

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

AB-9722

File: 20-534243; Reg: 17086147

7-ELEVEN, INC. and HUMBLE TREE CORPORATION,
dba 7-Eleven Store #2366-14184G
1711 159th Avenue,
San Leandro, CA,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: March 1, 2019
Sacramento, CA

ISSUED MARCH 5, 2019

Appearances: *Appellants:* Donna J. Hooper, of Solomon, Saltsman & Jamieson,
as counsel for 7-Eleven, Inc. and Humble Tree Corporation,

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

OPINION

7-Eleven, Inc. and Humble Tree Corporation, doing business as 7-Eleven Store #2366-14184G, 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

¹The decision of the Department, dated June 21, 2018, is set forth in the appendix.

section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 30, 2013.

There is one prior instance of discipline against the license.

On November 20, 2017, the Department filed a single-count accusation against appellants charging that, on April 6, 2017, appellants' clerk, Donna Quesada (the clerk), sold an alcoholic beverage to 17-year-old Paola Ponce-Gonzalez (the decoy).

Although not noted in the accusation, the decoy was working for the Alameda County Sheriff's Department at the time.

At the administrative hearing held on April 12, 2018, documentary evidence was received and testimony concerning the sale was presented by the decoy and by Alameda County Sheriff's Detective Victor Ramirez.

Testimony established that on April 6, 2017, the decoy entered the licensed premises and selected a six-pack of Coors Lite beer in cans which she took to the register. When it was her turn, the clerk asked the decoy how her day was going and the decoy replied "good." The clerk asked if the beer was all she was going to buy and the decoy said it was. The clerk then scanned the beer and completed the sale without asking her for identification and without asking any age-related questions.

The decoy exited the premises and spoke with Sheriff's deputies about what had occurred. She re-entered the premises with the deputies. The clerk was assisting other customers, so Detective Ramirez asked the clerk to step away from the register. He informed the clerk that they were conducting a decoy operation and that she had sold alcohol to a minor. The clerk was apologetic and said she failed to check the decoy's ID because the store was busy.

Detective Ramirez asked the decoy to identify the person who sold her the beer. The decoy pointed at the clerk while standing one to three feet away from her. A photo of the two of them was taken together (exh. 3), and the clerk was subsequently cited.

The administrative law judge (ALJ) submitted his proposed decision on April 19, 2018, sustaining the accusation and recommending a 15-day suspension. The Department adopted the proposed decision in its entirety on June 11, 2018, and a Certificate of Decision was issued on June 21, 2018.

Appellants then filed a timely appeal contending the decoy operation violated rules 141(a)² and 141(b)(2), and failed to promote fairness, by utilizing a sophisticated, confident decoy with law enforcement training and a high success rate.

DISCUSSION

Appellants contend that the decoy operation violated rules 141(a) and 141(b)(2), and failed to promote fairness, by utilizing a sophisticated, confident decoy with law enforcement training and a high success rate. (AOB at pp. 5-7.)

Rule 141(b)(2) provides:

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

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.

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 the Department used a decoy in this case that failed to comply with standards set forth in rule 141(b)(2). They argue that the decoy's high success rate — successfully purchasing alcohol at five out of eleven licensed premises — was the result of her makeup, jewelry, and long polished nails, combined with her multi-year experience as a law enforcement volunteer. They maintain these factors gave her the appearance of a person over 21 years of age due to her mature and confident demeanor and comfort with purchasing alcohol. (AOB at p. 7.) Appellants further maintain that the use of such a decoy was unfair, in violation of rule 141(a).

(*Ibid.*)

Rule 141(a) provides:

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.

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

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the

Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

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

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

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

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

7. When the decoy visited the Licensed Premises, she was 4' 11" tall and weighed approximately 165 pounds. She was wearing a black sweater beneath a black wind-breaker style jacket. She had on light-blue blue-jeans and tennis shoes. She wore earrings on her ears. Her hair was colored black and blond and was braided. It was tied up high on the back of her head in a pony-tail. She wore make-up that included a foundation, highlighter, mascara, and some eye-brow pencil. She was not wearing any lip stick or lip gloss. Her nails were approximately 1" - 1¼" long and had skin-toned colored nail polish on them.

