

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

**AB-9739**

File: 20-214928; Reg: 18086519

7-ELEVEN, INC., DONALD J. BOUCHER, and PAULA BOUCHER,  
dba 7-Eleven Store #2233-16346  
602 Laurel Street, Santa Cruz, CA 95060,  
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: May 2, 2019  
Ontario, CA

**ISSUED MAY 16, 2019**

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

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

**OPINION**

7-Eleven, Inc., Donald J. Boucher, and Paula Boucher, doing business as  
7-Eleven Store #2233-16346, appeal from a decision of the Department of Alcoholic  
Beverage Control<sup>1</sup> suspending their license for 15 days because their clerk sold an  
alcoholic beverage to a police minor decoy, in violation of Business and Professions  
Code section 25658, subdivision (a).

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<sup>1</sup> The decision of the Department, dated July 30, 2018, is set forth in the  
appendix.

## FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. There are five prior instances of departmental discipline against the license.

On February 15, 2018, the Department filed a single-count accusation against appellants charging that, on August 24, 2017, appellants' clerk, John Mark Montes (the clerk), sold an alcoholic beverage to 18-year-old Jared Peterson (the decoy). Although not noted in the accusation, the decoy was working for the Santa Cruz Police Department (SCPD) at the time.

At the administrative hearing held on June 13, 2018, documentary evidence was received and testimony concerning the sale was presented by the decoy, by SCPD Officer David Roselle, and by co-licensee Donald J. Boucher.

Testimony established that on August 24, 2017, the decoy entered the licensed premises alone, and went to the coolers where he selected a three-pack of Coors beer in cans. The decoy wore an audio recording device so that SCPD officers could monitor his safety. The decoy took the beer to the counter, where two clerks were engaged in a conversation. After a short wait, the decoy was assisted by the younger of the two clerks. The clerk rang up the beer and completed the sale without asking the decoy for his identification and without asking him any age-related questions. The decoy exited the premises with the beer and confirmed to the officers through the audio device what had occurred.

The decoy re-entered the premises with Officer Roselle and another officer. From a distance of about eight feet, the decoy pointed out the clerk to the officers. Roselle identified himself to the clerk as a police officer and explained that he had sold alcohol to a minor. While standing on opposite sides of the counter, Roselle asked the

decoy how old he was and the decoy said he was 18.<sup>2</sup> A photo was taken of the clerk and decoy (exh. D-10), and the clerk was subsequently cited.

The administrative law judge (ALJ) submitted his proposed decision on June 22, 2018, sustaining the accusation and recommending a 15-day suspension. The proposed decision was adopted in its entirety by the Department on July 24, 2018, and a Certificate of Decision was issued on July 30, 2018.

Appellants then filed a timely appeal contending the ALJ's finding of fact, that the decoy's appearance complied with rule 141(b)(2),<sup>3</sup> is not supported by substantial evidence.

## DISCUSSION

Appellants contend that the ALJ's finding of fact, that the decoy displayed the appearance which would generally be expected of a person under the age of 21, was not supported by substantial evidence because of the decoy's "extensive experience purchasing alcohol" and the decoy's "impressive physical presence." (AOB at pp. 6-8.)

Rule 141(b)(2) provides:

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

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

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

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<sup>2</sup> The ALJ notes that the decoy is 18 twice - in Findings of Fact ¶¶ 4 and 11. This is apparently an error, given that the decoy was born in 1998. Appellants and the Department refer to him as being 19 throughout their pleadings. This appears to be correct and is confirmed by the decoy's testimony. (RT at pp. 11; 32.)

<sup>3</sup> References 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.

Appellants maintain the police used a decoy in this case that failed to comply with standards set forth in rule 141(b)(2). They argue that the decoy's appearance violated this rule because of his physical appearance — standing 6' 1" tall at 210 pounds — and a mature demeanor developed by his extensive experience as a decoy, giving him the appearance of a person over 21 years of age. (AOB at p. 7.) They contend a normal teenager would be nervous when purchasing alcohol. (*Ibid.*) Furthermore, appellants contend the decoy's short hair was consistent with someone in the military or law enforcement and that his face showed stubble, consistent with a man in his mid-twenties. (*Id.* at p. 8.)

