

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

AB-9732

File: 20-552726; Reg: 17086198

99 CENTS ONLY STORES, LLC,
dba 99¢ Only Store #65
5130 West 190th Street,
Torrance, CA 90503,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: February 7, 2019
Ontario, CA

ISSUED FEBRUARY 20, 2019

Appearances: *Appellant:* Ralph Barat Saltsman, of Solomon, Saltsman & Jamieson, as counsel for 99 Cents Only Stores, LLC,

Respondent: Jonathan V. Nguyen, as counsel for the Department of Alcoholic Beverage Control.

OPINION

99 Cents Only Stores, LLC, doing business as 99¢ Only Store #65, appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 25 days because its clerk sold an alcoholic beverage to a police minor decoy, in

¹The decision of the Department, dated July 27, 2018, is set forth in the appendix.

violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on April 22, 2016. There is one instance of discipline against the license currently pending. (Reg. #17085793.)

On December 5, 2017, the Department filed a one-count accusation against appellant, charging that its clerk, Ana Maria Cruz (the clerk), sold an alcoholic beverage to 17-year-old Vanessa Contreras (the decoy) on June 29, 2017. Although not noted in the accusation, the decoy was working for the Torrance Police Department (TPD) at the time.

On March 21, 2018, the Department filed a Motion to Consolidate the hearing in the instant matter with the aforementioned pending matter (reg. #17085793) because the accusations each involved a single count of a sale to the same minor decoy, at the same licensed location, with the same parties and attorneys. The motion was granted, with both accusations to be heard on April 9, 2018, and two separate decisions to be issued.

At the administrative hearing held on April 9, 2018, documentary evidence was received, and testimony concerning the sale was presented by the decoy; by TPD Detectives Scott Norris and Ryan Schmitz; by Department Supervising Agent Vic Duong; and by William Solper, Senior Director of Learning and Organizational Development for appellant.

Testimony established that on June 29, 2017, TPD Detective Norris entered the premises in an undercover capacity, followed shortly thereafter by the decoy. The decoy went to the coolers where she selected a six-pack of Hite beer. She took the beer to the sales counter and Detective Norris stood in line behind her where he could

observe the interaction between the decoy and clerk.

The decoy placed the beer on the counter and the clerk asked to see her identification. She handed the clerk her California Identification Card, which had a portrait orientation, contained her correct date of birth — showing her to be 17 years of age, a blue stripe indicating “AGE 18 IN 2017,” and a red stripe indicating “AGE 21 IN 2020.” (Exh. 5.) The clerk looked at the ID and entered something into the register. She looked confused and entered numbers into the register several more times while looking at the ID. The clerk then completed the transaction without asking any age-related questions. The decoy and detective exited the premises and notified other TPD officers about what had occurred.

The decoy re-entered the premises with Detectives Schmitz and Lee. The decoy pointed out the clerk to the officers as the person who sold her the beer. Detective Schmitz identified himself as a police officer to the clerk, explained the violation to her, and asked her to step out from behind the register. Detective Schmitz asked the decoy to identify the person who sold her the beer. The decoy pointed at the clerk and said she was the cashier who sold it to her. The clerk and decoy were standing about two feet apart at the time. A photo was taken of the clerk and decoy together. (Exh. 2) The clerk was subsequently cited and her employment terminated.

On April 21, 2018, the administrative law judge (ALJ) submitted a proposed decision sustaining the accusation and recommending that the license be suspended for 25 days. The Department adopted the proposed decision in its entirety on July 23, 2018, and issued a Certificate of Decision on July 27, 2018.

Appellant then filed a timely appeal contending: (1) the decoy did not display the appearance of a person under the age of 21, in violation of rule 141(b)(2), and (2) the

Department erred when it treated a pending disciplinary matter as a factor in aggravation, and failed to consider evidence of mitigation when determining the penalty.

DISCUSSION

I

Appellant contends that the decoy did not display the appearance required by rule 141(b)(2), and that she appeared over the age of 21, because of her large stature, her clothing and make-up, and her experience as an Explorer with the TPD as well as her experience conducting numerous decoy operations. (AOB at p. 13.)