¶ . . . ¶

15. At the time of the April 6, 2017 investigation at the Licensed Premises, the decoy had been an Alameda County Sheriff Explorer about three years. As an explorer, the group met once every two weeks. They performed community service monthly, such as helping sign up youth soccer league players. She also interacted with the public as an explorer. In being an explorer, the decoy testified it helped mature her and helped her character.

16. The day the decoy went to Respondent's licensed premises, she visited a total of 11 other licensed premises as a decoy. A total of five of those eleven stores sold her an alcoholic beverage. Prior to that day, she acted as a decoy on three prior dates, visiting approximately 10-12 businesses on each day. She testified she was "a little bit comfortable" acting as the decoy when she went to Respondent's licensed premises.

(Findings of Fact, ¶¶ 7-16.) Based on these findings, the ALJ addressed appellant's rule 141(b)(2) defense:

4. Respondent argued 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 weighed approximately 15 pounds more at the time of the investigation than she weighed at the time of the hearing. Thus, the

decoy weighed approximately 165 pounds the day of the investigation. Further, the decoy indicated she was “comfortable” when she performed her role as a police decoy. Finally, Respondent pointed out the decoy was wearing extensive facial make-up when she was a decoy at Respondent’s licensed premises.

5. In this instance, decoy Paola Ponce-Gonzalez had an appearance that was consistent with her actual age of 17 years old when she was at Respondent’s premises. Standing 4' 11", she was casually dressed and although she was wearing facial make-up, it did not result in her looking any older than her actual age. The wearing of make-up by older teen girls is not so uncommon. While she was wearing some earrings, they did not make her look any older. She had an over-all youthful face, poise, and demeanor. While she participated on three earlier decoy operations, it was not shown that such experience made her appear any older than her actual age. While the decoy testified she was “... a little comfortable ...” when acting as a decoy, that did not make her materially appear any older than she was. Respondent’s sales clerk did not testify at the hearing, so there was no direct evidence presented she believed the decoy looked any older than her age. Also, the clerk made no statements to the Sheriff’s detectives at the scene that she thought the decoy appeared at least 21, thus she could lawfully be sold alcoholic beverages. Rather, the clerk promptly apologized for selling beer to the decoy and explained that because she was “busy” she did not check the decoy’s identification at the time of sale. Based upon the evidence presented and reasonable inferences thereon, the decoy met the appearance standard set forth in rule 141(b)(2).

(Determination of Issues, ¶¶ 4-5.)

With regard to the decoy’s law enforcement experience, appellants have failed to show how that experience is relevant. As the Board previously observed:

A decoy’s experience is not, by itself, relevant to a determination of the decoy’s apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. . . . There is no justification for contending that the mere fact of the decoy’s experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.

(Azzam (2001) AB-7631, at p. 5, emphasis in original.) This case is no different.

With regard to the decoy’s makeup, appellants appear to argue that individuals

under the age of 21 do not ordinarily wear foundation, mascara, etc. This has not been our experience. This Board wrote, in a similar case:

Appellant appears to assert that a decoy violates the rule by the mere fact of wearing make-up during a decoy operation. Make-up only has significance in this context, however, if it makes the decoy appear to be older, specifically, over the age of 21. Whether it is light or heavy is really irrelevant. It is the impact on a decoy's apparent age that matters. Appellant has made no showing that this decoy's make-up made her appear older than 21.

(*Circle K Stores, Inc.* (2001) AB-7677.) The same reasoning applies here.

Similarly, with regard to the decoy's size, appellants argue that the decoy appeared older because of her stature. However, as we have said many times, minors come in all shapes and sizes, and we are reluctant to suggest, without more, that minor decoys of large stature automatically violate the rule. (See, e.g., *7-Eleven/NRG Convenience Stores* (2015) AB-9477; *7-Eleven Inc./Lobana* (2012) AB-9164.)

This Board has noted that:

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

(*O'Brien* (2001) AB-7751, at pp. 6-7.) Notably, the standard is not that the decoy must display the appearance of a "childlike teenager" but "the appearance which could generally be expected of a person under 21 years of age." In Findings of Fact paragraphs 7 through 16, and Determination of Issues paragraphs 4 and 5, the ALJ found that the decoy met this standard.