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 regarding the decoy's appearance:

5. Peterson appeared and testified at the hearing. On August 24, 2017 his appearance during the operation was as depicted in photographs that were taken that date (Exhibits D-7 and D-8) where he was wearing a long sleeved Santa Cruz branded t-shirt and a pair of jeans. His face was fully exposed and he was clean shaven with a close cropped haircut. He had no visible tattoos. Peterson was approximately 6 feet tall and 210 pounds on the date of the operation. His appearance at the hearing was consistent with his appearance on the date of the operation.

[¶ . . . ¶]

13. Peterson had served as a volunteer decoy on multiple prior operations for SCPD after he had initially served as a decoy for the

Capitola Police Department (CPD). Peterson has been a cadet with CPD for over three years. Serving as a decoy did not make him nervous since he had done this since he was 17. He was generally calm during operations. At the time of this operation, Peterson had done approximately 15 prior operations with each one involving multiple visits to licensed premises. Peterson testified that the cadet training had helped him to present more maturely and professionally.

14. Peterson appeared his chronological age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, clothing, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of the clerk at the Licensed Premises on August 24, 2017, Peterson displayed the appearance which would generally be expected of a person less than 21 years of age during his interactions with the clerk. The clerk did not testify in this matter to explain his age related impressions of Peterson or why he sold Peterson alcohol without asking his age or asking him to produce identification.

(Findings of Fact, ¶¶ 5-14.) Based on these findings, the ALJ addressed appellants' rule 141(b)(2) arguments:

7. Respondent argues that Peterson had the appearance and demeanor of someone who could be in military service or in a law enforcement position because of his calm demeanor, clean cut appearance, athletic build and military style haircut. It is common knowledge that persons can enlist in the United States military beginning at the age of 17 and that many law enforcement agencies accept applications for employment after high school graduation. It is not uncommon to encounter service members or law enforcement officers who are under the age of 21. Appearing to be employed in either of these professions does not alone establish that the decoy's appearance was in violation of 141(b)(2). Respondent also highlighted the "mature" demeanor of Peterson in arguing non-compliance. The interaction between Peterson and Montes was minimal. Montes did not testify to what led to the sale. Respondent has pointed to no other evidence supporting its position that Peterson's appearance and demeanor failed to comply with the requirements of 141(b)(2).

8. Peterson testified in this matter and his appearance matched the appearance he presented to the clerk on the date of the operation. His appearance was consistent with a person under the age of 21. As previously noted, the clerk did not testify to establish whether there was anything in Peterson's manner or appearance that led Montes to reasonably conclude that he was over 21. Given the totality of the evidence presented by the Department credibly establishing compliance with rule 141(b), the Respondent's assertions that compliance did not

occur are unsupported.

(Conclusions of Law, ¶¶ 7-8.) We concur.

As this Board has said many times, minors come in all shapes and sizes and we are reluctant to suggest, without more, that a minor decoy automatically violates the rule based on height, weight, or other physical characteristics. (See, e.g., *7-Eleven/NRG Convenience Stores* (2015) AB-9477; *7-Eleven Inc./Lobana* (2012) AB-9164.) This Board has noted that:

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

(*O'Brien* (2001) AB-7751, at pp. 6-7.) Notably, the standard is not that the decoy must display the appearance of a "childlike teenager" but "the appearance which could generally be expected of a person under 21 years of age." In Findings of Fact paragraphs 5 through 14, and Conclusions of Law paragraphs 7 and 8, the ALJ found that the decoy met this standard.

The Board has also, on innumerable occasions, rejected the "experienced decoy" argument. As the Board previously observed:

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

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

Appellants presented no evidence that the decoy's experience or demeanor *actually resulted* in him displaying the appearance of a person 21 years old or older on

the date of the operation in this case. As the ALJ notes, the clerk did not testify. We cannot know what went through the clerk's mind in the course of the transaction, or why he made the sale without asking for identification. Absent some evidence to establish that the decoy's experience or demeanor was the *actual reason* the clerk made the sale, these arguments must fail.

Ultimately, appellants are 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.

