

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

AB-9738

File: 20-232006 Reg: 18086288

LAI THI TRINH and SANH HOA TRUONG,
dba La Tapatia Meat Market
1506-1508 West Edinger Avenue,
Santa Ana, CA 92704,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: D. Huebel

Appeals Board Hearing: February 7, 2019
Ontario, CA

ISSUED FEBRUARY 20, 2019

Appearances: *Appellants:* Donna Hooper, of Solomon Saltsman & Jamieson, as counsel for Lai Thi Trinh and Sanh Hoa Truong, doing business as La Tapatia Meat Market.
Respondent: Jonathan Nguyen as counsel for the Department of Alcoholic Beverage Control.

OPINION

Lai Thi Trinh and Sanh Hoa Truong, doing business as La Tapatia Meat Market, appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 15 days because their clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

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

Appellants' off-sale beer and wine license was issued on May 8, 1989. On January 5, 2018, the Department filed an accusation charging that co-appellant Lai Thi Trinh, while working as a clerk, sold an alcoholic beverage to 18-year-old Ernesto Guerrero-Campo on August 18, 2017. Although not noted in the accusation, Guerrero was working as a minor decoy for the Santa Ana Police Department at the time.

At the administrative hearing held on May 9, 2018, documentary evidence was received and testimony concerning the sale was presented by Guerrero (the decoy); by Brenda Ortega, a second decoy who accompanied Guerrero; by Officers Joe Castellanos and David Juarez of the Santa Ana Police Department; and by co-licensees Lai Thi Trinh and Sanh Hoa Truong.

Testimony established that on the date of the operation, decoys Guerrero and Ortega entered the licensed premises and walked to the refrigerated beer section. Decoy Guerrero selected a three-pack of 25-ounce cans of Bud Light beer. Guerrero took the three-pack of beer to the front sales counter for purchase. Decoy Ortega followed and stood next to Guerrero.

Decoy Guerrero placed the three-pack of Bud Light beer on the counter. Trinh, who was working as a clerk, asked for Guerrero's identification. Guerrero handed Trinh his valid California Identification Card, which had a vertical orientation, showed his correct date of birth, and included a red stripe that read "AGE 21 IN 2020" and a blue stripe that read "AGE 18 IN 2017." Trinh retrieved the identification, looked at it for 10 seconds, and handed it to her husband and co-appellant Sanh Hoa Truong, who was seated at the cash register next to her. Truong retrieved the identification, looked at the photo on it, compared it to decoy Guerrero, and read the blue stripe on the

identification. When Truong looked at the blue stripe, he misread it as stating Guerrero was 21 years old in 2017, and believed Guerrero was old enough to purchase alcoholic beverages. Truong spoke in a language other than English to his wife, Trinh, told her decoy Guerrero was 21 in 2017, and handed the identification back to Trinh. Trinh handed the identification to her husband a second time, and he handed it back to her. Trinh retrieved the identification, and looked only at the month and day of the date of birth. There was no evidence that she looked at the year of birth or at the red stripe that read "AGE 21 IN 2020." Trinh then spoke in broken English to decoy Guerrero, saying "You 21 years old in three months. You make it." The clerk's remark was framed as a statement, not a question. Guerrero understood Trinh to be making a statement and not asking him a question, and understood Trinh to be stating that he would be 21 years old in three months, so it would be okay. Guerrero did not respond in any way to Trinh's second statement. Trinh then proceeded with the sale of alcohol to decoy Guerrero, telling him the cost of the beer. Guerrero gave money to Trinh, who provided the decoy with change. Decoy Guerrero took the change and the three-pack of Bud Light beer and exited the store with decoy Ortega.

Officer Juarez was inside the licensed premises posing as a customer and witnessed these events. Officer Juarez exited the store soon after the two decoys exited.

During the sales transaction, Trinh did not speak or interact with decoy Ortega. At no time during the sales transaction did Trinh ask how old decoy Guerrero was, or any other age-related questions.

Decoys Guerrero and Ortega reentered the licensed premises with Santa Ana Police Department Sergeant Garcia and Officers Castellanos and Bonner. Officer Castellanos asked decoy Guerrero to identify the person who sold him the beer. Guerrero pointed out the female clerk, Trinh. Guerrero and Trinh were standing three feet apart at the time of this identification, with Trinh behind the cash register and Guerrero standing on the customer side of the cash register. Officer Castellanos advised Trinh of the violation. A photo of Trinh and decoy Guerrero was taken after the face-to-face identification, with Guerrero holding his identification and the three-pack of Bud Light beer while standing next to Trinh.

After the hearing, the Department issued a decision determining the violation charged was proved and no defense was established.

Appellants then filed this appeal contending the decoy operation violated rules 141(a) and (b)(2) by employing minor decoys who appeared to be a married couple over the age of 21.

DISCUSSION

Appellants contend the operation was unfair because decoys Guerrero and Ortega "appeared as a married couple who were over the age of 21." (App.Br., at p. 6.) Appellants opine that Guerrero "appears, objectively, over the age of 21" and is a "fully-grown man with a sturdy, well-developed build and a faint mustache" along with "thick prescription glasses." (*Id.* at p. 7.) Moreover, appellants argue that both Trinh and Truong believed decoy Ortega was Guerrero's wife. (*Ibid.*) Finally, appellants contend "both decoys had training and experience with law enforcement that caused them to present themselves in a mature manner." (*Ibid.*)

Appellant claims the "ALJ erred by substituting her judgment [of the decoys' apparent age], which is necessarily less informed," for the judgment of Trinh and Truong, "who were present at the time of the operation." (*Id.* at p. 8.) According to appellant, this error requires reversal.

This Board is bound by the factual findings in the Department's decision as long as they 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.]

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; see also *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628].)

Moreover, 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].) "The trier of fact . . . is the sole judge of the credibility of the witnesses [and] may disbelieve them even though they are uncontradicted if there is any rational ground for doing so, one such reason for disbelief being the interest of the witnesses in the case." (*Pescosolido v. Smith* (1983) 142 Cal.App.3d 964, 970-971 [191 Cal.Rptr. 415].) The Appeals Board will not interfere with credibility determinations absent a clear showing of abuse of discretion.

Rule 141 provides, in relevant part,

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

(b) The following minimum standards shall apply to actions filed pursuant to Business and Professions Code Section 25658 in which it is alleged that a minor decoy has purchased an alcoholic beverage:

(1) At the time of the operation, the decoy shall be less than 20 years of age;

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

(3) A decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages;

(4) A decoy shall answer truthfully any questions about his or her age;

(5) Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

(Code Regs., tit. 4, § 141.) The rule provides an affirmative defense, and the burden of proof lies with the party asserting it. (*Chevron Stations, Inc.* (2015) AB-9445, at pp. 3-16; *7-Eleven, Inc./Lo* (2006) AB-8384, at pp. 8-11.)

