

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

AB-9725

File: 20-555048; Reg: 17085540

7-ELEVEN, INC. and KSDD, INC.,
dba 7-Eleven Store #2367-14279C
367 Ocean Street,
Santa Cruz, CA 95060,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: May 2, 2019
Ontario, CA

ISSUED MAY 16, 2019

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

Respondent: Matthew Gaughan, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and KSDD, Inc., doing business as 7-Eleven Store #2367-14279C, appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 10 days because their clerk sold an alcoholic beverage to a

¹The decision of the Department under Government Code section 11517, subdivision (c), dated June 27, 2018, is set forth in the appendix, as is the Proposed Decision of the administrative law judge (ALJ) dated October 31, 2017.

Section 11517, subdivision (c)(2)(E) permits the Department to reject the proposed decision—as it did here—and decide the case upon the record, including the transcript of the hearing.

police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 2015.

Appellants have a total of five 7-Eleven franchises, including the license at issue here.

There is no prior record of departmental discipline against any of appellants' licenses.

On May 8, 2017, the Department filed a single-count accusation against appellants charging that, on February 18, 2017, appellants' clerk, Elizabeth Garcia (the clerk), sold an alcoholic beverage to 18-year-old Jared Peterson (the decoy). Although not noted in the accusation, the decoy was working for the Santa Cruz Police Department (SCPD) at the time.

At the administrative hearing held on October 17, 2017, documentary evidence was received and testimony concerning the sale was presented by the decoy; by SCPD Officer David Roselle; and by Gemma Baez, general manager of five stores owned by appellant.

Testimony established that February 18, 2017, the decoy entered the licensed premises and went to the coolers where he selected a six-pack of Budweiser beer in bottles. The decoy was wearing an audio recording device. He took the beer to the counter and waited in line. When it was his turn, he presented the beer for purchase. The clerk asked for the decoy's birthday and he said "1998." The clerk asked no other questions and did not ask the decoy for his identification before completing the transaction. The recording of the transaction was entered into evidence. (Exh. D-5.)

The decoy exited the premises with the beer and went to the vehicle where the SCPD officers were waiting. He told them what had occurred and that the clerk's name

was Elizabeth. Officer Roselle entered the premises with the decoy and the decoy pointed out the clerk. Roselle approached her and explained the violation. The clerk admitted that she recognized the decoy. A photo of the decoy and clerk was taken (exh. D-6) and the clerk was subsequently cited.

On October 31, 2017, the administrative law judge submitted his proposed decision, sustaining the accusation and recommending a 5-day suspension of the license. On February 1, 2018, the Department issued its Notice Concerning Proposed Decision, advising the parties that the Department had considered, but did not adopt the proposed decision.

On April 3, 2018 in its Notice Pursuant to Government Code section 11517(c)(2)(E)(i), the Department invited the parties to submit written argument regarding the penalty — specifically, the use of a licensee’s disciplinary history at other premises; the treatment of the disciplinary histories of co-licensees; aggravating or mitigating factors which should be considered; and the appropriate penalty in this case. Both parties submitted written argument.

On July 27, 2018, the Director issued his Decision Under Government Code section 11517(c), sustaining the accusation and suspending the license for 10 days.

Appellants then filed a timely appeal contending: (1) the decision is not supported by substantial evidence, and fails to comply with rule 141(b)(2),² because the decoy was physically imposing, confident, experienced — giving him the appearance of an individual over 21 years of age, and (2) the decision is not supported by substantial evidence because it ascribes to appellants arguments they did not make and fails to

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.

address arguments which were raised. These issues will be discussed together.

DISCUSSION

Appellants contend that the decision is not supported by substantial evidence, and fails to comply with rule 141(b)(2), because the decoy was physically imposing, confident, experienced — giving him the appearance of an individual over 21 years of age. (AOB at pp. 8-9.) The appellants further contend the decision is not supported by substantial evidence because it ascribes to appellants arguments they did not make — regarding the face-to-face identification of the clerk and whether the decoy answered truthfully in response to a question about his age — and fails to address arguments which were raised regarding rule 141(b)(2). (*Id.* 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.

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

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

Appellants maintain that the decoy's imposing physical stature — at 6 feet and 220 pounds — his confident demeanor, and his extensive experience as a decoy, police cadet, manager, and security guard, all undermine the finding that his appearance complied with rule 141(b)(2). (AOB at p. 9.) They argue the decoy's

sheer physical bulk, his manifest comfort with and experience as a decoy, and his long track record of maturity as demonstrated by his work both as a police cadet and in private employment all militate against a conclusion that his use as a decoy complies with the minimum requirements of Rule 141(b)(2).

(*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].)

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

Therefore the issue of substantial evidence, when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings.

The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; Harris, *supra*, at 114.)

