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

AB-9827
File: 20-547170; Reg: 18087173

APRO, LLC,
dba United Oil #151
909 Pacific Coast Highway
Harbor City, CA 90710,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: January 9, 2020
Los Angeles, CA

ISSUED JANUARY 21, 2020

Appearances: *Appellant:* David Brian Washburn, of Solomon, Saltsman & Jamieson, as counsel for Apro, LLC,

Respondent: Alanna K. Ormiston, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Apro, LLC, doing business as United Oil #151, appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for 15 days because its clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

[1]The decision of the Department, dated June 25, 2019, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 22, 2014. There is no record of prior departmental discipline against the license.

On July 17, 2018, the Department filed a single-count accusation charging that appellant's clerk, Maribel Orejel (the clerk), sold an alcoholic beverage to 18-year-old Jorge Hernandez (the decoy) on March 10, 2018. Although not noted in the accusation, the decoy was working for the Los Angeles Police Department (LAPD) at the time.

At the administrative hearing held on February 5, 2019, documentary evidence was received, and testimony concerning the sale was presented by the decoy and LAPD Officer Sergio Melero. Willie Joseph Green, Jr., appellant's district manager, testified on behalf of appellant.

Testimony established that on March 10, 2018, the decoy went to the licensed premises with two LAPD officers. The premises was not open to the public but items could be ordered from the clerk through a glass partition. The decoy ordered a beer from the clerk and she asked what kind he wanted. He asked for a Bud Light. The clerk asked the decoy for his identification and he handed her his California identification card through a small opening. The ID had a portrait orientation, contained his correct date of birth — showing him to be 18 years of age — and had a red stripe indicating "AGE 21 IN 2020." (Exh. 3.) The clerk looked at the ID for a few seconds and handed it back to him. The decoy paid for the beer, the clerk gave him some change, and then instructed him to go to the pass-through window on the side of the building where she handed him the beer. Subsequently, the decoy made a face-to-face

identification of the clerk, a photo of the two of them was taken (exh. 4), and the clerk was cited.

The administrative law judge (ALJ) issued a proposed decision on March 11, 2019, sustaining the accusation and recommending that the license be suspended for 15 days. The Department adopted the proposed decision on June 14, 2019 and a certificate of decision was issued on June 25, 2019.

Appellant then filed a timely appeal contending: (1) rule 141(b)(2)[2] was violated because the decoy did not display the appearance of a person under the age of 21, and (2) the Department erred when it failed to consider evidence of mitigation and failed to articulate its reasoning when determining the penalty.

DISCUSSION

I

ISSUE CONCERNING DECOY'S APPEARANCE

Appellant contends the decoy did not display the appearance which could generally be expected of a person under 21 years of age. It contends the decoy had the physique of a mature professional athlete and appeared to be over the age of 21 due to his large stature and broad shoulders. It also contends the decoy displayed a confident demeanor because of his extensive experience as a decoy and Explorer, and as such, it maintains the ALJ erred by finding compliance with rule 141(b)(2). (AOB at pp. 5-7.)

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

[2]References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

> circumstances presented to the seller of alcoholic beverages at the time of the alleged offense.

This rule provides an affirmative defense, and the burden of proof lies with appellant. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

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, 112 [28 Cal.Rptr.74].)

Therefore, the issue of substantial evidence when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the whole record,

whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; *Harris*, *supra*, 212 Cal.App.2d at p. 114.)

This Board has stated many times that, in the absence of compelling reasons, it will ordinarily defer to the ALJ's findings on the issue of whether there was compliance with rule 141(b)(2). The ALJ made the following findings regarding the decoy's appearance:

> 5. Hernandez appeared and testified at the hearing. On March 10, 2018, he was 6'3" tall and weighed 195 pounds. His hair was short and parted on the side. He wore a black long-sleeve shirt, blue jeans, Vans and a black G-Shock watch. (Exhibit 2 & 4.) His appearance at the hearing was the same except that his hair was a little longer and he was five pounds heavier.
>
> [¶ . . . ¶]
>
> 9. Hernandez learned of the decoy program through his role as a cadet. He joined the cadets on September 2015, leaving in November 2018. As a cadet, he received physical training the instruction on investigating traffic collisions He also worked at various events, such as Dodgers games. He had been a decoy between 20 and 50 times before march 10, 2018, visiting 8 to 10 locations each time. On march 10, 2018, two of the three locations he visited sold alcohol to him.
>
> [¶ . . . ¶]
>
> 13. Hernandez appeared his age—18—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 the Licensed Premises on March 10, 2018, Hernandez displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Orejel.