Appellants presented no evidence that the decoy's experience, make-up, or stature *actually resulted* in her displaying an appearance of a person 21 years old or older on the date of the operation in this case. The clerk did not testify. We cannot

know what went through her mind in the course of the transaction — except that she told the detective that she failed to ask for identification because the store was busy. Appellants rely entirely on a difference of opinion — theirs versus that of the ALJ — as to what conclusion the evidence in the record supports. Absent an evidentiary showing, this argument must fail. Ultimately, appellants are asking this Board to consider the same set of facts and reach a different conclusion, despite substantial evidence to support those findings. This the Board cannot do.

On the issue of fairness, the Court of Appeals recently opined on whether the Board was empowered to impose additional fairness criteria beyond those enumerated in rule 141. The Court found:

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. [Citation.] Consequently, Rule 141's use of the word “fairness” does not render the rule ambiguous or confusing.

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd./ Garfield Beach (2017) 7 Cal.App.5th 628, 638 [213 Cal.Rptr.3d 130.]) In other words, the Court made it very clear that the word “fairness” in rule 141(a) is not subject to enlargement by this Board, allowing it to add fairness requirements to decoy operations.

The five factors enumerated in rule 141(b)(1) through (5) lay out specifically what is required to make a decoy operation “fair.” Those five factors were all complied with in this case.

ORDER

The decision of the Department is affirmed.³

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

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

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

APPENDIX

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

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

7-ELEVEN INC. & HUMBLE
TREE CORPORATION
7-ELEVEN #2366-14184G
1711 159th AVENUE
SAN LEANDRO, CA 94578

CONCORD DISTRICT OFFICE

File: 20-534243

Reg: 17086147

OFF-SALE BEER AND WINE - LICENSE

CERTIFICATE OF DECISION

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 June 11, 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 August 1, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: June 21, 2018



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

7-Eleven Inc. & Humble Tree Corporation	}	File: 20-534243
Db a 7-Eleven #2366-14184G	}	
1711 159 th Avenue	}	Reg.: 17086147
San Leandro, CA 94578	}	
	}	License Type: 20
Respondent	}	
	}	Word Count Estimate: 12,500
	}	
	}	Rptr: Katherine Wyatt, CSR-9866
<u>Regarding Their Type-20 Off-Sale Beer and Wine</u>	}	California Reporting
<u>License Under the State Constitution and the Alcoholic</u>	}	<u>PROPOSED DECISION</u>
<u>Beverage Control Act.</u>	}	

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter in Oakland, California, April 12, 2018.

Sean Klein, Attorney III, Department of Alcoholic Beverage Control, appeared and represented the Department of Alcoholic Beverage Control. (Hereafter, “the Department”)

Donna Hooper, Esq., of the law firm of Solomon, Saltsman, and Jamieson, represented 7-Eleven, Incorporated and Humble Tree Corporation. (Collectively hereafter, “Respondent”)

The Department seeks to discipline Respondent’s license on the grounds that, on or about April 6, 2017, Respondent, through its agent or employee, Donna Quesada, sold, furnished, or gave away, or caused to be sold, furnished, or given away, an alcoholic beverage to Paola Ponce-Gonzalez, 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 April 12, 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 November 20, 2017. On December 8, 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 set for a hearing and heard to completion on April 12, 2018. (Exhibit 1: Pre-hearing pleadings)

2. On August 30, 2013, the Department issued Respondent a Type-20 Off-Sale Beer and Wine license for its premises known as 7-Eleven Store #2366-14184G at 1711 159th Avenue, San Leandro, California.² (Hereafter the “Licensed Premises”)

3. Since Respondent has been licensed, it suffered one prior accusation as follows³:

Date of Violation	Section Violated	Registration Date	Registration Number	Penalty Imposed
01-02-2014	Bus. & Prof. Code; 24200(a-b) and 25658(a)	03/12/2014	14080113	15-day license suspension

4. On April 6, 2017, Paola Ponce-Gonzalez assisted the Alameda County Sheriff's Department in conducting a decoy-operation at the Licensed Premises. (Hereafter, “the decoy”) In that type operation, the decoy, then 17 years old, would attempt to purchase an alcoholic beverage at the Licensed Premises. The decoy was working with Alameda County Sheriff Detective Victor Ramirez, Detective Shaun Corey, and some other deputies.