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

8. Peterson appeared and testified at the hearing. On February 18, 2017 his appearance was as depicted in a photograph that was taken prior to the operation (Exhibit D-4) where he was wearing an Under Armour sweatshirt with the hood down and a pair of jeans. His face was fully exposed and he was clean shaven with a trim haircut. He had no visible tattoos. Peterson was 6 feet tall and 220 pounds on the date of the operation. His appearance at the hearing was consistent with his appearance on the date of the operation except for being about 10 pounds heavier.

[¶ . . . ¶]

14. Peterson had served as a volunteer decoy on multiple prior operations for both SCPD and the Capitola Police Department (CPD) since he was 17 years old. Peterson has been a cadet with CPD for over three years. Serving as a decoy did not make him nervous and he was generally calm during operations.

15. Peterson appeared his chronological age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, clothing, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of the clerk at the Licensed Premises on February 18, 2017, Peterson displayed the appearance which would generally be expected of a person less than 21 years of age during his interactions with the clerk. The clerk did not testify in this matter to explain her age related impressions of Peterson or why she sold Peterson alcohol after being told by Peterson that his year of birth was 1998.

(Findings of Fact, ¶¶ 8-15.) Based on these findings, the ALJ reached the following

conclusions:

8. Further, Peterson testified in this matter and his appearance matched the appearance he presented to the clerk on the date of the operation. His appearance was consistent with a person under the age of 21. As previously noted, the clerk did not testify to establish whether there was anything in Peterson's manner or appearance that led her to reasonably conclude that he was over 21.

(Conclusions of Law, ¶ 8.)

The Board has repeatedly declined to substitute its judgment for that of the ALJ on the question of size. Minors come in all shapes and sizes, and we are reluctant to suggest, without more, that minor decoys of large stature automatically violate the rule. (See, e.g., *7-Eleven/NRG Convenience Stores* (2015) AB-9477; *7-Eleven Inc./Lobana* (2012) AB-9164.) This Board has noted that:

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

(*O'Brien* (2001) AB-7751, at pp. 6-7.) Notably, the standard is not that the decoy must display the appearance of a "childlike teenager" but "the appearance which could generally be expected of a person under 21 years of age." In Finding of Fact paragraphs 8 through 15, and Conclusions of Law paragraph 8, the ALJ found that the decoy met this standard.

The Board has also repeatedly rejected the "experienced decoy" argument. 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.

Appellants presented no evidence that the decoy's experience actually resulted in his 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, why she failed to ask for identification, or why she disregarded the decoy's truthful statement about the year he was born. 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.

Similarly, appellants argument that it was error for the ALJ to discuss arguments they did not raise in their arguments at the administrative hearing — specifically, the fact that he addressed the face-to-face identification of the clerk, and the decoy's response to the clerk when asked for his birthdate. However, appellants ignore the fact that these details were presented at the hearing, so it was certainly not error for the ALJ to discuss them. Even if, arguendo, this could be construed as an error, "the appellant bears the burden to show it is reasonably probable he or she would have received a more favorable result at trial had the error not occurred." (*Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 308 [140 Cal.Rptr.3d 459].) No such showing has been made. Furthermore, appellants' assertion that the ALJ's failure to discuss every point raised in their arguments does not constitute error, much less reversible error:

[A]n opinion is not a brief in reply to counsel's arguments. (*Holmes v. Rogers* (1859) 13 Cal. [191] at p. 202.) In order to state the reasons, grounds, or principles upon which a decision is based, the court need not discuss every case or fact raised by counsel in support of the parties' positions.

(*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1263 [970 P.2d 872; 82 Cal.Rptr.2d 85].)

In sum, we have reviewed the entire record and agree with the ALJ's conclusion that there was compliance with rule 141. As we have said on many occasions, the ALJ is the trier of fact, and has the opportunity to observe the decoy as he testifies and to make a determination whether the decoy has an appearance which meets the requirement of rule 141(b)(2), that he possess the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages. The evidence presented at the hearing, including the presence of the decoy himself, clearly provided substantial evidence for finding that the decoy's appearance complied with this requirement. Ultimately, appellants are asking this Board to consider the same set of facts and reach a different conclusion, despite substantial evidence to support those findings. This we cannot do.

ORDER

The decision of the Department is affirmed.³

MEGAN McGUINNESS, ACTING CHAIR
SUSAN A. BONILLA, 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. and
KSDD, Inc.,
dba 7 Eleven 2367-14279C
367 Ocean Street
Santa Cruz, California 95060

Licensee(s).

