

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

AB-9702

File: 47-336734 Reg: 17085689

AMF BOWLING CENTERS, INC.,
dba AMF Southshore Lanes
312 Park Street,
Alameda, CA 94501,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 6, 2018
Sacramento

ISSUED JANUARY 29, 2019

Appearances: *Appellant:* Donna Hooper, of Solomon Saltsman & Jamieson, as counsel for AMF Bowling Centers, Inc., doing business as AMF Southshore Lanes.
Respondent: Colleen R. Villarreal as counsel for the Department of Alcoholic Beverage Control.

OPINION

AMF Bowling Centers, Inc., doing business as AMF Southshore Lanes (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 5 days because its bartender sold an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

1. The decision of the Department, dated March 28, 2018, is set forth in the appendix.

Appellant's on-sale general bona fide eating place license was issued on January 6, 1998. On June 27, 2017, the Department filed an accusation charging that appellant's clerk, Brady Gray (the bartender), sold an alcoholic beverage to 19-year-old Angela Luong on January 24, 2017. Although not noted in the accusation, Luong was working as a minor decoy in a joint operation between the Alameda Police Department and the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on December 19, 2017, documentary evidence was received and testimony concerning the sale was presented by Luong (hereinafter "decoy Luong") and by Agent Joel Thalken of the Department of Alcoholic Beverage Control. Appellant presented no witnesses.

Testimony established that on the date of the operation, the decoy went to the licensed premises for the purpose of determining if she could purchase an alcoholic beverage at appellant's business. The licensed premises generally operates as a bowling alley.

Prior to entering the premises, Department agents instructed decoy Luong to present her true identification to the bartender if he asked to inspect it and to disclose her true age if the bartender asked for that. The decoy carried her valid California Identification Card and purchase money in her pocket. On the date of the operation, decoy Luong was five feet four inches tall and weighed approximately 123 pounds. Her hair was about 10 to 12 inches long, dark brown with a faint red tinge, and worn straight down. She was wearing a white or light gray t-shirt with a stylized image of the head of the Statue of Liberty printed on it. She also wore a light powder blue hoodie sweatshirt that was open in the front, and the hood portion sat flat on her back. She wore dark

jeans and sneakers on her feet. She wore no make-up except some eyeliner. She carried neither a purse nor a wallet, and wore no jewelry.

During the operation, the decoy had a second companion decoy when she entered the licensed premises to make her purchase. That companion was Sahaila Manning (hereinafter "decoy Manning"). Decoy Manning was 19 years old and was dressed in a checkered pattern shirt, over which she wore a gray long sleeve sweatshirt, and dark pants. She had long black hair also worn straight down.

Decoys Luong and Manning entered the licensed premises together at approximately 5:45 p.m. After the decoys entered, they were followed by Department agents Thalken, Ott, and Louie, and by Alameda Police Officer Horikoshi. The two decoys took seats at a service counter inside the premises. The agents and officer stood approximately ten feet from the decoys in order to observe the decoys' activity at the counter.

After the decoys were seated at the counter, appellant's bartender came to their immediate vicinity. Decoy Luong ordered a 12-ounce Bud Lite beer from the bartender. He left the area and returned a few moments later with a 12-ounce bottle of Bud Lite beer that he opened and served to decoy Luong. Decoy Luong gave the bartender a \$20 bill in payment for her beer. The bartender took the purchase money, then returned a few moments later and gave decoy Luong her change. At no time did the bartender ask decoy Luong to present her identification or ever inquire about her age. At no time did the bartender ever have any contact, conversation, or interaction with decoy Manning.

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

Appellant then filed this appeal contending neither decoy Luong nor decoy Manning displayed the appearance generally expected of a person under 21 years of age, as required by rule 141(b)(2). We will address the arguments regarding each decoy separately.

