

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

**AB-9786**

File: 21-163153; Reg: 18086946

THREE RIVERS VILLAGE MARKET, INC.,  
dba Three Rivers Village Market  
40869 Sierra Drive  
Three Rivers, CA 93271,  
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: December 5, 2019  
Sacramento, CA

**ISSUED DECEMBER 17, 2019**

*Appearances:*      *Appellant:* Dean R. Lueders, of ACTlegally, as counsel for Three Rivers Village Market, Inc.,  
  
                                 *Respondent:* Colleen R. Villarreal, as counsel for the Department of Alcoholic Beverage Control.

**OPINION**

Three Rivers Village Market, Inc., doing business as Three Rivers Village Market, appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> suspending its license for 15 days because its clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Profession Code<sup>2</sup> section 25658(a).

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<sup>1</sup>The decision of the Department, dated December 6, 2018, is set forth in the appendix.

<sup>2</sup> All statutory references are to the California Business and Professions Code unless otherwise stated.

## FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on October 22, 1984. There is one prior record of departmental discipline against the license.

On May 17, 2018, the Department filed a single-count accusation against appellant charging that, on January 16, 2018, appellant's clerk, Elana Diane Gauthier (the clerk), sold an alcoholic beverage to 19-year-old Jonathan Kevin Ash (the decoy). Although not noted in the accusation, the decoy was working for the Tulare County Sheriff's Office (TCSO) at the time.

At the administrative hearing held on October 10, 2018, documentary evidence was received, and testimony concerning the sale was presented by the decoy, TCSO Detective John De La Rosa, and Nataliya Dixon, manager of the licensed premises and one of appellant's corporate officers.

Testimony established that on January 16, 2018, the decoy entered the licensed premises and selected two 25-ounce cans of Bud Light beer from the refrigerators. The decoy took the beer to the register for purchase and presented them to the clerk. The clerk scanned the beer cans and asked the decoy for his identification.

In response, the decoy handed the clerk his valid California driver's license, which was in portrait orientation, contained his correct date of birth (showing him to be 19 years old), and had a red bar that read in white letters "AGE 21 IN 2019." The clerk appeared to examine the license but did not ask the decoy any age-related questions. The decoy then paid for the beer, and the clerk returned his identification along with his change and a receipt. The decoy took the beer cans and exited the store.

While the decoy was at the licensed premises, he was accompanied by a 16-year-old female named Carissa. Carissa entered the store with the decoy and followed

him as he walked through the licensed premises. However, the decoy and Carissa did not speak to one another while they were at the licensed premises. Likewise, Carissa and the clerk did not speak with one another, nor did they interact in any way.

On October 24, 2018, the administrative law judge (ALJ) issued his proposed decision sustaining the accusation. The Department adopted the proposed decision in its entirety on December 3, 2018 and issued a certificate of decision three days later. Appellant then filed a timely appeal contending: (1) The Department's finding — that the decoy displayed the appearance which would generally be expected of a person under the age of 21 — is not supported by substantial evidence, and; (2) the Department failed to proceed in a manner required by law by failing to produce the second decoy at the administrative hearing.

## DISCUSSION

### I

#### ISSUE CONCERNING RULE 141(b)(2)

Appellant contends that the ALJ's finding that the decoy's appearance complied with rule 141(b)(2) is not supported by substantial evidence. (AOB, at pp. 3-4.) Specifically, appellant argues that the ALJ ignored the decoy's testimony that he had a mustache at the time of the sale, and this fact, combined with the decoy's large stature,<sup>3</sup> gave the minor the appearance not generally expected of someone under 21 years of age. (*Id.* at p. 4.)

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<sup>3</sup> The decoy was approximately 6'1" and weighed 260 pounds. The decoy was photographed standing next to the clerk on the day of the incident. (Exh. D-3.)

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.)

Here, the ALJ found that the decoy's appearance complied with rule 141(b)(2). (Decision, at p. 6.) Therefore, this Board is required to defer to those findings so long as they are supported by substantial evidence. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Southland)* (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652, 659] [citing *Kirby v. Alcoholic Beverage Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628] ["In considering the sufficiency of the evidence issue the court is governed by the substantial evidence rule[;] any conflict in the evidence is resolved in favor of the decision; and every reasonably deducible inference in support thereof will be indulged. [Citations.]"; see also *Kirby v. Alcoholic Bev. etc. Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815] ["When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the department."].) "Substantial evidence" is "evidence of ponderable legal significance, which is 'reasonable in nature, credible and of solid value.'" (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 814 [38 Cal.Rptr.2d 304, 307–308], internal citations omitted.)

