

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

AB-9831

File: 20-426328; Reg: 18088373

PREMIER UPLAND, LLC,
dba 7-Eleven Store #2171-39210
204 North Euclid Avenue, Upland, CA 91786,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: February 6, 2020
Los Angeles, CA

ISSUED FEBRUARY 18, 2020

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

Respondent: Patricia G. Huber, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Premier Upland, LLC, doing business as 7-Eleven Store #2171-39210, appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 10 days (with 5 days conditionally stayed for one year, provided no further cause for discipline arises during that time) because its clerk sold an alcoholic beverage to a Department minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

¹ The decision of the Department, dated July 18, 2019, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on July 29, 2005. There is no prior record of departmental discipline against the license.

On December 18, 2018, the Department filed a single-count accusation charging that appellant's clerk, Destiny Lopez (the clerk), sold an alcoholic beverage to 16-year-old A.O.,² on August 10, 2018. Although not noted in the accusation, the decoy was working for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on April 25, 2019, documentary evidence was received, and testimony concerning the sale was presented by the decoy and Department Agent Vincent Rock. Karina Sando, appellant's store manager, testified on its behalf.

Testimony established that on August 10, 2018, Department Agent Rock entered the licensed premises followed shortly thereafter by the decoy. The decoy went to the cooler and selected a 12-pack of Coors Light beer in cans. He took the beer to the register and waited in line. When it was his turn he placed the beer on the counter and the clerk asked for his identification.

The decoy handed the clerk his California driver's license, which had a portrait orientation, and contained his correct date of birth (showing him to be 16 years old), a blue stripe indicating "AGE 18 IN 2019," and a red stripe indicating "AGE 21 IN 2022." (Exh. D-8.) The clerk looked at the license then completed the sale without asking any age-related questions. Agent Rock observed the sale while being assisted by an adjacent cashier. Both the decoy and agent then exited the store.

² We refer to the decoy by his initials only because he is under the age of 18.

Multiple Department agents re-entered the store with the decoy. Agent Rock contacted the clerk and told her that she had sold alcohol to a minor. The agent asked the decoy to identify the clerk who sold him the beer. The decoy said "she did" while looking at the clerk and standing approximately three feet away. Agent Rock asked how old he was and the decoy said he was 16 years old. The clerk and decoy were subsequently photographed together (exh. D-6) and the clerk was cited. During the investigation the clerk said that she mistakenly thought the decoy's license had a horizontal orientation and that she hit an override button on the register to make the sale.

The administrative law judge (ALJ) issued his proposed decision on April 30, 2019, sustaining the accusation and recommending a 10-day suspension. The Department adopted the proposed decision but modified the penalty to a 10-day suspension, with five of those days conditionally stayed for one year.³ The Department issued an Order to that effect on July 1, 2019, and a Certificate of Decision was issued on July 18, 2019.

Appellant then filed a timely appeal contending: (1) rule 141(b)(2)⁴ was violated when the Department utilized a decoy who did not display the appearance generally expected of a person under the age of 21; and (2) the Department erred when it failed to consider evidence of mitigation.

³ The penalty was reduced pursuant to Business and Professions Code section 24211 which provides:

The department may on its own motion at any time before a penalty assessment is placed into effect and without any further proceedings, review the penalty, but such review shall be limited to its reduction.

⁴ 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.

DISCUSSION

I

ISSUE CONCERNING DECOY'S APPEARANCE

Appellant contends the Department used a decoy who did not display the appearance generally expected of a person under the age of 21 due to his athletic stature and his experience as both a decoy and as a police Explorer. (AOB at pp. 7-8.)

Rule 141(b)(2) provides:

The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense.

This rule provides an affirmative defense, and the burden of proof lies with appellant.

(*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

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*, at 212 Cal.App.2d 106, 112.)

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

3. A.O. was born on XXXXXXXXXXXX. He was 16 years old on August 10, 2018. On that date, A.O. served as a minor decoy in an operation conducted by the Department at multiple locations, including at the Licensed Premises.
4. A.O. appeared and testified at the hearing in this matter. A.O.'s appearance at the hearing was generally as depicted in images that were taken during the operation on August 10, 2018. (Exhibits D-2 and D-3)

A.O. testified credibly that he was approximately 10 pounds lighter and slightly shorter during the operation. On the date of the hearing he was approximately five feet, ten inches tall and weighed approximately 240 pounds.