Rule 141(b)(2) provides:

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

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

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

Appellant maintains that the decoy's mature physical appearance and experience as a decoy and as an Explorer undermine a finding that her appearance complied with rule 141(b)(2). It argues:

it is a complete abuse of discretion on the part of the ALJ to find that Ms. Contreras appeared under the age of 21 when she was wearing mascara, a black lace shirt, capris pants, has experience working with local police department, and is rather large and matronly in stature.

(AOB at p. 14.)

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:

5. Decoy Contreras appeared and testified at the hearing. On June 29, 2017, she was approximately 5' 5" tall and weighed 220 pounds. She wore a black top with lace, denim capris and black sandals. She wore only mascara for make-up. (Exhibits 2 and 3.) Her appearance at the hearing was similar.

[¶ . . . ¶]

11. Decoy Contreras appeared her age at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of clerk Cruz at the Licensed Premises on June 29, 2017, decoy Contreras displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to clerk Cruz. Decoy Contreras appeared her true age.

12. Decoy Contreras learned about the decoy program through her two years' experience (as of the date of the hearing) as an Explorer with the Torrance PD. She currently has the rank of corporal. On June 29, 2017, she visited five locations, with three of those locations selling alcohol to her, including the Licensed Premises.

(Findings of Fact, ¶¶ 5-12.) Based on these findings, the ALJ reached the following conclusions on the issue of compliance with rule 141(b)(2):

6. With respect to rule 141(b)(2), specifically, the Respondent argued decoy Contreras did not have the appearance generally expected of a person under the age of 21. Respondent's counsel opined that decoy Contreras "doesn't look 16," "definitely looks older than 21," and explained that since the decoy is 220 pounds, carrying a lot of extra weight can sometimes age people and one "cannot tell if they have a baby face or not." . . .

7. This rule 141(b)(2) argument is rejected. The Respondent presented no evidence that any of these factors actually resulted in decoy Contreras appearing 21 or older to clerk Cruz. Decoy Contreras appears her true age, no matter what her weight. Decoy Contreras looked her age at the time of the sales transaction, 17, and at the time of the hearing, 18.

(Conclusions of Law, ¶¶ 6-7.)²

Minors come in all shapes and sizes, and the Board has historically been 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." The ALJ found that the decoy met this standard in this case.

The Board has also repeatedly declined to substitute its judgment for that of the ALJ on the issue of 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.

²Please note: counsel's reference to the decoy not looking 16, quoted here, refers to the 2016 matter, consolidated here for hearing, which occurred when this same decoy was 16 years old.

(Azzam (2001) AB-7631, at p. 5, emphasis in original.) This argument was not raised at the administrative hearing — therefore, the Board is entitled to consider this issue waived, as numerous cases have held that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control* (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23].)

Furthermore, appellant presented no evidence that the decoy's experience and training *actually resulted* in her displaying the 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, but we do know that she requested and was furnished the decoy's identification, yet made the sale anyway. Instead, appellant relies on a difference of opinion — its versus that of the ALJ — as to what conclusion the evidence in the record supports. Absent an evidentiary showing, this argument must fail. In Finding of Fact paragraphs 5-12, and Conclusions of Law paragraphs 6-7, *supra*, the ALJ found that the decoy met the standard required by rule 141(b)(2).

We have reviewed the entire record and agree with the ALJ's determination that there was compliance with rule 141(b)(2). As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity to observe the decoy as she testifies and to make the determination whether the decoy's appearance met the requirement of rule 141 that she 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

herself, clearly provided substantial evidence for finding that the decoy's appearance complied with the requirements of rule 141(b)(2). We see no flaw in the ALJ's findings or determinations. Ultimately, appellant is 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.

II

Appellant contends the Department failed to proceed in a manner required by law when it treated a pending disciplinary matter as a factor in aggravation, and failed to consider evidence of mitigation when determining the penalty. (AOB at pp. 6-12.)

The Board will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) "Abuse of discretion" in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.] (*Brown v. Gordon*, 240 Cal. App. 2d 659, 666-667 (1966) [49 Cal. Rptr. 901].)

If the penalty imposed is reasonable, the Board must uphold it even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].) This Board's review of a penalty looks only to see whether it can be considered reasonable, and, if it is reasonable, the Board's inquiry ends there.