DISCUSSION

I

Appellant argues the evidence does not support the ALJ's finding that decoy Luong displayed the appearance generally expected of a person under 21 years of age because decoy Luong had "extensive experience working as a decoy" and had "attempt[ed] to purchase alcohol 80 to 400 times prior to this operation." (App.Br., at p. 7.) Appellant directs this Board to decoy Luong's testimony that she was "confident" during the operation, and argues "[i]t is axiomatic that the amount of experience a person has practicing a task the more comfortable they will become at it and the more confident and self-assured they will appear in performing that task." (*Ibid.*) Relying solely on this purported axiom, appellant claims that "[b]y the time [decoy] Luong and [decoy] Manning entered Appellant's premises Luong had shed the normal insecurities and apprehension that would have been generally expected in the demeanor of a person under the age of 21 attempting to illegally purchase alcohol." (*Ibid.*)

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].)

Rule 141 states, in relevant part,

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.

(Code Regs., tit. 4, § 141(a).) Additionally, subdivision (b)(2) requires a decoy "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." (Code Regs., tit. 4, § 141(b)(2).) 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 ALJ made the following factual findings regarding decoy Luong's appearance:

8. When decoy Luong was at Respondent's premises on February 24, 2017, she was 5' 4" tall and weighed approximately 123 pounds. Her hair was about 10-12 inches long, dark brown with a faint red tinge, and worn straight down. She was wearing a white/light gray t-shirt with a stylized image of the head of the Statue of Liberty printed on it. She also wore a

light powder blue "hoodie" sweatshirt that was open in the front and the hood portion sat flat on her back. She wore dark jeans and sneakers on her feet. She wore no make-up except some eyeliner. She carried neither a purse nor a wallet. She wore no jewelry.

(Findings of Fact, ¶ 8.) Based on these findings, he reached the following determinations:

2. In defense to the accusation, Respondent argued decoy Luong did not meet the appearance standard set out 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 decoy Luong appeared at least 25 years old, was a very experienced decoy having served as a decoy on at least 20 operations during the past three years, and that decoy Luong felt confident when acting as a decoy. Respondent added that decoy Luong testified she purchased an alcoholic beverage at 40% of all the premises she visited in her three year decoy career. The Department argued the then 18 year old decoy Luong, wearing no make-up, but for some eyeliner, and no jewelry, appeared very youthful and met Rule 141(b)(2)'s decoy appearance standard.

3. In this instance, decoy Luong had an appearance that was consistent with her actual age of 18 years old when she visited Respondent's premises. She was casually dressed, wearing no make-up, but for some eye-liner. She wore no jewelry nor any other artifacts nor clothing that made her look any older than she was. She also had a youthful face, poise, and demeanor. While she participated on numerous earlier decoy operations, it was not shown that such experience made her look any older than her actual age. While she testified she was confident when acting as a decoy, that did not make her appear any older than she was. Respondent's bartender did not testify at the hearing, so there was no direct evidence presented that he believed the decoy looked any older than her age. The bartender made no statements to the investigating agents at the scene that he thought the decoy was of legal age, thus he could lawfully sell and serve her an alcoholic beverage.

¶ . . . ¶

5. When the elements of decoy Luong's appearance as discussed above are weighed together with such added factors as her demeanor, mannerisms, persona, and poise, decoy Luong displayed 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 and so met the appearance standard in Rule 141(b)(2).

(Determination of Issues, ¶¶ 2-3, 5.)

As the ALJ observed, appellant failed to establish that decoy Luong's experience or confidence made her appear over the age of 21. In order to make this connection, appellant relies only on unsupported generalizations—that experience necessarily begets outwardly visible confidence, and that minors illegally purchasing alcohol necessarily lack confidence when doing so. Anyone who has interacted with teenagers knows that confidence is not a trait limited to adults—even if the task at hand is unfamiliar, illegal, or even dangerous. Ultimately, appellant's position defies the law: a bartender is required to verify a patron's age, not her personality. (See Bus. & Prof. Code, § 25658(a).)

Absent direct evidence establishing that this particular decoy's experience and confidence tangibly affected her outward appearance, appellant has failed to carry its burden of proving a rule 141(b)(2) affirmative defense.

