

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

AB-9799

File: 21-578861; Reg: 18087472

7-ELEVEN, INC. and AMAN SANDEEP, INC.,
dba 7-Eleven Store #33292C
1161 West Lugonia Avenue
Redlands, CA 92374-2000,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: October 3, 2019
Los Angeles, CA

ISSUED OCTOBER 15, 2019

Appearances: *Appellants:* Adam N. Koslin, of Solomon, Saltsman & Jamieson, as
counsel for 7-Eleven, Inc. and Aman Sandeep, Inc.,

Respondent: Lisa Wong, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Aman Sandeep, Inc., doing business as 7-Eleven Store #33292C, 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,

¹The decision of the Department, dated March 11, 2019, is set forth in the appendix.

subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 19, 2017. The franchisee, Amandeep Singh, held the license in his name alone from December 17, 2013 until the current incorporation. There is no record of prior departmental discipline against the license.

On September 11, 2018, the Department filed a single-count accusation against appellants charging that, on June 26, 2018, appellants' clerk, Karina Cardona Avila (the clerk), sold an alcoholic beverage to 18-year-old Daniel Shahabi (the decoy). Although not noted in the accusation, the decoy was working for the Redlands Police Department (RPD) at the time.

At the administrative hearing held on January 9, 2019, documentary evidence was received and testimony concerning the sale was presented by the decoy, RPD Corporal Michael Merriman, and franchisee Amandeep Singh.

Testimony established that Cpl. Merriman entered the licensed premises in plain clothes on June 26, 2018, followed shortly thereafter by the decoy. The decoy went to the coolers where he selected a three-pack of Bud Light tall beer cans. He took the beer to the counter where the clerk said "you look young mijo." The decoy smiled and placed the beer on the counter. The clerk asked for his identification and the decoy handed her his California driver's license which had a portrait orientation, contained his correct date of birth (showing him to be 18 years of age), and included a red stripe indicating "AGE 21 IN 2021." (Exh. 3.) The clerk looked at the license, then completed the sale without asking any age-related questions. Cpl. Merriman observed the

transaction from inside the premises.

The decoy exited the store, followed by Cpl. Merriman. The decoy, Merriman, and Officer Grantz re-entered the premises and approached the clerk. Cpl. Merriman advised the clerk of the violation, then asked her “did you sell beer to this gentleman?” The clerk acknowledged having sold beer to the decoy. The decoy identified the clerk as the seller of the beer. Cpl. Merriman asked the decoy his age and he said that he was 18. The decoy and clerk were approximately five feet apart during this identification. A photo of the decoy and clerk was taken (exh. 4) and the clerk was issued a citation.

The administrative law judge (ALJ) issued her proposed decision on January 24, 2019 sustaining the accusation and recommending a 15-day suspension. The Department adopted the proposed decision in its entirety on March 1, 2019, and issued a Certificate of Decision on March 11, 2019.

Appellants then filed a timely appeal contending the ALJ abused her discretion by failing to properly consider mitigating evidence and to explain her findings.

DISCUSSION

Appellants contend that the ALJ abused her discretion by failing to properly consider mitigating evidence when determining the appropriate penalty. They contend the ALJ mischaracterized the evidence and failed to “bridge the analytical gap” between her findings and conclusions, thereby committing reversible error. (AOB at pp. 9-14.)

The Board will not disturb the Department's penalty order in the absence of an

abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) "'Abuse of discretion' in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.]" (*Brown v. Gordon*, 240 Cal.App.2d 659, 666-667 (1966) [49 Cal.Rptr. 901].) If the penalty imposed is reasonable, the Board must uphold it even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Rule 144 provides:

In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act (Bus. and Prof. Code Sections 23000, *et seq.*), and the Administrative Procedures Act (Govt. Code Sections 11400, *et seq.*), the Department shall consider the disciplinary guidelines entitled "Penalty Guidelines" (dated 12/17/2003) which are hereby incorporated by reference. Deviation from these guidelines is appropriate where the Department in its sole discretion determines that the facts of the particular case warrant such a deviation - such as where facts in aggravation or mitigation exist.

(Cal. Code Regs., tit. 4, § 144.)