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

> 5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondent argued that Hernandez's height and weight, coupled with his confident demeanor, gave him the appearance of a person over the age of 21.
>
> This argument is rejected. Although tall, Hernandez had a youthful face. The mere fact that Hernandez was an experienced decoy does not automatically mean that he appeared older. In this case, there is no evidence that his experience as a cadet had any impact upon his appearance or Orejel's evaluation of his appearance. Hernandez's appearance was consistent with that of a person who is 19 years old., i.e,. Hernandez had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 13.)

(Conclusions of Law, ¶ 5.) We agree with the ALJ's reasoning and conclusions.

As this Board has said many times, minors come in all shapes and sizes and we are reluctant to suggest that a minor decoy automatically violates the rule based on height, weight, or other physical characteristics. (See, e.g., *7-Eleven/ NRG Convenience Stores* (2015) AB-9477; *7-Eleven Inc./Lobana* (2012) AB-9164.) This Board has noted that:

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

(*O'Brien* (2001) AB-7751, at pp. 6-7.) Notably, the standard is <u>not</u> that the decoy must display the appearance of a "childlike teenager" but "the appearance which could generally be expected of a person under 21 years of age." (Rule 141(b)(2).) In Findings of Fact paragraphs 5-13, and Conclusions of Law paragraph 5, the ALJ found

that the decoy met this standard, notwithstanding the details highlighted by appellant such as his height, weight, and physique. We agree.

Appellant also argues that the decoy displayed a demeanor which was not typical for a teenager because of his experience as an Explorer and as a decoy. They maintain this experience gave the decoy a confident demeanor which made him appear more mature. The Board has, however, rejected the "experienced decoy" argument many times. As the Board previously observed:

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

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

In a similar minor decoy case, where the Court of Appeal was tasked with determining whether an ALJ's assessment of the decoy's appearance was correct, the Court said that under the facts before them, while:

> [O]ne could reasonably look at the photograph [of the decoy] and reasonably conclude that the decoy appeared to be older than 21 years of age, we cannot say that, as a matter of law, a trier of fact could not reasonably have concluded otherwise.

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (2002) 103 Cal.App.4th 1084, 1087 [127 Cal.Rptr.2d 652].)

The instant case is no different. We do not believe the evidence supports a finding that the ALJ "could not reasonably have concluded otherwise." (*Id.* at p. 1087.) As stated above, case law instructs us that when, as here, "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, supra*, 25 Cal.App.3d at p. 335.)

Appellant presented no evidence that the decoy's physical appearance or demeanor *actually resulted* in his displaying the appearance of a person 21 years old or older on the date of the operation in this case. The clerk did not testify. We cannot know what went through her mind in the course of the transaction, or why she made the sale. There is simply no evidence to establish that the decoy's physical appearance or demeanor were the *actual reason* the clerk made the sale.

Ultimately, appellant is simply asking this Board to second guess the ALJ and reach a different conclusion, despite substantial evidence to support the findings in the decision. This we cannot do.

II

ISSUE CONCERNING PENALTY

Appellant contends that the ALJ erred by failing to consider evidence of mitigation when determining the penalty and by failing to articulate the reasoning behind the penalty determination. (AOB at pp. 7-9.)

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* (1966) 240 Cal.App.2d 659, 666-667 [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:

> PENALTY
>
> The Department requested an aggravated penalty. In making this argument, the Department noted that, not only did Maribel Orejel actually looked [*sic*] at Jorge Hernandez's ID before selling alcohol to him, but the sale violated one of the conditions on the Respondent's license. The Respondent argued that a 10-day, all stayed penalty was appropriate in light of the Respondent's training and policies, including the changes it implemented after the sale.
>
> The petition for conditional license refers to a "drive-in premises" and provides that "all sales of alcoholic beverages shall be made from within the licensed enclosure." In the Department's view, by handing alcohol to Hernandez through the pass-through window, the Respondent violated this condition. Yet the Department did not charge such a violation. Although the Department has the authority to amend the accusation at [*sic*] "[a]t any time before the matter is submitted for decision,"[fn.] the Department did not move to amend the accusation before the record was closed. If, as the Department argued, the sale in question also violated a condition on the license, it was incumbent upon the Department to allege a violation of section 23804. Its failure to do so, among other things, denied the Respondent the opportunity to present evidence on the issue. Accordingly, it is improper to use this uncharged alleged violation [fn.] as an aggravating factor.
>
> Some mitigation is warranted based on the Respondent's policies and its training of its employees. This is offset, however, by its relatively short licensed history (just over three year). The penalty recommended herein complies with rule 144.

