

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

AB-9734

File: 21-411967; Reg: 18086629

SF SACRAMENTO, INC.,
dba SF Supermarket
4562 Mack Road,
Sacramento, CA 95823,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: March 1, 2019
Sacramento, CA

ISSUED MARCH 6, 2019

Appearances: *Appellant:* Donna J. Hooper, of Solomon, Saltsman & Jamieson, as
counsel for SF Sacramento, Inc.,

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

OPINION

SF Sacramento, Inc., doing business as SF Supermarket, 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 violation of

¹The decision of the Department, dated July 26, 2018, is set forth in the appendix.

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

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on December 20, 2004. There is one prior instance of discipline against the license.

On March 21, 2018, the Department filed a single-count accusation charging that appellant's clerk, Phu Vo Anh Tran (the clerk), sold an alcoholic beverage to 19-year-old Brittany Elizabeth Davis (the decoy) on July 26, 2017. Although not noted in the accusation, the decoy was working for the Sacramento Police Department at the time.

At the administrative hearing held on May 23, 2018, documentary evidence was received, and testimony concerning the sale was presented by the decoy, by Sacramento Police Officer Yul Alameda, and by Tha Tran, a supervisor at the licensed premises.

Testimony established that on July 26, 2017, the decoy entered the licensed premises and went to the coolers where she selected a six-pack of Bud Light beer in bottles. She took the beer to the counter and waited in line. When it was her turn, she presented the beer to the clerk. The clerk scanned the beer and completed the sale without asking the decoy for identification and without asking any age-related questions.

The decoy exited the premises and walked towards the officers waiting in a vehicle. On the way, the cardboard container holding the beer broke and the bottles fell to the ground, breaking two of them. While cleaning up the mess, the decoy spoke to Officer Alameda and the other officers about what had occurred in the licensed premises, and described the clerk — noting that he was wearing a grey beanie.

The decoy re-entered the premises with the officers and pointed out the clerk to

them. One of the officers approached the clerk, explained the violation to him, and asked him to step out from behind the register. The decoy pointed at the clerk and verbally identified him as the person who sold her the beer. The decoy and clerk were standing approximately five feet apart and facing each other at the time. A photo of the two of them was then taken (exh. D-4), and the clerk was subsequently cited. The clerk later resigned from his position after being reprimanded by his supervisor. The sale, as well as the identification of the clerk, was captured by a camera worn by the decoy. (Exh. D-2.)

On June 1, 2018, the administrative law judge (ALJ) submitted his proposed decision, sustaining the accusation and recommending a 25-day suspension. The Department adopted the proposed decision in its entirety on July 5, 2018, and a Certificate of Decision was issued on July 26, 2018.

Appellant then filed a timely appeal contending: (1) the decoy operation failed to comply with rule 141(b)(2)² by utilizing a physically mature and full-figured decoy with a high success rate, and (2) the ALJ failed to proceed in a manner required by law when he failed to consider mitigating circumstances, and failed to articulate his reasoning, when determining the penalty.

DISCUSSION

I

Appellant contends the decoy operation failed to comply with rule 141(b)(2) by utilizing a physically mature and full-figured decoy with a high success rate. (AOB at pp. 7-10.)

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.

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 the police used a decoy in this case that failed to comply with standards set forth in rule 141(b)(2). It argues that the decoy's high success rate — successfully purchasing alcohol at four out of eleven licensed premises³ — was the result of her physically mature and full-figured appearance, giving her the appearance of a person over 21 years of age.

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.

³Beyond merely asserting that being able to purchase alcohol at four out of eleven locations constitutes a "high" success rate, appellant did not offer any rationale for this conclusion. Regardless, the issue of the decoy's success rate is not discussed here since it was not argued by appellant.

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

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

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

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

11. Davis appeared her chronological age at the time of the decoy operation. Based on her overall appearance, i.e., her physical

appearance, clothing, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of Tran at the Licensed Premises on May 23, 2018,⁴ [sic] Davis displayed the appearance which could generally be expected of a person less than 21 years of age during the interactions with Tran.