The court of appeal recently held that the fairness requirement contained in rule 141(a) is not an ambiguous, general decree, but is defined by the five requirements that follow in subdivision (b):

Contrary to the Appeals Board's contention, Rule 141 provides specific guidance regarding how to preserve fairness in minor decoy operations.

Subdivision (b) of Rule 141 implements the goal of fairness by imposing five specific requirements for every minor decoy operation. Decoys must be under the age of 20; have the appearance of a person under 21; carry their own actual identification and present that identification upon request; truthfully answer any questions about their ages; and make face-to-face identifications of the persons who sold the alcoholic beverages. (Rule 141, subd. (b)(1)-(5).) Fairness under Rule 141 is assured by a set of five expressly defined safeguards, all of which must be fulfilled during a minor decoy operation.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Garfield Beach CVS)* (2017) 7 Cal.App.5th 628, 638 [213 Cal.Rptr.3d 130] [addressing general fairness defense where decoy did not respond to clerk's age-related statement].) The court went on to "reject the Appeals Board's attempt to add a new defense to Rule 141 that is not expressed in the rule." (*Id.* at p. 640.)

Notably, there is nothing in rule 141 that precludes the use of a married decoy, provided that decoy otherwise complies with the five safeguards outlined in subdivision (b). (See *Garfield Beach CVS, supra*; see also Code Regs., tit. 4, § 141(b).) As the Department correctly points out, "persons can freely enter into a marriage at age 18 in the state of California" and "persons *under* the age of 18 can also get married in California pursuant to a court order." (Dept.Br., at p. 9, emphasis in original.) Marital status is irrelevant to a decoy's apparent age. As a matter of law, appellants' purported assumption that Ortega and Guerrero were a married couple cannot support a defense under any subdivision of rule 141.

Regarding the decoys' appearance generally, the ALJ made the following relevant findings of fact:

5. Decoy Guerrero appeared and testified at the hearing. On August 18, 2017, he was approximately 5'8" tall and weighed approximately 190 pounds. He wore a black t-shirt with a picture of a gorilla and the word "X-LARGE" written in red on the front, blue jeans and black shoes. He wore no jewelry. He wore black-rimmed prescription eyeglasses. His hair was

cut short and styled in a left comb-over. (Exhibits 3 and 4.) His appearance at the hearing was the same except his hair was approximately an inch longer and slightly curly, but still styled in a left comb-over.

6. Decoy Ortega appeared and testified at the hearing. On August 18, 2017, she was 18 years old, 5 feet tall and weighed 120 pounds. She wore a black t-shirt, navy blue jeans and white shoes. She wore a necklace and a ring on the middle finger of her left hand. She wore her hair down, past her shoulders, with bangs on her forehead. (Exhibit 5.) Her appearance at the hearing was the same, except that she weighed 115 pounds, and wore a ring on each of her middle fingers.

¶ . . . ¶

11. Decoy Guerrero appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of clerk Trinh at the Licensed Premises on August 18, 2017, decoy Guerrero displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to clerk Trinh. Decoy Guerrero appeared his true age, as a teenager.

12. Decoy Ortega 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 clerk Trinh at the Licensed Premises on August 18, 2017, decoy Ortega displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to clerk Trinh. Decoy Ortega appeared her true age, as a teenager.

(Findings of Fact, ¶¶ 5-6, 11-12.) Based on these findings, the ALJ reached the following relevant conclusions of law:

6. With respect to rule 141(b)(2), specifically, the Respondents argued decoy Guerrero did not have the appearance generally expected of a person under the age of 21. Respondents' counsel opined that decoy Guerrero "definitely looked 21" because "he's a rather large, stocky man, had a faint mustache at the time, wears thick glasses" with a "fairly strong prescription," which generally is found on someone older than 21 with deteriorating eyes. Respondent's counsel also opined that decoy Guerrero's "short haircut, kind of military hairstyle also" made him look older, and "there was no evidence [the decoys] were nervous, they seemed to be comfortable." Respondents argued the decoys came into

the Licensed Premises "as a couple," with clerk Trinh referring to decoy Ortega as decoy Guerrero's "wife," hence that leant [sic] "an air of maturity as they presented themselves to the licensees."

7. This rule 141(b)(2) argument is rejected. Neither clerk Trinh, nor Mr. Truong testified that the factors, as opined by Respondents' counsel above, were the reasons why they thought decoy Guerrero looked 21 years or older. Those factors were not the direct testimony of Sanh Hoa Truong or clerk Trinh, but interjected as counsel's opinion and conjecture. In fact, clerk Trinh and Mr. Truong's assertions as to the factors which caused them to believe decoys Guerrero and Ortega were 21 years old or older are not credible for the reasons discussed more fully below.

8. Clerk Trinh claimed that on August 18, 2017, the decoys "both look that day they—dress up. Look more like 21—21 or older," and that the way decoy Guerrero dressed he looked older than 21. Clerk Trinh did not say why the dress attire made either decoy look 21 or older. Clerk Trinh threw in, "maybe he wear glasses too, maybe." She was not even sure if he wore glasses. Again she does not state what it is about the glasses that allegedly makes decoy Guerrero appear older than his actual age. Teenagers wear glasses too and it does not make them appear older than their age. Mr. Truong claimed he thought decoy Guerrero looked 21 or older because "he dressed up and glasses and hair style and come with that lady I thought they have to be at least 21." Then Mr. Truong said he thought decoy Ortega "look younger," acknowledging decoy Ortega looked younger than decoy Guerrero. Mr. Truong did not say why or what it was about the glasses, hair style or dress attire that made either decoy appear 21 years or older.