Among the mitigating factors provided by the rule are the length of licensure without prior discipline, positive actions taken by the licensee to correct the problem, cooperation by the licensee in the investigation, and documented training of the licensee and employees. Aggravating factors include, *inter alia*, prior disciplinary history, licensee involvement, lack of cooperation by the licensee in the investigation, and a continuing course or pattern of conduct. (*Ibid.*)

The Penalty Policy Guidelines further address the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

Penalty Policy Guidelines:

The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

(Ibid.)

In the decision, the ALJ addresses the issue of penalty at length, and explains the factors considered in determining the 15-day suspension:

PENALTY

The Department requested the Respondents' license be suspended for a period of 15 days, arguing concern that the same cash register system was in place to scan and swipe IDs at the time of the violation as after, minimal evidence of the computer-based training and the BARS program's effectiveness.

The Respondents recommended a mitigated 5 day penalty, based on the following factors: (1) the premises' discipline-free operation for almost five years (since 2013 when Mr. Singh held the license in his own name and including the incorporation to the violation date), and (2) therefore, this said history shows the systems in place prior to the violation have been effective, (3) the Respondents disciplined clerk Cardona, although she is a valued employee, ensuring her "mistake" had repercussions, (4) with the BARS program the Respondents have increased employee discipline by giving a write-up for the first red card received, and discharge of employment for the second red card received, and (5) after the violation

the Respondents changed their cash register policy requiring their clerks to scan the ID's bar code or swipe the ID's magnetic strip. The Respondents argue that all of the above show they take seriously their responsibility to avoid sales to minors.

While it is commendable Mr. Singh says he has had no discipline at this location during the time it was licensed under his name since December 17, 2013, the Respondents have been licensed since April 19, 2017. Although any period of discipline-free operation is always worth noting, both the approximate four and a half years (since December 17, 2013, to the violation date) and the Respondents' one year, two month, seven day discipline-free history (from the date the license issued through the date of the violation) are insufficient to warrant mitigation in this case. Even if the undersigned took into account the time the premises was licensed under Mr. Singh's own name, the Respondents failed to address the problem at hand and no real change has been made since the violation; with the same systems in place prior to the violation as after, for example, the cash register system, the computer-based training, and the BARS program.

The BARS program would have rewarded clerk Cardona for the violation at hand since clerk Cardona asked for ID. The BARS program might want to include the clerk checking the red flags of minor's vertical IDs as part of providing a green card as a reward. The same cash register POS system was in place to scan and swipe IDs at the time of the violation, but it was not being used. After the violation, while the clerks are now told to swipe or scan IDs, they are still able to manually press a key or keys that tell the POS system the ID is age-appropriate with the visual ID check still available to them. Mr. Singh said he and the managers merely remind the clerks to ask of IDs. There was no evidence they remind cashiers on a regular basis to swipe or scan IDs.

Furthermore, there was no evidence presented as to how clerk Cardona was able to proceed with the sale of alcohol to decoy Shahabi. However, by the preponderance of evidence, clerk Cardona more than likely either entered an age-appropriate birthdate or pressed a visual ID OK button (informing the POS system the ID was age-appropriate), which tricked the POS system in to allowing the sale. Despite the testified to training there was no evidence presented why the valued clerk, who presumably underwent said training, did not scrutinize more closely the minor's vertical ID with its red stripe clearly depicting the customer would not be 21 years old until 2021. The minor ID's vertical format and red stripe are two clear and easily identifiable red flags, which alone should have stopped the clerk from proceeding with the sale. There is no evidence the Respondents have made any changes or taken steps to address the

problem at issue, which is that its clerks are still able to override the cash register's safety protocol by a manual visual ID check which could trick the POS system into believing the minor customer is age-appropriate for the sale. The Respondents made no mention of removing the visual ID check or of having a zero tolerance policy in place as a deterrent for when its clerks violate their policy and sell age-restricted merchandise to minors.

Based on a thorough weighing of the argued for factors, the aggravating and mitigating factors balance each other out. The penalty recommended herein complies with rule 144.

(Decision at pp. 7-9.)

As we have said time and again, this Board's review of a penalty looks only to see whether it can be considered reasonable, and, if it is reasonable, the Board's inquiry ends there. The extent to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion — pursuant to rule 144 — and the Board may not interfere with that discretion absent a clear showing of abuse of discretion.