#### ORDER

The decision of the Department is affirmed.<sup>4</sup>

MEGAN McGUINNESS, ACTING CHAIR  
SUSAN A. BONILLA, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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<sup>4</sup> This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

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



# APPENDIX

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

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

7-ELEVEN, INC., DONALD J. BOUCHER,  
PAULA BOUCHER  
7-ELEVEN 2233 16346  
602 LAUREL STREET  
SANTA CRUZ, CA 95060

OFF-SALE BEER AND WINE - LICENSE

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

SALINAS DISTRICT OFFICE

File: 20-214928

Reg: 18086519

**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 24, 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 10, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: July 30, 2018



Matthew D. Botting  
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

7-Eleven, Inc., Donald J. Boucher,  
Paula Boucher  
dba 7-Eleven 2233 16346  
602 Laurel Street  
Santa Cruz, California 95060

Respondent

Off-Sale Beer and Wine License

} File: 20-214928  
}  
} Reg.: 18086519  
}  
} License Type: 20  
}  
} Page Count: 65  
}  
} Reporter:  
} TimiAnne Bourell-CSR # 2845  
} Absolute Court Reporters  
}  
} **PROPOSED DECISION**

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Capitola, California on June 13, 2018.

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

Donna Hooper, Attorney, represented Respondents 7-Eleven, Inc., Donald J. Boucher, and Paula Boucher (Respondent).

The Department seeks to discipline the Respondent's license on the grounds that, on or about August 24, 2017 the Respondent, through their agent or employee, John Mark Montes, sold, furnished, or gave alcoholic beverages to Jared Peterson, an individual under the age of 21 in violation of Business and Professions Code section 25658(a).<sup>1</sup> (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 June 13, 2018.

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<sup>1</sup> All statutory references are to the Business and Professions Code unless otherwise noted.

## FINDINGS OF FACT

1. The Department filed the accusation on February 15, 2018.
2. On July 1, 1988 the Department issued a type 20, off-sale beer and wine 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 (Exhibits D-2 through D-6):

<b>Violation Date</b>	<b>Violation</b>	<b>Registration Date</b>	<b>Registration Number</b>	<b>Penalty</b>
2/2/90	25658(a)	4/23/90	90020034	10 day suspension.
5/29/96	25658(a)	11/15/96	96038097	10 day suspension.
2/21/98	25658(a)	7/1/98	98043964	20 day suspension with 5 days stayed
4/25/03	25658(a)	11/18/03	03056273	15 day suspension.
8/26/11	25658(a)	10/20/11	11075927	7 day suspension.

4. Jared Peterson (Peterson) was born on April 10, 1998 and was 18 years old on the date the decoy operation he participated in was conducted. On August 24, 2017 Peterson served as a minor decoy in an operation conducted by the Santa Cruz Police Department (SCPD) at a series of locations including the Licensed Premises.
5. Peterson appeared and testified at the hearing. On August 24, 2017 his appearance during the operation was as depicted in photographs that were taken that date (Exhibits D-7 & D-8) where he was wearing a long sleeved Santa Cruz branded t-shirt and a pair of jeans. His face was fully exposed and he was clean shaven with a close cropped haircut. He had no visible tattoos. Peterson was approximately 6 feet tall and 210 pounds on the date of the operation. His appearance at the hearing was consistent with his appearance on the date of the operation.
6. On August 24, 2017 Peterson entered the Licensed Premises for the purpose of attempting to purchase an alcoholic beverage. Prior to entering, he was instructed to carry his identification, to tell the truth regarding his age and to provide his identification if

asked. Peterson wore a recording device that recorded the audio of his interactions in the Licensed Premises so that the SCPD officers could monitor his safety. The SCPD officers waited for Peterson's return in an unmarked police vehicle.

7. Peterson entered the Licensed Premises and went to the beer coolers. He selected a three-pack of Coors beer cans. Peterson took his selection to the two clerks who were working the registers. As he approached, the two were having a conversation. He waited to have the purchase rung up. Shortly after standing in line, Peterson was waited on by the younger of the two clerks. Peterson presented the three-pack of Coors beer for purchase and it was scanned.

