

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

AB-9746

File: 21-86007 Reg: 18086619

AHMAD NASSER,
dba Kansas Food Market
2250 23rd Street,
San Francisco, CA 94107,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: David W. Sakamoto

Appeals Board Hearing: June 6, 2019
Ontario, CA

ISSUED JUNE 21, 2019

Appearances: *Appellant:* David B. Washburn, of Solomon, Saltsman & Jamieson,
as counsel for Ahmad Nasser,

Respondent: Sean Klein, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

Ahmad Nasser, doing business as Kansas Food Market, appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending his license for 10 days, with all 10 days conditionally stayed for a period of one year provided no further cause for discipline arises during that period, because he sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658(a).

¹The decision of the Department, dated September 11, 2018, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's type 21 off sale general license was issued on February 29, 1980. There is a single incident of prior discipline by the Department against the license, which occurred on September 21, 2001.

On March 20, 2018, the Department filed an accusation charging that appellant himself sold an alcoholic beverage to 16-year-old Zachary Hui (the decoy) on April 27, 2017. Although not noted in the accusation, Hui was working as a minor decoy for the San Francisco Police Department (SFPD) at the time.

At the administrative hearing on June 26, 2018, documentary evidence was received, and testimony concerning the sale was presented by the decoy and by SFPD Officer Alberto Duarte.

Testimony established that the decoy entered the licensed premises on April 27, 2017 and selected a 24 ounce Modelo beer from the refrigerated section. The decoy took the beer to the cash register tended by appellant and placed it on the counter. After perceiving that appellant wanted to view his identification,² the decoy presented his valid California Identification Card (ID) that displayed his birthday of May 14, 2000. Further, the decoy's ID was in portrait (vertical) format, indicating he was under 21 years of age, and had a red stripe that stated "AGE 21 in 2021" in white print.

Appellant inspected the decoy's ID for about one minute and then returned it to him. Appellant did not ask the decoy his age or any questions about the ID. Appellant sold the beer to the decoy who then exited the store with his change.

²At the hearing, the decoy could not recall exactly how appellant communicated that he wanted to view the his identification.

Outside the licensed premises, the decoy met with SFPD officers, including Officer Duarte, and told them what occurred. The decoy and Officer Duarte then re-entered the premises and approached the sales counter. Appellant, who was still tending the counter, looked in the direction of the decoy and Officer Duarte. Officer Duarte then asked the decoy who sold him the Modelo beer. The decoy verbally indicated it was the appellant and pointed his finger at him. Officer Duarte then instructed the decoy to exit the store and return to the police car. The decoy complied with Officer Duarte's instructions.

Officer Duarte set the Modelo beer and change on the sales counter, pulled out his police badge, and identified himself to appellant as a SFPD officer. Officer Duarte advised appellant that he had just sold beer to a minor. Appellant looked in the direction of the decoy as he exited the store. Appellant told Officer Duarte that he checked the decoy's ID and that it said he was born in 1991. Appellant did not deny that he knew who the decoy was, or that he sold beer to the decoy. Likewise, appellant did not ask to see the decoy or his ID again. Appellant was cited for selling an alcoholic beverage to an under-age decoy.

The administrative law judge (ALJ) issued his proposed decision on July 15, 2018, sustaining the accusation and recommending a 10-day suspension conditionally stayed for one year. The proposed decision was adopted by the Department on August 23, 2018, and a Certificate of Decision was issued on September 11, 2018.

Appellant then filed a timely appeal contending the record does not support a finding that the face-to-face identification complied with rule 141(b)(5)³.

³References 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.

DISCUSSION

Appellant contends that the ALJ's finding that a face-to-face identification took place, in compliance with rule 141(b)(5), is not supported by substantial evidence. (AOB at pp. 5-9.) Specifically, appellant contends that the ALJ erroneously adopted Office Duarte's testimony over the decoy's testimony, which differed regarding whether appellant looked up from his cash register at the time of the identification. (*Id.* at p. 7.) Further, appellant contends that there is "no definitive proof or concrete evidence that a face-to-face identification even occurred or that [appellant] was aware who [the decoy] was on the day of the operation" because no "photograph [was] taken with the decoy and the clerk together." (*Ibid.*)

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

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

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more

competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department’s decision. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331,335 [101 Cal.Rptr. 815]; *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106 [28 Cal.Rptr.74].) Simply stated, 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.)