5. The decoy was born on May 4, 1999, so was 17 years old as of April 6, 2017.

6. As a part of working as a decoy, she was instructed that when she attempted to purchase the alcoholic beverage, if the sales clerk asked her age, she was to respond truthfully. The decoy was also directed that if the sales clerk asked for her identification, she was to present it to the clerk for inspection.

7. When the decoy visited the Licensed Premises, she was 4'11” tall and weighed approximately 165 pounds. She was wearing a black sweater beneath a black wind-breaker style jacket. She had on light-blue blue-jeans and tennis shoes. She wore earrings on her ears. Her hair was colored black and blond and was braided. It was tied up high on the back of her head in a pony-tail. She wore make-up that included a foundation, highlighter, mascara, and some eye-brow pencil. She was not wearing any lip stick or lip gloss. Her nails were approximately 1” -1-1/4” long and had skin-toned colored nail polish on them.

² A Type-20 license permits the holder to retail beer and wine for consumption off the licensed premises.

³ Exhibit 2 included the full pleading and decisional history of the prior accusation matter.

8. Upon the decoy's entry into the Licensed Premises, she located and selected a six-pack of Coors-Lite beer in cans. She took that to the counter and waited in line to make her purchase. When it was her turn to buy the beer, the clerk, later identified as Donna Quesada, (Hereafter, "the clerk") asked the decoy how her day was going. The decoy said "good". The clerk asked the decoy if the beer was all she was going to purchase and the decoy said it was. The clerk scanned the beer and told the decoy its price. The decoy gave the clerk \$10.00 and the clerk put that money into the cash register and returned some change and a receipt back to the decoy. The decoy exited the store with her beer. The decoy purchased no item other than the beer. The clerk neither asked the decoy her age nor to produce her identification for inspection when sold the beer.

9. After the decoy exited the store, she met with Sheriff's deputies who were waiting for her outside. She told them the clerk sold beer to her. The decoy and the deputies entered the Licensed Premises together.

10. Near the entrance to the store, the decoy pointed out Donna Quesada, the sales clerk, to Sheriff's Detective Ramirez. (Hereafter, "Det. Ramirez") At that time, the clerk was assisting other customers at the sales counter.

11. Det. Ramirez, who was then wearing a police tactical vest to which a police badge was affixed along with his name tag, asked the clerk to step away from the sales counter area. Once the clerk moved to an area away from the sales counter, but still within the Licensed Premises, Det. Ramirez informed the clerk they were conducting a decoy operation and she had sold an alcoholic beverage to a minor-decoy. The decoy was still holding the beer she just purchased and was within 10 feet of the clerk. The clerk was apologetic and told Det. Ramirez that the store was busy and that is why she did not check the decoy's identification at the time of sale.

12. Det. Ramirez had the decoy and the clerk stand within 1-3' of each other. The Detective asked the decoy to point to or identify the person who sold her the beer. The decoy pointed at the sales clerk and which time Det. Ramirez took a photo of the decoy pointing at the clerk. (Exhibit 3: photo of decoy and clerk)

13. After the photo was taken, the decoy returned the beer back to the store. The decoy exited the Licensed Premises and waited outside while the deputies remained inside the store with the clerk.

14. While still in the Licensed Premises, Det. Ramirez recovered the decoy's \$10.00 purchase money from Respondent's cash register. The deputies then issued a citation to the clerk for selling an alcoholic beverage to a minor. They also left a notification letter of the violation at the Licensed Premises.

15. At the time of the April 6, 2017 investigation at the Licensed Premises, the decoy had been an Alameda County Sheriff Explorer about three years. As an explorer, the group met once every two weeks. They performed community service monthly, such as helping sign up youth soccer league players. She also interacted with the public as an explorer. In being an explorer, the decoy testified it helped mature her and helped her character.

16. The day the decoy went to Respondent's licensed premises, she visited a total of 11 other licensed premises as a decoy. A total of five of those eleven stores sold her an alcoholic beverage. Prior to that day, she acted as a decoy on three prior dates, visiting approximately 10-12 businesses on each day. She testified she was "a little bit comfortable" acting as the decoy when she went to Respondent's licensed premises.