File No.: 20-555048

Reg. No.: 17085540

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department on June 27, 2018, for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held on October 17, 2017, before Administrative Law Judge Alberto Roldan, and the written argument of the parties, and good cause appearing, the following decision is hereby adopted:

The Department seeks to discipline the Respondent's license on the grounds that, on or about February 18, 2017 the Respondent, through their agent or employee, Elizabeth Garcia, sold, furnished, or gave alcoholic beverages to Jared Peterson, an individual under the age of 21 in violation of Business and Professions Code section 25658(a).¹ (Exhibit D-1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on October 17, 2017.

FINDINGS OF FACT

1. The Department filed the accusation on May 8, 2017. On May 30, 2017 Respondent sought additional discovery from the Department via a request for discovery. In July 2017, the Department responded to the request for discovery but did not provide the requested home address of the decoy. The Department instead provided the law enforcement contact information of the agency that utilized the decoy, the Santa Cruz Police Department (SCPD). The

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

Department identified the name of the decoy utilized as Jared Peterson (Peterson) in the discovery provided to the Respondent.

2. On July 7, 2017 counsel for the Respondent sent a letter to the Department again requesting the home address of Peterson. (Exhibit L-1, Attachment 2) In addition to outlining the Respondent's prior efforts to contact Peterson through the SCPD and the ongoing discovery dispute, the letter contained a request by the Respondent's attorney to have Peterson contact her. Peterson credibly testified that he received a copy of the letter a number of weeks prior to the hearing in this matter. Peterson testified that one of the SCPD officers who supervised him during the operation had forwarded him the communication and explained that the Respondent's attorney wanted to speak with him. Peterson testified that he read the letter and elected not to call once he learned he was not required to respond to the letter.

3. Respondent introduced the declaration of Darlene Chacon (Chacon) regarding her unsuccessful efforts to reach Peterson through the SCPD. (Exhibit L-2) Chacon referenced calling and asking for "Jared Peterson" but her declaration is silent as to what context was presented by Chacon to the SCPD business office employee to help her ascertain who "Jared Peterson" was. The declaration was silent as to whether Chacon explained that Peterson was used as a decoy or whether Chacon identified the report number of the case even though the Respondent had this information prior to Chacon's call.

4. Chacon's declaration was executed on July 21, 2017 (Exhibit L- 2) and it also referenced her sending a written communication to "Jared Peterson" at the SCPD street address. However, no copy of the letter was introduced for this court to ascertain how the communication was specifically addressed. Chacon's declaration is silent as to how the letter was addressed other than the street address used. It is unclear whether the letter even referenced the Santa Cruz Police Department in the mailing address used or if it was simply mailed to "Jared Peterson" at 155 Center Street, Santa Cruz, CA 95060, which is the street address that Chacon referenced using in her declaration.

5. After considering the Respondent's motion (Exhibits L-1 & L-2), the Department's opposition to the motion (Exhibit D-2), the prior order denying the motion to compel (Exhibit D-3) and the testimony of Peterson and SCPD Officer David Roselle (Roselle) during both direct and cross examination, an order denying the reopened motion to compel discovery was issued during the hearing in this matter based on the findings that the Department had complied with its discovery obligation by providing contact information for the law enforcement agency that had used the decoy and the evidence that SCPD had provided the letter to Peterson requesting that he contact the Respondent's attorney. This letter had phone, email and address information in the letterhead and identified the Respondent's attorney by name. (Exhibit L-1, Attachment 2) No

evidence was presented suggesting that SCPD had inappropriately influenced the decision by Peterson to not call the Respondent's attorney after he was provided a copy of the letter.

6. On July 1, 2015 the Department issued a type 20, off-sale beer and wine license to the Respondent for the above-described location (the Licensed Premises). There is no record of prior Department discipline against the Respondent's license. The Respondent has a total of five 7 Eleven franchises including the Licensed Premises, which was the newest addition to a series of franchises in the Central California area that have been in operation for over 15 years. The Respondent has no prior discipline at any of the other franchises controlled by KSDD, Inc. which is the corporate entity which operates the Respondent's locations.

7. Peterson was born on April 10, 1998 and was 18 years old at the time of the investigation on February 18, 2017. On that date, Peterson served as a minor decoy in an operation conducted by the SCPD at a series of locations including the Licensed Premises.

8. Peterson appeared and testified at the hearing. On February 18, 2017 his appearance was as depicted in a photograph that was taken prior to the operation (Exhibit D-4) where he was wearing an Under Armour sweatshirt with the hood down and a pair of jeans. His face was fully exposed and he was clean shaven with a trim haircut. He had no visible tattoos. Peterson was 6 feet tall and 220 pounds on the date of the operation. His appearance at the hearing was consistent with his appearance on the date of the operation except for being about 10 pounds heavier.