Rule 141(b)(5) provides:

Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

This rule provides an affirmative defense. The burden is, therefore, on appellant to show non-compliance. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.) The rule requires “strict adherence.” (See *Acapulco Restaurants, Inc.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126] [finding that no attempt, reasonable or otherwise, was made to identify the appellant in that case].)

In *Chun* (1999) AB-7287, this Board made the following observation about the purpose of face-to-face identifications:

The phrase “face to face” means that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other’s presence, by the decoy’s identification, and the seller’s presence such that the seller is, or reasonably ought to be, knowledgeable that he or she

is being accused and pointed out as the seller.

(*Id.* at p. 5.)

In *7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983, the Board clarified application of the rule in cases where, as here, an officer initiates contact with a clerk following the sale:

As long as the decoy makes a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error, we do not believe that the officer's contact with the appellant before the identification takes place causes the rule to be violated.

(*Id.* at pp. 7-8; see also *7-Eleven, Inc./Morales* (2014) AB-9312; *7-Eleven, Inc./Paintal Corp.* (2013) AB-9310; *7-Eleven, Inc./Dars Corp.* (2007) AB-8590; *West Coasts Products LLC* (2005) AB-8270; *Chevron Stations, Inc.* (2004) AB-8187.)

The court of appeals has found compliance with rule 141 (b)(5) even where police escorted a seller outside the premises in order to complete the identification. (See *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Keller)* (2003) 109 Cal.App.4th 1687, 1697 [3 Cal.Rptr.3d 339] [finding that the rule leaves the location of the identification to the discretion of the peace officer].)

More recently, the court found rule 141(b)(5) was not violated when:

[T]he 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.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (CVS)* (2017) 18 Cal.App.5th 541, 547 [226 Cal.Rptr.3d 527, 531].) The court explained that the exact moment of the identification could not be severed from the entire identification

procedure, which included the decoy pointing out the appellant to the police, the decoy accompanying the police officer to the counter, the officer informing the appellant she had sold beer to the minor at his side, and the appellant and decoy being photographed together. (*Id.* at p. 532.) The court said. “The appellant in these circumstances certainly knew or reasonably ought to have known that she was being identified” because of the totality of the circumstances. (*Ibid.*)

Here, the ALJ made the following findings on the face-to-face identification in this case:

12. When decoy Hui and Officer Duarte were within three feet of the sales counter, Respondent, who was still tending the counter, looked in their direction. Officer Duarte asked decoy Hui who sold beer to him. Decoy Hui verbally indicated it was Respondent and also pointed his finger at Respondent. Officer Duarte then directed Decoy Hui to return outside to their police car which he did.

13. Officer Duarte then set decoy Hui’s beer and change on the sales counter, pulled out and displayed his police badge, identified himself to Respondent as a San Francisco Police Officer, and told Respondent he had just sold beer to a minor. Respondent also looked in the direction of the decoy Hui as he exited the store. [. . .] Respondent told Officer Duarte that he checked the decoy’s identification and that it said he was born in 1991. Respondent neither asked to see the decoy again nor to see the decoy’s identification again. Respondent neither denied he sold beer to the decoy nor denied he did not know who the decoy was. Respondent was generally cooperative with the police.^[fn] Officer Duarte issued a citation to Respondent for selling an alcoholic beverage to under-age decoy Hui.

(Findings of Fact, ¶¶ 12-13.) Based on these findings, the ALJ reached the following conclusions:

6. In this instance, Respondent argued that while Office [*sic*] Duarte testified the face-to-face identification occurred inside the Licensed Premises when Respondent was looking at Officer Duarte and the decoy when they were only two to three feet from the sales counter, Decoy Hui recalled that when he identified the clerk, the clerk was more facing towards the cash register on the sales counter. Respondent did not testify at the hearing to establish his version of events. *Officer Duarte’s version*

with respect to this aspect of the face-to-face identification is accepted. He was a 15 year police veteran and, in the event the decoy purchased an alcoholic beverage, was specifically assigned to execute the face-to-face identification and responsible for issuing a citation to the seller. Therefore, he would have been more focused on the details of his contact with Respondent. Further, in his follow up conversation with Respondent, he neither denied he sold beer to the decoy, nor that he had been misidentified by the decoy, nor asserted he did not know who the decoy was. Rather, Respondent told Officer Duarte he checked the decoy's identification at the time of the sale but he believed the decoy's identification reflected he was born in 1991 .^[fn] Respondent neither asked to see the decoy again nor to inspect the decoy's identification again. There was no evidence Respondent checked anyone else's identification at or near the time of Decoy Hui's purchase at Respondent's store. Based upon the totality of these circumstances, it was sufficiently shown the face-to-face identification required under rule 141(b)(5) was properly conducted and Respondent knew he was identified by decoy Hui as the one who sold him beer.