9. There was nothing about the decoys' typical teenage clothing to indicate they were dressed up. The decoys both wore black t-shirts and blue jeans, which is the typical attire of teenagers. There was absolutely nothing about the decoy's dress attire, decoy Guerrero's glasses or hair style which made them appear older than their actual age. Clerk Trinh never interacted with or spoke with decoy Ortega. Both decoys Guerrero and Ortega did not appear anywhere near 21 years of age. In fact, decoy Guerrero appeared his true age, 18, at all times, including at the time of the sales transaction, in the photographs taken of him before the said violation, and at the hearing. Furthermore, decoy Ortega looked, in person, like a teenager, with straight long hair and bangs, at just five feet tall and thin. Decoy Guerrero did not have any type of visible mustache in the photographs taken of him the day of the said violation (Exhibits 3 and 4) or at the hearing. If there was something, it is more probable that what he had was peach fuzz, as any typical teenager his age would have. Neither Mr. Truong nor clerk Trinh said they thought decoy Guerrero had a mustache; the reason they did not is because there was none to be seen. Decoy Guerrero's appearance, not only in the presence of clerk Trinh, but

at the hearing and as depicted in the photos taken on August 18, 2017, was not only consistent with that of a person under the age of 21, but consistent with that of an 18 year old, his actual age. The alleged claim Respondents' [sic] thought the decoys were married and thus appeared mature/older is disbelieved. Neither clerk Trinh nor Mr. Truong said that the fact they thought the decoys were married made them appear older than their true age. California lacks a minimum age requirement for persons to marry, other than requiring parental consent for those under 18 years of age. Even if these two teenage decoys were married, that in no way would have altered their appearance as teenagers. In other words, both decoys Guerrero and Ortega had the appearance generally expected of person under the age of 21. (Findings of Fact ¶¶ 11 and 12.)

(Conclusions of Law, ¶¶ 6-9.)

As noted above, this Board is bound by the ALJ's factual findings provided they are supported by substantial evidence. Appellants have not shown any flaw in these findings; instead, they merely argue that their own impression of the decoys' appearance is necessarily superior to that of the ALJ because they were present during the transaction. (App.Br., at p. 8.) In essence, appellants contend they are entitled to a favorable credibility finding, and that their own testimony must override any contrary finding of fact. That position is untenable to the point of absurdity. Appellants' self-serving and oft-inconsistent testimony is far from binding and, in fact, was repeatedly found less credible than the testimony offered by other percipient witnesses. (See, e.g., Conclusions of Law, ¶¶ 15 [crediting Officer Juarez and decoys over Trinh regarding statements to decoy Guerrero], 16 [Trinh's testimony inconsistent], 20 [crediting decoy Ortega's testimony over appellants' in part because decoy "has no motive or bias in the presentation of her testimony as do the licensees facing potential discipline"], 22-24 [appellants' testimony contradicts statements made to officers on date of operation], 25 [disbelieving Trinh's claim regarding poor vision].)

While appellants are certainly entitled to *present* testimony, whether that testimony is ultimately credible and sufficient to support a finding of fact is a question entrusted, by law, to the ALJ. In this case, the ALJ explicitly discredited appellants' testimony.² Based on other witnesses' statements, photographic evidence, and the presence of the decoys at the administrative hearing, the ALJ found the decoys' appearance complied with rule 141(b)(2). Appellants have shown no grounds for this Board to second-guess that finding.

ORDER

The decision of the Department is affirmed.³

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

2. In any event, as the ALJ noted, neither Trinh nor Truong testified that the factors described by appellants' counsel—such as decoy Guerrero's size, his purported mustache, his glasses, or the decoys' appearance as a couple—"were the reasons why [Trinh and Truong] thought decoy Guerrero looked 21 or older." (Conclusions of Law, ¶ 7.) "Those factors were not the direct testimony of Sanh Hoa Truong or clerk Trinh, but interjected as counsel's opinion and conjecture." (*Ibid.*) On appeal before this Board, appellants abandon their own testimony—which centered on a mistaken read of Guerrero's identification, along with the decoys' purportedly dressy clothing—and instead reassert their counsel's opinion regarding the decoys' apparent age. (See generally App.Br.)

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

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

APPENDIX

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

IN THE MATTER OF THE ACCUSATION
AGAINST:

LAI THI TRINH, SANH HOA TRUONG
LA TAPATIA MEAT MARKET
1506-1508 W EDINGER AVE
SANTA ANA, CA 92704

OFF-SALE BEER AND WINE - LICENSE

SANTA ANA DISTRICT OFFICE

File: 20-232006

Reg: 18086288

AB: 9738

Respondent(s)/Licensee(s)
under the Alcoholic Beverage Control Act.

CERTIFICATION

I, Dominique Williams, do hereby certify that I am a Senior Legal Analyst for the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that annexed hereto is a true, correct and complete record (not including the Hearing Reporter's transcript) of the proceedings held under Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code concerning the petition, protest, or discipline of the above-listed license heretofore issued or applied for under the provisions of Division 9 of the Business and Professions Code.

IN WITNESS WHEREOF, I hereunto affix my signature on September 21, 2018, in the City of Sacramento, County of Sacramento, State of California.


Office of Legal Services

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ABC APPEALS BOARD

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

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

**LAI THI TRINH AND SANH HOA TRUONG
LA TAPATIA MEAT MARKET
1506-1508 WEST EDINGER AVENUE
SANTA ANA, CA 92704**

OFF-SALE BEER AND WINE - LICENSE

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

SANTA ANA DISTRICT OFFICE

File: 20-232006

Reg: 18086288

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.

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JUL 27 2018

**Alcoholic Beverage Control
Office of Legal Services**

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:

Lai Thi Trinh, and Sanh Hoa Truong	}	File: 20-232006
Dbas: La Tapatia Meat Market	}	
1506-1508 West Edinger Avenue	}	Reg.: 18086288
Santa Ana, California 92704	}	
	}	License Type: 20
Respondents	}	
	}	Word Count: 45,750
	}	
	}	Reporter:
	}	Tami Comet
	}	Kennedy Court Reporters
	}	
<u>Off-Sale Beer and Wine License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Santa Ana, California, on May 9, 2018.

Jonathan Nguyen, Attorney, represented the Department of Alcoholic Beverage Control.

Donna Hooper, Attorney, represented Respondents, Lai Thi Trinh and Sanh Hoa Truong.

The Department seeks to discipline the Respondents' license on the grounds that, on or about August 18, 2017, the Respondent-Licensee, Lai Thi Trinh, at said premises, sold, furnished, gave or caused to be sold, furnished or given, alcoholic beverages to Ernesto Guerrero-Ocampo, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on May 9, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on January 5, 2018.