8. This clerk was the same person in the photo that was later taken of Peterson standing next to the clerk that served him. (Exhibit D-10) The clerk did not ask for Peterson's birthday or age as he processed the transaction for the beer. Peterson was not asked for his identification. The clerk proceeded to ring up the beer and told Peterson the cost was \$6.86. Peterson paid for the beer with the \$20 that was provided by SCPD. Peterson was given change by the clerk along with the beer purchase. Peterson asked for and was given a receipt. (Exhibit D-9)

9. Peterson then exited the Licensed Premises with the three-pack of Coors beer and went to the vehicle where the law enforcement officers were waiting. As he walked towards the vehicle, Peterson confirmed what had just occurred through the recording device to SCPD Officer David Roselle (Roselle). Peterson arrived at the vehicle and reiterated what had occurred prior to reentering the Licensed Premises with the officers.

10. Roselle entered the Licensed Premises with Peterson and at least one other officer. From about eight feet away, Peterson pointed at where the younger clerk was working at the register and confirmed that he was the one that made the sale. Roselle then approached this clerk and identified himself as a police officer both verbally and with his badge. Roselle told the clerk why they were there.

11. Peterson walked up and stood directly next to Roselle when he first started talking with the clerk. Roselle told the clerk that he had sold alcohol to a minor. While they were standing directly across the counter from the clerk, Roselle asked Peterson how old he was. Peterson responded that he was 18 years old. The clerk was identified as John Mark Montes (Montes).

12. After this occurred, Roselle took a photo with Peterson and Montes standing next to each other while Peterson held the Coors beer he had purchased. (Exhibit D-10) Montes was subsequently cited for the sale of an alcoholic beverage to Peterson. Montes did not testify in this matter to explain what led him to make the sale to Peterson.

13. Peterson had served as a volunteer decoy on multiple prior operations for SCPD after he had initially served as a decoy for the Capitola Police Department (CPD). Peterson has been a cadet with CPD for over three years. Serving as a decoy did not make him nervous since he had done this since he was 17. He was generally calm during operations. At the time of this operation, Peterson had done approximately 15 prior operations with each one involving multiple visits to licensed premises. Peterson testified that the cadet training had helped him to present more maturely and professionally.

14. Peterson appeared his chronological age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, clothing, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of the clerk at the Licensed Premises on August 24, 2017, Peterson displayed the appearance which would generally be expected of a person less than 21 years of age during his interactions with the clerk. The clerk did not testify in this matter to explain his age related impressions of Peterson or why he sold Peterson alcohol without asking his age or asking him to produce identification.

15. Donald Joseph Boucher (Boucher) testified for the Respondent. He is one of the franchise owners and is a named licensee. He has been one of the owners of the Licensed Premises for close to 30 years and is actively involved in its operation. Boucher learned of the incident with Montes about a week after it occurred from the store's manager. Montes had been an employee of the Licensed Premises since 2016. Boucher verbally reprimanded Montes but he did not terminate him after the incident. Boucher had all of the employees who sell age restricted products, including Montes, re-take the coming of age training module provided by the 7-Eleven corporation even though all new employees receive this computer training regarding underage sales. (Exhibit L-1) Boucher's more general practice was to have the employees re-take the module yearly.

16. Prior to the incident in this matter, the Respondent took other steps to try to prevent underage sales. At the time of the sale made by Montes, the Licensed Premises used a scanning system that activated during an alcohol sale. It also allowed the scanning of driver's licenses to confirm age although the system did allow manual date of birth entries and a visual override. (One of these bypass systems was used by Montes since Peterson was not asked for his California Driver's license during the sale.) Boucher annually purchased an identification guide to assist clerks in checking the authenticity of California identifications and identifications from other jurisdictions. The Respondent also utilized a secret shopper program to test that clerks were following proper protocols in making alcohol sales.

17. Except as set forth in this decision, all other allegations in the accusation and all other contentions by 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 August 24, 2017 the Respondent's clerk, John Mark Montes, inside the Licensed Premises, sold an alcoholic beverage to Jared Peterson, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 2-16)
5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141<sup>2</sup> and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondent argued that the face to face identification failed to comply with rule 141(b)(5) and that the decoy's appearance and demeanor did not comply with 141(b)(2). These violations, if established, would each be affirmative defenses.
6. However, there is no credible evidence supporting these assertions by the Respondent that there was a failure to comply with the requirements of either of these sections of rule 141. Peterson pointed out the clerk in this matter to one of the officers after he reentered. Peterson then stood across the counter from the clerk and confirmed his age in the direct presence of Montes after Montes had been told that he had sold to Peterson. They subsequently stood next to each other while Peterson held the beer that Montes had sold to him. This was clearly compliance with the requirement that Montes be made aware of