Appellants complain: “the ALJ did not enumerate any aggravating factors as such, instead electing to simply find ways in which the mitigative procedures adopted by Appellant were insufficient. As a result, the ALJ failed utterly to provide Appellants or the general public with the actual basis for her decision as to what penalty to impose” (AOB at p. 12.) Appellants assert this violates *Topanga* which states: “[I]mplicit in [the law] is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order.” (*Topanga Assn. for a Scenic Community v. Co. of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836].)

Appellants appear to want the Board to go behind the findings the decision and question the reasoning process utilized by the ALJ. This reads into the decision in *Topanga* a requirement that subsequent cases do not support. The contention that the Department failed to comply with *Topanga* has been rejected by this Board numerous times. For example, in *7-Eleven, Inc./Cheema* (2004) AB-8181, the Board said: "Appellants misapprehend *Topanga*. It does not hold that findings must be explained, only that findings must be made." (Also see: *No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 258-259 [242 Cal.Rptr. 760]; *Jacobson v. Co. of Los Angeles* (1977) 69 Cal.App.3d 374, 389 [137 Cal.Rptr. 909].)

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

This Board has repeatedly rejected the very same interpretation of *Topanga* that appellants now advocate. (See, e.g., *Mtanos Hawara & Susan Issa Hawara* (2015) AB-9512 at pp. 7-9; *Garfield Beach CVS, LLC/Longs Drug Store Cal., LLC* (2013) AB-9236, at pp. 3-4.) With regard to factual findings supporting the actual charges — *not* the penalty imposed — this Board has said:

If this Board observes that the evidence appears to contradict the findings

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

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

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

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

(*Hawara, supra* at p. 9.) We see no reason to deviate from this precedent or to require that the ALJ explain her reasoning process — particularly where, as here, ample reason for the penalty imposed has been provided.

Appellants have not established that the Department abused its discretion by imposing a 15-day penalty in this matter.

ORDER

The decision of the Department is affirmed.²

SUSAN A. BONILLA, CHAIR

²This 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.

MEGAN Mc GUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

APPENDIX

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

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

7-ELEVEN, INC., AND AMAN SANDEEP, INC.
7-ELEVEN STORE 33292 C
1161 WEST LUGONIA AVENUE
REDLANDS, CA 92374-2000

OFF-SALE BEER AND WINE - LICENSE

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

RIVERSIDE DISTRICT OFFICE

File: 20-578861

Reg: 18087472

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 March 1, 2019. 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 April 22, 2019, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: March 11, 2019



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., and Aman Sandeep, Inc.	}	File: 20-578861
Dbas: 7-Eleven Store 33292 C	}	
1161 West Lugonia Avenue	}	Reg.: 18087472
Redlands, California 92374-2000	}	
	}	License Type: 20
Respondents	}	
	}	Word Count: 11,648
	}	
	}	Reporter:
	}	Susan Gallagher
	}	Kennedy Court Reporters
	}	
<u>Off-Sale Beer and Wine License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at San Bernardino, California, on January 9, 2019.

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

Donna Hooper, Attorney, represented Respondents, 7-Eleven, Inc., and Aman Sandeep, Inc.

The Department seeks to discipline the Respondents' license on the grounds that, on or about June 26, 2018, the Respondents-Licensees' agent or employee, Karina Cardona Avila, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Daniel Armon Shahabi, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 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 January 9, 2019.