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

2. The Department issued a type 20, off-sale beer and wine license to the Respondents for the above-described location on May 8, 1989 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Ernesto Guerrero-Ocampo (hereinafter referred to as decoy Guerrero) was born on May 26, 1999. On August 18, 2017, he was 18 years old. On that date he served as a minor decoy, with a second minor decoy, Brenda Ortega (hereinafter referred to as decoy Ortega), in an operation conducted by the Santa Ana Police Department (Santa Ana PD). Decoy Ortega was born on June 22, 1999.
5. Decoy Guerrero appeared and testified at the hearing. On August 18, 2017, he was approximately 5'8" tall and weighed approximately 190 pounds. He wore a black t-shirt with a picture of a gorilla and the word "X-LARGE" written in red on the front, blue jeans and black shoes. He wore no jewelry. He wore black-rimmed prescription eyeglasses. His hair was cut short and styled in a left comb-over. (Exhibits 3 and 4.) His appearance at the hearing was the same except his hair was approximately an inch longer and slightly curly, but still styled in a left comb-over.
6. Decoy Ortega appeared and testified at the hearing. On August 18, 2017, she was 18 years old, 5 feet tall and weighed 120 pounds. She wore a black t-shirt, navy blue jeans and white shoes. She wore a necklace and a ring on the middle finger of her left hand. She wore her hair down, past her shoulders, with bangs on her forehead. (Exhibit 5.) Her appearance at the hearing was the same, except that she weighed 115 pounds, and wore a ring on each of her middle fingers.
7. On August 18, 2017, decoys Guerrero and Ortega entered the Licensed Premises and walked to the refrigerated beer section. Decoy Guerrero selected a three-pack of 25 ounce cans of Bud Light beer. (Exhibit 3.) Decoy Guerrero took the three-pack of beer to the front sales counter for purchase. Decoy Ortega followed and stood next to decoy Guerrero.
8. Decoy Guerrero placed the three-pack of Bud Light beer upon the counter. Clerk Lai Thi Trinh (hereinafter referred to as clerk Trinh) asked for decoy Guerrero's identification (ID). Decoy Guerrero handed to clerk Trinh his valid California Identification Card, which had a vertical orientation, showed his correct date of birth and included a red stripe which read, "AGE 21 IN 2020," and a blue stripe which read, "AGE 18 IN 2017." (Exhibit 2.) Clerk Trinh retrieved the ID, looked at it for 10 seconds and handed it to her husband, Sanh Hoa Truong, who was seated at the cash register next to her. Mr. Truong retrieved the ID, looked at the photo on the ID, compared it to decoy Guerrero, and read the blue stripe on the ID. When Mr. Truong looked at the blue stripe

he misread it to state decoy Guerrero was 21 years old in 2017, and believed decoy Guerrero was old enough to purchase alcoholic beverages. Mr. Truong spoke in a language other than English to his wife, clerk Trinh, and told her that decoy Guerrero is 21 years old in 2017, and handed the ID back to clerk Trinh. Clerk Trinh handed the ID back to her husband a second time and he handed it back to his wife. Clerk Trinh retrieved the ID, looked only at the month and day of the date of birth. There is no evidence that she looked at the year of birth or the red stripe which read, "AGE 21 IN 2020." Clerk Trinh then spoke in broken English to decoy Guerrero saying, "You 21 years old in three years."² The clerk's remark was framed as a statement, not a question. Despite the framed statement, decoy Guerrero nodded his head up and down in the affirmative. Clerk Trinh then spoke again in broken English to decoy Guerrero, saying, "You 21 years old in three months. You make it."³ The clerk's remark was framed as a statement, not a question. Decoy Guerrero understood clerk Trinh to be making a statement and not asking him a question, and understood clerk Trinh to state that he would be 21 years old in three months, so it will be okay. Decoy Guerrero did not respond in any way to clerk Trinh's second statement. Clerk Trinh then proceeded with the sales transaction of alcohol to decoy Guerrero, telling him the cost of the beer. Decoy Guerrero gave money to clerk Trinh, who provided the decoy with change. Decoy Guerrero took the change, the three-pack of Bud Light beer, and exited the store with decoy Ortega. Officer David Juarez of the Santa Ana PD was inside the Licensed Premises posing as a customer and witnessed these events. Officer Juarez exited the store soon after the two decoys exited. During the sales transaction clerk Trinh did not speak or interact with decoy Ortega. At no time during the said transaction did clerk Trinh ask how old decoy Guerrero was, his age or any age-related questions.

9. Decoys Guerrero and Ortega re-entered the Licensed Premises with Santa Ana PD Officers Joe Castellanos, Bonner and Sergeant Garcia. Officer Castellanos asked decoy Guerrero to identify the person who sold him the beer. Decoy Guerrero pointed out the female clerk, clerk Trinh. Decoy Guerrero and clerk Trinh were standing three feet apart at the time of this identification, with clerk Trinh behind the cash register and decoy Guerrero standing on the customer side of the cash register. Officer Castellanos advised clerk Trinh of the violation. A photo of clerk Trinh and decoy Guerrero was taken after the face-to-face identification, with decoy Guerrero holding his ID and the three-pack of Bud Light beer while standing next to clerk Trinh. (Exhibit 3.)

10. A citation was issued to clerk Trinh after the face-to-face identification.

11. Decoy Guerrero appeared his age at the time of the decoy operation. Based on his overall appearance; i.e., his physical appearance, dress, poise, demeanor, maturity, and

² Refer to footnote 8 below regarding this Finding of Fact.

³ Refer to footnote 8 below regarding these Finding of Fact.

mannerisms shown at the hearing, and his appearance and conduct in front of clerk Trinh at the Licensed Premises on August 18, 2017, decoy Guerrero displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to clerk Trinh. Decoy Guerrero appeared his true age, as a teenager.

12. Decoy Ortega 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 clerk Trinh at the Licensed Premises on August 18, 2017, decoy Ortega displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to clerk Trinh. Decoy Ortega appeared her true age, as a teenager.

(Lai Thi Trinh)

13. Lai Thi Trinh appeared and testified at the hearing.⁴ Clerk Trinh said that she usually wears non-prescription reading glasses, but left them at home on August 18, 2017. She said that on August 18, 2017, she handed decoy Guerrero's ID to her husband, Sanh Hoa Truong, to make sure decoy Guerrero was old enough to purchase alcohol. Her husband told her decoy Guerrero is 21 years old in 2017. Clerk Trinh admitted she relied on her husband's assessment and looked only at the month and day (May 26) of the birth date listed on the ID. She claimed she only read the month and date of birth because, "I don't see too clear." Throughout clerk Trinh's testimony she made inconsistent statements as to what she said to decoy Guerrero, testifying to multiple different versions of what she claimed she said to decoy Guerrero, as more fully discussed below. Clerk Trinh admitted that she did not recall exactly what she said to decoy Guerrero. Clerk Trinh claimed that decoy Guerrero smiled and nodded his head in the affirmative to her posed question. Clerk Trinh said the two decoys smiled at her when she was asking her question of decoy Guerrero.