(Findings of Fact, ¶ 11.) Based on these findings, the ALJ addressed appellant's rule 141(b)(2) arguments:

5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141^[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondent argued that the appearance of Davis failed to comply with rule 141(b)(2) because her appearance and demeanor appeared older. Respondent argued that Davis appeared older than 25 years of age. No witnesses testified to this assertion.

6. The Respondent offered little concrete evidence to support the conclusion offered that the Decoy appeared older than 25 years of age or that her appearance more generally failed to comply with the requirements of rule 141(b)(2). The clerk who made the sale was not called to testify regarding the impact of Davis' physical appearance or her demeanor on her apparent age. Tha Tran offered a hearsay statement that Tran said he thought she was over 21. The statement allegedly occurred when she was admonishing him for making the sale. The statement does not explain how he came to that conclusion or even if it was truthful. Tran was being confronted by a supervisor for having done an act that was in purported violation of the employer's policies. It is unknown why he made the statement since he did not testify to confirm that he said this or why he made the statement if it occurred. No other witnesses testified in support of the assertion that Davis appeared older than her chronological age. (Findings of Fact ¶¶ 4-11.)

7. Davis wore non-descript clothing consistent with the clothing worn by persons in her chronological age group. She did not wear make-up, jewelry or other attire that would lead an observer to objectively believe that she was older than her actual age. Her face appeared age appropriate. The only aspect of Davis that could be misconstrued for someone possibly older was her build. Davis had a full figure and a thick build. This was masked somewhat by the loose t-shirt and khaki pants she wore during the operation. (Findings of Fact ¶¶ 4-5.)

8. Regardless, while her figure could be consistent with a person who

⁴The ALJ here inserts the date of the administrative hearing. We assume he meant July 26, 2017, the date of the decoy operation.

was 25 as argued by the Respondent, it was also a figure the “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” as required by Rule 141(b)(2). Davis on the date of the operation would just as easily have blended into a senior assembly at a high school as a person in her mid-20s in the workforce. Her appearance on the date of the operation would have put a reasonable clerk on notice to check for identification because she very well could be under 21 based on her appearance. As previously noted, the clerk did not testify to establish whether there was anything in Davis’ manner or appearance that led him to reasonably conclude that she was over 21. Given the totality of the evidence presented by the Department credibly establishing compliance with rule 141(b)(2), the Respondent’s unsupported assertion that compliance did not occur is rejected.

(Conclusions of Law, ¶¶ 5-8.)

As this Board has said many times, minors come in all shapes and sizes, and we are reluctant to suggest, without more, that minor decoys of large stature automatically violate the rule. (See, e.g., *7-Eleven/NRG Convenience Stores* (2015) AB-9477; *7-Eleven Inc./Lobana* (2012) AB-9164.) This Board has noted that:

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

(*O’Brien* (2001) AB-7751, at pp. 6-7.) Notably, the standard is not that the decoy must display the appearance of a “childlike teenager” but “the appearance which could generally be expected of a person under 21 years of age.” In Findings of Fact paragraph 11, and Conclusions of Law paragraphs 5 through 8, the ALJ found that the decoy met this standard.

Appellant argues that the Board’s past decisions dictate reversal in this case because the Board previously found that:

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

that the decoy appears to be under 21.

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

Appellant contends that the ALJ's statement — that the decoy could “just as easily have blended into a senior assembly at a high school as a person in her mid-20s in the workforce” — means that the decoy did not comply with the Board's interpretation of rule 141(b)(2) in *7-Eleven/Dianne*. It argues that “just as easily” means an equal likelihood of looking older than 21 as it does younger than 21 — not a situation where most people would believe the decoy looked younger than 21.

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

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

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (2002) 103

Cal.App.4th 1084, 1087[127 Cal.Rptr.2d 652].) The instant case is no different. Even if the Board disagreed with the ALJ's assessment of the decoy's appearance, it does not believe the evidence supports a finding that he “could not reasonably have concluded otherwise.” (*Ibid.*) As stated above, case law instructs us that when, as here, “two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department's decision” (*Kirby, supra.*)

Appellant presented no evidence that the decoy's physical appearance or size *actually resulted* in her displaying an appearance of a person 21 years old or older on the date of the operation in this case. As the ALJ notes twice — the clerk did not testify. We cannot know what went through the clerk's mind in the course of the transaction, or why he failed to ask the decoy for her identification. Absent some evidence to establish that the decoy's large stature was the *actual reason* the clerk failed to ask for identification, this argument must fail. Ultimately, appellant is asking this Board to second guess the ALJ and reach a different conclusion, despite substantial evidence to support the findings in the decision. This the Board cannot do.

