G. responded to Barone's question. The clerk was identified as Edgar Manzo (Manzo) during Barone's investigation of the sale to B.G.

11. After B.G. stated his age, Manzo was photographed while standing immediately across the counter from him at a distance of approximately 3-4 feet. B.G. held the Bud Light beer can in one hand while he and Manzo faced the camera while Barone took the picture. (Exhibit D-2) From the initial law enforcement contact with Manzo until after this photograph was taken; B.G. was in the immediate presence of Manzo and the agents. Manzo was subsequently issued a citation for the sale.

12. B.G. had served as a decoy on one prior operation for the Department before December 31, 2017. Because of his large size, B.G. appeared slightly older than his chronological age of 16 years old at the time of the decoy operation. However, based on his overall appearance, i.e., his physical appearance, clothing, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of Manzo at the Licensed Premises on December 31, 2017, B.G. displayed the appearance which would generally be expected of a person less than 21 years of age during his interactions with Manzo. Even though Manzo remained an employee of the Licensed Premises,

Manzo did not testify in this matter to explain his age related impressions of B.G. or why he sold B.G. alcohol after B.G. presented a passport that identified him as being 16 years of age.

13. At the Licensed Premises, when a customer presents an alcoholic beverage for purchase, the item is scanned and the register then requires the clerk to confirm that the purchaser is over 21. On December 31, 2017 employees in the Licensed Premises could scan a driver's license or manually enter a particular birthdate into the register for approving or declining an alcohol sale. On that date, employees also had the option to press a button that allowed them to override the system after they made an informal visual identification that the purchaser appeared over 30. Shortly after Manzo was cited for the sale to B.G., the Licensed Premises deactivated the visual identification override and required a scanned or manually entered birthdate for all alcohol purchases. In addition, Manzo was counselled and required to re-take the age restricted sales training he had received when he was hired in November 2017. (Exhibit L-3)

14. Ritu Singh (Singh) is the owner of the Licensed Premises which is a franchise of 7-Eleven. She is also the corporate president of the corporation that holds the type 20 license used by the Licensed Premises to exercise off-sale beer and wine privileges. After the incident, in addition to having Manzo go through re-training, she also had the remaining employees at that location retake the restricted sales training program they initially took when they were hired. (Exhibit L-4) She also continued to monitor keyed in birthdates when employees use this option to ensure that they appeared to be making genuine entries of birth date information rather than keying in fake birthdates in order to complete and alcohol sale.

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

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.
4. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on December 31, 2017 the Respondent's clerk, Edgar Manzo inside the Licensed Premises, sold an alcoholic beverage to B.G., a person under the age of 21, in violation of Business and Professions Code section 25658(a) (Findings of Fact ¶¶ 2-13).
5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141³ and, therefore, the accusation should be dismissed. Specifically, the Respondent argued that the face to face identification failed to comply with rule 141(b)(5), the appearance of the decoy did not comply with rule 141(b)(2), and that the use of a United States passport was not in compliance with rule 141(b)(3). Any of these alleged violations, if established, would be affirmative defenses and require dismissal of the accusation pursuant to rule 141(c).
6. There is no credible evidence supporting the assertions by the Respondent that there was a failure to comply with rule 141. Regarding the rule 141(b)(5) violation, *Acapulco Restaurants, Inc. v. Alcoholic Beverages Control Appeals Board* (1998) 67 Cal.App.4th 575 confirmed that a face to face must occur for compliance, but that case never established a baseline standard for what was a compliant face to face identification. The subsequent decision in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1687 held that the regulation at "section 141, subdivision (b)(5), ensures-admittedly not as artfully as it might-that the seller will be given the opportunity, soon after the sale, to come "face-to-face" with the decoy." *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1687, 1698. This decision confirmed that the purpose of the face to face was to give the seller notice of who the decoy was.
7. Further clarification of what constituted a compliant face to face occurred in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2017) 18 Cal.App.5th 541. This case is particularly helpful since the identification by B.G. of Manzo in this matter was substantively similar to the identification that was found to be compliant with rule 141(c) in that case. In finding that identification compliant, that court ruled:

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

“Here there is no violation of Rule 141, as explained above, because the decoy made a face-to-face identification by pointing out the clerk to the officer inside the store while approximately 10 feet from her, standing next to her when the officer informed her she had sold alcohol to a minor, and taking a photograph with her as the minor held the can of beer he purchased from her. She had ample opportunity to observe the minor and to object to any perceived misidentification. The rule requires identification, not confrontation. The identification here meets the letter and the spirit of Rule 141.” *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2017) 18 Cal.App.5th 541, 547

8. While, general due process considerations demand a fair identification be facilitated by law enforcement, these cases makes clear that this particular regulation is focused on the more narrow concern of allowing the *seller* the opportunity to be aware of the identity of the decoy. It stands to reason that compliance with Rule 141, subdivision (b)(5) occurs if the clerk and the decoy, during the process of the investigation, prior to the citation being issued or departure of the decoy, are brought in reasonable proximity to each other to assure that the seller knows (or reasonably ought to know) that he or she is being identified as the seller by the decoy.