Rule 144 provides:

In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act (Bus. and Prof. Code Sections 23000, et seq.), and

the Administrative Procedures Act (Govt. Code Sections 11400, *et seq.*), the Department shall consider the disciplinary guidelines entitled "Penalty Guidelines" (dated 12/17/2003) which are hereby incorporated by reference. Deviation from these guidelines is appropriate where the Department in its sole discretion determines that the facts of the particular case warrant such a deviation - such as where facts in aggravation or mitigation exist.

(Cal. Code Regs., tit. 4, § 144.) The extent to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion — pursuant to rule 144 — and the Board may not interfere with that discretion absent a clear showing of abuse of discretion.

Among the mitigating factors provided by the rule are the length of licensure without prior discipline, positive actions taken by the licensee to correct the problem, cooperation by the licensee in the investigation, and documented training of the licensee and employees. Aggravating factors include, *inter alia*, prior disciplinary history, licensee involvement, lack of cooperation by the licensee in the investigation, and a continuing course or pattern of conduct. (*Ibid.*)

The Penalty Policy Guidelines further address the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

Penalty Policy Guidelines:

The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

(Ibid.)

In the decision, the ALJ devotes a separate section to the issue of penalty and explains the factors in aggravation and mitigation which contributed to his recommendation of a 25-day suspension:

PENALTY

The Department requested the Respondent's license be suspended for a period of 25 days, based on several aggravating factors: (1) Respondent was on notice to pay attention to alcohol sales to minors with the prior incident of August 10, 2016, during which Respondent sold to a 16 year old, (2) less than a year later Respondent sold alcohol to the same decoy who was then only 17 years old, (3) there was no credible evidence clerk Cruz received any training since Mr. Solper could not verify whether the persons listed on the roster of Exhibit B received the training as stated, (4) even if clerk Cruz received training the training is not working because clerk Cruz asked for the decoy's ID and still sold alcohol to a minor, (5) clerk Cruz did not enter decoy Contreras' date of birth because that date would have prevented the sale of alcohol to the decoy, (6) the decoy's ID was in vertical formatting with a red stripe reading, "AGE 21 IN 2020," and (7) the violation at hand occurred in June, which is when kids are out of school for the summer, partying - a time when licensees need to be extra diligent.

The Respondent argued that, if the accusation were not dismissed, a 15 day suspension was appropriate due to several mitigating factors: (1) clerks Cruz and Nava were fired after the violations pursuant to policy, (2) the Respondent has a thorough alcohol sales training program that requires a 100 percent pass rate to ensure its employees pay attention to the training module, and emphasizes employee responsibility / consequences, (3) clerks are required to check everyone's ID, not just someone who appears a certain age, (4) Exhibit B lists clerk Cruz as having undergone the said training, (5) after the incident of June 29, 2017, the Respondent retrained all of its employees and (6) the Respondent implemented the LMS to better keep an eye on employee training compliance.

While there was some evidence of mitigation in the form of retraining employees and attempted positive action by the licensee to correct the problem, the aggravating factors weigh more heavily. Two of Respondent's clerks sold alcohol to a youthful appearing minor who was actually only 16 and 17 years of age at the time of the said violations, which occurred less than 11 months apart, with a short licensure. Despite the Respondent's training module being available to employees since 2013, the training is not correcting the problem. Employees only

currently receive alcohol sales related training once during their employment. There is a lot of information in the training module, that if not repeated could easily be forgotten. There was no evidence as to when the Respondent would implement a plan to train employees once every two years. It would behoove the Respondent to train employees at least annually. The test employees take after the training module, consisting of only 10 questions, does not include the simple red flags of minor's IDs. It was not clear what policy is reinforced in the daily huddles where sales are discussed with associates. It was further not clear whether clerk Cruz actually received any training, as discussed above. If she did receive the said training, it is quite alarming clerk Cruz would proceed with the sale of alcohol to a minor despite the minor's youthful appearance and the red flags of the minor's ID (decoy Contreras' vertical ID plainly stated in red that she would not be 21 years old until the year 2020). The Respondent's policy of checking "everyone's ID" is not correcting the problem, as evidenced by clerk Cruz' actions. Also of grave concern, is that since the violation of August 10, 2016, Respondent's POS system has not changed. While there is no override button, the POS system permits a cashier to manually enter a random, age-appropriate date of birth, effectively tricking the POS system into allowing a sale of alcoholic beverages to a minor. The penalty recommended herein complies with rule 144.