II

Appellant contends that the ALJ failed to proceed in a manner required by law when he failed to consider all of appellant's mitigating evidence, and failed to articulate his reasoning when determining the penalty. (AOB at pp. 10-13.) Specifically, appellant maintains the ALJ failed to consider that appellant instituted a policy of having the clerks call a manager over when making an alcohol purchase, as well as the policy of having clerks write the birthdate of the purchaser on the back of receipts. They also contend the clerk's voluntary resignation was ignored. (*Ibid.*)

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].)

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.)

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 several paragraphs to the issue of penalty and explains the factors considered in determining the 25-day suspension:

The Department recommended that the Respondent's license be suspended for 25 days which is the standard penalty for a second violation of section 25658(a) within a three year period, without mitigation or aggravation. The Respondent had not been previously disciplined during the approximately 12 year period they have been operating the Licensed Premises leading up to the violation that occurred in 2016. The Respondent offered some evidence that they took steps to try to prevent future violations but these appeared to be ineffective.

There is no evidence that the Respondent availed itself of any of the training or materials provided by the Department to give guidance to the employees of the Licensed Premises. Tran ignored the protocol of calling over a supervisor during an alcohol sale. It is unclear what steps the Respondent took to communicate and enforce the importance of checking for identification and not selling alcoholic beverages to persons under 21 years of age.

Tha Tran, the supervisor who supposedly enforced the efforts of the Licensed Premises to avoid under aged sales of alcoholic beverages by its employees, was unable to even identify age security features on California identifications like the use of portrait orientation or the blue and red bands to differentiate ages. The ABC 299 was signed by Tran but English is a second language to Tran and Tha Tran testified through the use of a Vietnamese translator. Given the substantial language barrier, it is unclear how the legal mandates of the Act are being communicated by the Respondent to its employees. As such, the minimal effort made by the Respondent to prevent underage sales cannot be considered a mitigating factor.

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

(Decision, at pp. 6-7.)

As we have said time and again, 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. 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. The Board sees no abuse of discretion in the instant case.

Appellant complains that the ALJ failed to articulate his reasoning in regards to the penalty and arbitrarily omitted findings on some measures taken in mitigation. However, unless some statute requires it, an administrative agency's decision need not include findings with regard to mitigation. (*Vienna v. Cal. Horse Racing Bd.* (1982) 133 Cal.App.3d 387, 400 [184 Cal.Rptr. 64]; *Otash v. Bureau of Private Investigators* (1964) 230 Cal.App.2d 568, 574-575 [41 Cal.Rptr. 263].) Appellant has not pointed out a statute with such requirements. Findings regarding the penalty imposed are not necessary as long as specific findings are made that support the decision to impose disciplinary action. (*Williamson v. Bd. of Med. Quality Assurance* (1990) 217 Cal.App.3d 1343, 1346-1347 [266 Cal.Rptr. 520].)

With regard to factual findings supporting the actual charges — *not* the penalty imposed — this Board has said:

If this Board observes that the evidence appears to contradict the findings of fact, it will review the ALJ's analysis — assuming some reasoning is provided — to determine whether the ALJ's findings were nevertheless proper. Should this Board be faced with evidence clearly at odds with the findings and no explanation from the ALJ as to how he or she reached those findings, this Board will not hesitate to reverse. . . . While an ALJ may better shield himself against reversal by thoroughly explaining his reasoning, he is not required to do so. The omission of analysis alone is not grounds for reversal, provided findings have been made.

(*Garfield Beach CVS, LLC/Longs Drug Stores Cal., LLC* (2015) AB-9514, at pp. 6-7.)