5. On the date of the operation, A.O. wore an untucked black polo shirt, blue jeans and white sneakers. He had no visible tattoos or jewelry. His face was fully exposed and his short hair was combed to the side in a neat haircut with closely cropped sides. A.O. had braces on his teeth. A.O. had shaved the night before the operation but still appeared to be clean shaven in photographs that were taken of him. A.O. shaved the night before the hearing in this matter and he appeared to still be clean shaven during the hearing because his facial hair was so thin.

[¶ . . . ¶]

12. A.O. had served as a decoy on two prior operations for the Department before December 31, 2017. A Department agent assisted the Corona Police Department explorer program he participated in and that agent had asked him to volunteer as a decoy. A.O. was an explorer with that program since October 2015.

13. A.O. appeared slightly older than his chronological age of 16 years old during the decoy operation. This was solely because of his large size. His braces and light facial hair made his appearance consistent with his chronological age. 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 Lopez at the Licensed Premises on August 10, 2018, A.O. displayed the appearance which would generally be expected of a person less than 21 years of age during his interactions with Lopez.

(Findings of Fact, ¶¶ 3-13.) Based on these findings, the Department addressed appellant's rule 141(b)(2) defense:

11. Respondent also asserted that the appearance of the decoy did not comply with rule 141(b)(2). As noted above, Lopez did not testify in this matter to establish that her error was the result of A.O.'s appearance. Lopez, in fact, asked for A.O.'s identification which suggests that she had reason to believe that A.O. might be underage. (Exhibit D-8) The exchanges between Lopez and A.O. were minimal after the identification was produced. Further, A.O. testified in this matter and his appearance matched the appearance he presented to Lopez on the date of the operation. Even though A.O.'s height made him appear older than 16, he had the appearance "which could generally be expected of a person under 21 years of age" which is the standard required by rule 141(b)(2).

As previously noted, the clerk did not testify to establish facts suggesting an identification issue or whether there was anything in A.O.'s actions, manner, or appearance that led Lopez to reasonably conclude that A.O. was over 21. The Department has established compliance with rule 141(b)(2) and the Respondent has failed to rebut this evidence. (Findings of Fact ¶¶ 3-14)

(Conclusions of Law, ¶ 11.) We agree with this analysis and conclusion.

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 not that the decoy must display the appearance of a "childlike teenager" but "the appearance which could generally be expected of a person under 21 years of age." In Findings of Fact paragraphs 3 through 13, and Conclusion of Law paragraph 11, the Department found that the decoy met this standard.

Appellant also argues that the decoy displayed a demeanor which was not typical for a teenager because of his experience as a decoy and as a police Explorer. It maintains 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.

Appellant presented no evidence that the decoy's athletic stature or law enforcement experience *actually resulted* in him displaying an appearance of a person age 21 years 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. Appellant relies entirely on a difference of opinion — its versus that of the Department — as to what conclusion the evidence in the record supports. Absent an evidentiary showing, this argument must fail. Ultimately, appellant is asking this Board to consider the same set of facts and reach a different conclusion, despite substantial evidence to support those findings. This the Board cannot do.

II

ISSUE CONCERNING PENALTY

Appellant contends that the ALJ failed to sufficiently mitigate the penalty. It maintains a lesser penalty, or outright reversal, would be more appropriate in light of appellant's 13 years of discipline-free operation and its implementation of training and procedures to prevent sales to minors. (AOB at pp. 9-11.)

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.*)

Appellant argues that additional evidence of mitigation was presented at the hearing but was not considered: namely, (1) the length of licensure at the premises without discipline, (2) positive actions by the licensee to correct the problem, and (3) documented training of licensees and employees. Appellant contends that these efforts should have been considered as additional positive actions by the licensee to correct the problem, thereby meriting additional mitigation of the penalty.

The decision itself debunks appellant's assertion that these factors were ignored. (See Decision, at p. 8.) The ALJ takes note of all of these factors in mitigation, but simply reaches the conclusion that a 10-day suspension is appropriate. While appellant argues at length against this determination, it fails to acknowledge that the penalty actually imposed is a 10-day suspension with five days conditionally stayed for one year.

