

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

AB-9733

File: 21-477882; Reg: 18086739

GARFIELD BEACH CVS, LLC and LONGS DRUGS STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store #9948
2700 Yulupa Avenue,
Santa Rosa, CA 95405,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: May 2, 2019
Ontario, CA

ISSUED MAY 16, 2019

Appearances: *Appellants:* Jennifer L. Oden and Donna J. Hooper, of Solomon, Saltsman & Jamieson, as counsel for Garfield Beach CVS, LLC and Longs Drugs Stores California, LLC,

Respondent: Joseph J. Scoleri, III, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Garfield Beach CVS, LLC and Longs Drugs Stores California, LLC, doing business as CVS Pharmacy Store #9948, appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 5 days because their clerk sold an alcoholic beverage to a 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' type-21 off-sale general license was issued on June 22, 2009.

On April 5, 2018, the Department filed an accusation charging that appellants' clerk, Jessica Duffey (the clerk), sold an alcoholic beverage to 17-year-old Brendon Holling (the decoy) on December 30, 2017. 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 5, 2018, documentary evidence was received, and testimony concerning the sale was presented by the decoy and by Derrick Clark, an Alcoholic Beverage Control (ABC) agent.

Testimony established that the decoy entered the licensed premises on December 30, 2017 and selected a six-pack of Coors Light beer from a refrigerated cooler. The decoy took the beer to the sales counter and waited in line. When it was his turn, the clerk rang up the decoy's beer, took his money, and returned his change. The clerk never asked the decoy his age or to present some form of identification. The only conversation between the clerk and the decoy was whether the decoy belonged to the store's loyalty-rewards program.

The decoy exited the store with the six-pack of beer and met with ABC agents. The decoy told the agents that a female clerk sold him the beer, but did not ask his age or ask to view/inspect his identification. The agents and the decoy re-entered the licensed premises and approached the clerk. When they were approximately five feet away, one of the agents, Agent Clark, asked the decoy if he recognized the person who sold him the beer. The decoy identified the clerk. Agent Clark then told the clerk he was a peace officer and she had just sold alcohol to a person under 21 years of age. The clerk responded that "... her mind was not even there." She also told Agent Clark

that she did not like being the cashier because customers would get mad when she asked them to present identification.

Agent Clark, the decoy, and the clerk then moved to a rear area of the store. The decoy was photographed holding the beer he purchased while standing next to the clerk. (Exh. 3.) The clerk was subsequently cited.

On June 17, 2018, the administrative law judge (ALJ) submitted his proposed decision, sustaining the accusation and recommending a 5-day suspension. The Department adopted the proposed decision in its entirety on July 26, 2018 and a Certificate of Decision was issued the same day.

Appellant filed a timely appeal contending that the decoy operation failed to comply with rule 141(b)(2)² by utilizing a decoy with a high success rate.

DISCUSSION

Appellants contend the decoy operation failed to comply with rule 141(b)(2) by utilizing a decoy with a high success rate. (AOB at pp. 5-8.)

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.

This rule provides an affirmative defense, and the burden of proof lies with appellant. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

Appellants maintain that the decoy in this case failed to comply with standards set forth in rule 141(b)(2). They argue that the decoy's high success rate —

²References 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.

successfully purchasing alcohol at three out of six licensed premises on the same day— is evidence that his appearance was not one which could be generally expected of a person under 21.

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 regarding the decoy's appearance:

7. When the Decoy entered the Licensed Premises, he was 5'9" tall and weighed approximately 165 pounds. He wore a black hooded sweatshirt and blue jeans. He wore a wristwatch. His hair was blonde and no longer than approximately one inch. (Exhibit 2: Photo of decoy and Exhibit 3: photo of the Decoy with sales clerk.) The Decoy's over all [sic] appearance was appropriate for his age and he did not appear any older than his actual age, 17.

[...]

13. Prior to serving as a decoy on December 30, 2017, the Decoy had a friend who previously served as a decoy and the Decoy thought he would also like to participate in that kind of operation. The Decoy eventually met Agent Clark who agreed to let him participate as a decoy. The Decoy had neither any affiliation with law enforcement, such as being a police explorer or police cadet, nor any military related ties or experiences.