9. B.G. testified to first identifying Manzo to the agents at the entranceway of the Licensed Premises. This alone would have been insufficient because Manzo appeared to be preoccupied with customers when this occurred. However, much more occurred in this case to put Manzo on notice that he was accused of selling beer to B.G. Barone approached Manzo at the counter, got his attention and identified himself as a law enforcement officer investigating a sale of alcohol to a minor. While the sale to B.G. was discussed between Barone and Manzo at the counter, B.G. stood directly next to Barone. Right after this discussion, while in the immediate presence of Manzo, B.G. said he was sixteen years old in response to Barone’s question about his age. Manzo was clearly aware that the decoy was B.G. because he discussed making the sale to B.G. with the agents and with Singh when she counselled him about his error. Before Manzo was cited on December 31, 2017, B.G. and Manzo were photographed adjacent to each other and separated only by the width of a counter. (Findings of Fact ¶¶ 3-14 and Exhibit D-2) Manzo clearly came face to face with B.G. under circumstances that made it clear that Manzo had been identified as the person who sold B.G. beer and that B.G. was the minor at issue. Though Manzo did not testify in this matter, his statements to Singh and the agents made it clear that he understood the decoy was B.G. (Findings of Fact ¶¶ 3-14)

10. None of the evidence presented by the Respondent rebutted the credible evidence presented by the Department that this was a fully compliant identification that allowed Manzo to become aware that B.G. was the decoy. Respondent has offered no evidence or argument suggesting that the identification violated state or federal due process

considerations. Given the totality of the evidence presented by the Department credibly establishing compliance with rule 141(b)(5), the Respondent's assertions that compliance did not occur are unsupported.

11. Respondent also asserted that the appearance of the decoy did not comply with rule 141(b)(2). As noted above, Manzo did not testify in this matter to establish that his error was the result of B.G.'s appearance. Manzo, in fact, asked for B.G.'s identification which suggests that he had reason to believe that B.G. might be underage. Manzo did not ask any follow up questions after asking B.G. for identification, so the exchanges between him and B.G. were minimal. Further, B.G. testified in this matter and his appearance matched the appearance he presented to the Manzo on the date of the operation. Even though B.G.'s height and heft made him appear older than 16, he had the appearance "which could generally be expected of a person under 21 years of age" which is the standard required by rule 141(b)(2). As previously noted, the clerk did not testify to establish facts suggesting an identification issue or whether there was anything in B.G.'s actions, manner, or appearance that led Manzo to reasonably conclude that B.G. was over 21. The Department has established compliance with rule 141(b)(2) and the Respondent has failed to rebut this evidence.

12. The Respondent argued that the use of a United States passport by B.G. was in violation of rule 141(b)(3). That subsection of the regulation, in its entirety, requires that:

"[a] decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages[.]"

13. This regulation does not require, as Respondent asserted, that the identification be a California driver's license or identification card. It does not require any particular identification; just that any identification used meets certain minimum standards. The United States passport met all of the identification requirements of this regulation and B.G. complied with the presentation requirement when he was asked to show identification. The United States passport was B.G.'s own identification. It had his correct date of birth on display on the same page as his picture. B.G. presented the identification when Manzo asked for it. The Respondent has cited no facts or authorities that establish that the use of the United States passport by B.G. failed to comply with the letter or spirit of this regulation. The Department has established compliance with rule 141(b)(3) and the Respondent has failed to rebut this evidence.

14. Similarly, the Respondent has asserted, without authority, that the Department's investigation on December 31, 2017 was "unfair" since it happened to be a particularly busy day because it was New Year's Eve. The evidence received in this matter was that

the investigation occurred during a period of time when the Licensed Premises was exercising off-sale beer and wine privileges. It is one of the core law enforcement missions of the Department to ensure that licensees are exercising their privileges in a lawful manner. Licensees are subject to inspection and regulation pursuant to the California Alcoholic Beverage Control Act. An inspection or investigation during the normal operating hours of a business is, on its face, unremarkable. Given the nature of the New Year's holiday and its strong association with revelry and alcohol consumption, one would expect the Department to be more vigilant during this holiday period as was the case in this matter. The Respondent has failed to offer any facts or authorities that establish that the decoy operation was unlawful because it fell on the eve of a holiday that made the business busier than usual.

PENALTY

The Department recommended that the Respondent's license be suspended for the standard penalty of 15 days. The Department found that the period of licensure since July 2014 without prior discipline was not long enough to warrant mitigation and that the sale to a sixteen year old weighed against mitigation as well.

The Respondent argued for a 10 day penalty if the Accusation were sustained based on the period of licensure without prior incidents, the Respondent's ongoing efforts to prevent unlawful alcohol sales, and its adoption of stricter standards immediately after the incident in this matter.

Significant evidence was presented regarding the Respondent's policies to prevent sales of alcoholic beverages to underage individuals that were in place at this Licensed Premises before December 31, 2017. This incident appeared to be a departure from the employee practices stressed by the Respondent. The Respondent took the incident seriously, specifically counselled and retrained the clerk who made the sale, and then put *all* of its sales employees through retraining in the days after the sale to B.G. The Respondent also removed an override feature from the register that allowed visual identifications in order to stress that employees must determine the date of birth of persons purchasing alcohol. These efforts by the Respondent do support mitigation of the discipline.

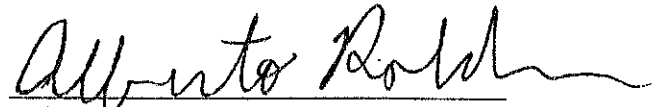
There appear to be no factors in aggravation applicable to this violation. The penalty recommended herein complies with rule 144.

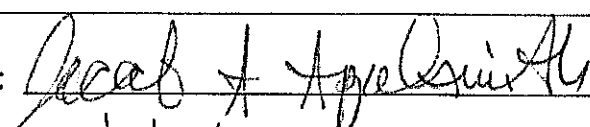
7-Eleven, Inc., Dukaan Doh, Inc.
DBA: 7-Eleven Store 2368 19600E
File #20-540461
Reg. #18086723
Page 9

ORDER

The Respondents' off-sale beer and wine license is hereby suspended for a period of 10 days.

Dated: June 8, 2018


Alberto Roldan
Administrative Law Judge

<input checked="" type="checkbox"/>	Adopt
<input type="checkbox"/>	Non-Adopt: _____
By: 	
Date: <u>7/3/18</u>	