14. Clerk Trinh claimed the way decoy Guerrero was dressed on August 18, 2017, he looked older than 21. Clerk Trinh claimed that on August 18, 2017, the decoys "both look that day they – they dress up. Look more than 21 – 21 or older." Clerk Trinh claimed she thought decoy Guerrero and decoy Ortega were married, but did not explain why. At another point in her testimony clerk Trinh referred to decoy Ortega as decoy Guerrero's friend. Upon direct examination, clerk Trinh admitted that both she and her husband looked at the wrong line on the ID. Upon cross-examination, Mr. Truong acknowledged and clarified that the wrong line he looked at during the sales transaction

⁴ Lai Thi Trinh will hereinafter be referred to as clerk Trinh to be consistent with the reference to her above and throughout the proposed decision.

was the blue stripe on decoy Guerrero's ID which read, "AGE 18 IN 2017." Clerk Trinh said that after the sales transaction Officer Castellanos explained to her that she had read the wrong line on the decoy's ID and showed her the correct line to read.⁵

15. On August 18, 2017, the Respondents' cash register required that clerk Trinh manually enter the cost of the three-pack of Bud Light beer because the cash register did not have a scanner at the time. Clerk Trinh admitted the cash registers did not have any function to prevent the sale of alcohol to minors.

(Sanh Hoa Truong)

16. Sanh Hoa Truong appeared and testified at the hearing. The Licensed Premises is open from 8:30 a.m. to 9:00 p.m. daily. Mr. Truong works at the Licensed Premises seven days a week, from 8:30 a.m. until 3:00 p.m. or 4:00 p.m. Either Mr. Truong or Lai Thi Trinh are present during business hours.

17. Mr. Truong claimed that on August 18, 2017, when decoy Guerrero approached the counter with the beer his wife, clerk Trinh, asked decoy Guerrero, "Are you 21?" and asked to see his ID. Mr. Truong admitted that when his wife handed him the decoy's ID, he looked at the wrong line, the blue line and instead of reading it correctly as, "AGE 18 in 2017," he read it as stating, "AGE 21 in 2017." Mr. Truong believed he made that mistake because he was not feeling well at the time due to stomach pain he was experiencing that Friday. He ended up going to the emergency room the following Monday. He acknowledged that based on reading the blue line wrong he told his wife the decoy was "21 years old in 2017." Mr. Truong claimed that his wife said to decoy Guerrero, "Oh you 21 years old three - six months ago, huh? You make it." He said his wife then repeated the same statement again, "twice, at least." Later upon direct examination, Mr. Truong said that when he looked at the decoy's ID he compared it to the decoy. He claimed he looked at his clothing and hairstyle, and saw "everything matching." Mr. Truong claimed that he thought decoy Guerrero was at least 21 years or older because of his hair style, he was dressed up, wore glasses, and came in with a lady. He thought decoy Ortega looked younger than decoy Guerrero. Mr. Truong said that when Officer Castellanos told his wife, clerk Trinh, that she had sold alcohol to a minor, clerk Trinh replied, "No, I checked ID and he 21 three years ago - three months ago."

18. Since the violation of August 18, 2017, Mr. Truong attended a Department LEAD class, for which he received a certificate of completion dated September 20, 2017. (Exhibit F.) Mr. Truong instructed his wife and all employees to check the ID of anyone

⁵ Officer Castellanos testified that he explained at length to both clerk Trinh and Mr. Truong how to read a minor's vertical formatted ID; explaining the blue and red lines and that they must also look at the date of birth listed to calculate whether the holder of the ID is a minor or not.

who looks 30 years old or younger, how to check IDs, and to be more careful in examining IDs, especially in recognizing the vertical IDs of minors. Mr. Truong plans to send his wife and the other employees to the LEAD class. After the said violation the Respondents replaced the two old cash registers, with new cash registers, so that when alcoholic beverages are scanned a screen pops up and asks the clerk to check the customer's ID, and verify the person is 21 years or older with a date listed on the screen. The cash registers do not have a function for the clerk to either scan the ID or enter the customer's date of birth. The clerk manually presses one of two buttons to indicate either that the date of birth was verified or it was not. By manually pressing the "verified" button, the alcohol sales transaction is permitted to proceed. By pressing the "not verified" button the cash register deletes the transaction and the alcohol sales transaction is not permitted.

19. Mr. Truong acknowledged that he was aware in 2017, prior to the sale to minor violation of August 18, 2017, that people were urinating and drinking alcoholic beverages in front of the Licensed Premises. He and his wife would tell the people to leave, but they would return. Prior to the violation of August 18, 2017, Officer Castellanos advised the Respondents that they needed to add warning signs and replace a warning sign which had graffiti written over it, which they did. (Exhibits A through E.) Officer Castellanos also asked the Respondents to remove items from the windows so that the inside of the Licensed Premises was visible from the exterior. The Respondents complied with all of Officer Castellanos' recommendations and were very cooperative with officer Castellanos.

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

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.
2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.
3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.

4. Cause for suspension or revocation of the Respondents' license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on August 18, 2017, the Respondent-Licensee, Lai Thi Trinh, inside the Licensed Premises, sold alcoholic beverages, to-wit: beer, to Ernesto Guerrero-Ocampo, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-12.)

5. The Respondents argued the decoy operation at the Licensed Premises failed to comply with rules 141(a)⁶, 141(b)(2) and 141(b)(4), and therefore, the accusation should be dismissed pursuant to rule 141(c).

6. With respect to rule 141(b)(2), specifically, the Respondents argued decoy Guerrero did not have the appearance generally expected of a person under the age of 21. Respondents' counsel opined that decoy Guerrero "definitely looked 21" because "he's a rather large, stocky man, had a faint mustache at the time, wears thick glasses" with a "fairly strong prescription," which generally is found on someone older than 21 with deteriorating eyes. Respondent's counsel also opined that decoy Guerrero's "short haircut, kind of military hairstyle also" made him look older, and "there was no evidence [the decoys] were nervous, they seemed to be comfortable." Respondents argued the decoys came into the Licensed Premises "as a couple," with clerk Trinh referring to decoy Ortega as decoy Guerrero's "wife," hence that leant "an air of maturity as they presented themselves to the licensees."

7. This rule 141(b)(2) argument is rejected. Neither clerk Trinh, nor Mr. Truong testified that the factors, as opined by Respondents' counsel above, were the reasons why they thought decoy Guerrero looked 21 years old or older. Those factors were not the direct testimony of Sanh Hoa Truong or clerk Trinh, but interjected as counsel's opinion and conjecture. In fact, clerk Trinh and Mr. Truong's assertions as to the factors which caused them to believe decoys Guerrero and Ortega were 21 years old or older are not credible for the reasons discussed more fully below.