(Decision at pp. 4-5.)

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.

Appellant appears to want the Board to go behind the ALJ's findings and require him to explain his reasoning. However, such a requirement has been rejected by this Board numerous times. For example, in 7-*Eleven, Inc.*/*Cheema* (2004) AB-8181, the Board said: "Appellants misapprehend *Topanga*.[3] 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].)

Indeed, 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].) Appellant has 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].)

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[3] *Topanga Assn. for a Scenic Community v. Co. of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836].

With regard to factual findings supporting the accusation — *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* (2015) AB-9512, at p. 9.) We see no reason to deviate from this precedent or to require that the ALJ explain his reasoning process — particularly where, as here, ample reason for the penalty imposed has been provided.

Appellant has 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.[4]

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

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

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

APPENDIX

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

IN THE MATTER OF THE ACCUSATION AGAINST:

APRO LLC
UNITED OIL #151
909 PACIFIC COAST HWY
HARBOR CITY, CA 90710

OFF-SALE BEER AND WINE - LICENSE

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

LAKEWOOD DISTRICT OFFICE

File: 20-547170

Reg: 18087173

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 June 14, 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, 300 Capitol Mall, Suite 1245, Sacramento, CA 95814.

On or after August 5, 2019, a representative of the Department will contact you to arrange to pick up the license.

Sacramento, California

Dated: June 25, 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:

Apro LLC dba United Oil #151 909 Pacific Coast Hwy. Harbor City, California 90710 Respondent	File: 20-547170 Reg.: 18087173 License Type: 20 Word Count: 14,000 Reporter: Tracy Terkeurst California Reporting
Off-Sale Beer and Wine License	**PROPOSED DECISION**

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Cerritos, California, on February 5, 2019.

Alanna K. Ormiston, Attorney, represented the Department of Alcoholic Beverage Control.

Brian Washburn, attorney-at-law, represented respondent Apro LLC.

The Department seeks to discipline the Respondent's license on the grounds that, on or about March 10, 2018, the Respondent, through its agent or employee, sold, furnished, or gave alcoholic beverages to Jorge Hernandez, 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 February 5, 2019.

FINDINGS OF FACT

1. The Department filed the accusation on July 17, 2018.

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

2. The Department issued a type 20, off-sale beer and wine license to the Respondent for the above-described location on December 22, 2014 (the Licensed Premises). The license was issued subject to a number of conditions. (Exhibit 5.)

3. There is no record of prior departmental discipline against the Respondent's license.

4. Jorge Hernandez was born on September 14, 1999. On March 10, 2018, he served as a minor decoy during an operation conducted by the Los Angeles Police Department. On that date he was 18 years old.

5. Hernandez appeared and testified at the hearing. On March 10, 2018, he was 6'3" tall and weighed 195 pounds. His hair was short and parted on the side. He wore a black long-sleeve shirt, blue jeans, Vans and a black G-Shock watch. (Exhibit 2 & 4.) His appearance at the hearing was the same except that his hair was a little longer and he was five pounds heavier.

6. The Licensed Premises is a small store which is part of a gas station. On March 10, 2018, Hernandez arrived at the gas station with Ofcr. Manlove and Ofcr. S. Melero. He exited the car and walked up to the Licensed Premises, which was closed to the public. A clerk, Maribel Orejel, was inside the Licensed Premises with a glass partition in front of her. The partition had a small opening through which money could be passed.

7. Hernandez asked Orejel for a beer. She responded by asking him what kind he wanted. He said he wanted a Bud Light. Orejel asked to see his ID (exhibit 3), which he handed to her through the small opening. She looked at it for a few seconds, then handed it back. He paid for the beer and she gave him some change. She instructed him to go to the pass-through window on the side of the building, where she handed him the beer. He went back to the car.