II

Appellant contends the Department must consider the appearance of both decoys in this operation. (App.Br., at p. 6.) Appellant argues decoy Manning, who accompanied decoy Luong into the licensed premises, also did not display the appearance generally expected of a person under 21 years of age. (App.Br., at pp. 7-9.) Appellant claims decoy "Manning's face as depicted in the exhibit has mature deep-set eyes and wrinkles around [the] mouth not typical of someone under 21." (*Id.*, at p. 7.)

Appellant further argues that "any question as to whether [decoy] Manning's in person appearance would have supported the Department's position must be resolved

in favor of Appellant" because, according to appellant, "the Department does not allow licensees direct contact with decoys, instead providing supervised phone calls, if the decoy agrees." (*Id.*, at pp. 7-8.) Appellant insists that in this case, the Department "chose to keep [decoy Manning] away from the hearing." (*Id.*, at p. 8.)

Appellant raises two discrete issues regarding decoy Manning: first, whether decoy Manning's appearance is relevant, and second—assuming her appearance is relevant—whether it complied with rule 141(b)(2). Appellant bears the burden of proof on both issues. (*Chevron Stations, Inc.* (2015) AB-9445, at pp. 3-16; *7-Eleven, Inc./Lo* (2006) AB-8384, at pp. 8-11.)

In *CEC Entertainment*, a case very similar to this one, this Board discussed the relevance of a second decoy and when the second decoy's presence may be required at hearing:

Appellant contends that the administrative law judge (ALJ) should have compelled the presence of Carlos Perez, a second decoy who accompanied the decoy to whom the beer was sold, so that he (the ALJ) could conduct a full and fair analysis of the apparent age of Duran. Appellant cites *Hurtado* (2000) AB-7246, a decision of the Appeals Board which ruled that consideration of the effect of another person who accompanied a decoy was "essential for disposition."

In *Hurtado*, a 27-year-old plain-clothed policeman sat at a small table with a minor decoy. Each ordered and were served a beer. The Appeals Board concluded that the "active participation" of the police could have misled the seller as to how the decoy appeared. Thus, the decoy operation was unfair and violated Rule 141.

This case is nothing like *Hurtado, supra*. There is no evidence in this case that the second decoy did anything, by way of word or gesture, that might have distracted the clerk or caused the kind of confusion that was the concern of the Board in *Hurtado, supra*, or *Southland Corporation/R.A.N., Inc.* (1998) [AB-6967], another Board decision cited by appellant.

In *7-Eleven, Inc./Jamizeh* (2002) AB-7790, the Board explained that "the real question to be asked when more than a single decoy is used is whether the second decoy engaged in some activity intended or having

the effect of distracting or otherwise impairing the ability of the clerk to comply with the law."

Thus, the mere fact that a second decoy accompanied the decoy who made the purchase is not, in and of itself, enough to persuade us that the decoy operation was unfair. The clerk did not testify, so any claim that the clerk was actually misled is wholly speculative.

(*CEC Entertainment, Inc.* (2004) AB-8189, at pp. 2-3; see also *Dave & Busters of Cal.* (2015) AB-9464, at pp. 12-15.)

Substitute "bartender" for "clerk" and we have appellant's case. Appellant concludes, without evidence or argument, that decoy Manning's appearance necessarily influenced the bartender's perception of decoy Luong's age, and therefore must be relevant. There is nothing in the record or in appellant's brief, however, to suggest decoy Manning participated in any way in the transaction, or that the bartender was even aware of decoy Manning's existence. Indeed, the ALJ made the following determinations:

[D]ecoy Manning had neither direct contact nor conversation nor any interaction with the bartender at any time decoy Luong ordered and was served her beer. The bartender never made any statements to the investigating agents indicating his belief that decoy Manning's presence next to decoy Luong somehow made decoy Luong look older than her actual age. It was not even proven the bartender was aware of decoy Manning's presence at the counter at all. Therefore, the presence of decoy Manning was neither proven to have made decoy Luong look any older than she was nor to have influenced the bartender's decision to sell and serve beer to decoy Luong in any respect.