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.
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 April 6, 2017, Respondent's employee, Donna Quesada, inside the Licensed Premises, sold an alcoholic beverage to Paola Ponce-Gonzalez, a person under the age of 21, in violation of Business and Professions Code section 25658(a)

2. The evidence established that the 4'11" tall 17 year-old decoy entered the Licensed Premises, selected a six pack of Coors-Lite beer and took it to the sales counter where she was waited on by the clerk. The clerk sold the decoy beer without asking the decoy her age or to present identification to establish the decoy was at least 21 years old. The decoy then exited the store where she contacted awaiting Sheriff's deputies. When Det. Ramirez told the clerk she had sold to the decoy, she apologized stating that the reason she did not check the decoy's identification was that she was too busy. To that extent, there was sufficient evidence to sustain Count 1, a violation of section 25658(a).

3. In Respondent's closing argument, Respondent objected to questions posed by the administrative law judge to the witnesses during their testimony. The undersigned ALJ did, as the trier of fact, ask questions of the witnesses in order to better understand their direct testimony. After the ALJ posed his questions, each side was given an opportunity to further examine the witnesses. Respondent never objected to either the form or substance of the ALJ's questions when they were being asked, but only made a blanket objection during Respondent's closing argument. As the questions were not objected to in a timely fashion, i.e. when they were being asked during the hearing, Respondent waived any objection it had to them.

4. Respondent argued 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 weighed approximately 15 pounds more at the time of the investigation than she weighed at the time of the hearing. Thus, the decoy weighed approximately 165 pounds the day of the investigation. Further, the decoy indicated she was "comfortable" when she performed her role as a police decoy. Finally, Respondent pointed out the decoy was wearing extensive facial make-up when she was a decoy at Respondent's licensed premises.

5. In this instance, decoy Paola Ponce-Gonzalez had an appearance that was consistent with her actual age of 17 years old when she was at Respondent's premises. Standing 4'11", she was casually dressed and although she was wearing facial make-up, it did not result in her looking any older than her actual age. The wearing of make-up by older teen girls is not so uncommon. While she was wearing some earrings, they did not make her look any older. She had an over-all youthful face, poise, and demeanor. While she participated on three earlier decoy operations, it was not shown that such experience made her appear any older than her actual age. While the decoy testified she was "...a little comfortable..." when acting as a decoy, that did not make her materially appear any older than she was. Respondent's sales clerk did not testify at the hearing, so there was no direct evidence presented she believed the decoy looked any older than her age. Also, the clerk made no statements to the Sheriff's detectives at the scene that she thought the decoy appeared at least 21, thus she could lawfully be sold alcoholic beverages. Rather, the clerk promptly apologized for selling beer to the decoy and explained that because she was "busy" she did not check the decoy's identification at the time of sale. Based upon the evidence presented and reasonable inferences thereon, the decoy met the appearance standard set forth in Rule 141(b)(2).

6. Lastly, Respondent argued there was non-compliance with Rule 141(b)(5) due to an insufficient face-to-face identification by the decoy of the clerk, and therefore the accusation should be dismissed. Rule 141(b)(5) states that: "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.” Respondent argued that after the sale, when the decoy re-entered the premises and identified the sales clerk to the Sheriff’s detectives, the clerk was busy helping other customers at the sales counter so would not know she was being identified by the decoy. Respondent also argued there was no proper face-to-face identification when the Detective took the photo of the decoy pointing out the clerk because the decoy did not testify the Detective asked her to point out or identify the sales clerk at that very instant. (Exhibit 3: photo of clerk and decoy)

7. In *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board* (1998) 67 Cal. App.4th 575, the court determined there must be strict compliance with Rule 141, including its requirement that the decoy perform a face-to-face identification of the seller. In that case, because the decoy never performed any face-to-face identification whatsoever, there was no compliance with Rule 141(b)(5) and therefor a defense to the accusation under Rule 141(c) was established. However, that case did not expressly decide what actions would be sufficient to comply with the face-to-face identification requirement.