8. Clerk Trinh claimed that on August 18, 2017, the decoys "both look that day they - dress up: Look more than 21 - 21 or older," and that the way decoy Guerrero dressed he looked older than 21. Clerk Trinh did not say why the dress attire made either decoy look 21 or older. Clerk Trinh threw in, "maybe he wear glasses too, maybe." She was not even sure if he wore glasses. Again she does not state what it is about the glasses that allegedly makes decoy Guerrero appear older than his actual age. Teenagers wear glasses too and it does not make them appear older than their age. Mr. Truong claimed he thought decoy Guerrero looked 21 or older because "he dressed up and glasses and hair

⁶ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

style and come with that lady I thought they have to be at least 21.” Then Mr. Truong said he thought decoy Ortega “look younger,” acknowledging decoy Ortega looked younger than decoy Guerrero. Mr. Truong did not say why or what it was about the glasses, hair style or dress attire that made either decoy appear 21 years or older.

9. There was nothing about the decoys’ typical teenage clothing to indicate they were dressed up. The decoys both wore black t-shirts and blue jeans, which is the typical attire of teenagers. There was absolutely nothing about the decoy’s dress attire, decoy Guerrero’s glasses or hair style which made them appear older than their actual age. Clerk Trinh never interacted or spoke with decoy Ortega. Both decoys Guerrero and Ortega did not appear anywhere near 21 years of age. In fact, decoy Guerrero appeared his true age, 18, at all times, including at the time of the sales transaction, in the photographs taken of him before the said violation, and at the hearing. Furthermore, decoy Ortega looked, in person, like a teenager, with straight long hair and bangs, at just five feet tall and thin. Decoy Guerrero did not have any type of visible mustache in the photographs taken of him the day of the said violation (Exhibits 3 and 4) or at the hearing. If there was something, it is more probable that what he had was peach fuzz, as any typical teenager his age would have. Neither Mr. Truong nor clerk Trinh said they thought decoy Guerrero had a mustache; the reason they did not is because there was none to be seen. Decoy Guerrero’s appearance, not only in the presence of clerk Trinh, but at the hearing and as depicted in the photos taken on August 18, 2017, was not only consistent with that of a person under the age of 21, but consistent with that of an 18 year old, his actual age. The alleged claim Respondents’ thought the decoys were married and thus appeared mature/older is disbelieved. Neither clerk Trinh nor Mr. Truong said that the fact they thought the decoys were married made them appear older than their true age. California lacks a minimum age requirement for persons to marry, other than requiring parental consent for those under 18 years of age. Even if these two teenage decoys were married, that in no way would have altered their appearance as teenagers. In other words, both decoys Guerrero and Ortega had the appearance generally expected of persons under the age of 21. (Findings of Fact ¶¶ 11 and 12.)

10. With regard to Respondents rule 141(b)(4) argument, Respondents argued when clerk Trinh claimed she questioned decoy Guerrero saying he’ll be 21 and three months, when he nodded it became an answer responding in a way that “he led her to believe he was 21 and three months,” and therefore, pursuant to rule 141(b)(4), “he was required to tell her she got it wrong, he wasn’t 21 and three months.”

11. This argument is rejected. When clerk Trinh initially made the statement, “you 21 years old in three years,” and decoy Guerrero nodded affirmatively, as clerk Trinh claimed, decoy Guerrero was truthfully stating that he was not yet 21, but would be in three years. Thereafter, when clerk Trinh made the second statement, again phrasing her

remark in the form of a statement and not a question, and whether she said “you 21 years old *in* three months,” “you 21 years old *and* three months,” or “you make it, you 21 years old *in/and* three months, you make it,” decoy Guerrero was in no way obligated to respond to any of clerk Trinh’s statements, pursuant to *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2017) 7 Cal.App.5th 628, 213 Cal.Rptr.3d 130, C078574. That court held that, (1) rule 141(b)(4) which requires a minor decoy to “truthfully answer any questions about his or her age, [does] not require [a] minor decoy to truthfully respond to [a] clerk’s statement, after looking at [the decoy’s] driver’s license,” “as [the] rule only require[s] decoys to answer questions,” and (2) the rule does not impose an “affirmative duty on [a] minor decoy to speak up in order to clarify any mistake regarding [the] age articulated by [a] sales clerk.” The court specifically found the minor decoy in that case, “was not required to respond to the clerk’s statement that might have related to the decoy’s age.” (*Supra* at p. 637, 639-640) In the matter at hand the clear, credible testimony of both decoys and Officer Juarez, consistently and adamantly maintained that clerk Trinh uttered a statement or statements, not a question or questions, and decoy Guerrero did not verbally respond. Any contention by Respondents otherwise is disbelieved as more fully discussed below. As such, in line with the cited case above, decoy Guerrero had no affirmative duty and was not required to respond to or clarify clerk Trinh’s statements that might have related to the decoy’s age.

12. As to rule 141(a), Respondents argued it was unfair to allow two decoys to enter the Licensed Premises as a couple, coming in looking like they are a “married couple.” This argument is rejected. First of all, the mere fact that two teenagers entered the Licensed Premises together does not make them a “married couple.” Regardless, 18 year olds are legally permitted to marry. Even if these two teenage decoys were married, that would in no way alter their demeanor or appearance as teenagers. More importantly, in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2017) 7 Cal. App.5th 628, 638 [213 Cal.Rptr.3d 130], the Court of Appeal determined, “Contrary to the Appeals Board’s contention, Rule 141 provides specific guidance regarding how to preserve fairness in minor decoy operations. Subdivision (b) of Rule 141 implements the goal of fairness by imposing five specific requirements for every minor decoy operation. Decoys must be under the age of 20; have the appearance of a person under 21; carry their own actual identification and present that identification upon request; truthfully answer any questions about their ages; and make face-to-face identifications of the persons who sold the alcoholic beverages. (Rule 141(b)(1)-(5).) Fairness under Rule 141 is assured by a set of five expressly defined safeguards, all of which must be fulfilled during a minor decoy operation.” Accordingly, the court did not recognize the separate criteria of “fairness” to be applied when assessing whether individual decoy operations comply with rule 141(a). The Court of Appeal was clear that “fairness” is achieved by adhering to the five standards set forth in Rule 141(b)(1)-(5). In

the matter at hand, the record made clear that all five of the standards set forth in Rule 141(b)(1)-(5) were complied with during the said decoy operation.

13. 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, a statement by the witness that is 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.

14. Mr. Truong's contentions that clerk Trinh asked decoy Guerrero, "Are you 21?" and "at least" twice repeated "Oh you 21 years old three - six months ago, huh? You make it," and clerk Trinh's contentions that she asked decoy Guerrero age-related questions and decoy Guerrero nodded his head in the affirmative each time, and said "yeah," along with Mr. Truong and clerk Trinh's contentions they made assessments of the decoys' ages based on dress attire, eye glasses, hair style, and potential marital status of the decoys are disbelieved for the following reasons.