9. On February 18, 2017 Peterson entered the Licensed Premises for the purpose of attempting to purchase an alcoholic beverage. Prior to entering, he was instructed to carry his identification, to tell the truth regarding his age and to provide his identification if asked. Peterson wore a recording device that recorded the audio of his interactions in the Licensed Premises. (Exhibit D-5)

10. Peterson went into the Licensed Premises and approached where the beer was in coolers. He selected a six-pack of Budweiser beer bottles. Peterson took his selection to the line for the two clerks who were working the registers. He waited to have the purchase rung up. Shortly after standing in line, Peterson was waited on by the clerk to the left and he presented the six-pack of Budweiser beer for purchase.

11. This clerk was the same individual in the photo that was later taken of Peterson standing next to the clerk that served him. (Exhibit D-6) Peterson noticed that her name tag said "Elizabeth." The clerk asked for Peterson's birthday as she started the transaction for the beer. Peterson said "1998" out loud to the clerk. No further questions were asked of Peterson about his age. Peterson was not asked to produce identification. The clerk proceeded to ring up the beer

and told Peterson the cost. Peterson paid for the beer. Peterson was given change by the clerk along with the beer purchase. Because Peterson was wearing a recording device that captured the conversation between Peterson and the clerk, the Department moved into evidence the recording. (Exhibit D-5) The recording was consistent with Peterson's description of the transaction.

12. Peterson exited the Licensed Premises with the six-pack of Budweiser beer and went to the vehicle where the law enforcement officers were waiting. Peterson confirmed what had just occurred to Roselle and that the clerk's name was "Elizabeth". Roselle entered the Licensed Premises with Peterson. Peterson pointed out the clerk while she was working at the register. Roselle approached the clerk and told her why they were there. Roselle told her that she had sold alcohol to a minor. The clerk admitted that she did recognize Peterson while she looked at him across the counter. After this occurred, Roselle took a photo with Peterson and the clerk standing next to each other while Peterson held the beer he had purchased. The clerk told Roselle that her last name was "Garcia" (Garcia) and she produced a credit card with her name since Garcia did not have her driver's license with her. Garcia was cited for the sale to Peterson. She did not testify in this matter.

13. Roselle recovered the silent video recording of the interaction between Peterson and Garcia. (Exhibit D-7) Peterson viewed this video footage during the hearing in this matter and testified that it accurately reflected his interactions with the clerk during the operation and his subsequent reentry with the law enforcement officers to contact Garcia.

14. Peterson had served as a volunteer decoy on multiple prior operations for both SCPD and the Capitola Police Department (CPD) since he was 17 years old. Peterson has been a cadet with CPD for over three years. Serving as a decoy did not make him nervous and he was generally calm during operations

15. Peterson appeared his chronological age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, clothing, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of the clerk at the Licensed Premises on February 18, 2017, Peterson displayed the appearance which would generally be expected of a person less than 21 years of age during his interactions with the clerk. The clerk did not testify in this matter to explain her age related impressions of Peterson or why she sold Peterson alcohol after being told by Peterson that his year of birth was 1998.

16. Gemma Baez (Baez) testified for the Respondent regarding the training and policies that were utilized by the Respondent to avoid sales to underage persons. Baez is the general manager of the five franchises owned by the Respondent and has been an employee of the Respondent for over 15 years. All new employees receive computer training regarding underage sales and they are required to pass a test on this and other subjects prior to beginning work. Cashiers also

receive individual training on this and other subjects. The Licensed Premises and the other Franchises utilize a scanning system that is activated when an alcohol sale is taking place. (Exhibits L-3 & L-4) No evidence was presented as to whether any of the other premises operated by Respondent are in fact licensed to sell alcoholic beverages or, if they are, when they were licensed.

17. Materials are in all of the franchised locations to assist clerks in checking the authenticity of California and military identifications. (Exhibit L-7) Signage is placed in prominent locations in the franchises to remind customers and clerks that they must show identification to purchase alcohol. (Exhibits L-5 & L-6) There are regular meetings that are attended by managers, the owners, and employees regarding the enforcement of alcohol sale policies. These meetings were in place prior to the incident in this matter. The Respondent's franchises have received multiple responsible alcohol merchant awards including an award at the Licensed Premises in December 2016. (Exhibit L-8)

18. Baez regularly checks the register transaction system to ensure that clerks are not bypassing the alcohol sales protocols by performing manual overrides. (Exhibit L-9) Garcia was subject to termination as a result of the sale to Peterson but she resigned before she could be terminated. After the incident in this matter, the Respondent implemented an additional policy requiring that all cashiers sign an acknowledgment at the beginning of every work shift that they will follow the franchise's age restricted products policy. (Exhibits L-10 through L-14)

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

CONCLUSIONS OF LAW

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

4. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on February 18, 2017 the Respondent's clerk, Elizabeth Garcia, inside the Licensed Premises, sold an alcoholic beverage to Jared Peterson, a person under the age of 21, in violation of business and Professions Code section 25658(a). (Findings of Fact ¶¶ 6-15)

5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141² and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondent argued that the face to face identification failed to comply with rule 141(b)(5) and that the decoy did not truthfully respond to a question about his age as required by 141(b)(4). These violations, if established, would each be affirmative defenses.