(Determination of Issues, ¶ 4.) These determinations accurately reflect the evidence in the record. We see no cause to second-guess the ALJ's conclusions on this issue.

Because appellant has neither argued nor established that decoy Manning's physical appearance was relevant, the Board need not address whether her appearance complied with rule 141(b)(2).

Finally, appellant fundamentally misrepresents the procedural background of this case. Its contention that the Department "does not allow licensees direct contact with decoys" is demonstrably false. (See App.Br., at pp. 7-8.) The Department duly notified both decoys that counsel for appellant wished to speak with them. (Exh. 2, Order Denying Motion to Compel, at p. 1; Exh. 2, see also Declaration of Colleen Villarreal, at p. 2.) Decoy Manning declined to speak with appellant's counsel. (Exh. 2, Order Denying Motion to Compel, at pp. 1-2; see also Exh. 2, Declaration of Colleen Villarreal, at p. 3.) Decoy Luong, on the other hand, *did* agree to speak with appellant's counsel, but requested a Department attorney also be present. (Exh. 2, Order Denying Motion to Compel, at p. 2; see also Exh. 2, Declaration of Colleen Villarreal, at p. 3.) In light of decoy Luong's request, however, counsel for appellant declined to conduct the interview. (Exh. 2, Order Denying Motion to Compel, at p. 2.) As the ALJ wrote, "It is apparent that [appellant] is not interested in interviewing the minor decoy volunteers prior to the administrative hearing." (*Ibid.*)

Per *Cimarusti*, a decoy's right to decline—or, by extension, condition—an interview is absolute. (*Cimarusti v. Superior Ct.* (2000) 79 Cal.App.4th 799, 809 [94 Cal.Rptr.2d 336].) Appellant cannot blame the Department for a decoy's independent exercise of her rights.

Similarly, appellant's contention that the Department "chose to keep [decoy Manning] away from the hearing" is false. (App.Br., at p. 8.) Decoy Manning did not participate in the transaction. She therefore could offer no relevant testimony beyond what was already offered by decoy Luong and Agent Thalken, and her physical appearance—as discussed above—was irrelevant. Her presence at the hearing was not

required, and would have constituted a needlessly duplicative waste of time. (See Evid. Code, § 352.)

In sum, appellant has shown no grounds for relief.

ORDER

The decision of the Department is affirmed.²

BAXTER RICE, CHAIRMAN
MEGAN MCGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

2. 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:

AMF BOWLING CENTERS INC
AMF SOUTHSORE LANES
312 PARK ST
ALAMEDA, CA 94501

OAKLAND DISTRICT OFFICE

File: 47-336734

Reg: 17085689

AB: 9702

ON-SALE GENERAL EATING PLACE -
LICENSE

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

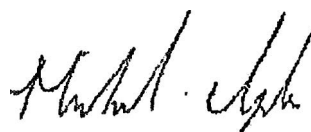
CERTIFICATION

I, Michael Clyde, do hereby certify that I am a Legal Secretary 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 May 25, 2018, in the City of Sacramento, County of Sacramento, State of California.

2018 MAY 25 PM 3:22
RECEIVED
ABC APPEALS BOARD



MICHAEL CLYDE
Legal Secretary
Office of Legal Services

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

IN THE MATTER OF THE ACCUSATION
AGAINST:

AMF BOWLING CENTERS, INC.
AMF SOUTHSORE LANES
312 PARK STREET
ALAMEDA, CA 94501

ON-SALE GENERAL EATING PLACE - LICENSE

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



CONCORD DISTRICT OFFICE

File: 47-336734

Reg: 17085689

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 March 19, 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 May 8, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: March 28, 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:

AMF Bowling Centers, Inc.
Dbas: AMF Southshare Lanes
312 Park Street
Alameda, CA 94501

Respondent

Regarding Its Type-47 On-Sale General Eating Place
License Under the State Constitution and the Alcoholic
Beverage Control Act.

} File: 47-336734
}
} Reg.: 17085689
}
} License Type: 47
}
} Word Count Estimate: 17,750
}
} Rptr: Debbie Acevedo-Ramirez
} Atkinson-Baker Court Reporters
}
} **PROPOSED DECISION**
}

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter in Oakland, California, on December 19, 2017.