Appellant's disagreement with the penalty imposed does not mean the Department abused its discretion. 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 penalty here is within the bounds of the Department's discretion, and the Board is simply not empowered to reach a contrary conclusion from that of the Department — and substitute its own judgment — when, as here, the underlying decision is reasonable and supported by substantial evidence. We find no abuse of discretion and the penalty imposed complies with the guidelines of rule 144.

ORDER

The decision of the Department is affirmed.⁵

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

⁵This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

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

APPENDIX

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

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

PREMIER UPLAND LLC
7-ELEVEN STORE 2171-39210A
204 N EUCLID AVENUE
UPLAND, CA 91786

OFF-SALE BEER AND WINE - LICENSE

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

RIVERSIDE DISTRICT OFFICE

File: 20-426328

Reg: 18088373

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 25, 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 August 28, 2019, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: July 18, 2019



Matthew D. Botting
General Counsel

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

**IN THE MATTER OF THE ACUUSATION
AGAINST:**

Premier Upland, LLC
Dba 7-Eleven Store 2171-39210A
204 Euclid Ave
Upland, CA 91786

File No.: 20-426328

Reg. No.: 18088373

Respondent(s)/Licensee(s).

ORDER

The Department hereby adopts the Proposed Decision of the Administrative Law Judge dated April 30, 2019, in the above-entitled matter, and pursuant to Business and Professions Code section 24211, the Department reduces the discipline in this matter as follows:

Respondent's off-sale beer and wine license is hereby suspended for a period of 10 days, with 5 days thereof stayed for a period of one year, commencing the date when the decision in this matter becomes final, upon the condition that no subsequent final determination is made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred during the period of the stay. Should such a determination be made, the Director of the Department of Alcoholic Beverage Control may, in the Director's sole discretion and without further hearing, vacate the stay and revoke the license, and should not such determination be made, the stay shall become permanent.

Sacramento, California

Dated: July 1, 2019



Matthew Botting
General Counsel

For: Jacob Appelsmith
Director

Pursuant to Government Code section 11521(a), any party may petition for reconsideration of this decision. The Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or on the effective date of the decision, whichever is earlier.

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9, of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Premier Upland, LLC,
DBA: 7-Eleven Store 2171-39210A
204 N. Euclid Ave.
Upland, California 91786

Respondent

Off-Sale Beer and Wine License

} File: 20-426328
} Registration: 18088373
} License Type: 20
} Page Count: 90
} Reporter:
} Carlos Hohicho-CSR # 13111
} Kennedy Reporting
} **PROPOSED DECISION**

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at San Bernardino, California, on April 25, 2019.

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

Donna Hooper, Attorney, represented respondent Premier Upland, LLC (Respondent).

The Department seeks to discipline the Respondent's license on the grounds that, on or about August 10, 2018, respondent-licensee's agent or employee, Destiny Lopez, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to A.O.¹, an individual under the age of 21 in violation of Business and Professions Code section 25658(a)² (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 April 25, 2019.

¹ In this matter, the Decoy used by the Department was under 18 years of age at the time of the hearing. He is referred to by his initials in this proposed decision to protect his privacy.

² All statutory references are to the Business and Professions Code unless otherwise noted.