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

FINDINGS OF FACT

1. The Department filed the accusation on September 11, 2018. At the hearing, the Department amended the accusation by interlineation, without objection by the Respondents, replacing the name “Cardova” with the name “Cardona” in count 1.
2. The Department issued a type 20, off-sale beer and wine license to the Respondents for the above-described location on April 19, 2017 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents’ license.
4. Daniel Armon Shahabi (hereinafter referred to as decoy Shahabi) was born on January 20, 2000. On June 26, 2018, he was 18 years old. On that date he served as a minor decoy in an operation conducted by the Redlands Police Department (hereinafter referred to as Redlands PD).
5. Decoy Shahabi appeared and testified at the hearing. On June 26, 2018, he was 6 feet tall and weighed approximately 155 pounds. He wore a gray John Wayne t-shirt, green cargo shorts, and gray Nike running shoes. He described his hair as a buzz cut on the sides with the top of his hair an inch and one-half long. (Exhibits 2, 4 and A.) His appearance at the hearing was the same except the length of the top of his hair was one inch long.
6. On June 26, 2018, Redlands PD Corporal Merriman entered the Licensed Premises, in a plain clothes capacity, followed shortly thereafter by decoy Shahabi. Decoy Shahabi walked straight to the alcoholic beverage coolers and selected a three-pack of Bud Light tall beer cans. (Exhibit 4.) Decoy Shahabi brought the three-pack of beer directly to the check-out line and waited in line behind three patrons. There were two clerks working behind the sales counter, a female and male clerk.
7. Decoy Shahabi reached the sales counter behind which stood the female clerk, Karina Cardona Avila (hereinafter referred to as clerk Cardona to be consistent with the witness testimony). Clerk Cardona said to the decoy, “You look young mijo.” Decoy Shahabi smiled and placed the three-pack of Bud Light beer cans on the counter. Clerk Cardona asked decoy Shahabi for his identification (ID). Decoy Shahabi handed clerk Cardona his valid California Driver License, which clerk Cardona accepted. Decoy Shahabi’s California Driver license had a vertical orientation, showed his correct date of birth and included a red stripe which read, “AGE 21 IN 2021.” (Exhibit 3.) Clerk Cardona looked at the ID, then handed the ID back to the decoy. Clerk Cardona continued with the sales transaction. Decoy Shahabi gave money to the clerk, who provided the decoy with change. Decoy Shahabi took the change, the three-pack of Bud Light beer and exited the store. Clerk Cardona did not ask decoy Shahabi any age-related questions or questions

about his ID. Decoy Shahabi did not communicate with corporal Merriman while he was inside the Licensed Premises. Corporal Merriman witnessed these above-described events while posing as a customer. Corporal Merriman exited the store soon after decoy Shahabi.

8. Decoy Shahabi re-entered the Licensed Premises with Corporal Merriman and Officer Grantz. The three of them approached clerk Cardona, who was standing on the west side of the counter by the food area. Corporal Merriman advised clerk Cardona of the violation. Corporal Merriman asked clerk Cardona, "Did you sell beer to this gentleman?" referring to decoy Shahabi. Clerk Cardona acknowledged having sold alcohol to decoy Shahabi. Corporal Merriman then turned to the decoy and asked him to identify the person who sold him the beer. Decoy Shahabi pointed at clerk Cardona and identified her as having sold him the three-pack of Bud Light beer. Corporal Merriman then turned to decoy Shahabi and asked him his age, to which the decoy replied that he was 18. Decoy Shahabi and clerk Cardona were standing five feet apart and looking at each other at the time of this identification. A photo of clerk Cardona and decoy Shahabi was taken after the face-to-face identification, with decoy Shahabi holding the three-pack of Bud Light beer in his right hand and his California Driver License in his left hand, while standing next to clerk Cardona. (Exhibit 4.)

9. Corporal Merriman issued a citation to clerk Cardona after the face-to-face identification. There was no evidence that clerk Cardona was distracted during the sales transaction or the face-to-face identification. Clerk Cardona did not appear at the hearing.

10. Decoy Shahabi appeared his age at the time of the decoy operation. 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 front of clerk Cardona at the Licensed Premises on June 26, 2018, decoy Shahabi displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk. In-person, decoy Shahabi appears his age, like a teenager.

11. June 26, 2018, was the first day of decoy operations in which decoy Shahabi participated. He visited 24 locations during that operation and two of those locations sold alcohol to decoy Shahabi, including the Licensed Premises. Decoy Shahabi learned about the decoy program through his service as a police explorer with the Redlands PD. As of June 26, 2018, he had been a police explorer for three years and reached the rank of sergeant. His duties as a sergeant include having more responsibilities than the other explorers, training new explorers, running meetings, and participating in most explorer posts, including ride-a-longs. Decoy Shahabi believes his experience as a police explorer has given him maturity, but that he just acts his age during decoy operations.

(Respondents' Witness)

12. Amandeep Singh appeared and testified at the hearing. Mr. Singh has been the franchisee of the Licensed Premises since December 17, 2013, with ownership originally under his name until 2017, when he incorporated under Aman Sandeep Inc. Prior to becoming a franchisee Mr. Singh has worked for 7-Eleven franchisees for three years and prior to that he worked for a private convenience store. Mr. Singh owns three separate premises, including the Licensed Premises. Since 2013, Mr. Singh has had no Department violations at his stores except the sale at hand.