However, the Board has firmly clarified that it will not widen this holding to include the penalty:

We emphasize that this above language does *not* extend to the penalty. No “analytical bridge” of any sort is required in imposing a penalty. Provided the penalty is reasonable, this Board will have no cause to retrace the ALJ’s reasoning.

(*Hawara, supra* at p. 9.)

Appellant has not established that the Department abused its discretion by imposing a 25-day penalty in this matter.

ORDER

The decision of the Department is affirmed.⁵

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

⁵This 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:**

SF SACRAMENTO, INC.
SF SUPERMARKET
4562 MACK ROAD
SACRAMENTO, CA 95823

OFF-SALE GENERAL - LICENSE

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

SACRAMENTO DISTRICT OFFICE

File: 21-411967

Reg: 18086629

CERTIFICATE OF DECISION

CORRECTED COPY

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 5, 2018. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

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

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

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

Sacramento, California

Dated: July 26, 2018



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

SF Sacramento, Inc.
DBA: SF Supermarket
4562 Mack Road
Sacramento, California 95823

Respondent

} File: 21-411967

} Reg.: 18086629

} License Type: 21

} Word Count: 13,076

} Reporter:

} Brittany Anne Fiores CSR #13460

} California Reporting

Off-Sale General License

PROPOSED DECISION

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Sacramento, California, on May 23, 2018.

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

Donna Hooper, Attorney, represented Respondent SF Sacramento, Inc.

The Department seeks to discipline the Respondent's license on the grounds that, on or about July 26, 2017 the Respondent, through their agent or employee, Phu Vo Anh Tran, sold, furnished, or gave alcoholic beverages to Brittany Elizabeth Davis, an individual under the age of 21 in violation of Business and Professions Code section 25658(a).¹ In the accusation, the Department further alleged that there is cause for suspension or revocation of the license of the Respondent in accordance with section 24200 and sections 24200(a) and (b). The Department further alleged that the continuance of the license of the Respondent would be contrary to public welfare and/or morals as set forth in Article XX, Section 22 of the California State Constitution and sections 24200(a) and (b). (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 May 23, 2018.

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

FINDINGS OF FACT

1. The Department filed the accusation on March 21, 2018.
2. On December 20, 2004 the Department issued a type 21, off-sale general license to the Respondent for the above-described location (the Licensed Premises).
3. The following is the record of prior Department discipline against the Respondent's license as established by official records introduced by the Department:

Violation Date	Violation	Registration Date	Registration Number	Penalty
4/28/2016	25658(a)	June 29, 2016	16084421 (Exhibit D-3)	15 day suspension with 10 days stayed.

4. Brittany Elizabeth Davis (Davis) was born on September 23, 1997. She was 19 years old at the time of the investigation. On July 26, 2017 Davis served as a minor decoy in an operation conducted by the Sacramento Police Department (SPD) in coordination with the Department.

5. Davis appeared and testified at the hearing. On May 23, 2018 her facial appearance was as depicted in an image of Davis that was taken during the operation (Exhibit D-4) with the exception of her hair. On the date of the operation, Davis had longer hair that was pulled back into a fastener so that it was close to her scalp. During the hearing, Davis wore a close cropped haircut that showed scalp on the sides and was slightly longer on top. During the operation, Davis wore an untucked maroon tee shirt and tan khakis. Over her shoulder she carried a plaid purse that had a hidden video camera inside of it. (Exhibits D-4 and D-5) The audio was recorded through white headphones that hung around Davis' neck. (Exhibit D-4) Davis wore nothing on her head, little makeup on her face, and had no earrings. She did wear metal framed glasses with clear lenses. (Exhibit D-4) Except as noted regarding her hair, Davis' appearance at the hearing was essentially the same as her appearance on the date of the decoy operation. She appeared at the hearing to be approximately 5 feet, five inches tall and she had a thick build.

