

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

AB-9744

File: 20-484818 Reg: 18086696

7-ELEVEN, INC. and HALLAK ENTERPRISES, INC.,
dba 7-Eleven Store #25302
711 Jamacha Road,
El Cajon, CA 92019,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: May 2, 2019
Ontario, CA

ISSUED MAY 16, 2019

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

Respondent: Jennifer Casey, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Hallak Enterprises, Inc., doing business as 7-Eleven Store #25302, appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 15 days because their clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

¹The decision of the Department, dated August 13, 2018, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' type 20, off-sale beer and wine license was issued on February 24, 2010. On March 26, 2018 the Department filed an accusation against appellants charging that, on September 23, 2017, appellants' clerk, Layth Jabbar (the clerk), sold an alcoholic beverage to 18-year-old Kennedy Nolta (the decoy). Although not noted in the accusation, the decoy was working for the El Cajon Police Department at the time.

At the administrative hearing held on June 19, 2018, documentary evidence was received, and testimony concerning the sale was presented by the decoy and by Officer Robert Lesagonicz, a peace officer for the El Cajon Police Department.

Testimony established that the decoy entered the licensed premises on September 23, 2017 to purchase an alcoholic beverage. It was her first day working as a decoy. After selecting a six-pack of Coors beer from a cooler, the decoy went to the register. When it was her turn, the decoy presented the beer for purchase to the clerk.

The clerk scanned the beer and asked the decoy for identification. The decoy produced her California driver's license, which had a portrait orientation, and contained her correct date of birth — showing her to be 18 years old, and a red stripe indicating "AGE 21 IN 2020." (Exh. D-4)

The clerk looked at the decoy's license for about 35 seconds and appeared to enter numbers into the register. The clerk then accepted the decoy's money, returned her change, and allowed her to leave. During the transaction, the clerk failed to utilize the store's identification scanning system, which would have confirmed the decoy's actual age. Likewise, the clerk failed to ask the decoy's age or any age-related questions.

After leaving the store, the decoy met with law enforcement officers. She reported to the officers what occurred inside. The decoy and the officers then re-entered the store and the decoy pointed out the clerk. One of the officers contacted the clerk, explained who they were, and had him step out from behind the counter.

The decoy then approached and pointed at the clerk, stating “this is the clerk who sold me beer.” Officers took a photo of the decoy and the clerk standing next to each other, while the decoy held the beer that she had purchased. (Exh. D-5.) The clerk was subsequently cited. The clerk did not testify or otherwise explain what led him to make the sale to the decoy, even though he examined her driver’s license.

On July 2, 2018, the administrative law judge (ALJ) submitted his proposed decision, sustaining the accusation and recommending a 15-day suspension. The Department adopted the proposed decision in its entirety on August 7, 2018, and a Certificate of Decision was issued on August 13, 2018.

Appellant filed a timely appeal contending that the decoy operation failed to comply with rule 141(b)(2)² by utilizing a decoy with “an appearance decidedly older than 21” (AOB, p. 5.)

DISCUSSION

Appellants contend that the decoy operation failed to utilize a decoy with an appearance generally expected of a person under the age of 21. (AOB at pp. 4-7.) Specifically, appellants contend that “[t]he decoy’s physical appearance³, and readiness

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.

³Appellants cite to Exhibit D-5, which is a photograph of the decoy and the clerk, stating “[t]here was nothing about [the decoy’s] appearance that was particularly youthful, she presents as a confident adult and her face is consistent with someone over 21 years old.” (AOB at p. 6.)

to hand over her identification without hesitation, created the circumstance in which the decoy appeared over 21 to the clerk at the time of the sale.” (*Id.* at p. 6.)

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.)

Appellants maintain that the decoy in this case failed to comply with standards set forth in rule 141(b)(2). They argue that the decoy’s physical appearance, coupled with her confidence in presenting her identification, and “considered in the context of her experience at the teen academy,” allowed her to present as older than 21 to the clerk. (AOB at p. 6.) Appellants contend the ALJ’s finding of fact – that the decoy met rule 141(b)(2) standards – was not supported by the evidence. (*Ibid.*) The Board disagrees.