(Decision, at pp. 8-9.)

Appellant argues that the Department erred when it treated a pending disciplinary matter — the 2016 incident, consolidated with the instant matter at the administrative hearing — as a factor in aggravation. It asserts that the proposed decision submitted by the ALJ in this 2016 matter was rejected by the Director, and that the Department has yet to submit its own decision in that case, therefore it cannot properly be considered as prior disciplinary history. (AOB at p. 7.) Department counsel, on the other hand, argues that the Department used "the prior violation as an aggravating factor, showing a continuing course or pattern of conduct by appellant." (RRB at p. 7.)

The problem we face, of course, is that an accusation with no final decision is simply not yet a "prior violation" so the decision in this matter is a clear abuse of discretion. Due process demands that the Board treat this matter as not final, because the possibility exists that the pending matter could be dismissed. The Board simply

has no way to know, one way or the other, what the outcome of that other matter will be. For this reason alone, due process demands that we reverse the Department's decision. We would be remiss if we relied on pure conjecture — that the accusation in the 2016 matter will be sustained — in order to support aggravation of the penalty in this matter. The Department's "continuing course of conduct" argument must also fail because at this point in time we simply do not know whether that charge has been sustained.

Appellant also argues that additional evidence of mitigation was presented at the hearing but was not considered: namely, (1) the length of licensure at the premises without discipline; (2) positive actions by the licensee to correct the problem — the licensee testified that he disabled the visual ID button that allowed the clerk to make the sale without entering a date of birth; and (3) documented training of licensees and employees. Appellant contends that these efforts should have been considered as additional positive actions by the licensee to correct the problem — meriting additional mitigation of the penalty. The decision itself, however, debunks appellant's assertion that that these factors were ignored. (See Decision, *supra*, at pp. 8-9.) We see no error on this point.

While the Department is correct that rule 144 gives the Department great discretion in reaching its penalty determination, that discretion is abused if it relies upon an improper factor, as it did here. A pending accusation is simply not the equivalent of prior disciplinary history, or a continuing course of conduct, and cannot be relied on as such until and unless there is a final decision in that matter. Therefore, we reverse the Department's decision and remand this matter for reconsideration of the penalty without reliance on a non-final pending accusation.

ORDER

The decision of the Department is reversed and remanded to the Department for

reconsideration of the penalty in light of the above discussion.³

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

³This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.

APPENDIX

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

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

99 CENTS ONLY STORES, LLC
99 C ONLY STORE #65
5130 WEST 190TH STREET
TORRANCE, CA 90503

OFF-SALE BEER AND WINE - LICENSE

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

LAKWOOD DISTRICT OFFICE

File: 20-552726

Reg: 17086198

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on July 23, 2018. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

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

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after September 6, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: July 27, 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:

99 Cents Only Stores, LLC
Dbas: 99 ¢ Only Store #65
5130 West 190th Street
Torrance, California 90503

Respondent

Off-Sale Beer and Wine License

} File: 20-552726
}
} Reg.: 17086198
}
} License Type: 20
}
} Word Count: 13,275
}
} Reporter:
} Tracy Terkeurst
} California Reporting
}
} **PROPOSED DECISION**

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

Kerry Winters, Attorney, represented the Department of Alcoholic Beverage Control.

Donna Hooper, Attorney, represented Respondent, 99 Cents Only Stores, LLC.

The Department seeks to discipline the Respondent's license on the grounds that, on or about June 29, 2017, the Respondent, through their agent or employee, at said premises, sold, furnished, gave or caused to be sold, furnished or given, alcoholic beverages to Vanessa Contreras (V.C.), an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 1B.)