8. Subsequently, the court in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board; 7-Eleven, Inc., et.al., Real Parties in Interest* (2003) 109 Cal.App.4th 1687, 1698 addressed what actions would constitute a sufficient face-to-face identification. In that case, the investigating officers decided to move the clerk and the decoy outside the licensed premises where the decoy identified the selling clerk. The court stated: "Regulation section 141, subdivision (b)(5), ensures-admittedly not as artfully as it might-that the seller will be given an opportunity, soon after the sale, to come “face-to-face” with the decoy.” There was no requirement that the face-to-face identification actually occur inside or within the licensed premises. Therefore, although the investigating officer moved the decoy and clerk outside the premises, at which time the decoy identified the clerk, that sequence of events still complied with Rule 14(b)(5).

9. Very recently, the Court of Appeal in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board; Garfield Beach CVS, LLC, et.al, Real Parties in Interest*(2017) 18 Cal.App.5th 541,547 found compliance with Rule 141(b)(5) where, “...the decoy made a face-to-face identification by pointing out the clerk to the officer inside the store while approximately 10 feet from her, standing next to her when the officer informed her she had sold alcohol to a minor, and taking a photograph with her as the minor held the can of beer he purchased from her. She had ample opportunity to observe the minor and to object to any perceived misidentification. The rule requires identification, not confrontation. The identification here meets the letter and spirit of Rule 141.”

10. In this instance, the decoy initially identified the clerk to the Sheriff's detective while just inside the premises' entrance and approximately 10 feet from the sales clerk and sales counter. The Detective approached the clerk and told her they were conducting a decoy operation and she sold beer to a decoy. At that point, the decoy was still inside the premises no further than 10 feet from the sales counter, in the company of other sheriff's deputies, and holding her six-pack of beer. The detective then had the clerk move from the sales counter to a less busy adjacent location inside the Licensed Premises. The decoy also moved closer to the clerk. The clerk promptly apologized to the detective for selling beer to the decoy. More importantly, she specifically told the Detective the reason she did not ask the decoy for identification was that she was too busy. That statement evidenced the clerk knew and understood precisely who the Detective was referring to as the underage purchaser of beer, as opposed to any other customer she waited on. Once the decoy and clerk were within 1-2 feet of each other, the detective asked the decoy to identify the seller. The decoy, while still holding the six-pack of Coors Lite beer, pointed to the clerk while the detective took a photo of them. (Exhibit 3: photo of decoy and clerk). The clerk had a clear opportunity to view the decoy and obviously knew, or should have known, she was being identified by the decoy as being the person who sold her the beer. The clerk did not testify at the hearing so as to present any different or contrary version of events. There was no indicia whatsoever the decoy misidentified the selling clerk. At no time before, during, or after the photo was taken did the clerk ever dispute, refute, challenge, or otherwise deny she sold beer to the decoy. In its closing argument, Respondent contended the decoy did not testify that when the photo was taken the detective immediately prior thereto asked her to identify the person who sold her the beer. However, even if that was so, considering all the other circumstances, including the clerk's admission to selling the beer to the decoy and her explanation why the decoy's identification was not first checked, there was still compliance with Rule 141(b)(5).

11. As Respondent did not demonstrate there was non-compliance with Rule 141(b)(2) or Rule 141(b)(5), 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. If there is a second violation of section 25658 within 36 months of a prior violation of section 25658, under Rule 144, the presumptive penalty is increased to a 25 day license suspension.

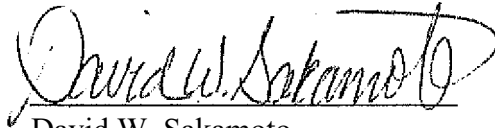
2. Rule 144 also permits imposition of a revised penalty based on the presence of aggravating or mitigating factors.
3. The Department argued this was a straight-forward case with no particularly mitigating or aggravating factors. As the prior sale-to-minor violation occurred more than 36 months prior to the violation herein, the Department recommended a 15 day license suspension.
4. Respondent argued that if the accusation was sustained, a 15 day suspension was the appropriate penalty.
5. In this instance, while the decoy was only 17 years old when she purchased her beer at Respondent's premises, there were no other particularly aggravating or mitigating circumstances to warrant deviation from the 15 day suspension specified in Rule 144.
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 but not specifically argued at the hearing lack merit.

ORDER

Count 1 of the accusation is sustained.

Respondent's license is suspended for 15 days.

Dated: April 19, 2018



David W. Sakamoto
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: <u>Jacob A. [Signature]</u>
Date: <u>6/11/18</u>