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:

4. Kennedy Jere Nolta (Nolta) was born on May 28, 1999 and was 18 years old on the date the September 23, 2017 decoy operation was conducted. On that date, Nolta served as a minor decoy in an operation conducted by the El Cajon Police Department (ECPD) and the Department at a series of locations, including the Licensed Premises. Nolta became a volunteer decoy for ECPD after taking a one week teen academy with ECPD during the summer of 2017.

5. Nolta appeared and testified at the hearing. On September 23, 2017 her appearance was as depicted in a photograph that was taken that date. (Exhibit D-5) Nolta wore a blue and green striped t-shirt, blue khakis and beige Vans branded sneakers. She wore no hat and her straight hair was parted so that her face was fully exposed. Nolta wore no jewelry or makeup. She had no visible tattoos. Nolta was approximately 5 feet, five inches tall and 120 pounds on the date of the operation. She did not change her clothing or appearance during the decoy operation. Her appearance at the hearing was consistent with her appearance during the operation.

[. . .]

13. Nolta 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 mannersisms shown at the hearing, and her appearance and conduct in front of [the clerk] at the Licensed Premises on September 23, 2017, Nolta displayed the appearance which would generally be expected of a person less than 21 years of age during her interactions with [the clerk]. [The clerk] did not testify in this matter to explain his age related impressions of Nolta or why he sold Nolta alcohol after he saw her identification that indicated she was only 18 years old.

(Findings of Fact, ¶¶ 4-5, 13.) Based on these findings, the ALJ addressed appellants' rule 141(b)(2) arguments:

7. [. . .] Respondent argues that the "mature" demeanor of Nolta was the driving factor in the non-compliance. The evidence of her demeanor being a factor was not established. The interaction between Nolta and Jabbar was minimal. Jabbar asked for her identification and she produced it. Jabbar did not testify to what led to the sale. Respondent has pointed to no other evidence supporting its position that Nolta's appearance and/or demeanor failed to comply with the requirements of 141(b)(2).

8. Nolta testified in this matter and her appearance matched the appearance she presented to Jabbar on the date of the operation. Her appearance was consistent with a person under the age of 21. There were no unusually mature features in her physical appearance. She looked like a typical, 18 year old in every regard and her clothing was consistent with a person of that age. As previously noted, the clerk did not testify to establish whether there was anything

in Nolta's manner or appearance that led Jabbar 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), the Respondent's assertions that compliance did not occur are unsupported.

(Conclusions of Law, ¶¶ 7-8.)

This Board has noted that:

An 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 4-5, and 13, and Conclusions of Law paragraphs 7-8, 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.

Appellant presented no evidence that the decoy's experience or demeanor *actually resulted* in her 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 — in spite of looking directly at the decoy's driver's license, which

showed her to be 18 years of age. Absent some evidence to establish that the decoy's training or demeanor was the *actual reason* the clerk made the sale, these arguments must fail.

In a similar way, we specifically reject appellants' contention that the decoy's confidence in handing her license to the clerk created the appearance that she was over 21. Again, the clerk did not testify and we have no way of knowing if her confidence *actually resulted* in the clerk making the sale. Further, there is nothing in the record indicating that the decoy's presentation of the driver's license was done "confidently," as appellants contend. It appears as if appellants are suggesting that the mere presentation of any driver's license, when asked, would give a decoy the appearance of someone older than 21. However, by that logic, everything a decoy does could be seen as "confident" – from presenting an alcoholic beverage to a clerk to volunteering to be a decoy in the first place. Under those circumstances, all decoys would appear over 21 years of age and the criteria of 141(b)(2) would lose all meaning.