On March 21, 2018, the Department filed a Motion to Consolidate the hearings for accusations bearing registration numbers 17085793 and 17086198, and requested separate proposed decisions. Both accusations involve a single count of a sale to the same minor decoy at the same licensed location, with the same parties and attorneys. On March 30, 2018, Chief Administrative Law Judge John Lewis issued an Order Consolidating Hearings with both accusations to be heard on April 9, 2018, and two separate proposed decisions to be written.

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

99 Cents Only Stores, LLC
Dba: 99¢ Only Store #65
File #20-552726
Reg. #17086198
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Although there is only one set of exhibits and one transcript, the exhibits and the transcript apply to both accusations; with the exception that Exhibits 1B, 2 and 3 apply only to registration number 17086198, and Exhibits 1A, 4, 6, and 7, apply only to registration number 17085793.

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 April 9, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on December 5, 2017.
2. The Department issued a type 20, off-sale beer and wine license to the Respondent for the above-described location on April 22, 2016 (the Licensed Premises).
3. Respondent has been the subject of the following discipline, which is still pending:

<u>Date of Violation</u>	<u>Reg. No.</u>	<u>Violation</u>	<u>Penalty</u>
August 10, 2016	17085793	BP§25658(a)	Pending

4. Vanessa Contreras (hereinafter referred to as decoy Contreras) was born on September 11, 1999. On June 29, 2017, she was 17 years old. On that date she served as a minor decoy in an operation conducted by the Torrance Police Department (Torrance PD).
5. Decoy Contreras appeared and testified at the hearing. On June 29, 2017, she was approximately 5'5" tall and weighed 220 pounds. She wore a black top with lace, denim capris and black sandals. She wore only mascara for make-up. (Exhibits 2 and 3.) Her appearance at the hearing was similar.
6. On June 29, 2017, decoy Contreras entered the Licensed Premises. She walked to the alcoholic beverage section and selected a six-pack of hite beer. (Exhibit 2.) Beer is an alcoholic beverage. Decoy Contreras took the six-pack of beer to the front sales counter for purchase.
7. At the counter, decoy Contreras approached clerk Ana Maria Cruz (hereinafter referred to as clerk Cruz), and placed the six-pack of hite beer upon the counter. Clerk Cruz asked for identification (ID). Decoy Contreras handed to clerk Cruz her valid California Identification Card, which had a vertical orientation, showed her correct date of birth and included a red stripe which read, "AGE 21 IN 2020," and a blue stripe which

read, "AGE 18 IN 2017." (Exhibit 5.) Clerk Cruz retrieved the ID, looked at it and entered some numbers into the cash register. Clerk Cruz looked confused and kept entering numbers into the cash register while looking at the ID several times. Eventually clerk Cruz proceeded with the sales transaction of alcohol to the decoy. Decoy Contreras gave money to clerk Cruz, who provided the decoy with change. Decoy Contreras took the change, the six-pack of hite beer, and exited the store. Detective Scott Norris of the Torrance PD was inside the Licensed Premises posing as a customer and witnessed these events. Deputy Norris exited the store soon after decoy Contreras exited.

8. After decoy Contreras walked outside the store she and Detective Norris notified Torrance PD Detectives Ryan Schmitz and Lee of the violation, with decoy Contreras carrying the six-pack of hite beer she purchased.

9. Decoy Contreras re-entered the Licensed Premises with Detectives Schmitz and Lee. Once she was inside the store decoy Contreras pointed out clerk Cruz as the person who sold her the alcohol, with clerk Cruz behind the cash register, approximately five to 10 feet away. Detectives Schmitz, Lee and decoy Contreras approached clerk Cruz. Detective Schmitz identified himself as a police officer and asked clerk Cruz to step away from the cash register, which she did. Detective Schmitz advised clerk Cruz of the violation and then asked decoy Contreras to identify the person who sold alcohol to her. Decoy Contreras pointed at clerk Cruz and said that she was the cashier who sold her the alcohol. Decoy Contreras and clerk Cruz were standing two feet apart at the time of this identification. A photo of clerk Cruz and decoy Contreras was taken after the face-to-face identification, with decoy Contreras holding her ID and the six-pack of hite beer while standing next to clerk Cruz. (Exhibit 2.)