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

the identity of the minor at issue.<sup>3</sup> Neither the clerk nor any other witnesses for the Respondent testified to rebut the credible evidence presented by the Department that this was a fully compliant identification. Montes did not tell the officers why he made the sale and he did not testify in this matter regarding his age related impressions of Peterson. (Findings of Fact ¶¶ 4-14)

7. Respondent argues that Peterson had the appearance and demeanor of someone who could be in military service or in a law enforcement position because of his calm demeanor, clean cut appearance, athletic build and military style haircut. It is common knowledge that persons can enlist in the United States military beginning at the age of 17 and that many law enforcement agencies accept applications for employment after high school graduation. It is not uncommon to encounter service members or law enforcement officers who are under the age of 21. Appearing to be employed in either of these professions does not alone establish that the decoy's appearance was in violation of 141(b)(2). Respondent also highlighted the "mature" demeanor of Peterson in arguing non-compliance. The interaction between Peterson and Montes was minimal. Montes did not testify to what led to the sale. Respondent has pointed to no other evidence supporting its position that Peterson's appearance and demeanor failed to comply with the requirements of 141(b)(2).

8. Peterson testified in this matter and his appearance matched the appearance he presented to the clerk on the date of the operation. His appearance was consistent with a person under the age of 21. As previously noted, the clerk did not testify to establish whether there was anything in Peterson's manner or appearance that led Montes to reasonably conclude that he was over 21. Given the totality of the evidence presented by the Department credibly establishing compliance with rule 141(b), the Respondent's assertions that compliance did not occur are unsupported.

## PENALTY

The Department recommended that the Respondent's license be suspended for a period of 15 days which is the standard penalty for a violation without mitigation or aggravation based on the evidence of multiple violations during the period of licensure at this

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<sup>3</sup> Clarification of what constituted a compliant face to face occurred in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2017) 18 Cal.App.5th 541. In finding that identification compliant, that court ruled, "[h]ere there is no violation of Rule 141, as explained above, because the decoy made a face-to-face identification by pointing out the clerk to the officer inside the store while approximately 10 feet from her, standing next to her when the officer informed her she had sold alcohol to a minor, and taking a photograph with her as the minor held the can of beer he purchased from her. She had ample opportunity to observe the minor and to object to any perceived misidentification. The rule requires identification, not confrontation. The identification here meets the letter and the spirit of Rule 141." *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2017) 18 Cal.App.5th 541, 547



Licensed Premises. While none of the priors occurred within a six year period of the incident in this matter, there are a total of five prior violations of section 25658(a) that have occurred during the time that the Respondent has been licensed at this location. The Department argued that the overall record of violations weighed against any mitigation. While these priors do not make the Respondent subject to enhanced penalties because they did not occur within a 36 month period of this violation, the Respondent's history of repeated violations is a factor in aggravation to be considered.

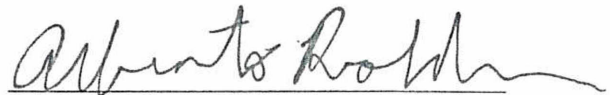
The Respondent did present credible evidence showing that established and enforced policies to prevent sales of alcoholic beverages to underage individuals were in place even prior to this incident. The Respondent has made a legitimate effort to attempt to comply with the Act and resolve the issues that led to five prior incidents of selling alcohol to minors. Before the sale to Peterson, there had been no violations for approximately six years. The actions of Montes in selling to Peterson without asking age related questions or requesting identification appeared to be a deviation from the expectations the Respondent had communicated to its employees regarding age restricted sales. All of the above are appropriate factors in mitigation to be weighed in this matter.

There appear to be no factors in aggravation applicable to this violation beyond the Respondent's disciplinary history. The penalty recommended herein complies with rule 144.

**ORDER**

The Respondents' off-sale beer and wine license is hereby suspended for a period of 15 days.

Dated: June 22, 2018



Alberto Roldan  
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: <u>James J. Lopez</u>
Date: <u>7/24/18</u>