FINDINGS OF FACT

1. The Department filed the accusation on December 18, 2018. (Exhibit D-1)
2. On July 29, 2005 the Department issued a type 20, off-sale beer and wine license to the Respondent for the above-described location (the Licensed Premises). There is no record of prior Department discipline against the Respondent's license.
3. A.O. was born on October 17, 2001. He was 16 years old on August 10, 2018. On that date, A.O. served as a minor decoy in an operation conducted by the Department at multiple locations, including at the Licensed Premises.
4. A.O. appeared and testified at the hearing in this matter. A.O.'s appearance at the hearing was generally as depicted in images that were taken during the operation on August 10, 2018. (Exhibits D-2 and D-3) A.O. testified credibly that he was approximately 10 pounds lighter and slightly shorter during the operation. On the date of the hearing he was approximately five feet, ten inches tall and weighed approximately 240 pounds.
5. On the date of the operation, A.O. wore an untucked black polo shirt, blue jeans and white sneakers. He had no visible tattoos or jewelry. His face was fully exposed and his short hair was combed to the side in a neat haircut with closely cropped sides. A.O. had braces on his teeth. A.O. had shaved the night before the operation but still appeared to be clean shaven in photographs that were taken of him. A.O. shaved the night before the hearing in this matter and he appeared to still be clean shaven during the hearing because his facial hair was so thin.
6. On August 10, 2018 A.O. was brought to the Licensed Premises by agents of the Department for the purpose of trying to buy alcohol. Before going into the Licensed Premises, A.O. was instructed to carry his identification, show it if requested, and to be truthful regarding his age if asked. A.O. carried his California driver's license as the identification he would produce if asked.
7. Department Agent V. Rock (Rock) entered the Licensed Premises before A.O. to ensure his safety. A.O. entered the Licensed Premises after Rock but did not interact with him. A.O. was not familiar with the location but was able to immediately find the coolers. Once he found them, A.O. selected a 12-pack of Coors Light beer cans. (Exhibit D-5) A.O. took the beer to the register and waited in line for the next cashier. After the people before him were assisted, A.O. approached the register. A.O. presented the beer to the clerk for purchase by placing it on the counter. The clerk asked A.O. for identification

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and A.O. produced his California driver's license. The clerk took the license from A.O. and appeared to examine it before returning it to A.O. (Exhibit D-8)

8. A.O.'s California driver's license showed that he was 16 years old based on his date of birth which was depicted on the license. It also had a blue stripe that showed he was not 18 until the year 2019. The identification also showed that he was under 21 by the red stripe warning saying he would not be 21 until the year 2022. The license was also in a portrait orientation. (Exhibit D-7) Despite this information, the clerk appeared to ask no questions of A.O. about his age during any of their interaction. The clerk rang up the beer and told A.O. the price. A.O. paid the clerk for the beer with \$20 he was given by the agents, took possession of it and left. The entire interaction between the clerk and A.O. was brief. (Exhibit D-8) Rock witnessed the sale to A.O. while he was simultaneously served by another clerk who was working an adjacent register. (Exhibit D-8)

9. After leaving, A.O. went to the vehicle where the Department agents were waiting. A.O. then returned with multiple agents, including Rock, to the Licensed Premises. Upon entering, Rock made contact with the clerk who he watched make the sale to A.O. and identified himself as law enforcement. Rock told the clerk she had made a sale to an underage person.

10. After Rock told the clerk they were there because she had sold alcohol to a minor, Rock asked A.O. to identify the clerk who sold the beer. A.O. responded "she did" towards the clerk while the clerk was looking at A.O. and the agents. A.O. was then asked how old he was to which he responded by saying he was 16 years old. A.O. was standing approximately three feet away from the clerk when A.O. responded to Rock's question. The clerk was identified as Destiny Lopez (Lopez) during Rock's investigation of the sale to A.O. (Exhibit D-4)

11. Lopez was subsequently photographed while standing next to A.O. while he held the Coors Light beer in one hand and his driver's license in his other hand. (Exhibit D-6) From the initial law enforcement contact with Lopez until after this photograph was taken; A.O. was in the immediate presence of Lopez and the agents. After the photograph of Lopez and A.O. was taken, A.O. left the Licensed Premises and waited in one of the agents' vehicles. Lopez stated to Rock that she made a mistake in the sale and that she had believed the identification was in a horizontal orientation and that she did an override to make the sale. Lopez was subsequently issued a citation for the sale of beer to A.O.

12. A.O. had served as a decoy on two prior operations for the Department before December 31, 2017. A Department agent assisted the Corona Police Department explorer program he participated in and that agent had asked him to volunteer as a decoy. A.O. was an explorer with that program since October 2015.