In his decision, the ALJ rejected appellant's arguments that the decoy's physical appearance did not comply with rule 141(b)(2). The ALJ found that, while the decoy's

“height and heft put him in the upper size echelon in terms of people his age, this alone is not disqualifying since it is reasonable to expect a large range of heights and weights when considering the appearance of a ‘typical’ 19 year old male.” (Conclusions of Law, ¶ 9.) The ALJ went on to note the decoy was clean shaven,<sup>4</sup> had no visible tattoos, and wore attire “consistent with a person in his late teens.” (*Ibid.*) Ultimately, the ALJ concluded that the decoy had an appearance generally expected of a person under 21 years of age. (*Ibid.*) As noted above, “we are bound to construe the evidence in the light most favorable to the ALJ’s decision” and will uphold the findings so long as they are supported by substantial evidence. (*Southland, supra*, 103 Cal.App.4th at 1087.)

To support his findings, the ALJ relied on a photograph of the decoy from the day of the operation (exh. D-3). (Findings of Fact, ¶¶ 5, 7.) Photographs of a decoy from the day of the operation are “arguably the most important piece of evidence in considering whether the decoy displayed the physical appearance of someone under 21 years of age.” (*Southland, supra*, 103 Cal.App.4th at 1094.) Further, the ALJ relied on his personal observations of the decoy’s appearance at the hearing, which he found “to have the same size and appearance on the date of the operation as his appearance during the hearing.” (Findings of Fact, ¶ 5.) ALJ’s are also entitled to rely on their personal observations of a decoy when the decoy testifies that his appearance and mannerisms were “the same on the stand as it was when he purchased the beer.” (*Southland, supra*, 103 Cal.App.4th at 1094.) The Board sees no error with the ALJ’s findings regarding the decoy’s appearance, which are supported by a photograph of the

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<sup>4</sup> Appellant takes issue with the fact that the ALJ described the decoy as “clean shaven.” (AOB, at p. 4.) However, this is supported by the decoy’s testimony, that he did not have any facial hair on the day of the operation. (RT, at p. 12:6-8.)

decoy from the date of the operation, as well as the ALJ's personal observations at the hearing. Both sources are "reasonable in nature, credible and of solid value." (*County of Los Angeles, supra*, 32 Cal.App.4th at 814.)

Based on the above, appellant relies entirely on a difference of opinion — its versus the ALJ's — as to the decoy's appearance. Ultimately, appellant is asking this Board to consider the same set of facts as the ALJ and reach a different conclusion, despite substantial evidence to support the findings. Since the Board does not have the authority to second-guess the ALJ, the Department's decision must stand.

## II

### ISSUE CONCERNING THE SECOND DECOY

Appellant contends that the Department violated section 25666 by failing to produce Carissa, the second minor, at the hearing. (AOB, at pp. 4-5.)

Section 25666 states, in pertinent part:

In any hearing on an accusation charging a licensee with a violation of Sections 25658, 25663, and 25665, the department shall produce the *alleged* minor for examination at the hearing [...].

(Emphasis added.) The plain meaning of the term "alleged," in the context of the accusation, clearly refers to the minor who the Department alleged to have purchased alcohol from appellant's clerk. In this case, that minor is Ash, not Carissa.

However, this Board has repeatedly said that a second minor's appearance may be relevant if they participate in the alcoholic beverage transaction in some way:

In cases involving more than a single decoy, the Board has consistently been guided by the rule that the real question to be asked is whether the second decoy engaged in some activity intended to or having the effect of distracting or otherwise impairing the ability of the clerk to comply with the law.

(*7-Eleven, Inc./Kumar and Kumar, Inc.* (2012) AB-9218.) Since the Department rejected appellant's argument that Carissa participated in the minor decoy operation (Conclusions of Law, ¶ 6), we review simply to determine whether the Department's finding is supported by substantial evidence. (*Southland*, 103 Cal.App.4th at 1094.) If it is, we must uphold it. (*Ibid.*)

Here, the decoy testified that he and Carissa entered the licensed premises together. (RT, at p. 13:11-15.) Carissa stood 2-3 feet behind him as he selected beer from the cooler and then followed him to the register. (*Id.* at p. 21:9-14.) The decoy did not recall where Carissa was standing while he was at the register, or whether the clerk paid any attention to her. (*Id.* at pp. 21:15-18, 22:10-14.)