(Determination of Issues, ¶ 6 (emphasis added).)

Appellant contends the record does not support the ALJ's findings. However, the ALJ found that the decoy identified appellant both verbally and by pointing at him while standing within two to three feet of the sales counter. (Findings of Fact, ¶ 12.) This was done after appellant "looked in their direction." (*Ibid.*) After speaking with Officer Duarte, appellant did not deny making the sale to the decoy or deny seeing the decoy. (*Id.* at ¶ 13.) Likewise, appellant never requested to view the decoy or his identification. (*Ibid.*) The only thing appellant said to Officer Duarte was "that he checked the decoy's identification and that it said he was born in 1991." (*Ibid.*) The ALJ reasonably inferred from appellants' statements to Officer Duarte that he understood which decoy and sale Officer Duarte was referring to. (Determination of Issues at ¶ 6.)

Based on the above, there is substantial evidence to support the ALJ's findings that, under the totality of the circumstances, the appellant knew or reasonably ought to have known that he was being identified by the decoy. (*CVS, supra*, at 532.)

Appellant's main contention is not that Officer Duarte's testimony fails to support the ALJ's decision⁴, but rather, that the ALJ "disregarded the Minor Decoy's testimony," which differed from Officer Duarte's testimony regarding the face to face identification. (AOB at pp. 3-4.) In other words, appellant is asking the Board to adopt the decoy's version of events over Officer Duarte's. However, this Board cannot simply substitute one version for another, as it "is without power to make findings of fact." (*Hasselbach v. Dep't of Alcoholic Beverage Control* (1959) 167 Cal.App.2d 662, 667, [334 P.2d 1058, 1062].)

"[C]ourts generally will defer to the broad discretion vested in administrative agencies when the evidence is conflicting, or even when reasonable men might well differ on questions of the credibility of witnesses, or upon the proper inferences to be drawn from the evidence, subject to the requirements, of course, that the finding be supported by substantial evidence." (*Lorimore v. State Pers. Bd.* (1965) 232 Cal.App.2d 183, 186 [42 Cal. Rptr. 640].) A higher administrative body "may not ignore the 'great weight' accorded to ALJ findings on witness credibility where the ALJ observed demeanor." (*Absmeier v. Simi Valley Unified Sch. Dist.* (2011) 196 Cal.App.4th 311, 318-19 [126 Cal. Rptr. 3d 237, 243].)

Here, the ALJ accepted Officer Duarte's version of the face-to-face identification because Officer Duarte was "a 15 year police veteran[,] was specifically assigned to

⁴Appellant does, however, imply that the ALJ's findings were not based on substantial evidence since "Officer Duarte routinely testified to his usual custom and practice, rather than the details of this specific transaction." (AOB at p. 3.) However, with regard the ALJ's Findings of Fact in paragraphs 12 and 13, those findings are properly based on Officer Duarte's testimony regarding the specific transaction in question, not his usual custom and practice. (RT at pp. 41:19-42:15; 43:24-44:4; 45:18-25; 51:22-52:15; 53:22-54:15.)

execute the face-to-face identification and responsible for issuing a citation.”

(Determination of Issues, ¶ 6.) On these facts, the ALJ concluded that Officer Duarte

“would have been more focused on the details of his contact with [appellant].” (*Ibid.*)

Finally, the ALJ concluded that appellant’s statements to him and lack of confusion or

follow up questions indicated that appellant understood which decoy and transaction

Officer Duarte was referring to. (*Ibid.*) As stated above, the ALJ’s findings are

supported by substantial evidence, and the Board cannot simply change those findings

by adopting the decoy’s testimony over Officer Duarte’s.