6. However, there is no credible evidence supporting these assertions by the Respondent that there was a failure to comply with the requirements of either of these sections of rule 141. Peterson pointed out the clerk in this matter, and identified her name as "Elizabeth" before even returning to the Licensed Premises so his later identification in the Licensed Premises was not tainted by any form of suggestion. Peterson then stood across the counter from the clerk and confirmed his earlier identification in the clerk's presence and with her knowledge. Her awareness of the identification was confirmed by her acknowledgement that she remembered selling to Peterson while he was still present for her to look at. Peterson and Garcia were then photographed next to each other. (Findings of Fact ¶¶ 5-12)

7. Neither the clerk nor any other witnesses for the Respondent testified to rebut the credible evidence presented by the Department that this was a fully compliant identification. The video and audio recordings of the actual transaction between the clerk and the decoy are also at odds with the unsupported assertion of the Respondent that Peterson failed to respond truthfully to an age related question as required by rule 141(b)(4). Peterson truthfully said he was born in "1998" and any birthdate in that year of birth would have been underage. (Finding of Fact ¶ 11) Peterson gave his true year of birth. Had this caused any confusion on the part of Garcia, she could have asked for further clarification and/or requested his identification before completing the transaction. Given the totality of the evidence presented by the Department credibly establishing compliance with rule 141(b), the Respondent's assertions that compliance did not occur are unsupported.

8. Further, Peterson testified in this matter and his appearance matched the appearance he presented to the clerk on the date of the operation. His appearance was consistent with a person under the age of 21. As previously noted, the clerk did not testify to establish whether there was

² All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

anything in Peterson's manner or appearance that led her to reasonably conclude that he was over 21.

PENALTY

The Department recommended that the Respondent's license be suspended for a period of 15 days, which is the standard penalty for a violation without mitigation or aggravation, based on the short period of licensure at this Licensed Premises.

The Respondent presented credible evidence showing that established and enforced policies to prevent sales of alcoholic beverages to underage individuals were in place even prior to the incident here. Subsequent to the incident, the Respondent added an additional, enforced policy to further ensure that no underage sales occur. The Department presented evidence that the Licensed Premises was licensed only since July 2015. In contrast, the Respondent argued that the Licensed Premises is part of a chain of five franchises operated by the Respondent-Licensee that have remained discipline free for over 15 years, and that this is evidence of the overall effectiveness of its training program and that Respondent takes its responsibilities as a licensee seriously.

Although Baez testified to having worked for Respondent for 15 years and is not aware of any violations prior to this one at any of the five locations, there is actually no evidence that any of those other locations are in fact licensed or, if it can be inferred that they are licensed, for how long they have been licensed. Whether or not it is appropriate to evaluate the Respondent's training and management practices by looking at the disciplinary history of other licensed locations, in this case there is insufficient evidence to support the conclusion that the training and management are effective based upon the lack of disciplinary history at other premises³. The only evidence in the record regarding length of licensure is with respect to the subject Licensed Premises, and that was only for a short time prior to the sale in question. Although the witness may have been employed by Respondent for 15 years, there is no evidence that the other locations have been licensed for all or any part of that time period. For this reason, whether the disciplinary history at other licensed locations could reasonably support mitigation as evidence of an effective training program, there is insufficient evidence to support such a conclusion here.

Notwithstanding the fact that Respondent failed to present sufficient evidence to support the argument concerning the effectiveness of the alcoholic beverage training program, it is apparent in looking at the totality of the evidence that Respondent takes its license responsibilities very

³ Given the lack of evidence here, the Department need not address the issue of whether the disciplinary history at other premises licensed to a licensee should be considered for purposes of mitigation, as is proffered in this case, or as aggravation, as might be argued in another case involving a licensee with a record of discipline at other locations.

seriously. This should be encouraged and does constitute some level of mitigation that slightly outweighs the aggravating factor of the short period of licensure of the Licensed Premises.

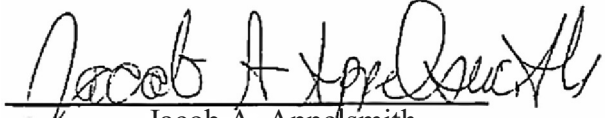
The penalty recommended herein complies with rule 144.

ORDER

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

Sacramento, California

Dated: June 27, 2018



Jacob A. Appelsmith
Director

Pursuant to Government Code section 11521(a), any party may petition for reconsideration of this decision. The Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or on the effective date of the decision, whichever is earlier.