13. A.O. appeared slightly older than his chronological age of 16 years old during the decoy operation. This was solely because of his large size. His braces and light facial hair made his appearance consistent with his chronological age. 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 Lopez at the Licensed Premises on August 10, 2018, A.O. displayed the appearance which would generally be expected of a person less than 21 years of age during his interactions with Lopez.
14. Lopez did not testify in this matter to explain her age related impressions of A.O. or why she sold him alcohol after he presented a California driver's license that clearly identified him as being 16 years of age. Lopez remarked to Rock that she did make the sale to A.O. and her statement about erroneously thinking the license was horizontal made it clear that she was aware of the impact of age related features on a California driver's license.
15. Karina Sando (Sando) testified for the Respondent. She is a full-time store manager for the Licensed Premises and has worked there since 2009. Sando is familiar with the policies and procedures of the Licensed Premises and is actively involved in its operation. The Licensed Premises requires all employees serving as clerks to comply with state law and prepare clerk's affidavits. (Exhibit L-1) The Licensed Premises trains all employees regarding sales of alcohol in a backroom program prior to allowing them to work at registers. This block of instruction is a 2 hour computer training module and all employees have to pass a test administered after the instruction before they can move onto being trained at the register. The module is focused specifically on age restricted sales, like alcohol, and it includes training on identifications and their features. (Exhibit L-2)
16. Lopez, like all other register employees, had been trained and had prepared a clerks affidavit prior to the sale that was made to A.O. Her training included the above described block of instruction. Lopez was terminated because of the underage sale incident pursuant to the Licensed Premises' employment policy. Lopez violated the existing policy that made selling alcohol to a person under 21 a terminable offense. This policy was in place prior to the incident in this matter.
17. After the incident with A.O. and Lopez, all of the employees who sell age restricted products had to review the age restricted sale module even though all new employees reviewed this module upon hire. (Exhibit L-2)

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18. Prior to the incident in this matter, the Respondent took other steps to try to prevent underage sales. At the time of the sale made by Lopez, the Licensed Premises used a register system that activated during an alcohol sale. When an alcoholic beverage was scanned, the register would prompt the cashier to check for identification. To do this, the policy was to obtain identification from the customer if they appeared to be under 30 years of age. As a result of the incident, Sando began to instruct employees to check identification if the person appeared under 50 years of age. The register system did and continues to allow clerks to override the identification system manually. The Respondent also continued utilizing a secret shopper program to test that clerks were following proper protocols in making alcohol sales. An improper sale would lead to a warning and employees were subject to termination for multiple violations.

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

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.
2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.
3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.
4. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on August 10, 2018 the Respondent's clerk, Destiny Lopez inside the Licensed Premises, sold an alcoholic beverage to A.O., a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 2-18)
5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141³ and, therefore, the accusation should be dismissed. Specifically, the Respondent argued that the face to face identification failed to comply with rule 141(b)(5) and the appearance of the decoy did not comply with rule 141(b)(2). Any of

³ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

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these alleged violations, if established, would be affirmative defenses and require dismissal of the accusation pursuant to rule 141(c).

6. There is no credible evidence supporting the assertions by the Respondent that there was a failure to comply with rule 141. Regarding the rule 141(b)(5) violation, *Acapulco Restaurants, Inc. v. Alcoholic Beverages Control Appeals Board* (1998) 67 Cal.App.4th 575 confirmed that a face to face must occur for compliance, but that case never established a baseline standard for what was a compliant face to face identification. The subsequent decision in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1687 held that the regulation at "section 141, subdivision.(b)(5), ensures-admittedly not as artfully as it might-that the seller will be given the opportunity, soon after the sale, to come "face-to-face" with the decoy." *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1687, 1698. This decision confirmed that the purpose of the face to face was to give the seller notice of who the decoy was.

7. Further clarification of what constituted a compliant face to face occurred in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2017) 18 Cal.App.5th 541. This case is particularly helpful since the identification by A.O. of Lopez in this matter was substantively similar to the identification that was found to be compliant with rule 141(c) in that case. In finding that identification compliant, that court ruled:

"Here there is no violation of Rule 141, as explained above, because the decoy made a face-to-face identification by pointing out the clerk to the officer inside the store while approximately 10 feet from her, standing next to her when the officer informed her she had sold alcohol to a minor, and taking a photograph with her as the minor held the can of beer he purchased from her. She had ample opportunity to observe the minor and to object to any perceived misidentification. The rule requires identification, not confrontation. The identification here meets the letter and the spirit of Rule 141." *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2017) 18 Cal.App.5th 541, 547

8. While, general due process considerations demand a fair identification be facilitated by law enforcement, these cases makes clear that this particular regulation is focused on the more narrow concern of allowing the *seller* the opportunity to be aware of the identity of the decoy. It stands to reason that compliance with Rule 141, subdivision (b)(5) occurs if the clerk and the decoy, during the process of the investigation, prior to the citation being issued or departure of the decoy, are brought in reasonable proximity to each other to assure that the seller knows (or reasonably ought to know) that he or she is being identified as the seller by the decoy.