The Board believes that the ALJ’s findings are supported by substantial evidence and that the face-to-face identification in this matter complies with rule 141(b)(5). The Board is prohibited from reweighing the evidence or exercising its independent judgment to overturn the Department’s factual findings to reach a contrary, although perhaps equally reasonable, result. (*Masani, supra.*)

ORDER

The decision of the Department is affirmed.⁵

MEGAN McGUINNESS, ACTING CHAIR
SUSAN A. BONILLA, 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:**

AHMAD NASSER
KANSAS FOOD MARKET
2250 23RD STREET
SAN FRANCISCO, CA 94107

OFF-SALE GENERAL - LICENSE

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

CONCORD DISTRICT OFFICE

AB - 9746

File: 21-86007

Reg: 18086619

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 23, 2018. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

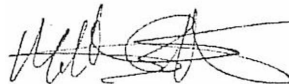
Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date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

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

On or after October 22, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: September 11, 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:

Ahmad Nasser
Db: Kansas Food Market
2250 23rd Street
San Francisco, CA 94107

Respondent

Regarding His Type-21 Off-Sale General License
Under the State Constitution and the Alcoholic
Beverage Control Act.

} File: 21-86007
}
} Reg.: 18086619
}
} License Type: 21
}
} Word Count Estimate: 13,995
}
} Rptr: Kristie Shepherd, CSR-14268
} Emerick & Finch Reporters
} **PROPOSED DECISION**
}

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter in San Francisco, California, on June 26, 2018.

Sean Klein, Attorney III, Department of Alcoholic Beverage Control, appeared and represented the Department of Alcoholic Beverage Control. (Hereafter the Department)

Ralph B. Saltsman, Esq., of Solomon, Saltsman, and Jamieson, represented Mr. Ahmad Nasser, the licensee. (Hereafter Respondent)

As set forth in the Department's accusation, it seeks to discipline Respondent's license on the grounds that, on or about April 27, 2017, Respondent Ahmad Abd Nasser, at said premises, sold, furnished, or gave away, or caused to be sold, furnished, or given away, an alcoholic beverage to Z.H., a person under the age of 21, in violation of California Business and Professions Code section 25658(a).¹ (Exhibit 1: Pre-hearing pleadings)

After oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing, the matter was argued by the parties and submitted for decision on June 26, 2018.

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

FINDINGS OF FACT

1. The Department filed the accusation on March 20, 2018. On April 9, 2018, the Department received Respondent's Special Notice of Defense and Notice of Defense. The matter was set for a hearing and heard to completion on June 26, 2018. (Exhibit 1: Pre-hearing pleadings.)

2. On February 29, 1980, the Department issued Respondent a type-21 off-sale general license for his premises as captioned above.² (Hereafter the Licensed Premises)

3. Since being licensed, Respondent suffered the following disciplinary history at the Licensed Premises:

Date of Violation	Violation	Reg. Date.	Reg. Number	Penalty Imposed
6-14-2001	Bus. & Prof. §25658(a) and §24200(a & b)	9-21-2001	01051552	15 day suspension, all stayed

4. On April 27, 2017, 16 year old Zachary Ryan Hui (Hereafter decoy Hui) assisted the San Francisco Police Department (Hereafter SFPD) in conducting a decoy-operation.³ Under the supervision of SFPD Officer Alberto Duarte, Inspector Gordon, and Sergeant George, decoy Hui was sent into various licensed businesses, including the Licensed Premises, to determine if he could purchase an alcoholic beverage even though he was not yet 21 years old.

5. Decoy Hui was born on May 14, 2000 and was 16 years old when he went to the Licensed Premises on April 27, 2017.

6. Prior to going to the Licensed Premises, the officers instructed decoy Hui not to buy alcoholic beverages in glass bottles and not to purchase six-packs of alcoholic beverages, unless that was the only alcoholic beverage available.

7. As decoy Hui entered the Licensed Premises, he was 5'11" tall and weighed approximately 147 pounds. He had a thin-lean build. He had brown eyes and black hair that was approximately 5" long and combed over from left to right. He wore a pair of black framed glasses. He wore a watch on his left wrist. He wore a dark gray sweatshirt with a

² A type-21 license permits the license-holder to retail beer, wine, and distilled spirits for consumption off the licensed premises.

³ Zachary Hui was referred to as "Z.H." in the accusation.