14. This was the third date the Decoy volunteered as a decoy. On December 30, 2017, he visited a total of six licensed premises as a decoy. He was able to purchase alcoholic beverages at three of those six licensed premises. Three or four of the six licensed premises asked to view his identification. Although the Decoy had visited a combined total of 15-20 licensed businesses on the three dates he acted as a decoy before he went to the Licensed Premises and even

though he was participating in a lawful investigation under the direction of law enforcement officers, he still felt a little nervous when purchasing alcoholic beverages at the Licensed Premises because it was not a natural thing for him to do as he was under 21 years of age.

(Findings of Fact, ¶¶ 7, 13-14.) Based on these findings, the ALJ addressed appellants' rule 141(b)(2) arguments:

3. [...] Respondent argued the Decoy purchased alcoholic beverages at 50% or at three of the six licensed premises he visited on December 30, 2017. However, there was no evidence regarding the circumstances surrounding the Decoy's purchase at the other licensed premises he visited on that date, there is no way to tell if the Decoy's appearance had any role to play at those other licensed premises. It is just as possible the clerks at the other two licensed premises were careless, negligent, or just did not like to check customer's identifications because customers would get mad at them, as the clerk in this instance told the Agents. The Decoy's rate of purchase was not necessarily an indicator the decoy did not meet Rule 141's decoy appearance standard. Further, a sampling of only six licensed premises seems too small to draw any kind of meaningful inference regarding the Decoy's appearance.

4. Based upon the evidence presented and reasonable inferences thereon, the Decoy met the appearance standard set forth in Rule 141(b)(2). The Decoy was only 17 years old when he visited Respondent's premises. He was casually dressed, wearing blue jeans and a black sweatshirt. He had short blonde hair, was 5'9" tall, and weighed 165 pounds. He also had a youthful face and build. While he acted as a decoy on two earlier dates, *it was not shown that limited experience made him look any older than his actual age*. The Decoy had no other law enforcement ties or related experiences, e.g. there was no evidence he was a police explorer or police cadet. He was simply a civilian volunteer. Respondent's clerk did not testify at the hearing, so there was no direct evidence presented she believed the decoy looked any older than his actual age. [...]

(Determination of Issues, ¶¶ 3-4 (Emphasis added).)

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 in rule 141(b)(2) 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 Findings of Fact paragraphs 7, 13, and 14, and Conclusions of Law paragraphs 3 and 4, the ALJ found that the decoy met this standard.

Appellants argue that the Board's past decisions dictate reversal in this case because the Board previously found that:

The phrase "could generally be expected" clearly implies, as this board has said, that *not everyone* will necessarily believe that a particular decoy appears to be under 21, but it also means that *most* people will believe that the decoy appears to be under 21.

(Quoting *7-Eleven/Dianne Corp.* (2002) AB-7835 at p. 6, emphasis in original.)

Appellants contend that the decoy's appearance falls short of the "most people" standard since he was sold alcohol by "half of all clerks he interacted with on December 30, 2017" (AOB at p. 7.)

First, even under a "most people" standard, appellants' argument must fail. As the ALJ noted in paragraph 3 of his Findings of Facts, there was no evidence indicating "the Decoy's appearance had any role to play at those other licensed premises."³ Appellants assume, without any evidence, that the decoy's success rate was based on his appearance, as opposed to something else. However, "[i]t is just as possible the clerks at the other two licensed premises were careless, negligent, or just did not like to check customer's identifications because customers would get mad at them, as the clerk in this instance told the Agents." (Determination of Issues, ¶ 3.)

³Further, as the ALJ noted in paragraph 3 of the Determination of Issues, appellants failed to establish that their own clerk relied on the decoy's characteristics in her decision to sell him beer.

Second, while a “most people” standard may have been the position of the Board in 2002, it simply does not state the controlling law on rule 141(b)(2). In a similar minor decoy case, where the Court of Appeal was tasked with assessing whether an ALJ’s assessment of the decoy’s appearance was correct, the Court said that under the facts before them, while:

[O]ne could reasonably look at the photograph [of the decoy] and reasonably conclude that the decoy appeared to be older than 21 years of age, we cannot say that, as a matter of law, a trier of fact could not reasonably have concluded otherwise.