15. As to Mr. Truong's claim his wife, clerk Trinh, said, "Are you 21?" not even clerk Trinh claimed she asked decoy Guerrero whether he was 21 years old. Additionally, it was clear during the giving of their testimony that Mr. Truong's English/grammar was better than clerk Trinh's English/grammar. As such, it was clear clerk Trinh would not have used the proper grammar to say, "Are you 21," as alleged. Furthermore, the credible testimony of both the decoys and Officer Juarez consistently maintained that clerk Trinh did not ask decoy Guerrero any age-related questions, but made statements to decoy Guerrero. As to Mr. Truong's second alleged claim that his wife repeated a statement, the credible testimony of both decoys and Officer Juarez credibly maintained that clerk Trinh did not repeat her statements.

16. Clerk Trinh presented inconsistent testimony as to what she said to decoy Guerrero. During clerk Trinh's testimony she kept repeating that she said, "you 21 years old *in* three months," and Respondents' counsel kept trying to correct Ms. Trinh's testimony asking her whether she said "you 21 *and* three months." Clerk Trinh would then repeat the "*and* three months," but would eventually go back to saying, "you 21 years old *in* three months." At certain points in her testimony she added a different word or two at the end to change her statement into a question format. She first claimed she asked, "Oh you make it *huh*, you're 21 years old *in* three months. *Is that right? Huh.*" She then changed her statement to, "Hey, you're 21 years and three months, huh." Then she claimed she said, "Is that 23 years *and* three months you make it." Then she corrected herself and

said, "at 21 years old *in* three months you lucky you." Clerk Trinh then admitted that she did not recall exactly what it was she said, and then claimed she said, "You make it," and then said, "I *tell* him, '21 years old *and* three months you make it.'" (Emphasis again added with italics.)

17. Clerk Trinh contradicted her claimed testimony that decoy Guerrero verbally responded "Yeah," to her remark. The majority of clerk Trinh's testimony was that decoy Guerrero did not say anything in response to her remark but clerk Trinh indicated with her head that decoy Guerrero nodded affirmatively to her first remark.

18. Clerk Trinh further contradicted her claimed testimony that (1) clerk Trinh asked two questions of decoy Guerrero, and (2) decoy Guerrero nodded after both of clerk Trinh's remarks. During Respondents' counsel's direct examination of clerk Trinh, clerk Trinh made it clear that she just thought decoy Guerrero was 21 years old and that was why she did not pursue questioning him. For example, when Respondents' counsel queried whether when clerk Trinh made the statement to decoy Guerrero she was asking for more information, clerk Trinh replied, "No. Just -- just think he 21. That's why I didn't ask more." To which Respondent's counsel again tried to correct clerk Trinh's testimony and asked, "Okay. And you said he was 21 *and* three months?" To which clerk Trinh replied, "Yes. I asked him. That's why you -- you make it. You 21 years old *in* three months? You make it." Then at another point clerk Trinh contradicts her earlier testimony and claims she asked two questions, but only mentions decoy Guerrero nodding his head after her first question. Clerk Trinh said, "I'm ask him first, I question," then clerk Trinh nods her head as she had done earlier in her testimony in referencing decoy Guerrero nodding his head, and then clerk Trinh said, "and I ask him again 'you 21 years old *in* '" she cut herself off and altered her testimony to, "*and* three months, *huh?* You make it." Clerk Trinh ends her explanation there and does not say that decoy Guerrero nodded his head again, after her alleged second question, until prompted by Respondents' counsel. Also, at this point, clerk Trinh's testimony is consistent with decoy Ortega's testimony and Sanh Hoa Truong's testimony that clerk Trinh made *two* statements when speaking to decoy Guerrero.

19. With regard to whether decoy Guerrero nodded his head in response to clerk Trinh's statements, questions were not asked of decoys Guerrero and Ortega or Officer Juarez whether decoy Guerrero nodded his head in response to clerk Trinh's statements. However, Officer Juarez credibly maintained that decoy Guerrero did not respond in any way to clerk Trinh's statement that he would be 21 years old in three months. Officer Juarez further credibly testified that from his position he could see decoy Guerrero's back. As such, Officer Juarez would have been able to see whether decoy Guerrero nodded his head or not in response to clerk Trinh's second statement. Decoy Ortega testified on direct examination that decoy Guerrero did not say anything in response to

clerk Trinh's statements. On cross-examination decoy Ortega testified she was looking at clerk Trinh when clerk Trinh was looking at the ID and handing the ID back to decoy Guerrero; and did not see decoy Guerrero's face or expression at the time. Mr. Truong presented inconsistent testimony in this regard stating in response to Respondents' counsel's question what decoy Guerrero's response was to clerk Trinh saying to him, "Oh you 21 years old three - six months ago, huh? You make it," Mr. Truong replied, "I didn't see - just he shook his head and didn't say anything else." If Mr. Truong did not see decoy Guerrero's response then how would he know whether he shook his head or not? Based on balancing the testimony (of the credible, consistent testimony of Officer Juarez, and the two decoys as against the inconsistent and biased testimony of clerk Trinh and Mr. Truong,) while the undersigned gives clerk Trinh the benefit of the doubt that decoy Guerrero may have nodded his head in the affirmative, it is found he did so only after clerk Trinh made the first statement to decoy Guerrero.

20. Decoy Guerrero, decoy Ortega, and Officer Juarez all credibly testified that clerk Trinh framed the remark(s) as a statement, not a question. Decoy Ortega furthermore could recall material matters about which she testified regarding what clerk Trinh said, and, in addition, decoy Ortega's testimony was more consistent than the testimony of clerk Trinh and Mr. Truong. Moreover, decoy Ortega has no motive or bias in the presentation of her testimony as do the licensees facing potential discipline. For those reasons, including the undersigned's observations of the witnesses as they testified, decoy Ortega's testimony is the more credible between her, clerk Trinh and Sanh Hoa Truong's testimony, regarding clerk Trinh's statements.