"Columbia" logo on the upper left chest area, blue-jeans, and tennis shoes.⁴ (Exhibit 5: photo of decoy Hui)

8. As decoy Hui entered the Licensed Premises, he possessed his valid California Identification Card that displayed his birthdate of May 14, 2000. In white print on a red stripe it indicated decoy Hui will be "AGE 21 in 2021". In white print on a blue strip it indicated decoy Hui was "AGE 18 IN 2018". The card was in the vertical format used for those under 21 years of age. (Exhibit 4: Copy of decoy Hui's Identification Card.)

9. On April 27, 2017, decoy Hui entered Respondent's premises alone while SFPD Officer Duarte, Inspector Gordon, and Sergeant George remained outside. Decoy Hui selected a 24 ounce Modelo beer from the refrigerated section of the Licensed Premises. He took the beer to the cash register that was tended by Respondent himself. No other patrons were in the Licensed Premises.

10. After decoy Hui put his can of beer on the sales counter, he perceived that Respondent wanted to view his identification.⁵ Decoy Hui gave Respondent his valid California Identification card. (Exhibit 4) Respondent inspected decoy Hui's identification card for about one minute then returned it to him. Respondent did not ask decoy Hui his age or any questions about the identification. Respondent then sold the Modelo beer to decoy Hui who thereafter exited the store with the beer and some change from the sale. No other patrons were at the counter when Respondent sold beer to decoy Hui.

11. Once outside the Licensed Premises, Decoy Hui met with Officer Duarte and the two other SFPD officers. Decoy Hui gave Officer Duarte the beer and the change received from Respondent. Decoy Hui told Officer Duarte that the person selling beer to him did not ask his age but asked for his identification. Decoy Hui, Officer Duarte, and Inspector Gordon then immediately re-entered the Licensed Premises while Sergeant George remained outside the Licensed Premises.

12. When decoy Hui and Officer Duarte were within three feet of the sales counter, Respondent, who was still tending the counter, looked in their direction. Officer Duarte asked decoy Hui who sold beer to him. Decoy Hui verbally indicated it was Respondent and also pointed his finger at Respondent. Officer Duarte then directed Decoy Hui to return outside to their police car which he did.

13. Officer Duarte then set decoy Hui's beer and change on the sales counter, pulled out and displayed his police badge, identified himself to Respondent as a San Francisco Police Officer, and told Respondent he had just sold beer to a minor. Respondent also looked in

⁴ Although in Exhibit 5, a photo of the decoy taken prior to his visit to Respondent's premises, the decoy was holding a cap, he wore no such cap when he was at the Licensed Premises.

⁵ Decoy Hui did not recall exactly how Respondent communicated to him to present his identification.

the direction of the decoy Hui as he exited the store. Officer Duarte then asked Respondent for his identification, return of the undercover-purchase money used by the decoy, and the posted license. Upon his inspection of the posted license and Respondent's identification, Officer Duarte noticed that Respondent was the licensee for that premises. During Officer Duarte's interaction with Respondent, Respondent told Officer Duarte that he checked the decoy's identification and that it said he was born in 1991. Respondent neither asked to see the decoy again nor to see the decoy's identification again. Respondent neither denied he sold beer to the decoy nor denied he did not know who the decoy was. Respondent was generally cooperative with the police.⁶ Officer Duarte issued a citation to Respondent for selling an alcoholic beverage to under-age decoy Hui.

14. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in the Licensed Premises, decoy Hui displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the sales clerk herein. Respondent Nasser. In fact, Decoy Hui's over-all appearance was appropriate for his age and he did not appear older than his actual age, 16 years old, when he visited the Licensed Premises.

15. Decoy Hui visited approximately 5-10 licensed premises on April 27, 2017, and Respondent's Licensed Premises was the only business where he purchased an alcoholic beverage that day. Decoy Hui served as a decoy on earlier dates in 2017, but not during any prior years.

LEGAL BASIS OF DECISION

1. Article XX, section 22 of the California Constitution and Business and Professions 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. Business and Professions Code 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. Business and Professions Code 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.

⁶ Respondent-Licensee-sales clerk Ahmad Nasser did not testify at the hearing regarding his version of events.

4. Business and Professions Code section 25658(f) permits law enforcement officials to use persons under 21 years old to apprehend licensees, employees or agents or other persons who sell or furnish alcoholic beverages to minors. The Department was directed to and did adopt and publish a rule regarding the use of underage decoys.