Further, Detective De La Rosa testified that a second minor is often used as "security" for the minor decoy, and that second minors are instructed not to interact with anyone while at a licensed premises. (RT at p. 44:13-19.) In fact, Carissa was specifically instructed not to interact with the decoy or anyone else during the operation. (*Id.* at p. 44:20-25.) Finally, the ALJ noted that the clerk did not testify, so there is no evidence indicating Carissa distracted or impaired her during the sale, or that Carissa's appearance changed her perception of the decoy's age.

Based on the above, there is substantial evidence to support the ALJ's conclusion that Carissa did not act as "an uncharged decoy who worked in tandem with Ash." (Conclusions of Law, ¶ 6.) This Board cannot reweigh that evidence or exercise its own independent judgment "to reach a contrary, although perhaps equally reasonable, result." (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826, 831–832].) The Department's decision must stand.

ORDER

The decision of the Department is affirmed.<sup>5</sup>

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

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<sup>5</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.

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:**

**THREE RIVERS VILLAGE MARKET, INC.  
THREE RIVERS VILLAGE MARKET  
40869 SIERRA DRIVE  
THREE RIVERS, CA 93271**

**OFF-SALE GENERAL - LICENSE**

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

**FRESNO DISTRICT OFFICE**

**File: 21-163153**

**Reg: 18086946**

**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 December 3, 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 January 16, 2019, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: December 6, 2018



Matthew D. Botting  
General Counsel

**RECEIVED**

**DEC 06 2018**

Alcoholic Beverage Control  
Office of Legal Services

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Three Rivers Village Market, Inc.  
DBA: Three Rivers Village Market  
40869 Sierra Drive  
Three Rivers, California 93271

Respondent

} File: 21-163153  
}  
} Registration: 18086946  
}  
} License Type: 21  
}  
} Page Count: 80  
}  
} Reporter:  
} Theresa Hansen-CSR #8937  
} Atkinson Baker  
}  
}  
} **PROPOSED DECISION**

Off-Sale General License

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Visalia, California, on October 10, 2018.

Colleen Villarreal, Attorney, represented the Department of Alcoholic Beverage Control (Department).

Dean R. Leuders, Attorney, represented Three Rivers Village Market, Inc. (Respondent).

The Department seeks to discipline the Respondent's license on the grounds that, on or about January 16, 2018 the Respondent, through their agent or employee, Elana Diane Gauthier, sold, furnished, or gave alcoholic beverages to Jonathan Kevin Ash, 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 October 10, 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 May 17, 2018. (Exhibit D-1)
2. On October 22, 1984 the Department issued a type 21, off-sale general license to the Respondent for the above-described location (the Licensed Premises).
3. The following is the record of prior Department discipline against the Respondent's license as established by official records introduced by the Department (Exhibit D-2):

Violation Date	Violation	Registration Date	Registration Number	Penalty
8/26/2016	25658(a)	9/29/2016	16084778	10 day suspension, all stayed

4. Jonathan Kevin Ash (Ash) was born on September 6, 1998 and was 19 years old during the investigation on January 16, 2018. On that date, Ash served as a minor decoy in an operation conducted by the Tulare County Sheriff's Department (TCSD) and the Department at multiple locations, including at the Licensed Premises. His recruitment as a decoy resulted from his time as an Explorer with the TCSD.

5. Ash appeared and testified at the hearing on October 10, 2018. Except for his hair being shorter, his appearance was as depicted in an image that was taken of Ash on January 16, 2018. (Exhibit D-3) On the date of the operation, Ash wore an Oakland Raiders branded pullover jacket and khaki shorts. Ash did not wear a hat or any head covering. His face was clean shaven and fully exposed. Ash wore his hair short and combed in a side part. Ash was approximately 6 feet, 1 inch tall and 260 pounds at the hearing. His build was heavyset, not muscular. Ash appeared to have the same size and appearance on the date of the operation as his appearance during the hearing.

6. On January 16, 2018 at approximately 5:50 p.m. Ash went to the Licensed Premises with TCSD deputies and agents of the Department for the purpose of trying to buy alcohol. Prior to entering, he was told to make an attempt at purchasing an alcoholic beverage. Ash was instructed to carry his identification, show it if requested, and to be truthful regarding his age if asked. Ash entered with an underage female by the name of Carissa Loreto (Loreto). Loreto was 16 years old. Ash and Loreto did not talk to each other while they were in the Licensed Premises. Loreto followed Ash as he walked through the Licensed Premises.

7. Ash went into the Licensed Premises and proceeded to the refrigerators containing beer. He selected two 25 ounce Bud Light beer cans as depicted in a later image taken of Ash and the clerk he interacted with. (Exhibit D-3) Ash approached the register and saw two female clerks working. Ash presented the Bud Light beer cans to the closest clerk for purchase. This clerk began to help Ash. Loreto was standing 2-3 feet behind Ash when this occurred.