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Southland Corporation) (2002) 103 Cal.App.4th 1084, 1087[127 Cal.Rptr.2d 652].) The instant case is no different. Even if the Board disagreed with the ALJ’s assessment of the importance of the decoy’s success, staff does not believe the evidence supports a finding that he “could not reasonably have concluded otherwise.” *(Ibid.)* Case law instructs us that 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, supra.)*

As stated above, appellants presented no evidence that the decoy’s physical appearance *actually resulted* in him displaying an appearance of a person 21 years old or older on the date of the operation in this case. A high success rate, alone, does not establish a rule 141(b)(2) defense. As the ALJ noted, the clerk did not testify. However, there is testimony and other evidence in the record that supports the ALJ’s determination that the decoy displayed the appearance which could generally be expected of a person under 21 years of age. Ultimately, appellants are asking this

Board to second guess the ALJ and reach a different conclusion, despite substantial evidence to support the findings in the decision. This the Board cannot do.

ORDER

The decision of the Department is affirmed.⁴

MEGAN McGUINNESS, ACTING CHAIR
SUSAN A. BONILLA, 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:**

**GARFIELD BEACH CVS, LLC
LONGS DRUG STORES CALIFORNIA, LLC
CVS PHARMACY STORE 9948
2700 YULUPA AVENUE
SANTA ROSA, CA 95405**

SANTA ROSA DISTRICT OFFICE

File: 21-477882

Reg: 18086739

CERTIFICATE OF DECISION

OFF-SALE GENERAL - LICENSE

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

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 26, 2018. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

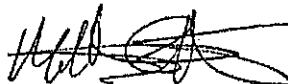
Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date 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:

Garfield Beach CVS, LLC	}	File: 21-477882
Longs Drug Stores California, LLC	}	
Dbas: CVS Pharmacy Store 9948	}	Reg.: 18086739
2700 Yulupa Avenue	}	
Santa Rosa, CA 95405	}	License Type: 21
	}	
Respondents	}	Word Count Estimate: 8,500
	}	
	}	Rptr: Kristie Shepherd, CSR-14268
	}	
<u>Regarding Their Type-21 Off-Sale General License</u>	}	<u>PROPOSED DECISION</u>
<u>Under the State Constitution and the Alcoholic</u>	}	
<u>Beverage Control Act.</u>	}	

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter in Santa Rosa, California, on June 5, 2018.

Colleen Villarreal, Attorney III, Department of Alcoholic Beverage Control, appeared and represented the Department of Alcoholic Beverage Control. (Hereafter Department)

Donna Hooper, Esq., of Solomon, Saltsman, and Jamieson, represented Garfield Beach CVS, LLC and Longs Drug Stores California, LLC. (Collectively hereafter Respondent)

As set forth in the Department's accusation, it seeks to discipline Respondent's license on the grounds that, on or about December 30, 2017, Respondent, through its agent or employee, Jessica Marie Duffey, at said premises, sold, furnished, or gave away, or caused to be sold, furnished, or given away, an alcoholic beverage to B.H., a person under the age of 21, in violation of California Business and Professions Code section 25658(a).¹
(Exhibit 1: Pre-hearing pleadings)

After oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing, the matter was argued by the parties and submitted for decision on June 5, 2018.