13. The Respondents' employees when hired undergo a 45-minute computer-based training comprised of slides separated into six sections, some of which address sales to minors of age-restricted sales including, but not limited to alcohol, tobacco, and lottery tickets. The computer-based training teaches employees how to check customer IDs for the customer's name, photograph, expiration date, and birthdate, as well as how to recognize a minor's vertical ID with the red and blue stripes indicating the year a minor turns 21 and 18 years of age, respectively. Employees take a test after reviewing the slides. This same training is repeated annually. After employees complete the computer-based training they are trained on how to use the cash registers.

14. The Respondents' cash register point of sale (POS) system allows for their employees to choose from manually inputting the ID is age-appropriate (visual ID check), swiping the ID's magnetic strip or scanning the ID bar code for age-restricted transactions. After scanning an age-restricted product a screen appears on the register monitor requesting the clerk to ask for the customer's ID and to make sure they are born prior to a date listed on the screen. The employee is told to compare the photograph on the ID with the customer. Prior to June 26, 2018, all of the Respondents' employees were visually checking customer IDs and were not using the ID swipe or scan functions of the cash register. If a minor's ID is scanned or swiped the cash register will not allow the age-restricted sale to proceed. After the said violation the Respondents' policy is to tell employees to either swipe or scan the ID, and, as a last resort, to visually check the customer's ID. Clerks are told to ask for the IDs of anyone appearing 30 years old or under, but are advised they may ask the ID of anyone. Respondents' managers remind employees on a daily basis to check customer IDs for age-restricted product sales and "once in a while" Mr. Singh sends text reminders of the same to his employees.

15. The Respondents participate in the BARS Secret Shopper Program. The Respondents' clerks are provided green cards upon their successfully requesting identification of a secret shopper who attempts to purchase an age-restricted product, and a red card for failing to request identification. The Respondents give a write-up to an employee who receives one red card and fire the employee upon receipt of a second red card.

16. After the said violation of June 26, 2018, the Respondents re-trained their employees on the computer-based training. Clerk Cardona was placed on a two-day, unpaid suspension, and Mr. Singh individually reviewed the computer-based training with clerk Cardona. Mr. Singh believed that clerk Cardona was too valuable an employee to discharge her, since in his opinion “she’s a great employee,” and in the five years she has worked for him he has never had any problems with her, she always asks for IDs and made the one “mistake” in selling alcohol to a minor on June 26, 2018; additionally, 7-Eleven provided her with an award for outstanding customer service. Prior to working for Mr. Singh, clerk Cardona has worked for 7-Eleven, Inc. for four years.

17. Mr. Singh stops by each of his three stores “almost” on a daily basis, spending “about an hour a day for cash reports making sure everything is done and everyone is doing what they’re supposed to.” The Respondents have five separate signs posted around their store informing customers that the store checks customers’ IDs: one sign located on the sales counter at the front registers (Exhibit B), a second located at the entrance of the store (Exhibit C), and a sign posted on each of the three alcohol cooler glass doors (Exhibit D). Mr. Singh believes that, despite the violation of June 26, 2018, the protocols he has in place at his stores have been effective in preventing sales to minors.

18. 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 Respondents’ license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on June 26, 2018, the Respondents-Licensees’ employee, clerk Karina Cardona Avila, inside the Licensed Premises, sold alcoholic beverages, to-wit: a three-pack of Bud Light beer, to Daniel Armon Shahabi, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-10.)

5. The Respondents argued the decoy operation at the Licensed Premises failed to comply with rules 141(a) and 141(b)(2), therefore, the accusation should be dismissed pursuant to rule 141(c).

6. With respect to rule 141(b)(2), Respondents argued decoy Shahabi did not have the appearance of someone under the age of 21 because of certain factors which made him appear to be older than 21. Those factors include the Respondents' counsel's opinion that (1) the decoy's height, demeanor in "the way he carries himself with authority" as "self-assured," "mature and responsible," (2) as well as his police explorer experience, responsibility and rank as a sergeant, and, finally, his "deep set eyes" and "facial hair clearly depicted in Exhibit A" cause him to appear "easily 30 years old."