10. Detective Lee issued a citation to clerk Cruz after the face-to-face identification. Clerk Cruz did not appear and did not testify at the hearing. There is no evidence clerk Cruz was distracted, or that anyone interfered, during the sales transaction or the face-to-face identification. There was no evidence the cash register/POS (point of sale) system was not functioning properly.

11. Decoy Contreras appeared her age at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of clerk Cruz at the Licensed Premises on June 29, 2017, decoy Contreras displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to clerk Cruz. Decoy Contreras appeared her true age.

12. Decoy Contreras learned about the decoy program through her two years' experience (as of the date of the hearing) as an Explorer with the Torrance PD. She currently has the

rank of corporal. On June 29, 2017, she visited five locations, with three of those locations selling alcohol to her, including the Licensed Premises.

13. William Solper appeared and testified at the hearing. Mr. Solper has been working for 99 Cents Only Stores LLC for eight years as the Senior Director of Learning and Organizational Development. His role includes developing store operations training programs for all store operations company-wide, and leadership development. In 2013, Mr. Solper developed and the company began using an on-line module employee training course and certification of alcohol sales for the company's stores licensed with the Department. Cashiers and store associates who use the company's point of sale system are required to log into the on-line interactive training module, which includes videos and an audio component of someone reading each slide as the employee reads along.

14. Mr. Solper presented at the hearing a sample of the screenshots from the said on-line training module, entitled, "Alcohol Sales eLearning Course Screenshots." (Exhibit A.) The training covers store policy and procedure in complying with California laws and regulations on the sales of alcoholic beverages. Employees must ask for IDs of "everyone," hold the ID and inspect it. It identifies acceptable IDs, including any unexpired U.S. Military ID, State issued Driver License or ID Card, unexpired or expired U.S. Passport, Passport Card and Foreign Passport. The training modules include California Provisional Driver License and ID Cards issued to minors, including a picture of their vertical format and the red stripe which indicates when the minor will turn 21 years of age. It teaches employees about fake IDs. Employees are asked to use the "FLAG" step system, which instructs employees to "Feel" the ID to see if there is anything unusual like thickness, raised edges, re-lamination, "Look" at the information on the card and compare it to the minor, looking for alterations, "Ask" the customer questions to ensure their answers meet the descriptions on the ID, and "Give" the ID back to the customer even if it is fake. The training reviews signs of intoxication, refusing the sale of alcohol, employee responsibility and consequences of sales to minors, including, but not limited to, possible termination of employment, as well as suspension and revocation of the store's Department license. If a customer becomes difficult after an employee refuses the sale of alcoholic beverages the employee is required to page the on-duty manager, who will address the situation on a case-by-case basis.

15. After reviewing the on-line training module, employees must answer 10 questions related to the training module. Employees only pass if they get 100 percent correct. If they do not pass they must notify their manager, retake both the on-line training module and the test until they score 100 percent on the test. Mr. Solper presented a sample test at the hearing. (Exhibit D.) Employees are currently trained once. The company is in the process of implementing a new policy which will require employees to undergo training once every two years to ensure employees understand and are reminded of store policy.

16. Prior to September 2017, employees would sit at a computer in the back office of the store, take the on-line training module, and once they completed the training they would take a test, and sign an Associate Meeting Roster to confirm they completed and passed the on-line training. That roster was kept in the office of the store. Mr. Solper presented an Associate Meeting Roster for Store 65 (Exhibit B), but acknowledged he had no personal knowledge of whether the persons listed on the said rosters completed the required training. A problem with the Associate Meeting Roster was that there was no way to instantaneously track employee training compliance since the roster was located in the individual store.

17. Beginning in September of 2017, the Associate Meeting Roster was replaced with the Learning Management System (LMS). Mr. Solper described the LMS as basically a “cloud” system, which enables the company to track employee completion of the on-line interactive training module. Employee training completion and compliance is placed on the LMS or cloud, and not on the individual stores’ computers. Mr. Solper presented a sample of a report which he generated from the LMS on April 4, 2018, which monitors employee completion and compliance with the on-line training. (Exhibit C.) The advantage of the LMS over the paper roster system, is that the company can timely verify store associate certifications and compliance with company training. The verification of employee training is done on a month-to-month basis.