5. Under California Code of Regulations, title 4, division 1, article 22, section 141, commonly referred to as “rule 141”,

(a) A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

(b) The following minimum standards shall apply to actions filed pursuant to Business and Professions Code Section 25658 in which it is alleged that a minor decoy has purchased an alcoholic beverage:

(1) At the time of the operation, the decoy shall be less than 20 years of age;

(2) 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 aliened offense;

(3) A decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages;

(4) A decoy shall answer truthfully any questions about his or her age;

(5) Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

(c) Failure to comply with this rule shall be a defense to any action brought pursuant to Business and Professions Code Section 25658.

DETERMINATION OF ISSUES

1. Cause for suspension or revocation of Respondent's license exists under Article XX, section 22 of the California State Constitution and Business and Professions Code sections 24200(a) and (b) because on April 27, 2017, the licensee, Ahmad Nasser, inside the Licensed Premises, sold an alcoholic beverage to Zachary Hui, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-10.)

2. Respondent argued there was non-compliance with rule 141(b)(5) due to an insufficient face-to-face identification by the decoy of the clerk and therefore the accusation should be dismissed under rule 141(c), Rule 141(b)(5) states that: "Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face-to-face identification of the alleged seller of the alcoholic beverages."

3. In *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board* (1998) 67 Cal. App.4th 575, the court determined there must be strict compliance with Rule 141, including its requirement that the decoy perform a face-to-face identification of the seller. In that case, because the decoy never performed any face-to-face identification whatsoever, there was no compliance with Rule 141(b)(5) and therefore a defense to the accusation under Rule 141(c) was established. However, that case did not expressly decide what actions were sufficient to comply with the face-to-face identification requirement.

4. Subsequently, the court in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board; 7-Eleven, Inc., et.al., Real Parties in Interest* (2003) 109 Cal.App.4th 1687, 1698 addressed what actions would constitute a sufficient face-to-face identification. In that case, the investigating officers moved the clerk and the decoy outside the licensed premises where the decoy identified the selling clerk. The court stated: "Regulation section 141, subdivision (b)(5), ensures—admittedly not as artfully as it might—that the seller will be given an opportunity, soon after the sale, to come “face-to-face” with the decoy.” There was no requirement that the face-to-face identification actually occur inside or within the licensed premises. Therefore, although the investigating officer moved the decoy and clerk outside the premises, at which time the decoy identified the clerk, that sequence of events still complied with rule 141(b)(5).

5. Very recently, the Court of Appeal in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board; Garfield Beach CVS, LLC, et.al, Real Parties in Interest*(2017) 18 Cal.App.5th 541,547 found compliance with rule 141(b)(5) where, "...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 spirit of Rule 141.”

6. In this instance, Respondent argued that while Officer Duarte testified the face-to-face identification occurred inside the Licensed Premises when Respondent was looking at Officer Duarte and the decoy when they were only two to three feet from the sales counter, Decoy Hui recalled that when he identified the clerk, the clerk was more facing towards the cash register on the sales counter. Respondent did not testify at the hearing to establish his version of events. Officer Duarte’s version with respect to this aspect of the face-to-face identification is accepted. He was a 15 year police veteran and, in the event the decoy purchased an alcoholic beverage, was specifically assigned to execute the face-to-face identification and responsible for issuing a citation to the seller. Therefore, he would have been more focused on the details of his contact with Respondent. Further, in his follow up conversation with Respondent, he neither denied he sold beer to the decoy, nor that he had been misidentified by the decoy, nor asserted he did not know who the decoy was. Rather, Respondent told Officer Duarte he checked the decoy’s identification at the time of the sale but he believed the decoy’s identification reflected he was born in 1991.⁷ Respondent neither asked to see the decoy again nor to inspect the decoy’s identification again. There was no evidence Respondent checked anyone else’s identification at or near the time of Decoy Hui’s purchase at Respondent’s store. Based upon the totality of these circumstances, it was sufficiently shown the face-to-face identification required under rule 141(b)(5) was properly conducted and Respondent knew he was identified by decoy Hui as the one who sold him beer.

7. As Respondent did not establish there was non-compliance with rule 141(b)(5), a defense to the accusation under rule 141(c) was not established. The evidence supported sustaining Count 1 of the accusation.