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

FINDINGS OF FACT

1. The Department filed the accusation on April 5, 2018. On April 23, 2018, the Department received Respondent's Special Notice of Defense requesting a hearing on the accusation. The matter was set for a hearing and heard to completion on June 5, 2018. (Exhibit 1: Pre-hearing pleadings.)
2. On June 22, 2009, the Department issued Respondent a type-21 off-sale general license for its premises as captioned above.² (Hereafter the Licensed Premises)
3. The Department did not allege Respondent suffered any prior disciplinary history since licensed.
4. On December 30, 2017, Brendon Holling (Hereafter the Decoy) assisted the Department of Alcoholic Beverage Control in conducting a decoy-operation.³ The Decoy operated under the supervision of Alcoholic Beverage Control Agent Derrick Clark and Agent Carlson.⁴ During the operation that date, the Decoy, then 17 years old, attempted to purchase an alcoholic beverage at six alcoholic beverage licensed businesses, including the Licensed Premises.
5. The Decoy was born on April 14, 2000 and was 17 years old when he went to the Licensed Premises on December 30, 2017.
6. Prior to going to the Licensed Premises, Agent Clark instructed the Decoy that when he attempted to purchase an alcoholic beverage at the Licensed Premises, if the sales clerk asked his age, he was to truthfully disclose it.⁵ Agent Clark also instructed the Decoy that if the sales clerk asked for his identification, he was to present his valid identification to the clerk.
7. When the Decoy entered the Licensed Premises, he was 5'9" tall and weighed approximately 165 pounds. He wore a black hooded sweatshirt and blue jeans. He wore a wristwatch. His hair was blonde and no longer than approximately one inch. (Exhibit 2: Photo of decoy and Exhibit 3: Photo of the Decoy with sales clerk.) The Decoy's over all appearance was appropriate for his age and he did not appear any older than his actual age, 17.

² A type-21 license permits the license-holder to retail beer, wine, and distilled spirits for consumption off the licensed premises.

³ Brendon Holling was referred to as "B.H." in the accusation.

⁴ Another decoy, Jacob Robles, also worked with the Agents that evening. However, decoy Robles did not participate in the investigation at the Licensed Premises.

⁵ ABC Agent Clark and decoy Brendon Holling both testified at the hearing.

8. On December 30, 2017, at approximately 2:35 p.m., the Decoy entered the Licensed Premises alone while the ABC Agents remained outside. The Decoy selected one six-pack of Coors Light beer from a refrigerated cooler and took it to the sales counter area. After two customers ahead of him were waited on by the clerk, Jessica Duffey, (Hereafter the Clerk) it became the Decoy's turn to make his purchase. The Clerk rang up the Decoy's beer on her register and told him its price. The Decoy paid the Clerk \$10.00. She took his money and thereafter returned some change to the Decoy. At no time did the Clerk ask the Decoy his age or to present some form of identification to her to determine his age. The only topic discussed was whether the Decoy had any sort of loyalty-rewards number for that store. Once the sale was completed, the Decoy exited the store with his six-pack of Coors Light beer.

9. After the Decoy exited the store, he immediately met the ABC Agents and told them what just occurred inside the Licensed Premises. He indicated the female clerk neither asked his age nor asked to inspect/view his identification to determine his age.⁶

10. The Decoy and the Agents then re-entered the Licensed Premises. The Clerk approached the Agents and the Decoy. When she was approximately five feet from them, Agent Clark asked the Decoy in a strong voice if the Decoy recognized the person who sold him the alcoholic beverages. While the Decoy and Clerk were facing each other, the Decoy pointed at the Clerk and said that she was the one who sold to him. Agent Clark then immediately identified himself to the Clerk as a peace officer and explained that they were conducting a decoy operation and she had just sold alcohol to a person under 21 years of age. The Clerk responded that "...her mind was not even there." She also told Agent Clark that she did not even like being the cashier because customers got mad at her when she asked them to present their identifications.

11. Agent Clark, the Decoy, and the Clerk moved to a rear area of the store. At that location, a photo was taken depicting the Decoy, holding the beer he just purchased, standing next to the Clerk. (Exhibit 3: Photo of Decoy and Clerk.)

12. The Clerk indicated to the Agents that her identification was in her car. The Agents, Decoy, and Clerk exited the store. While the Decoy went to the Agents' car, the Agents and the Clerk went to her car where she located and presented her identification to the Agents. The Agents then issued a citation to the Clerk.

13. Prior to serving as a decoy on December 30, 2017, the Decoy had a friend who previously served as a decoy and the Decoy thought he would also like to participate in that kind of operation. The Decoy eventually met Agent Clark who agreed to let him participate

⁶ The Decoy possessed his valid identification when the Clerk sold him the beer.

as a decoy. The Decoy had neither any affiliation with law enforcement, such as being a police explorer or police cadet, nor any military related ties or experiences.