8. After Ash presented the beers for purchase, the clerk scanned the beers. The clerk then asked Ash for his identification. In response to this request, Ash physically handed the clerk his California driver's license. (Exhibit D-4) The clerk took the license from Ash and appeared to examine it. Ash's California driver's license was in portrait orientation because of his age. It had a red bar below his date of birth that said in white letters "AGE 21 IN 2019". (Exhibit D-4)

9. After taking and looking at the license, the clerk did not ask Ash any age related questions. Loreto was not spoken to during the exchange between Ash and the clerk even though she was standing directly behind Ash. Ash paid for the beer cans with cash. The clerk rang up the two beers, returned Ash's identification and gave Ash change, a receipt and the two beers. The clerk then allowed him to leave.

10. Ash approached the vehicle where the law enforcement officers were waiting. Ash told them what happened. After this, the Tulare County deputies and the Department agents went into the Licensed Premises with Ash. Upon entering, the law enforcement officers and Ash made contact with the clerk who made the sale. She was standing near another female clerk. Subsequent to the officers identifying themselves and their reason for being there, Ash was asked to identify the clerk who made the sale. Ash pointed at the clerk and simultaneously said "she did" in reference to the clerk who made the sale. The clerk was looking at them when Ash pointed her out. She was approximately 2-3 feet away during this identification. TCSD Deputy Sheriff John De La Rosa (De La Rosa) subsequently identified her as Elana Diane Gauthier (Gauthier).

11. After he identified Gauthier, Ash was photographed while standing immediately next to Gauthier. Ash held his identification. Ash also held the two beers he had bought from the Licensed Premises. (Exhibit D-3) From the initial law enforcement contact with Gauthier until after this photograph was taken; Ash was in the immediate presence of Gauthier and the officers. The beer cans, the receipt, and the change Ash received from Gauthier were also photographed by the officers during the investigation. (Exhibit D-5) Gauthier was subsequently issued a citation for the sale. Prior to being issued the citation, Gauthier admitted to selling the beers and said that she had misread the year "1988" on the license. Gauthier did not respond when De La Rosa asked her about the other age features that were on Ash's identification.

12. Ash is a physically large person. However, 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 Gauthier at the Licensed Premises on January 16, 2018, Ash displayed the appearance which would generally be expected of a person less than 21 years of age during his interactions with Gauthier. Gauthier did not testify in this matter to explain her age related impressions of Ash.

13. Natalia Dixon (Dixon) testified for the Respondent in this matter. She is one of the principals in the corporation that holds the license in this matter. She is also the manager of the Licensed Premises. She testified to the practices used at the Licensed Premises to prevent underage sales of alcohol. All clerks undergo a two week training period that includes specific instructions related to alcohol sales. The Licensed Premises maintains a book at the register with examples of identifications for the guidance of clerks. Dixon regularly met with clerks and reminded them of alcohol sales policies including the carding of purchasers regardless of age. The Licensed Premises had posted policies regarding alcohol sales that were visible to customers and the clerks on duty. (Exhibits L-6, L-7 and L-9)

14. Dixon went to the Licensed Premises during the incident when Gauthier sold to Ash. Dixon saw Ash and would have guessed that he was older than 21. Despite this, the Licensed Premises policy would have been to ask for identification from Ash if he were purchasing alcohol. Subsequent to the incident with Ash, Gauthier admitted to Dixon that she had "screwed up." Shortly after the incident, Gauthier resigned her employment. As a result of the incident, the Licensed Premises installed a card scanner system and software program to take the guesswork out of checking identifications from the clerks. The system requires that a date of birth be scanned in or entered into the register before a sale of alcohol can go through. (Exhibits L-1, L-2, L-3, L-4, L-5 and L-8)

15. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

### CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.

4. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on January 16, 2018 the Respondent's clerk, Elana Diane Gauthier, inside the Licensed Premises, sold an alcoholic beverage to Jonathan Kevin Ash, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 2-14)

5. The Respondent argued that the Department failed to comply with section 25666 because Loreto was not produced and she was part of the overall operation that day. Section 25666(a) states:

“(a) In any hearing on an accusation charging a licensee with a violation of Sections 25658, 25663, and 25665, the department shall produce the *alleged minor* (emphasis added) for examination at the hearing unless he or she is unavailable as a witness because he or she is dead or unable to attend the hearing because of a then-existing physical or mental illness or infirmity, or unless the licensee has waived, in writing, the appearance of the minor. When a minor is absent because of a then-existing physical or mental illness or infirmity, a reasonable continuance shall be granted to allow for the appearance of the minor if the administrative law judge finds that it is reasonably likely that the minor can be produced within a reasonable amount of time.”