7. This rule 141 (b)(2) argument is rejected. Respondents' unsupported assertions are nothing but assumption and conjecture. Respondents presented no evidence as to why clerk Cardona allegedly believed decoy Shahabi to be 21 years old or older. Clerk Cardona did not testify. There was no evidence provided that at the time of the decoy operation clerk Cardona made any mention of these factors as a reason for believing the decoy to be 21 or older or as a reason for proceeding with the sale. In fact, the evidence indicates clerk Cardona believed otherwise. At the time of the sales transaction, clerk Cardona told decoy Shahabi, "You look young mijo."² Clerk Cardona then looked at the decoy's *vertically* formatted minor's ID, which alone should trigger a red flag that a minor stood before the clerk since Mr. Singh testified his clerks are trained to recognize such, and the ID advised he would be 21 years old in 2021. Based on the preponderance of the evidence it is more probable clerk Cardona knew the decoy was a minor and proceeded with the sale anyway, if not, she was otherwise extremely careless and disregarded everything she was taught. Regardless, there was nothing about decoy Shahabi's police explorer experience, responsibilities, rank, height, demeanor, or facial hair depicted in Exhibit A which made him appear older than his actual age. In fact, when viewing the photograph exhibits of the decoy and viewing decoy Shahabi in-person

² The undersigned determined this statement by the clerk to be non-hearsay because it is not used to prove the truth of the matter, but used as circumstantial evidence to prove a state of mind, such as belief intent, or knowledge. In this matter, just as in AB-9442, "the clerk's statements – even disregarding the assertions within them – support the inference that [she] knowingly and intentionally sold the beer to the decoy." The circumstantial evidence corroborates the direct evidence that the minor decoy handed the clerk his vertical formatted minor's California Driver License, which depicted his birth year as 2000, showing he was 18 years old, and had a red stripe reading, "AGE 21 IN 2021," which the clerk took possession of, looked at, and proceeded with the sale of alcohol to the minor. A statement is not hearsay, though made extra judicially, to the extent that it is offered as circumstantial evidence of some fact in issue other than the truth or falsity of the statement itself. (*People v. Jackson* (1989) 49 Cal.3d 1170, 1187 [264 Cal.Rptr. 852]; 31 Cal.Jur.3d (2010) Evidence, § 247.) Use of such circumstantial evidence to prove a state of mind, such as belief, intent, or knowledge, is not opposed by the hearsay rule "because the utterance is not used for the sake of inducing belief in any assertion it may contain. The assertion, if in form there is one, is to be disregarded, and the indirect inference alone regarded." (*Skelly v. Richman* (1970) 10 Cal.App.3d 844, 858 [89 Cal.Rptr. 556], citing 6 Wigmore on Evid. (3d ed. 1940), § 1790, p. 239]; *Estate of Truckenmiller* (1979) 97 Cal.App.3d 326 [158 Cal.Rptr. 699]; *Sandoval v. Southern Cal. Enterprises* (1950) 98 Cal.App.2d 240 [219 P.2d 928]; *Hickman v. Arons* (1960) 187 Cal.App.2d 167 [9 Cal.Rptr.379].)

he looks his age, like a teenager. In other words, decoy Shahabi had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 10.)

8. With respect to rule 141(a) the Respondents' counsel argued the decoy operation was not run in a manner which promoted fairness because of the John Wayne t-shirt worn by "a relatively young man. My first thought when I saw him is you're young for that shirt." Respondents continued their argument that "law enforcement needs to be cognizant of that type of attire that is going to inspire comments that will be incriminating in the context, even though they might not reflect that she [clerk Cardona] believed that the person was actually under 21."

9. This argument is rejected and without merit. There was no evidence the Department attempted to take unfair advantage of the situation or that clerk Cardona was distracted, in any way, during the sales transaction by the said John Wayne t-shirt.