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

Donna J. Hooper, Esq., of the law firm of Solomon, Saltsman, and Jamieson represented the licensee, AMF Bowling Centers, Inc. (Hereafter, “Respondent”)

The Department seeks to discipline Respondent’s license on the grounds that, on or about February 24, 2017, Respondent, through its agent or employee, Brady Gray, sold, furnished, or gave away, or caused to be sold, furnished, or given away, an alcoholic beverage to Angela Luong., 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 December 19, 2017.

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 June 27, 2017. On July 24, 2017, the Department received a Notice of Defense and a Special Notice of Defense from Respondent requesting a hearing on the accusation. The matter was heard to completion on December 19, 2017.
2. The Department issued Respondent a Type 47 On-Sale General Bona Fide Eating Place license on January 6, 1998.²
3. Since Respondent has been licensed, there have been no prior disciplinary actions against it by the Department.
4. On January 24, 2017, 18 year old Angela Luong (Hereafter, “decoy Luong”) acted as a decoy for the Department of Alcoholic Beverage Control and the Alameda Police Department for the purpose of determining if she could purchase an alcoholic beverage at Respondent’s licensed premises at 312 Park Street, Alameda, California. The licensed premises generally operates as a bowling alley. This investigative activity is commonly referred to as a “decoy” operation. As described below, Respondent’s bartender did sell and serve an alcoholic beverage, a beer, to decoy Luong in violation of section 25658(a).
5. Prior to decoy Luong going to Respondent’s premises, she served as a decoy on earlier occasions. She first became aware of decoy operations about three years ago when the police discussed those operations at her high school. During the past three years, she was an Oakland Police Department Explorer scout and served as a decoy on approximately 20 different dates, visiting approximately 4 to 20 businesses on each date’s operation. Over all, approximately 40% of the licensed businesses sold her an alcoholic beverage. Over time, she felt more confident when serving as a decoy. Her outward appearance has not changed that much the past three years.
6. As an Oakland Police Explorer scout, she helped direct traffic, helped provide security once or twice a year, and also served food to the community. She had no outside employment.
7. Decoy Luong was born on October 2, 1998 and was 18 years old as of February 24, 2017, the date she visited Respondent’s licensed premises as a decoy.

² A Type 47 license permits the holder to retail in beer, wine, and distilled spirits in conjunction with operating a bona-fide eating place as defined in section 23038.

8. When decoy Luong was at Respondent's premises on February 24, 2017, she was 5' 4" tall and weighed approximately 123 pounds. Her hair was about 10-12 inches long, dark brown with a faint red tinge, and worn straight down. She was wearing a white/light gray t-shirt with a stylized image of the head of the Statue of Liberty printed on it. She also wore a light powder blue "hoodie" sweatshirt that was open in the front and the hood portion sat flat on her back. She wore dark jeans and sneakers on her feet. She wore no make-up except some eyeliner. She carried neither a purse nor a wallet. She wore no jewelry.

(Exhibit 3A: photo of decoy)

9. Prior to entering Respondent's premises, ABC Agents with the decoy instructed her to present her true identification to the bartender if he asked to inspect it and to disclose her true age if the bartender asked for that. The decoy carried her valid California Identification Card and purchase money in her pocket. (Exhibit 3B: copy of decoy Luong's identification card)

10. In this operation, decoy Luong had a companion decoy when she entered the premises to attempt to make her purchase. That companion was Sahaila Manning. (Hereafter, "decoy Manning")(Exhibit A-1: photo of decoy Manning) She was 19 years old and was dressed in a checkered pattern shirt over which she wore a grey long sleeve sweatshirt and dark pants. She had long black hair also worn straight down.³

11. Both decoys Luong and Manning together entered Respondent's premises at approximately 5:45 p.m. After the two decoys entered, they were followed by Alcoholic Beverage Control Agents Thalken, Ott, and Louie and Alameda Police Officer Horikoshi. The two decoys took seats at a service counter in the premises. The agents and officer stood approximately ten feet from the decoys in order to observe the decoys' activity at the counter.