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9, of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

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

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

7 ELEVEN, INC. AND KSDD, INC.
7 ELEVEN 2367-14279C
367 OCEAN STREET
SANTA CRUZ, CA 95060

OFF-SALE BEER AND WINE - LICENSE

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

SALINAS DISTRICT OFFICE

File: 20-555048

Reg: 17085540

CERTIFICATE OF DECISION

NOTICE CONCERNING PROPOSED DECISION

To the parties in the above-entitled proceedings:

You are hereby advised that the Department considered, but did not adopt, the Proposed Decision in the above titled matter and that the Department will itself decide the case pursuant to the provisions of Section 11517(c)(2)(E). A copy of the Proposed Decision has previously been sent to all parties.

The Department has requested that a transcript of the hearing be prepared. A copy of the record will be made available to you. Upon receipt of the hearing transcript, the Department will notify you of the cost of a copy of the record. At that time you all also be advised of the date by which written argument if any, is to be submitted.

Sacramento, California

Dated: February 1, 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. and
KSDD, Inc.,
dba 7 Eleven 2367-14279C
367 Ocean Street
Santa Cruz, California 95060

Respondent

} File: 20-555048
}
} Reg.: 17085540
}
} License Type: 20
}
} Word Count: 19,036
}
} Reporter:
} Theresa A. Ward-CSR # 9587
} Pulone Reporting Services
}
} **PROPOSED DECISION**

Off-Sale Beer and Wine License.

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter in Capitola, California, on October 17, 2017.

Matthew Gaughan, Attorney, represented the Department of Alcoholic Beverage Control (Department).

Donna Hooper, Attorney, represented Respondent 7 Eleven, Inc. and KSDD, Inc.

The Department seeks to discipline the Respondent's license on the grounds that, on or about February 18, 2017 the Respondent, through their agent or employee, Elizabeth Garcia, sold, furnished, or gave alcoholic beverages to Jared Peterson, an individual under the age of 21 in violation of Business and Professions Code section 25658(a).¹ (Exhibit D-1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on October 17, 2017.

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

FINDINGS OF FACT

1. The Department filed the accusation on May 8, 2017. On May 30, 2017 Respondent sought additional discovery from the Department via a request for discovery. In July 2017, the Department responded to the request for discovery but did not provide the requested home address of the decoy. The Department instead provided the law enforcement contact information of the agency that utilized the decoy, the Santa Cruz Police Department (SCPD). The Department identified the name of the decoy utilized as Jared Peterson (Peterson) in the discovery provided to the Respondent.
2. On July 7, 2017 counsel for the Respondent sent a letter to the Department again requesting the home address of Peterson. (Exhibit L-1, Attachment 2) In addition to outlining the Respondent's prior efforts to contact Peterson through the SCPD and the ongoing discovery dispute, the letter contained a request by the Respondent's attorney to have Peterson contact her. Peterson credibly testified that he received a copy of the letter a number of weeks prior to the hearing in this matter. Peterson testified that one of the SCPD officers who supervised him during the operation had forwarded him the communication and explained that the Respondent's attorney wanted to speak with him. Peterson testified that he read the letter and elected not to call once he learned he was not required to respond to the letter.
3. Respondent introduced the declaration of Darlene Chacon (Chacon) regarding her unsuccessful efforts to reach Peterson through the SCPD. (Exhibit L-2) Chacon referenced calling and asking for "Jared Peterson" but her declaration is silent as to what context was presented by Chacon to the SCPD business office employee to help her ascertain who "Jared Peterson" was. The declaration was silent as to whether Chacon explained that Peterson was used as a decoy or whether Chacon identified the report number of the case even though the Respondent had this information prior to Chacon's call.
4. Chacon's declaration was executed on July 21, 2017 (Exhibit L- 2) and it also referenced her sending a written communication to "Jared Peterson" at the SCPD street address. However, no copy of the letter was introduced for this court to ascertain how the communication was specifically addressed. Chacon's declaration is silent as to how the letter was addressed other than the street address used. It is unclear whether the letter even referenced the Santa Cruz Police Department in the mailing address used or if it was simply mailed to "Jared Peterson" at 155 Center Street, Santa Cruz, CA 95060, which is the street address that Chacon referenced using in her declaration.
5. After considering the Respondent's motion (Exhibits L-1 & L-2), the Department's opposition to the motion (Exhibit D-2), the prior order denying the motion to compel

(Exhibit D-3) and the testimony of Peterson and SCPD Officer David Roselle (Roselle) during both direct and cross examination, an order denying the reopened motion to compel discovery was issued during the hearing in this matter based on the findings that the Department had complied with its discovery obligation by providing contact information for the law enforcement agency that had used the decoy and the evidence that SCPD had provided the letter to Peterson requesting that he contact the Respondent's attorney. This letter had phone, email and address information in the letterhead and identified the Respondent's attorney by name. (Exhibit L-1, Attachment 2) No evidence was presented suggesting that SCPD had inappropriately influenced the decision by Peterson to not call the Respondent's attorney after he was provided a copy of the letter.