9. A.O. testified to identifying Lopez after Rock approached Lopez at the counter, got her attention and identified himself as a law enforcement officer investigating a sale of alcohol to a minor. While the sale to A.O. was discussed between Rock and Lopez at the counter, A.O. stood adjacent to Rock. Right after this discussion, while in the immediate presence of Lopez, A.O. pointed out Lopez as the seller and said he was sixteen years old in response to Rock's question about his age. Lopez was clearly aware that the decoy was A.O. because she discussed making the sale to A.O. with the agents and described that she erroneously thought his identification was horizontal. Before Lopez was cited, A.O. and Lopez were photographed next to each other. (Findings of Fact ¶ 11 and Exhibit D-6) Lopez clearly came face to face with A.O. under circumstances that made it clear that Lopez had been identified as the person who sold A.O. beer and that A.O. was the minor at issue. Though Lopez did not testify in this matter, her statement to Rock made it clear that she understood the decoy was A.O. (Findings of Fact ¶¶ 3-14)

10. None of the evidence presented by the Respondent rebutted the credible evidence presented by the Department that this was a fully compliant identification that allowed Lopez to become aware that A.O. was the decoy. Respondent has offered no evidence or argument suggesting that the identification violated state or federal due process considerations. Given the totality of the evidence presented by the Department credibly establishing compliance with rule 141(b)(5), the Respondent's assertions that compliance did not occur are unsupported.

11. Respondent also asserted that the appearance of the decoy did not comply with rule 141(b)(2). As noted above, Lopez did not testify in this matter to establish that her error was the result of A.O.'s appearance. Lopez, in fact, asked for A.O.'s identification which suggests that she had reason to believe that A.O. might be underage. (Exhibit D-8) The exchanges between Lopez and A.O. were minimal after the identification was produced. Further, A.O. testified in this matter and his appearance matched the appearance he presented to the Lopez on the date of the operation. Even though A.O.'s height made him appear older than 16, he had the appearance "which could generally be expected of a person under 21 years of age" which is the standard required by rule 141(b)(2). As previously noted, the clerk did not testify to establish facts suggesting an identification issue or whether there was anything in A.O.'s actions, manner, or appearance that led Lopez to reasonably conclude that A.O. was over 21. The Department has established compliance with rule 141(b)(2) and the Respondent has failed to rebut this evidence. (Findings of Fact ¶¶ 3-14)

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PENALTY

The Department recommended that the Respondent's license be suspended for 10 days by taking into account the long period of licensure without discipline as mitigation. A standard penalty in this matter would be 15 days.

The Respondent argued for a 10 day all stayed penalty if the Accusation were sustained based on the long period of licensure without prior incidents and the Respondent's past and present efforts to prevent underage sales.

The Respondent did present credible evidence showing that established and enforced policies to prevent sales of alcoholic beverages to underage individuals were in place, even prior to this incident, and that further steps were taken after the sale to A.O. to prevent underage sales. The Respondent has a sustained history of operation for over 13 years, until this violation, without a prior incident. This history appears to be the product of an effort to comply rather than just luck.

After the sale to A.O., the Respondent communicated its seriousness to other employees by terminating Lopez and having all employees retrain on the module. The Respondent's manager changed the operating policy to require carding all persons who appeared to be under 50. The Respondent has made a legitimate effort to attempt to comply with the Act and limit errors that might lead to underage sales. All of the above are appropriate factors in mitigation to be weighed in this matter.

Mitigation is found and there are no factors in aggravation. This supports a downward departure from the standard penalty. The penalty recommended herein complies with rule 144.

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ORDER

The Respondents' off-sale beer and wine license is hereby suspended for a period of 10 days.

Dated: April 30, 2019

Alberto Roldan
Alberto Roldan
Administrative Law Judge

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| <input checked="" type="checkbox"/> Adopt | Except as to pending: 10 days, stayed for 12 months |
| <input type="checkbox"/> Non-Adopt: | |
| By: <u>Alberto Roldan</u> | |
| Date: <u>6/25/19</u> | |