18. After the said violations of August 10, 2016 and June 29, 2017, clerks Cruz and Nava were fired, pursuant to Respondent’s store policy. After the June 29, 2017 violation, the Respondent’s clerks were retrained, and store managers began conducting daily huddles with their store associates to discuss sales and reinforce store policy. There also have been changes in hiring practices, with the implementation of a new program that involves integrity testing and background checks to improve the quality of hiring candidates. Since the violation of August 10, 2016, the Respondent has not changed its POS register system. Once an alcoholic beverage is scanned the system makes a loud noise and alerts the clerk to check the customer ID and enter the customer’s date of birth. If the customer’s date of birth is such that the customer would be 21 years or older the sale will proceed; otherwise the sale will not be permitted. There is no visual override button, to override the system requirements, other than by manually entering a date of birth which would make the customer 21 years or older.

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 June 29, 2017, the Respondent's clerk, Ana Maria Cruz, inside the Licensed Premises, sold alcoholic beverages, to-wit: beer, to Vanessa Contreras, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-12.)
5. The Respondent argued the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)², and therefore, the accusation should be dismissed pursuant to rule 141(c).
6. With respect to rule 141(b)(2), specifically, the Respondent argued decoy Contreras did not have the appearance generally expected of a person under the age of 21. Respondent's counsel opined that decoy Contreras "doesn't look 16," "definitely looks older than 21," and explained that since the decoy is 220 pounds, carrying a lot of extra weight can sometimes age people and one "cannot tell if they have a baby face or not," Respondent argued that decoy Contreras had a 60 percent success rate in buying alcohol from three of the five licensed premises she visited on June 29, 2017; arguing that AB-7835 (May 31, 2002) holds that a high success rate is a relevant factor to consider in whether there is 141(b)(2) compliance.
7. This rule 141(b)(2) argument is rejected. The Respondent presented no evidence that any of these factors actually resulted in decoy Contreras appearing 21 or older to clerk Cruz. Decoy Contreras appears her true age, no matter what her weight. Decoy

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

Contreras looked her age at the time of the sales transaction, 17, and at the time of the hearing, 18.

8. Regarding AB-7835, it held that the minor decoy's "extremely high (80 percent) purchase rate" *in addition to* "the fact the decoy was not even asked for identification in any of the premises that sold to him" was a strong indication the decoy in that matter did not display the appearance that could generally be expected of a person under the age of 21. The Appeals Board maintained that it was "not only the exceedingly high 'success rate' that cast[] doubt" on the decoy's apparent age, but that it also considered, what the Appeals Board described as, the administrative law judge's "flawed" analysis and "the unreliable basis used to find the decoy's apparent age."

In the matter at hand, there was a 60 percent "success rate," and *no* evidence presented as to whether or not the two other licensed premises that sold alcohol to decoy Contreras asked for her ID. Clerk Cruz asked for decoy Contreras' ID, which was in the vertical format and had a red-stripe which advised the minor would not be 21 years old until the year 2020. Based on Respondent's witness testimony, if clerk Cruz received the on-line module training on February 6, 2017, she should have known by those two red flags that decoy Contreras was not old enough to purchase alcoholic beverages. However, based on clerk Cruz' actions she was not aware of the red flags, and therefore it is unclear what training, if any, she received. Especially in light of Mr. Solper's admission that he could not verify whether clerk Cruz indeed completed the required training as the Associate Meeting Roster purported (Exhibit B). From the credible testimony of Detective Norris, clerk Cruz looked at the ID and entered some numbers into the cash register, looked confused and kept entering numbers into the cash register while looking at the ID several times. Clerk Cruz had several attempts to enter the decoy's correct date of birth, which the POS system most certainly, from the Respondent's witness testimony, would have notified clerk Cruz to stop the sale. There was no evidence the POS system was not functioning properly. Yet, clerk Cruz was able to proceed with the sale of alcohol to decoy Contreras despite her youthful appearance and her valid minor's ID with its red flags. It is inherently more probable that, under these circumstances, and in light of the preponderance of the evidence, clerk Cruz entered an age-appropriate date of birth to trick the POS system to allow the sale to proceed. The reason why she did so is unknown since clerk Cruz did not testify. There could be a myriad of reasons why clerk Cruz proceeded with the sale of alcohol to the minor decoy, including, but not limited to that she was in a hurry to get the transaction concluded, and other reasons unrelated to decoy Contreras' appearance. Regardless, decoy Contreras looked her age at the time of the sales transaction, 17, and at the time of the hearing, 18. In other words, decoy Contreras had the appearance generally expected of a person under the age of 21. (Findings of Fact ¶ 11.)