For the above reasons, we reject appellant's argument. 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.⁴

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

⁴This 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 & HALLAK ENTERPRISES, INC
7-ELEVEN #25302
711 JAMACHA ROAD
EL CAJON, CA 92019-3202

OFF-SALE BEER AND WINE - LICENSE

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

SAN DIEGO DISTRICT OFFICE

File: 20-484818

Reg: 18086696

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 August 7, 2018. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

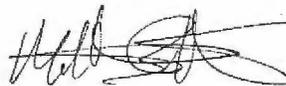
Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date 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 24, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: August 13, 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. & Hallak Enterprises, Inc.	}	File: 20-484818
dba 7-Eleven #25302	}	
711 Jamacha Road	}	Reg.: 18086696
El Cajon, California 92019-3202	}	
	}	License Type: 20
Respondent	}	
	}	Page Count: 88
	}	
	}	Reporter:
	}	Fabian Schwin
	}	Kennedy Court Reporting
	}	
<u>Off-Sale Beer and Wine License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at San Diego, California on June 19, 2018 at 9:30 a.m.

Jennifer Casey, Attorney, represented the Department of Alcoholic Beverage Control (Department).

Donna Hooper, Attorney, represented Respondents 7-Eleven, Inc. & Hallak Enterprises, Inc. (Respondent).

The Department seeks to discipline the Respondent's license on the grounds that, on or about September 23, 2017 the Respondent, through their agent or employee, Layth Jabbar, sold, furnished, or gave alcoholic beverages to Kennedy Jere Nolta, an individual under the age of 21 in violation of Business and Professions Code section 25658(a).¹ (Exhibit D-1)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on June 19, 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 26, 2018. (Exhibit D-1)
2. On February 24, 2010 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:

Violation Date	Violation	Registration Date	Registration Number	Penalty
7/25/2015	25658(a)	9/29/2015	15083099 (Exhibit D-3)	10 day suspension.

4. Kennedy Jere Nolta (Nolta) was born on May 28, 1999 and was 18 years old on the date the September 23, 2017 decoy operation was conducted. On that date, Nolta served as a minor decoy in an operation conducted by the El Cajon Police Department (ECPD) and the Department at a series of locations, including the Licensed Premises. Nolta became a volunteer decoy for ECPD after taking a one week teen academy with ECPD during the summer of 2017.
5. Nolta appeared and testified at the hearing. On September 23, 2017 her appearance was as depicted in a photograph that was taken that date. (Exhibit D-5) Nolta wore a blue and green striped t-shirt, blue khakis and beige Vans branded sneakers. She wore no hat and her straight hair was parted so that her face was fully exposed. Nolta wore no jewelry or makeup. She had no visible tattoos. Nolta was approximately 5 feet, five inches tall and 120 pounds on the date of the operation. She did not change her clothing or appearance during the decoy operation. Her appearance at the hearing was consistent with her appearance during the operation.
6. On September 23, 2017 Nolta entered the Licensed Premises to attempt to purchase an alcoholic beverage. It was the first day she had worked as a decoy. Prior to entering, she was instructed to carry identification, to be truthful regarding age related questions and to provide identification if asked for it. Nolta wore a device that recorded audio of interactions in the Licensed Premises so that the ECPD officers could monitor her safety. She also wore a purse with a camera. ECPD Officer Paladino (Paladino) entered the Licensed Premises at approximately the same time as Nolta but they did not interact while she was inside.

7. After entering, Nolta went to the beer coolers. She selected a six-pack of twelve ounce Coors beer bottles. Nolta then went to the register. One clerk appeared to be working there. She was behind one other customer while waiting. Shortly after finishing with the customer in front of her, Nolta was waited on by the clerk at the register. Nolta presented the six-pack of Coors beer for purchase to this clerk.

8. The clerk scanned the beer and then asked for Nolta's identification. Nolta produced her California driver's license and handed it to the clerk. (Exhibit D-4) The clerk appeared to enter numbers into the register after he received Nolta's driver's license and looked at it for about 35 seconds. He did not swipe or scan the identification during the time he had it. The clerk proceeded to ring up the beer and told Nolta the cost. Nolta paid for the beer with the \$10 cash that was provided by ECPD. Nolta was given change and the beer purchase and allowed to leave. At no point during the transaction did the clerk ask Nolta's age or any age related questions.