6. On July 1, 2015 the Department issued a type 20, off-sale beer and wine license to the Respondent for the above-described location (the Licensed Premises). There is no record of prior Department discipline against the Respondent's license. The Respondent has a total of five 7 Eleven franchises including the Licensed Premises, which was the newest addition to a series of franchises in the Central California area that have been in operation for over 15 years. The Respondent has no prior discipline at any of the other franchises controlled by KSDD, Inc. which is the corporate entity which operates the Respondent's locations.

7. Peterson was born on April 10, 1998 and was 18 years old at the time of the investigation on February 18, 2017. On that date, Peterson served as a minor decoy in an operation conducted by the SCPD at a series of locations including the Licensed Premises.

8. Peterson appeared and testified at the hearing. On February 18, 2017 his appearance was as depicted in a photograph that was taken prior to the operation (Exhibit D-4) where he was wearing an Under Armour sweatshirt with the hood down and a pair of jeans. His face was fully exposed and he was clean shaven with a trim haircut. He had no visible tattoos. Peterson was 6 feet tall and 220 pounds on the date of the operation. His appearance at the hearing was consistent with his appearance on the date of the operation except for being about 10 pounds heavier.

9. On February 18, 2017 Peterson entered the Licensed Premises for the purpose of attempting to purchase an alcoholic beverage. Prior to entering, he was instructed to carry his identification, to tell the truth regarding his age and to provide his identification if asked. Peterson wore a recording device that recorded the audio of his interactions in the Licensed Premises. (Exhibit D-5)

10. Peterson went into the Licensed Premises and approached where the beer was in coolers. He selected a six-pack of Budweiser beer bottles. Peterson took his selection to

the line for the two clerks who were working the registers. He waited to have the purchase rung up. Shortly after standing in line, Peterson was waited on by the clerk to the left and he presented the six-pack of Budweiser beer for purchase.

11. This clerk was the same individual in the photo that was later taken of Peterson standing next to the clerk that served him. (Exhibit D-6) Peterson noticed that her name tag said "Elizabeth." The clerk asked for Peterson's birthday as she started the transaction for the beer. Peterson said "1998" out loud to the clerk. No further questions were asked of Peterson about his age. Peterson was not asked to produce identification. The clerk proceeded to ring up the beer and told Peterson the cost. Peterson paid for the beer. Peterson was given change by the clerk along with the beer purchase. Because Peterson was wearing a recording device that captured the conversation between Peterson and the clerk, the Department moved into evidence the recording. (Exhibit D-5) The recording was consistent with Peterson's description of the transaction.

12. Peterson exited the Licensed Premises with the six-pack of Budweiser beer and went to the vehicle where the law enforcement officers were waiting, Peterson confirmed what had just occurred to Roselle and that the clerk's name was "Elizabeth". Roselle entered the Licensed Premises with Peterson. Peterson pointed out the clerk while she was working at the register. Roselle approached the clerk and told her why they were there. Roselle told her that she had sold alcohol to a minor. The clerk admitted that she did recognize Peterson while she looked at him across the counter. After this occurred, Roselle took a photo with Peterson and the clerk standing next to each other while Peterson held the beer he had purchased. The clerk told Roselle that her last name was "Garcia" (Garcia) and she produced a credit card with her name since Garcia did not have her driver's license with her. Garcia was cited for the sale to Peterson. She did not testify in this matter.

13. Roselle recovered the silent video recording of the interaction between Peterson and Garcia. (Exhibit D-7) Peterson viewed this video footage during the hearing in this matter and testified that it accurately reflected his interactions with the clerk during the operation and his subsequent reentry with the law enforcement officers to contact Garcia.

14. Peterson had served as a volunteer decoy on multiple prior operations for both SCPD and the Capitola Police Department (CPD) since he was 17 years old. Peterson has been a cadet with CPD for over three years. Serving as a decoy did not make him nervous and he was generally calm during operations

15. Peterson appeared his chronological age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, clothing, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of the

clerk at the Licensed Premises on February 18, 2017, Peterson displayed the appearance which would generally be expected of a person less than 21 years of age during his interactions with the clerk. The clerk did not testify in this matter to explain her age related impressions of Peterson or why she sold Peterson alcohol after being told by Peterson that his year of birth was 1998.