In this matter, only Ash was alleged as the decoy in the Accusation. The evidence established that only Ash purchased alcohol in the Licensed Premises. Ash was produced and testified as a witness. The Department complied with the specific requirement of this statute.

6. Further, the evidence does not support that Loreto acted as an uncharged decoy who worked in tandem with Ash. While Loreto accompanied and walked behind Ash, she did not participate in the selection of the alcohol or the presentation of the alcohol for purchase. She was specifically instructed by the officers to not interact with Ash during the purchase and the evidence established that she complied with this instruction. Loreto did not have any interaction with Gauthier. Gauthier did not testify to suggest that Loreto even made an impression on her such that she associated Loreto with Ash's interaction with Gauthier during the purchase. This argument by the Respondent that Loreto was a decoy is rejected as unfounded. (Findings of Fact ¶¶ 2-14)

7. The Respondent also 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. Specifically, the Respondent argued that the appearance of the decoy did not comply with rule 141(b)(2). This violation, if established, would be an affirmative defense and require dismissal of the accusation pursuant to rule 141(c).

8. There is also no credible evidence supporting the assertion by the Respondent that the appearance of the decoy failed to comply with rule 141(b)(2). As noted above, Gauthier did not testify in this matter to establish that she allowed the sale as the result of Ash's appearance or demeanor. The record in this matter is that Gauthier barely spoke with Ash at all. There was little opportunity for her to form an opinion about Ash's demeanor and its impact on her age related impressions of Ash. Gauthier only spoke to Ash in furtherance of the transaction for the beers. Ash did not carry on any significant conversation with Gauthier prior to or beyond the brief transaction of the purchase. Further, Ash testified in this matter and his physical appearance matched the physical appearance he presented to Gauthier on the date of the operation. (Findings of Fact ¶¶ 2-14)

9. While Ash's height and heft put him in the upper size echelon in terms of people his age, this alone is not disqualifying since it is reasonable to expect a large range of heights and weights when considering the appearance of a "typical" 19 year old male. Overall, Ash had an appearance "which could generally be expected of a person under 21 years of age" and he was chronologically under 20 which are the standards required for compliance with rule 141(b)(2). In addition, his attire was consistent with a person in his late teens. Also, Ash was clean shaven and had no visible tattoos or other accoutrements that might have created a misimpression about his age. (Findings of Fact ¶¶ 2-14)

10. As previously noted, the clerk did not testify to establish facts suggesting that there was anything in Ash's actions, manner, or appearance that would have led a reasonable person in Gauthier's position to conclude that Ash was over 21. Furthermore, Gauthier was given Ash's identification with his true age and date of birth information which gave Gauthier objective information to further calibrate the age of Ash. The evidence is that Gauthier failed to do so despite being given ample information to recognize that Ash was under 21. The Department has established compliance with rule 141(b)(2) and the Respondent has failed to rebut this evidence. (Findings of Fact ¶¶ 2-14)

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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.



### **PENALTY**

The Department established that the Respondent suffered a prior violation of section 25658(a) within 36 months. The standard penalty for a violation with one prior of this nature is 25 days. This prior occurred in 2016. No other factors in aggravation have been established by the Department.

The Respondent has established some factors in mitigation that justify a departure downward from this standard penalty. Other than the one prior, the Licensee has been discipline free since the issuance of the license in 1984. The Respondent has shown that it has trained its employees to prevent underage sales and that this incident and the one prior appear to be departures from the standards the Respondent enforces with its employees.

Further, since the sale to Ash, the Respondent has taken the positive action of installing an automated ID check system to avoid human errors and to further hold its clerks accountable for alcohol sales. The Respondent has shown a commitment to avoid problems in the future.

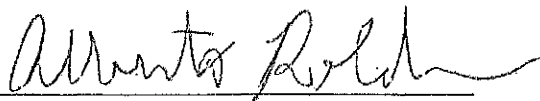
There appear to be no other factors in mitigation applicable to this violation. No other factors in aggravation have been shown. The penalty recommended herein complies with rule 144.

Three Rivers Village Market, Inc.  
DBA: Three Rivers Village Market, Inc.  
File 21-163153  
Reg. 18086946  
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### ORDER

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

Dated: October 24, 2018



Alberto Roldan  
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: <u>Jacob J. Hjeltnen</u>
Date: <u>12/3/18</u>