21. In balancing the credible, consistent testimony of Officer Juarez, and decoys Guerrero and Ortega against the inconsistent and biased testimony/contentions of clerk Trinh and Mr. Truong, two Licensees facing potential discipline, the testimony of the decoys and Officer Juarez is found to be more credible that clerk Trinh made statement(s), did not pose questions to decoy Guerrero, and decoy Guerrero did not respond verbally and did not respond in any manner to clerk Trinh's second statement to him, including the claimed nodding of his head at the second statement clerk Trinh made to him. Accordingly, it is found that: (1) clerk Trinh first stated, "You 21 years old in three years." Clerk Trinh then stated, "You 21 years old in three months. You make it." (2) decoy Guerrero nodded in the affirmative only to clerk Trinh's first statement, as reflected in the Findings of Fact above.⁷

⁷ It should be noted that both decoys and Officer Juarez testified credibly. No two people will use the exact same words to describe the same event—word choice, distance and time estimates, and so forth will naturally vary from person to person. The minor differences in the testimony of these witnesses do not call into question any of their credibility. In making the said Findings of Fact as to what Lai Thi Trinh said to decoy Guerrero, the undersigned took into consideration the credible testimony of both decoys and Officer Juarez with the credibility discussion above, and the manner in which Lai Thi Trinh testified in broken English, in addition to her repeated references to

22. Clerk Trinh at another point in her testimony admitted, "I make mistake." She admitted that during the sales transaction she looked at the wrong line and that thereafter Officer Castellanos pointed out the correct line to look at on the minor's ID. Officer Castellanos credibly testified he explained to clerk Trinh how to recognize a minor's vertical ID card with the blue and red striped lines and explained that she must also look at the birthdate to determine whether the customer is age appropriate. Clerk Trinh admitted that she relied upon her husband's assessment of the ID card, that decoy Guerrero was 21 years old in 2017.

23. Clerk Trinh and Mr. Truong never made any comments about the decoys' appearance to Santa Ana PD on the day of the violation (i.e., clothing, glasses, and hairstyle) or otherwise as having any influence on their decision to sell the three-pack of Bud Light beer to the minor decoy. During clerk Trinh's testimony she admitted she made a mistake looking at the wrong line on the ID card. Officer Castellanos credibly maintained that clerk Trinh's explanation to him as to why she so adamantly believed decoy Guerrero was 21 was because of her reliance on the decoy's ID and the line which indicated his age at a certain year. Even Mr. Truong testified that his wife told Officer Castellanos, "No, *I checked ID* and he 21 three years ago – three months ago." (Emphasis added with italics.) During Officer Castellanos further credible testimony about what Mr. Truong told him after the violation, there is no evidence Mr. Truong explained any other reason why he believed decoy Guerrero to be 21 years old other than his verification of the ID card. During Mr. Truong's testimony he also admitted that he looked at "the wrong line," specifying that he read the blue stripe on the decoy's ID and made the mistake deeming the decoy to be 21 in 2017. Based on the preponderance of the evidence it is more probable that when Mr. Truong told clerk Trinh, "[he's] 21 years old in 2017," clerk Trinh accepted the fact decoy Guerrero was 21 years old, based on her husband's mistaken assessment, and proceeded with the sales transaction of alcoholic beverages to decoy Guerrero.

24. Therefore, contrary to clerk Trinh and Mr. Truong's testimony otherwise (that they took into account the decoys' appearance) the statements they made at the time of the violation indicate clerk Trinh and Mr. Truong were not in any way misled by the minors' appearance or the presence of decoy Ortega. Respondents failed to present substantial evidence in support of their contention that aspects of decoy Guerrero's poise, demeanor, conduct, maturity and mannerisms made him appear older than 21. Clerk Trinh said that decoys Guerrero and Ortega just smiled and he nodded. What the testimony makes clear is that what clerk Trinh and Mr. Truong were misled by was their failure to understand the red flags of a minor's ID - that of the vertical format, and the bold, red stripe advising that decoy Guerrero would not be 21 years old until the year 2020. In the future, the

saying, "You make it, you 21 years old in three months, you make it," to establish that clerk Trinh said, "You 21 years old in three years," and then said, "You 21 years old in three months. You make it."

Respondents might want to also consider asking age-related questions, including, but not limited to, "How old are you?" and/or "Are you 21 years old?"

25. Finally, clerk Trinh's claim she could not read the date of birth on the decoy's ID because she left her non-prescription, reading glasses at home is disbelieved. Clerk Trinh admitted that she was able to read the month and day (May 26) of the birthdate listed on decoy Guerrero's ID. Furthermore, during the hearing she acknowledged she also did not have her eye glasses, but was readily able, despite claiming not to be able, to read the small, fine print on Exhibit B of the "State Law" sign, which is about the same size print as the date of birth on an ID.

PENALTY

The Department requested the Respondents' license be suspended for a period of 15 days, given that both licensees were involved in the said sale to minor violation and despite the 29 years discipline free history, since they continue to rely on the clerk to verify whether a customer is a minor or not.


The Respondents argued that, if the accusation were not dismissed, a 10 day, all-stayed suspension was appropriate due to several mitigating factors: (1) Respondents' 29 year discipline-free operation since May 8, 1989, which also proves that what the Respondents have been doing to avoid sales to minors is working despite the old cash register system they used, (2) Licensee Sanh Hoa Truong completed the LEAD Training Program soon after the violation on September 20, 2017, Mr. Truong instructed employees regarding checking IDs and recognizing minor IDs, in addition to Respondents plan to enroll clerk Trinh and the remaining employees in the LEAD course, and (3) Respondents replaced their old cash registers with a new system which requires the clerk verify the date of birth listed on the ID with the date listed on the computer screen, thereby addressing the licensees' confusion with the relevant dates on the decoy's ID during the said violation.

The Respondents' approximate 28 year discipline-free history is commendable and warrants a mitigated penalty. Also taken into account is the documented training of the licensee, cooperation by the licensees during investigation and additional positive action taken to correct the problem. However, both of the Licensees' involvement also weighed in the balancing of the mitigating and aggravating factors. The penalty recommended herein complies with rule 144.

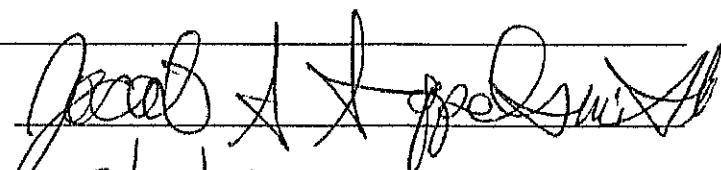
ORDER

The Respondents' off-sale beer and wine license is hereby suspended for a period of 10 days, with execution of 10 days of the suspension stayed upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within one year from the effective date of this decision; that should such determination be made, the Director of the Department of Alcoholic Beverage Control may, in the Director's discretion and without further hearing, vacate this stay order and re-impose the stayed penalty; and that should no such determination be made, the stay shall become permanent.

Dated: June 19, 2018



D. Huebel
Administrative Law Judge

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