16. Gemma Baez (Baez) testified for the Respondent regarding the training and policies that were utilized by the Respondent to avoid sales to underage persons. Baez is the general manager of the five franchises owned by the Respondent and has been an employee of the Respondent for over 15 years. All new employees receive computer framing regarding underage sales and they are required to pass a test on this and other subjects prior to beginning work. Cashiers also receive individual training on this and other subjects. The Licensed Premises and the other Franchises utilize a scanning system that is activated when an alcohol sale is taking place. (Exhibits L-3 & L-4)

17. Materials are in all of the franchised locations to assist clerks in checking the authenticity of California and military identifications. (Exhibit L-7) Signage is placed in prominent locations in the franchises to remind customers and clerks that they must show identification to purchase alcohol. (Exhibits L-5 & L-6) There are regular meeting that are attended by managers, the owners, and employees regarding the enforcement of alcohol sale policies. These meetings were in place prior to the incident in this matter. The Respondent's franchises have received multiple responsible alcohol merchant awards including an award at the Licensed Premises in December 2016. (Exhibit L-8)

18. Baez regularly checks the register transaction system to ensure that clerks are not bypassing the alcohol sales protocols by performing manual overrides. (Exhibit L-9) Garcia was subject to termination as a result of the sale to Peterson but she resigned before she could be terminated. After the incident in this matter, the Respondent implemented an additional policy requiring that all cashiers sign an acknowledgment at the beginning of every work shift that they will follow the franchise's age restricted products policy. (Exhibits L-10 through L-14)

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

CONCLUSIONS OF LAW

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

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

3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.

4. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on February 18, 2017 the Respondent's clerk, Elizabeth Garcia, inside the Licensed Premises, sold an alcoholic beverage to Jared Peterson, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 6-15)

5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141² and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondent argued that the face to face identification failed to comply with rule 141(b)(5) and that the decoy did not truthfully respond to a question about his age as required by 141(b)(4). These violations, if established, would each be affirmative defenses.

6. However, there is no credible evidence supporting these assertions by the Respondent that there was a failure to comply with the requirements of either of these sections of rule 141. Peterson pointed out the clerk in this matter, and identified her name as "Elizabeth" before even returning to the Licensed Premises so his later identification in the Licensed Premises was not tainted by any form of suggestion. Peterson then stood across the counter from the clerk and confirmed his earlier identification in the clerk's presence and with her knowledge. Her awareness of the identification was confirmed by her acknowledgement that she remembered selling to Peterson while he was still present for her to look at. Peterson and Garcia were then photographed next to each other. (Findings of Fact ¶¶ 5-12)

7. Neither the clerk nor any other witnesses for the Respondent testified to rebut the credible evidence presented by the Department that this was a fully compliant identification. The video and audio recordings of the actual transaction between the clerk and the decoy are also at odds with the unsupported assertion of the Respondent that Peterson failed to respond truthfully to an age related question as required by rule 141(b)(4). Peterson truthfully said he was born in "1998" and any birthdate in that year of

² All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

birth would have been underage. (Finding of Fact ¶ 11) Peterson gave his true year of birth. Had this caused any confusion on the part of Garcia, she could have asked for further clarification and/or requested his identification before completing the transaction. Given the totality of the evidence presented by the Department credibly establishing compliance with rule 141(b), the Respondent's assertions that compliance did not occur are unsupported.

8. Further, Peterson testified in this matter and his appearance matched the appearance he presented to the clerk on the date of the operation. His appearance was consistent with a person under the age of 21. As previously noted, the clerk did not testify to establish whether there was anything in Peterson's manner or appearance that led her to reasonably conclude that he was over 21.

PENALTY

The Department recommended that the Respondent's license be suspended for a period of 15 days which is the standard penalty for a violation without mitigation or aggravation based on the short period of licensure at this Licensed Premises.

The Respondent presented credible evidence showing that established and enforced policies to prevent sales of alcoholic beverages to underage individuals were in place even prior to this incident. The Respondent then added an additional, enforced policy to further ensure that no underage sales occur. While the Department presented evidence that the Licensed Premises was only licensed since July 2015, the Respondent presented credible evidence that the Licensed Premises is part of a larger chain of franchises operated by the Respondent-Licensee that have remained discipline free for over 15 years.

The Licensee has shown a long standing pattern of behavior to ensure compliance with the Act. The Respondent has been recognized repeatedly for enforcing underage sale policies. This incident appeared to be a deviation from the norm. In addition, the Respondent enacted an additional policy after this incident to remind employees of their duty to prevent underage sales of alcohol. All of the above are appropriate factors in mitigation to be weighed in this matter.

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

7 Eleven, Inc. and KSDD, Inc.,
dba 7 Eleven 2367-14279C
File #20-555048
Reg. #17085540
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ORDER

The Respondents' off-sale general license is hereby suspended for a period of 5 days.

Dated: October 31, 2017



Alberto Roldan
Administrative Law Judge

<input type="checkbox"/> Adopt
<input checked="" type="checkbox"/> Non-Adopt: _____
By: <u>James A. Applebury</u>
Date: <u>1/16/18</u>