12. After the decoys were seated at the counter, Respondent's bartender, Brady Gray, came to their immediate vicinity. (Hereafter, "the bartender")(Exhibit 4B: photo of bartender) Decoy Luong ordered a 12 ounce Bud Lite beer from the bartender. He left the area and returned a few moments later with a 12 ounce bottle of Bud Lite beer that he opened and served to decoy Luong. (Exhibit 4A: photo of beer) Decoy Luong gave the bartender a \$20.00 bill in payment for her beer. The bartender took the purchase money and returned a few moments later and gave decoy Luong her change. At no time did the bartender ask decoy Luong to present her identification or ever inquire about her age. At no time did the bartender ever have any contact, conversation, or interaction with decoy Manning.

³ Decoy Sahaila Manning did not testify at the hearing. Exhibit A1, a photo of Manning, was admitted as evidence. Exhibit A2, a purported copy of Manning's Driver License, was not admitted due to insufficient foundation.

13. Approximately thirty seconds after the bartender served decoy Luong, the ABC Agents approached the bartender and identified themselves to him as ABC Agents. They directed him to come closer to where the decoys were, still at the service counter. While decoy Luong was within three feet of the bartender, Agent Thalken asked decoy Luong who sold beer to her. Decoy Luong pointed to the bartender and said "He did." As she identified the bartender, she and the bartender were facing one another. Agent Thalken asked the bartender if he understood decoy Luong had identified him as the one who sold beer to her. The bartender indicated he understood that. Both decoys were then escorted from the area.

14. After decoy Luong identified the bartender as the one who sold her beer, the Agents obtained the bartender's Identification. It was determined there were no outstanding warrants for him, Agent Thalken then issued the bartender a citation for selling beer to decoy Luong.

15. The decoy visited 10 or 11 premises on February 24, 2017, of which four sold an alcoholic beverage to decoy Luong.⁴ Of those four businesses that sold to her, only one asked to see her identification. Seven of the 10 or 11 businesses she visited asked to inspect her identification. (Exhibit B: ABC-338A-Shoulder Tap/Minor Decoy Results)

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.

⁴ Agent Thalken testified decoy Luong visited 10 premises, however Exhibit B, the Department's record of the decoy's activity that night, lists 11 premises visited. In either case, the decoy purchased an alcoholic beverage at 4 of the sites she visited that day.

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 does exist under Article XX, section 22 of the California State Constitution and Business and Professions Code sections 24200(a) and (b) because on February 24, 2017, Respondent's employee, Brady Gray, inside the Licensed Premises, sold an alcoholic beverage to Angela Luong, a person under the age of 21, in violation of Business and Professions Code section 25658(a).

2. In defense to the accusation, Respondent argued decoy Luong did not meet the appearance standard set out 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 decoy Luong appeared at least 25 years old, was a very experienced decoy having served as a decoy on at least 20 operations during the past three years, and that decoy Luong felt confident when acting as a decoy. Respondent added that decoy Luong testified she purchased an alcoholic beverage at 40% of all the premises she visited in her three year decoy career. The Department argued the then 18 year old decoy Luong, wearing no make-up, but for some eyeliner, and no jewelry, appeared very youthful and met Rule 141(b)(2)'s decoy appearance standard.

3. In this instance, decoy Luong had an appearance that was consistent with her actual age of 18 years old when she visited Respondent's premises. She was casually dressed, wearing no make-up, but for some eye-liner. She wore no jewelry nor any other artifacts nor clothing that made her look any older than she was. She also had a youthful face, poise, and demeanor. While she participated on numerous earlier decoy operations, it was not shown that such experience made her look any older than her actual age. While she testified she was confident when acting as a decoy, that did not make her appear any older than she was. Respondent's bartender did not testify at the hearing, so there was no direct evidence presented that he believed the decoy looked any older than her age. The bartender made no statements to the investigating agents at the scene that he thought the decoy was of legal age, thus he could lawfully sell and serve her an alcoholic beverage.