10. Moreover, the California Court of Appeal has made it clear that the notion of fairness does not authorize the creation of new defenses under rule 141 beyond those specified in rule 141(b). In *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2017) 7 Cal. App.5th 628, 638 [213 Cal.Rptr.3d 130], the Court of Appeal determined, "Contrary to the Appeals Board's contention, Rule 141 provides specific guidance regarding how to preserve fairness in minor decoy operations. Subdivision (b) of Rule 141 implements the goal of fairness by imposing five specific requirements for every minor decoy operation. Decoys must be under the age of 20; have the appearance of a person under 21; carry their own actual identification and present that identification upon request; truthfully answer any questions about their ages; and make face-to-face identifications of the persons who sold the alcoholic beverages. (Rule 141(b)(1)-(5).) Fairness under Rule 141 is assured by a set of five expressly defined safeguards, all of which must be fulfilled during a minor decoy operation." Accordingly, the court did not recognize the separate criteria of "fairness" to be applied when assessing whether individual decoy operations comply with rule 141(a). The Court of Appeal was clear that "fairness" is achieved by adhering to the five standards set forth in Rule 141(b)(1)-(5). In the matter at hand, the record made clear that all five of the standards set forth in Rule 141(b)(1)-(5) were complied with during the said decoy operation.

PENALTY

The Department requested the Respondents' license be suspended for a period of 15 days, arguing concern that the same cash register system was in place to scan and swipe IDs at the time of the violation as after, minimal evidence of the computer-based training and the BARS program's effectiveness.

The Respondents recommended a mitigated 5 day penalty, based on the following factors: (1) the premises' discipline-free operation for almost five years (since 2013 when Mr. Singh held the license in his own name and including the incorporation to the violation date), and (2) therefore, this said history shows the systems in place prior to the violation have been effective, (3) the Respondents disciplined clerk Cardona, although she is a valued employee, ensuring her "mistake" had repercussions, (4) with the BARS program the Respondents have increased employee discipline by giving a write-up for the first red card received, and discharge of employment for the second red card received, and (5) after the violation the Respondents changed their cash register policy requiring their clerks to scan the ID's bar code or swipe the ID's magnetic strip. The Respondents argue that all of the above show they take seriously their responsibility to avoid sales to minors.

While it is commendable Mr. Singh says he has had no discipline at this location during the time it was licensed under his name since December 17, 2013, the Respondents have been licensed since April 19, 2017. Although any period of discipline-free operation is always worth noting, both the approximate four and a half years (since December 17, 2013, to the violation date) and the Respondents' one year, two month, seven day discipline-free history (from the date the license issued through the date of the violation) are insufficient to warrant mitigation in this case. Even if the undersigned took into account the time the premises was licensed under Mr. Singh's own name, the Respondents failed to address the problem at hand and no real change has been made since the violation; with the same systems in place prior to the violation as after, for example, the cash register system, the computer-based training, and the BARS program.

The BARS program would have rewarded clerk Cardona for the violation at hand since clerk Cardona asked for ID. The BARS program might want to include the clerk checking the red flags of minor's vertical IDs as part of providing a green card as a reward. The same cash register POS system was in place to scan and swipe IDs at the time of the violation, but it was not being used. After the violation, while the clerks are now told to swipe or scan IDs, they are still able to manually press a key or keys that tell the POS system the ID is age-appropriate with the visual ID check still available to them. Mr. Singh said he and the managers merely remind the clerks to ask for IDs. There was no evidence they remind cashiers on a regular basis to swipe or scan IDs.

Furthermore, there was no evidence presented as to how clerk Cardona was able to proceed with the sale of alcohol to decoy Shahabi. However, by the preponderance of evidence, clerk Cardona more than likely either entered an age-appropriate birthdate or pressed a visual ID OK button (informing the POS system the ID was age-appropriate), which tricked the POS system into allowing the sale. Despite the testified to training there was no evidence presented why the valued clerk, who presumably underwent said training, did not scrutinize more closely the minor's vertical ID with its red stripe clearly

depicting the customer would not be 21 years old until 2021. The minor ID's vertical format and red stripe are two clear and easily identifiable red flags, which alone should have stopped the clerk from proceeding with the sale. There is no evidence the Respondents have made any changes or taken steps to address the problem at issue, which is that its clerks are still able to override the cash register's safety protocol by a manual visual ID check which could trick the POS system into believing the minor customer is age-appropriate for the sale. The Respondents made no mention of removing the visual ID check or of having a zero tolerance policy in place as a deterrent for when its clerks violate their policy and sell age-restricted merchandise to minors.

Based ^{on} a thorough weighing of the argued for factors, the aggravating and mitigating factors balance each other out. 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: January 24, 2019

D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
Non-Adopt: _____
By: <u>Jessica A. Applegate</u>
Date: <u>3/1/19</u>