8. Ofcr. Melero and his partners entered the Licensed Premises and identified themselves. Hernandez entered as well. Ofcr. Melero asked Hernandez to identify the person who sold him the beer. He identified Orejel by pointing at her. A photo of the two of them was taken (exhibit 4), after which Orejel was cited.

9. Hernandez learned of the decoy program through his role as a cadet. He joined the cadets on September 2015, leaving in November 2018. As a cadet, he received physical training and instruction on investigating traffic collisions. He also worked at various events, such as Dodgers games. He had been a decoy between 20 and 50 times before March 10, 2018, visiting 8 to 10 locations each time. On March 10, 2018, two of the three locations he visited sold alcohol to him.

10. Willie Green, Jr., District Manager for United Pacific, oversees the Licensed Premises. He testified about the training provided to managers and employees. With respect to age-restricted products, the training covers age limits, the types of IDs, and how to deal with suspicious IDs. The Respondent's policy is to card anyone who appears to be under the age of 30. Previously, if a person appeared to be over the age of 30, employees were to enter the actual month and date, but use 1970 for the year. After the violation in this case, it changed its policy to require that the actual year be used as well. Employees must sign a policy and acknowledgement as well as a clerk's affidavit. (Exhibit A & B.) After the sale in this case, the Respondent provided remedial training. (Exhibit D.)

11. The Respondent uses a secret-shopper program to ensure that its employees are complying with the policy. If any employee receives a red card, all employees are re-trained.

12. Orejel was terminated after this incident. Subsequently, LAPD sent another decoy into the location. The clerk did not sell alcohol to that decoy. (Exhibit F.)

13. Hernandez appeared his age—18—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 the Licensed Premises on March 10, 2018, Hernandez displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Orejel.

14. 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 March 10, 2018, the Respondent's employee, Maribel Orejel, inside the Licensed Premises, sold an alcoholic beverage to Jorge Hernandez, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-9 & 13.)

5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)[2] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondent argued that Hernandez's height and weight, coupled with his confident demeanor, gave him the appearance of a person over the age of 21.

This argument is rejected. Although tall, Hernandez had a youthful face. The mere fact that Hernandez was an experienced decoy does not automatically mean that he appeared older. In this case, there is no evidence that his experience as a cadet had any impact upon his appearance or Orejel's evaluation of his appearance. Hernandez's appearance was consistent with that of a person who is 19 years old, i.e., Hernandez had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 13.)

PENALTY

The Department requested an aggravated penalty. In making this argument, the Department noted that, not only did Maribel Orejel actually looked at Jorge Hernandez's ID before selling alcohol to him, but the sale violated one of the conditions on the Respondent's license. The Respondent argued that a 10-day, all stayed penalty was appropriate in light of the Respondent's training and policies, including the changes it implemented after the sale.

The petition for conditional license refers to a "drive-in premises" and provides that "all sales of alcoholic beverages shall be made from within the licensed enclosure." In the Department's view, by handing alcohol to Hernandez through the pass-through window, the Respondent violated this condition. Yet the Department did not charge such a violation. Although the Department has the authority to amend the accusation at "[a]t any time before the matter is submitted for decision,"[3] the Department did not move to amend the accusation before the record was closed. If, as the Department argued, the sale in question also violated a condition on the license, it was incumbent upon the Department to allege a violation of section 23804. Its failure to do so, among other things, denied the Respondent the opportunity to present evidence on the issue.

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

[3] Gov't Code § 11507.

Accordingly, it is improper to use this uncharged alleged violation[4] as an aggravating factor.

Some mitigation is warranted based on the Respondent's policies and its training of its employees. This is offset, however, by its relatively short licensed history (just over three years). The penalty recommended herein complies with rule 144.

ORDER

The Respondent's off-sale beer and wine license is hereby suspended for 15 days.

Dated: March 11, 2019

Matthew G. Ainley
Administrative Law Judge

☑ Adopt

☐ Non-Adopt: _____

By: _____

Date: 04/14/19

[4] Since the Department did not amend the accusation and in light of the lack of evidence on the issue, no findings are made whether the sale at issue violated the condition or not.