PENALTY

1. As to a penalty for this matter, the Department acknowledged Respondent had been licensed since 1980, with only one prior disciplinary action in 2001, for a violation of section 25658(a). However, the Department also argued whatever mitigation Respondent’s license history warranted was off-set by the aggravating factor that decoy Hui was only 16 years old and had a youthful appearance when Respondent sold him beer. Further, Respondent himself was the person who sold beer to decoy Hui after examining his identification that states his true birthdate. Therefore, the Department recommended the standard 15 day license suspension specified under rule 144 was appropriate for this matter.

⁷ If the decoy were born in 1991, he would have been 26 years old, 10 years older than his actual age.

2. Respondent argued that, if the accusation was sustained, a mitigated all-stayed penalty was more appropriate.⁸ Respondent argued he has been licensed since 1980 with only one prior violation of section 25658(a) approximately 16 years ago and no violations of any other type. Further, although decoy Hui was 16 years old, he was 5’11” tall and did not otherwise appear so immature that his age and appearance should be deemed a factor in aggravation that wholly off-set the mitigating factor of Respondent’s minimal disciplinary history over its 37 years of licensure.

3. In assessing an appropriate measure of discipline, the Department’s penalty guidelines are in California Code of Regulations, title 4, division 1, article 22, section 144, commonly referred to as “rule 144”. Under rule 144, the presumptive penalty for a first violation of selling or furnishing an alcoholic beverage to a minor in violation of section 25658 is a 15-day license suspension. The recommended penalty for a second violation of section 25658 that occurs within 36 months of the initial violation is a 25 day license suspension.

4. Rule 144 also permits imposition of a revised penalty based on the presence of aggravating or mitigating factors. One of the aggravating factors listed is the “Appearance and actual age of minor”. One of the mitigating factors listed is “Length of licensure at subject premises without prior discipline or problems.” Rule 144 does not specify what length of discipline-free licensure constitutes a mitigating factor and does not specify how much mitigation should be granted for what term of discipline free operation. While rule 144 lists the “Appearance and actual age of minor ” as an aggravating factor, it does not specify what degree of aggravation is warranted if that factor is present in a case.

5. The evidence established decoy Hui was only 16 years old and had the overall appearance reflecting a youthful person under 21 years of age. Yet, Respondent’s operation as a licensee for 37 years with its one and only prior violation occurring approximately 16 years ago is worthy of mitigation. In this instance, Respondent’s substantial total length of licensure with its only violation 16 years ago is of greater weight as a mitigating factor over the generally youthful appearance and actual age of the decoy involved in the transaction of April 27, 2017. Therefore, some net mitigation to the 15 day suspension recommended by the Department is appropriate. The penalty ordered below reflects a reasonable comparative weighing of the aggravating and mitigating factors involved in this matter and complies with rule 144.

6. Except as set forth in this decision, all other allegations in the accusation and all other contentions raised by the parties in the pleadings or at the hearing, but not specifically argued at the hearing, lack merit.

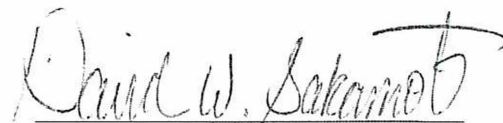
⁸ Although not expressly set forth by Respondent, it is assumed that the all-stayed suspension it recommended meant that any term of license suspension imposed would be stayed for some fixed duration of time, e.g. 12 months, and that it would be imposed only if, during that stayed-period, Respondent committed another violation; if no new violation occurred during the stayed period, the stay would become permanent.

ORDER

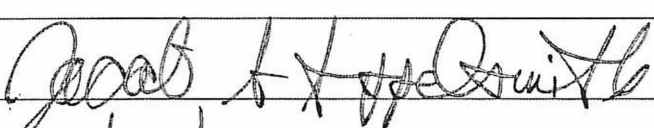
Count 1 of the accusation is sustained.

Respondent's license is hereby suspended for a period of 10 days, with execution of all 10 days of the suspension stayed, upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within **12 months** from the effective date of this decision; that should such determination be made by the Director of the Department of Alcoholic Beverage Control, the Director may, in his/her sole discretion and without further hearing, vacate the stay order and impose the stayed penalty; and that should no such determination be made, the stay shall become permanent.

Dated: July 15, 2018



David W. Sakamoto
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>8/23/18</u>