6. On July 26, 2017, Davis entered the Licensed Premises after receiving instructions from the officers running the operation. The video camera recorded when she was in the vehicle before entering into the Licensed Premises, her walk to the Licensed Premises, her interactions inside of the Licensed Premises through when she later walked back to the vehicle where the officers waited, and her reentry through when she identified the

clerk. (Exhibit D-2) Davis allowed the bag to hang at her side naturally and she did not aim the camera in any way. Before entering, she was instructed to go into the Licensed Premises and attempt to buy a national brand of beer. Davis was told to answer questions truthfully and to provide her identification if asked. Upon entering the Licensed Premises, Davis went to the coolers and selected a six-pack of Bud Light beer, which she then took to the checkout lines. There were customers in front of her so she waited her turn. After the previous customers were done, Davis presented the beer she had selected to the clerk for purchase. Davis did not present any other items for purchase.

7. A clerk, later identified as Phu Vo Ahn Tran (Tran), was working at that register. Tran rang up the beer purchase by scanning the beer. Tran did not ask Davis any questions. Tran did not ask Davis for identification. Tran only communicated with Davis regarding the cost of the six-pack which Davis paid in cash. Davis was given change for the purchase, the six-pack of Bud Light beer and a receipt. Tran allowed Davis to leave without any further interaction with Davis. At no point during the transaction did Tran ask about or comment about Davis' age or appearance. Davis then exited the Licensed Premises with the six-pack.

8. Davis walked towards the vehicle with the officers in the parking lot outside of the Licensed Premises. Before she got to the vehicle, the cardboard container unexpectedly broke and the bottles in the six-pack fell to the ground. Two of the bottles broke. While cleaning up the mess, Davis spoke with SPD Officer Yul Alameda (Alameda) and the other officers about what happened in the Licensed Premises. Davis described Tran and said he was wearing a grey beanie. Shortly after exiting, Davis re-entered with Alameda and the other officers. Davis pointed out Tran. One of the officers then approached him at the register. The officer told Tran about the investigation regarding his sale to a minor, and had him step to the side. Davis approached where Tran was now standing.

9. At this time, while standing five feet from Tran and facing him, Davis pointed at Tran and verbally identified him as the clerk who sold her the beer. Approximately two to three minutes later, Davis posed for a picture standing directly next to Tran while holding the remains of the six-pack she had purchased from Tran. (Exhibit D-4)

10. Davis learned of the decoy program when she was asked to participate while working as a student trainee. Her training consisted of being briefed regarding how she was supposed to act during a decoy operation. This incident occurred during the first decoy operation Davis worked. She was not nervous when she entered the Licensed Premises because she knew what she was expected to do.

11. Davis appeared her chronological age at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, clothing, poise, demeanor, maturity,

and mannerisms shown at the hearing, and her appearance and conduct in front of Tran at the Licensed Premises on May 23, 2018, Davis displayed the appearance which could generally be expected of a person less than 21 years of age during the interactions with Tran.

12. Tran did not testify in this matter. Tha Tran, a supervisor at the Licensed Premises did testify (through a Vietnamese interpreter) as to the training that Tran received as a clerk. Tha Tran ensured that Tran understood he was not supposed to sell to persons under the age of 21. At the time of his hiring, Tran was given an ABC-299 clerk's affidavit, explaining California's laws and the duties of person's selling alcoholic beverages. Tran had acknowledged receiving and reviewing the document on October 25, 2015. (Exhibit L-1) Tha Tran testified to instructing employees to check for identification and to make sure that the identifications are not expired.

13. Tha Tran testified that after the Licensed Premises was cited for a violation of section 25658(a) in 2016, they adopted a practice where supervisors would get involved in checking identifications during alcohol purchases. In addition, the Licensed Premises started the practice of retaining an extra receipt and writing down the birthday from the identification on the store copy of the receipt. Supervisors would wind up following this process 20-30 times a day. Tha Tran acknowledged that Tran did not call her or another supervisor over during the purchase made by Davis which was a violation of their protocol. Tha Tran admonished Tran after he was cited for selling to Davis. Tha Tran testified that Tran said he was tired, it was near the end of his shift and he thought Davis was over 21 which are why he didn't call Tha Tran over.