14. This was the third date the Decoy volunteered as a decoy. On December 30, 2017, he visited a total of six licensed premises as a decoy. He was able to purchase alcoholic beverages at three of those six licensed premises. Three or four of the six licensed premises asked to view his identification. Although the Decoy had visited a combined total of 15-20 licensed businesses on the three dates he acted as a decoy before he went to the Licensed Premises and even though he was participating in a lawful investigation under the direction of law enforcement officers, he still felt a little nervous when purchasing alcoholic beverages at the Licensed Premises because it was not a natural thing for him to do as he was under 21 years of age.

LEGAL BASIS OF DECISION

1. Article XX, section 22 of the California Constitution and Business and Professions section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.
2. Business and Professions Code Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.
3. Business and Professions Code Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.
4. Business and Professions Code Section 25658(f) permits law enforcement officials to use persons under 21 years old to apprehend licensees, employees or agents or other persons who sell or furnish alcoholic beverages to minors. The Department was directed to and did adopt and publish a rule regarding the use of underage decoys.
5. Under California Code of Regulations, title 4, division 1, article 22, section 141, commonly referred to as "rule 141",
 - (a) A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

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

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

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

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

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

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

(c) Failure to comply with this rule shall be a defense to any action brought pursuant to Business and Professions Code Section 25658.

DETERMINATION OF ISSUES

1. Cause for suspension or revocation of Respondent's license exists under Article XX, section 22 of the California State Constitution and Business and Professions Code sections 24200(a) and (b) because on December 30, 2017, Respondent's employee, Jessica Duffey, inside the Licensed Premises, sold an alcoholic beverage to Brendon Holling, a person under the age of 21, in violation of Business and Professions Code section 25658(a)
2. The evidence established the Decoy entered the Licensed Premises, selected a six pack of Coors-Lite beer and took it to the sales counter where he was waited on by the Clerk. The Clerk sold the Decoy beer without asking the Decoy his age or to present identification to establish he was at least 21 years old. The Decoy exited the store where he contacted awaiting ABC Agents. The Agents and Decoy reentered the Licensed Premises wherein the Decoy identified the selling clerk in a face-to-face fashion.

The Clerk told the Agents that her mind was “not even there” and that she did not like to make sales of alcoholic beverages because customers got mad at her when she asked them to present their identifications. To that extent, there was sufficient evidence to sustain Count I, a violation of section 25658(a).

3. Respondent asserted the Decoy did not meet the appearance standard set forth in Rule 141(b)(2) that states: “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.” Respondent argued the Decoy purchased alcoholic beverages at 50% or at three of the six licensed premises he visited on December 30, 2017. However, as there was no evidence regarding the circumstances surrounding the Decoy’s purchase at the other licensed premises he visited on that date, there is no way to tell if the Decoy’s appearance had any role to play at those other licensed premises. It is just as possible the clerks at the other two licensed premises were careless, negligent, or just did not like to check customer’s identifications because customers would get mad at them, as the clerk in this instance told the Agents. The Decoy’s rate of purchase was not necessarily an indicator the decoy did not meet Rule 141’s decoy appearance standard. Further, a sampling of only six licensed premises seems too small to draw any kind of meaningful inference regarding the Decoy’s appearance. Respondent also contended the Decoy looked older than his age because he looked gaunt, he carried himself as a peace officer, and he projected a confident demeanor. However, as the Clerk did not testify at the hearing, there was no evidence those characteristics, even if one assumed they were present, played any role whatsoever in the Clerk’s decision to sell beer to the Decoy. The Clerk never told the agents the Decoy appeared old enough to buy alcoholic beverages or that his appearance in some way factored into her decision to sell the Decoy beer. At most, all she told the ABC Agents was that her “...mind was not even there” and she did not like to have to ask patrons for their identifications because they got mad at her.⁷

4. Based upon the evidence presented and reasonable inferences thereon, the Decoy met the appearance standard set forth in Rule 141(b)(2). The Decoy was only 17 years old when he visited Respondent’s premises. He was casually dressed, wearing blue jeans and a black sweatshirt. He had short blonde hair, was 5’9” tall, and weighed 165 pounds. He also had a youthful face and build. While he acted as a decoy on two earlier dates, it was not shown that limited experience made him look any older than his actual age. The Decoy had no other law enforcement ties or related experiences, e.g. there was no evidence he was a police explorer or police cadet. He was simply a civilian volunteer. Respondent’s clerk did not testify at the hearing, so there was no direct evidence presented she believed the decoy looked any older than his actual age. Based upon the aforementioned factors and the Decoy’s overall appearance, mannerisms, demeanor, and persona, he displayed the

⁷ Respondent presented neither evidence regarding what, if any, training was given to the Clerk either prior to or after the violation herein, nor what, if any, remedial measures Respondent took to prevent future violations of this type.