9. Nolta exited the Licensed Premises with the six-pack of Coors beer. She then went to the vehicle where the law enforcement officers were waiting. Nolta arrived at the vehicle and told them what happened. Nolta then reentered the Licensed Premises with the officers. After entering, Nolta saw the clerk behind the counter and pointed him out to the officers. Paladino went up to this clerk, explained who they were and had him come from behind the counter.

10. Nolta walked up and stood in the immediate area where Paladino was interacting with the clerk. One of the officers asked Nolta if this was the clerk who sold her the beer. Nolta pointed at the clerk and said that "this is the clerk who sold me beer." The clerk appeared sad and hung his head after Nolta answered the officer's question. The clerk was identified as Layth Jabbar (Jabbar) during the investigation.

11. After this identification, one of the officers took a photo with Nolta and Jabbar standing next to each other. Nolta held the beer she had purchased and stood immediately to the left of Jabbar as this was done. (Exhibit D-5) Jabbar was subsequently cited for the sale of an alcoholic beverage to Nolta. Jabbar did not testify in this matter to explain what led him to make the sale to Nolta even though he had examined her California driver's license that showed she was 18 years old and that she was under 21 by the red stripe warning and portrait orientation. (Exhibit D-4)

12. Nolta exited after she was photographed with Jabbar. On that date, she went into a total of 14 different premises in a decoy capacity. 2 of the 14 locations sold alcohol to her, including the Licensed Premises.

13. Nolta 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 Jabbar at the Licensed Premises on September 23, 2017, Nolta displayed the appearance which would generally be expected of a person less than 21 years of age during her interactions with Jabbar. Jabbar did not testify in this matter to explain his age related impressions of Nolta or why he sold Nolta alcohol after he saw her identification that indicated she was only 18 years old.

14. Joseph George Hallak (Hallak) testified for the Respondent. He is the store franchisee and is the head of the corporate entity that owns the Licensed Premises. He has been involved in an ownership relationship with the Licensed Premises since it began operating in December 2008. It changed to a corporate structure and the corporation became the license holder effective February 24, 2010. Hallak is actively involved in the operation of the Licensed Premises. Jabbar was an employee at the Licensed Premises and had been trained in the Licensed Premises' policies regarding age restricted sales prior to the sale to Nolta.

15. Jabbar violated the existing policy that required the production of identification for age restricted items if the customer appeared younger than 35. After the incident with Nolta, all of the employees who sell age restricted products had to 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, upon hire. (Exhibit L-1)

16. Prior to the incident in this matter, the Respondent had a sale to an underage person that occurred in 2015 and led to discipline. (Exhibit D-3) Subsequent to that incident, the Respondent took other steps to try to prevent underage sales. At the time of the sale made by Jabbar, 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 visual identification overrides.

17. After the incident with Nolta, Hallak worked with the information technology representatives from 7-Eleven to change the register to only allow the scan or swipe of an identification during an alcohol sale. No sales are allowed to occur through a manual entry of a date of birth. This restrictive policy has led to lost sales in situations where persons have legitimate identifications that cannot be scanned. The Licensed Premises now has signs posted informing customers of the more restrictive policy. (Exhibits L-1 through L-3) Hallak has also availed himself of Department provided LEAD training and has shared that information with employees.

18. 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 September 23, 2017 the Respondent's clerk, Layth Jabbar, inside the Licensed Premises, sold an alcoholic beverage to Kennedy Jere Nolta, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 2-17)

5. The Respondent argued that the decoy operation at the Licensed Premises generally failed to comply with rule 141² and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondent argued that the decoy's appearance and demeanor did not comply with 141(b)(2). This violation, if established, would be an affirmative defense.