14. On cross examination, Tha Tran was asked about what she taught employees to ensure they did not sell to underage persons. Tha Tran broadly referenced having them check identifications to make sure the person was over 21 years of age. When asked about details, Tha Tran was unable to identify any features on a California Driver's License beyond a birthdate and expiration date to assist in identifying the age of the purchaser. No evidence was presented that any of the supervisors or employees went through any formal training to help the business identify best practices to prevent the sale of alcoholic beverages to underage persons.

15. 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 May 23, 2018 the Respondent's clerk, Phu Vo Ahn Tran, inside the Licensed Premises, sold an alcoholic beverage to Brittany Elizabeth Davis, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-11)
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 appearance of Davis failed to comply with rule 141(b)(2) because her appearance and demeanor appeared older. Respondent argued that Davis appeared older than 25 years of age. No witnesses testified to this assertion.
6. The Respondent offered little concrete evidence to support the conclusion offered that the Decoy appeared older than 25 years of age or that her appearance more generally failed to comply with the requirements of rule 141 (b)(2). The clerk who made the sale was not called to testify regarding the impact of Davis' physical appearance or her demeanor on her apparent age. Tha Tran offered a hearsay statement that Tran said he thought she was over 21. The statement allegedly occurred when she was admonishing him for making the sale. The statement does not explain how he came to that conclusion or even if it was truthful. Tran was being confronted by a supervisor for having done an act that was in purported violation of the employer's policies. It is unknown why he made the statement since he did not testify to confirm that he said this or why he made the

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

statement if it occurred. No other witnesses testified in support of the assertion that Davis appeared older than her chronological age. (Findings of Fact ¶¶ 4-11)

7. Davis wore non-descript clothing consistent with the clothing worn by persons in her chronological age group. She did not wear makeup, jewelry or other attire that would lead an observer to objectively believe that she was older than her actual age. Her face appeared age appropriate. The only aspect of Davis that could be misconstrued for someone possibly older was her build. Davis had a full figure and a thick build. This was masked somewhat by the loose t-shirt and khaki pants she wore during the operation. (Findings of Fact ¶¶ 4-5)

8. Regardless, while her figure could be consistent with a person who was 25 as argued by the Respondent, it was also a figure that “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” as required by Rule 141(b)(2). Davis on the date of the operation would just as easily have blended into a senior assembly at a high school as a person in her mid-20s in the workforce. Her appearance on the date of the operation would have put a reasonable clerk on notice to check for identification because she very well could be under 21 based on her appearance. As previously noted, the clerk did not testify to establish whether there was anything in Davis’ manner or appearance that led him to reasonably conclude that she was over 21. Given the totality of the evidence presented by the Department credibly establishing compliance with rule 141(b)(2), the Respondent’s unsupported assertion that compliance did not occur is rejected.

PENALTY

The Department recommended that the Respondent’s license be suspended for 25 days which is the standard penalty for a second violation of section 25658(a) within a three year period, without mitigation or aggravation. The Respondent had not been previously disciplined during the approximately 12 year period they have been operating the Licensed Premises leading up to the violation that occurred in 2016. The Respondent offered some evidence that they took steps to try to prevent future violations but these steps appeared to be ineffective.

There is no evidence that the Respondent availed itself of any of the training or materials provided by the Department to give guidance to the employees of the Licensed Premises. Tran ignored the protocol of calling over a supervisor during an alcohol sale. It is unclear what steps the Respondent took to communicate and enforce the importance of checking for identification and not selling alcoholic beverages to persons under 21 years of age.

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Tha Tran, the supervisor who supposedly enforced the efforts of the Licensed Premises to avoid under aged sales of alcoholic beverages by its employees, was unable to even identify age security features on California identifications like the use of portrait orientation or the blue and red bands to differentiate ages. The ABC 299 was signed by Tran but English is a second language to Tran and Tha Tran testified through the use of a Vietnamese translator. Given the substantial language barrier, it is unclear how the legal mandates of the Act are being communicated by the Respondent to its employees. As such, the minimal effort made by the Respondent to prevent underage sales cannot be considered a mitigating factor.

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

ORDER

The Respondents' off-sale general license is hereby suspended for a period of 25 days.

Dated: June 1, 2018



Alberto Roldan
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: <u>Robert A. Applequist</u>
Date: <u>7/5/18</u>