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 and therefore met Rule 141(b)(2)'s appearance standard for a person acting as a decoy.

5. As Respondent did not establish there was non-compliance with Rule 141(b)(2), a defense to the accusation under Rule 141(c) was not established. The evidence supported sustaining Count 1 of the accusation.

PENALTY

1. In assessing an appropriate measure of discipline, the Department's penalty guidelines are in California Code of Regulations, title 4, division 1, article 22, section 144, commonly referred to as "rule 144". Under rule 144, the presumptive penalty for a first violation of selling or furnishing an alcoholic beverage to a minor in violation of section 25658 is a 15-day license suspension.

2. Rule 144 also permits imposition of a revised penalty based on the presence of aggravating or mitigating factors. One of the aggravating factors listed is the "Appearance and actual age of minor". One of the mitigating factors listed is "Length of licensure at subject premises without prior discipline or problems."

3. As to a penalty for this matter, the Department acknowledged that Respondent had been licensed since 2009 with no prior disciplinary action against its license. However, the Department also contended that whatever mitigation the absence of prior disciplinary action warranted was equally off-set by the aggravating factor that the Decoy was only 17 years old and had a very youthful appearance when he purchased beer at the Licensed Premises without the Clerk asking his age or to present his identification. Therefore, the Department recommended the standard 15 day suspension specified under rule 144 was appropriate for this matter.

4. Respondent argued that, if the accusation was sustained, a mitigated penalty of a 10 day suspension, with all 10 of those days stayed from imposition, was more appropriate.⁸ Respondent argued that it has been licensed since 2009 with no prior discipline against its license. Further, the Decoy, although only 17 years old, did not appear so youthful that it should be deemed a factor in aggravation that wholly off-sets the mitigating factor of its eight years of discipline free operation.

⁸ Although not expressly set forth by Respondent, it is assumed that the 10 day all-stayed suspension it recommended meant that a 10 day license suspension would not be imposed for some fixed duration of time, e.g. 12 months, but that it would be imposed if, during that stayed-period, Respondent committed another violation, and if no new violation occurred, the stay would become permanent.

5. Rule 144 does specify what term of discipline-free licensure constitutes a mitigating factor and does not specify how much mitigation should be granted for discipline free operation. While rule 144 lists the "Appearance and actual age of minor." as an aggravating factor, it does not specify what degree of aggravation should be imposed if that factor is present in a case. The evidence established the Decoy was only 17 years old and had the appearance reflecting his actual age. Yet, Respondent's operation for eight years and six months is also worthy of recognition. In this instance, Respondent's substantial term of discipline free operation is of somewhat greater weight as a mitigating factor over the generally youthful appearance and actual age of the decoy involved in the lone transaction of December 30, 2017. Therefore, some net mitigation from the 15 day suspension called for in rule 144 is warranted, yet, not to the degree Respondent recommended. The penalty ordered below reflects a reasonable comparative weighing of the aggravating and mitigating factors involved in this matter and complies with rule 144.

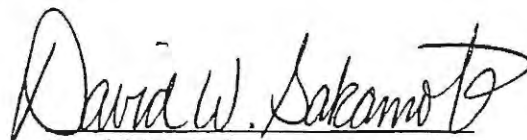
6. Except as set forth in this decision, all other allegations in the accusation and all other contentions raised by the parties in the pleadings or at the hearing, but not specifically argued at the hearing, lack merit.

ORDER

Count 1 of the accusation is sustained.

Respondent's license is suspended for 5 days.

Dated: June 17, 2018



David W. Sakamoto
Administrative Law Judge

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