6. However, there is no credible evidence supporting this assertion by the Respondent that there was a failure to comply with the requirements of rule 141. Nolta pointed out Jabbar in this matter to one of the officers after she reentered. Jabbar was clearly aware of the investigation and that he had been identified by Nolta for the sale given his reaction after the identification. Nolta then stood next to Jabbar while Nolta held the beer that Jabbar had sold to her. Her close proximity gave Jabbar ample opportunity to be aware that Nolta was the underage purchaser at issue in this matter. This was clearly compliance

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

with the requirement that Jabbar be made aware of the identity of the decoy at issue³. 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. Jabbar did not testify in this matter regarding his age related impressions of Nolta. (Findings of Fact ¶¶ 4-13)

7. In support of the assertion that there was a 141(b)(2) violation, Respondent argues that the “mature” demeanor of Nolta was the driving factor in the non-compliance. The evidence of her demeanor being a factor was not established. The interaction between Nolta and Jabbar was minimal. Jabbar asked for her identification and she produced it. Jabbar did not testify to what led to the sale. Respondent has pointed to no other evidence supporting its position that Nolta’s appearance and/or demeanor failed to comply with the requirements of 141(b)(2).

8. Nolta testified in this matter and her appearance matched the appearance she presented to Jabbar on the date of the operation. Her appearance was consistent with a person under the age of 21. There were no unusually mature features in her physical appearance. She looked like a typical, 18 year old in every regard and her clothing was consistent with a person of that age. As previously noted, the clerk did not testify to establish whether there was anything in Nolta’s manner or appearance that led Jabbar 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), 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 25 days which is the standard penalty for a violation when a prior discipline within 36 months has been established. The Department argued that the serious nature of the violation weighed against any mitigation. The Department noted that the Respondent’s system allowed for easy overrides and that Jabbar ignored clear evidence that Nolta was only 18 years old given that he had the opportunity to peruse her license and see her date of birth, the portrait configuration, and the red stripe.

³ 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

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 and that further steps were taken after the sale to Nolta to prevent underage sales. The Respondent has made a legitimate effort to attempt to comply with the Act and limit errors that might lead to underage sales. Jabbar's sale to Nolta, was a deviation from the Respondent's policies and led to the retraining of all employees, including Jabbar. This policy had been communicated to the Licensed Premises' employees regarding age restricted sales prior to the sale made by Jabbar.

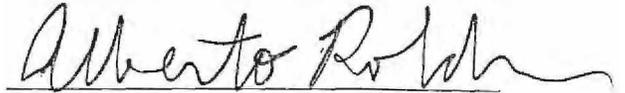
Prior to the incident with Nolta, the Licensed Premises used a scanner to allow for quick and accurate confirmations of age from persons using a scan able identification. The Licensed Premises did allow for overrides with the entry of a manual date of birth which allowed for the sale to Nolta to be completed. Since the incident with Nolta, the Licensed Premises no longer allows sales to persons without a scan able identification in order to take human error out of the equation. The Licensed Premises no longer allows for a manual entry of a date of birth which was the system in place when Jabbar sold to Nolta. All of the above are appropriate factors in mitigation to be weighed in this matter. All sales, regardless of the age of the purchaser, now have to go through this restrictive process.

Despite the argument of the Department, there appear to be no factors in aggravation applicable to this violation in relation to the sale itself. The violation itself was a fairly non-descript violation. It is a concern that this violation occurred approximately two years after a prior violation but this proven violation is what makes the presumptive discipline a 25 day suspension. Even before this violation, Respondent had policies in place to prevent underage sales that were violated by Jabbar. Jabbar and other employees were retrained and a more restrictive system was put in place which demonstrates the Respondent's commitment to enforcing its policies and preventing underage sales. This mitigation does outweigh the presumptive penalty in this matter such that a reduced penalty is appropriate. The penalty recommended herein complies with rule 144.

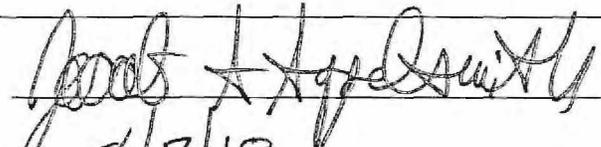
ORDER

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

Dated: July 2, 2018



Alberto Roldan
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>8/7/18</u>