4. Respondent also argued the presence of the decoy's companion, Sahaila Manning, made decoy Luong look older. Respondent argued decoy Manning looked over 21 years old, and that since young people associate with those that are very close in age to themselves, this made decoy Luong look or appear older than she was. Despite whatever social science theory Respondent's argument is premised on, it assumes that decoy Manning looked older than her 19 years. That was not proven. Rather, the image of decoy Manning as reflected in Exhibit A-1 is that of a youthful person, not necessarily appearing any older than her 19 years. Decoy Manning's mere presence with decoy Luong did not make decoy Luong appear any older than her 18 years of age. Also, decoy Manning had neither direct contact nor conversation nor any interaction with the bartender at any time decoy Luong ordered and was served her beer. The bartender never made any statements to the investigating agents indicating his belief that decoy Manning's presence next to decoy Luong somehow made decoy Luong look older than her actual age. It was not even proven the bartender was aware of decoy Manning's presence at the counter at all. Therefore, the presence of decoy Manning was neither proven to have made decoy Luong look any older than she was nor to have influenced the bartender's decision to sell and serve beer to decoy Luong in any respect.

5. When the elements of decoy Luong's appearance as discussed above are weighed together with such added factors as her demeanor, mannerisms, persona, and poise, decoy Luong displayed 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 and so met the decoy appearance standard in Rule 141(b)(2).

6. Lastly, Respondent argued it was denied due process of law because, prior to the hearing, its motion to compel the Department to disclose the contact address or home address of both decoys was denied.⁵ (Exhibit 2: Motion to Compel, Opposition, and Order). The undersigned ALJ declines to re-litigate the merits of Respondent's unsuccessful Motion to Compel Discovery.

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. The duration of licensure without disciplinary action is recognize as a factor in mitigation.

3. The Department recommended a mitigated 10 day suspension. It acknowledged that Respondent has been licensed since 1998 with no record of any prior violation. However, the Department noted Respondent's bowling alley is a place likely to attract minors justifying extra attention on those who seek to purchase alcoholic beverages. Further, while the decoy in this case appeared a youthful 18 years old, the bartender neither asked to inspect her identification nor otherwise verified her age. Lastly, the Department argued Respondent presented neither evidence regarding any steps it took with respect to training employees on the appropriate methods of avoiding selling alcoholic beverages to minors nor any steps it since took to prevent a future violation.

4. Respondent argued that if the accusation were sustained, the absence of any disciplinary action the past 19 years warranted a mitigated penalty of a five day suspension, with all five days stayed from imposition.

⁵ Whatever due process argument Respondent wished to raise now should have been raised at the time of the hearing on the discovery motion. At the hearing on the merits, the parties indicated that prior to the bearing, Respondent's counsel, in the presence of Department's counsel, interviewed decoy Luong.

5. While 19 years of licensure without any discipline is certainly notable and worthy of a measure of mitigation, a reduced 5 day suspension with all 5 days stayed is not quite justified. In this instance, a youthful appearing 19 year old was able to purchase beer without having her identification inspected nor any inquiry made concerning her age by the bartender. Respondent presented no evidence regarding any measure of training provided to the involved bartender or employees as to how to prevent selling alcoholic beverages to minors.⁶ Further, Respondent presented no evidence regarding what steps it took, if any, to prevent this type of violation in the future. A reduced and all-stayed penalty is not appropriate in this circumstance.

6. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties raised in the pleadings or at the hearing lack merit.

ORDER

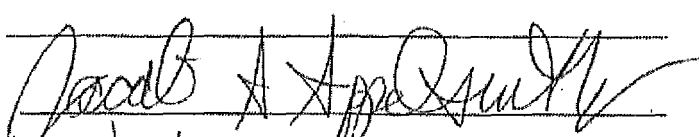
Count 1 of the accusation is sustained.

Respondent's license is suspended for five (5) days.

Dated: January 17, 2018



David W. Sakamoto
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>3/19/18</u>

⁶ Respondent called no witnesses at the hearing.

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