PENALTY

The Department requested the Respondent's license be suspended for a period of 25 days, based on several aggravating factors: (1) Respondent was on notice to pay attention to alcohol sales to minors with the prior incident of August 10, 2016, during which Respondent sold to a 16 year old, (2) less than a year later Respondent sold alcohol to the same decoy who was then only 17 years old, (3) there was no credible evidence clerk Cruz received any training since Mr. Solper could not verify whether the persons listed on the roster of Exhibit B received the training as stated, (4) even if clerk Cruz received training the training is not working because clerk Cruz asked for the decoy's ID and still sold alcohol to a minor, (5) clerk Cruz did not enter decoy Contreras' date of birth because that date would have prevented the sale of alcohol to the decoy, (6) the decoy's ID was in vertical formatting with a red stripe reading, "AGE 21 IN 2020," and (7) the violation at hand occurred in June, which is when kids are out of school for the summer, partying - a time when licensees need to be extra diligent.

The Respondent argued that, if the accusation were not dismissed, a 15 day suspension was appropriate due to several mitigating factors: (1) clerks Cruz and Nava were fired after the violations pursuant to policy, (2) the Respondent has a thorough alcohol sales training program that requires a 100 percent pass rate to ensure its employees pay attention to the training module, and emphasizes employee responsibility/consequences (3) clerks are required to check everyone's ID, not just someone who appears a certain age, (4) Exhibit B lists clerk Cruz as having undergone the said training, (5) after the incident of June 29, 2017, the Respondent retrained all of its employees and (6) the Respondent implemented the LMS to better keep an eye on employee training compliance.

While there was some evidence of mitigation in the form of retraining employees and attempted positive action by the licensee to correct the problem, the aggravating factors weigh more heavily. Two of Respondent's clerks sold alcohol to a youthful appearing minor who was actually only 16 and 17 years of age at the time of the said violations, which occurred less than 11 months apart, with a short licensure. Despite the Respondent's training module being available to employees since 2013, the training is not correcting the problem. Employees only currently receive alcohol sales related training once during their employment. There is a lot of information in the training module, that if not repeated could easily be forgotten. There was no evidence as to when the Respondent would implement a plan to train employees once every two years. It would behoove the Respondent to train employees at least annually. The test employees take after the training module, consisting of only 10 questions, does not include the simple red flags of minor's IDs. It was not clear what policy is reinforced in the daily huddles where sales are discussed with associates. It was further not clear whether clerk


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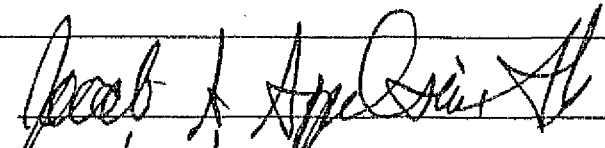
Cruz actually received any training, as discussed above. If she did receive the said training, it is quite alarming clerk Cruz would proceed with the sale of alcohol to a minor despite the minor's youthful appearance and the red flags of the minor's ID (decoy Contreras' vertical ID plainly stated in red that she would not be 21 years old until the year 2020). The Respondent's policy of checking "everyone's ID" is not correcting the problem, as evidenced by clerk Cruz' actions. Also of grave concern, is that since the violation of August 10, 2016, Respondent's POS system has not changed. While there is no override button, the POS system permits a cashier to manually enter a random, age-appropriate date of birth, effectively tricking the POS system into allowing a sale of alcoholic beverages to a minor. The penalty recommended herein complies with rule 144.

ORDER

The Respondent's off-sale beer and wine license is hereby suspended for a period of 25 days.

Dated: April 21, 2018


D. Huebel
Administrative Law Judge

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<input type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>7/23/18</u>