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

AB-9836
File: 21-568276; Reg: 19088509

7-ELEVEN, INC. and TERA TERA, INC.,
dba 7-Eleven Store #39521B
1324 West 7th Street
Los Angeles, CA 90017-2304,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: March 5, 2020
Los Angeles, CA

ISSUED MARCH 19, 2020

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

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

OPINION

7-Eleven, Inc. and Tera Tera, Inc., doing business as 7-Eleven Store #39521B, appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 15 days because their clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

[1]The decision of the Department, dated August 20, 2019, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on May 16, 2016. There is no record of prior departmental discipline against the license.

On January 31, 2019, the Department filed a single-count accusation against appellants charging that, on December 12, 2018, appellants' clerk, Mohit Sharma (the clerk), sold an alcoholic beverage to 18-year-old Dominic Michael Malachi (the decoy). 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 May 29, 2019, documentary evidence was received and testimony concerning the sale was presented by the decoy and LAPD Officer Cristian Valenzuela. Amal Estrada, president and sole shareholder of co-licensee Tera Tera, Inc., appeared on behalf of appellants.

Testimony established that on December 12, 2018, Ofcr. Valenzuela entered the licenced premises in a plain clothes capacity, followed shortly thereafter by the decoy. The decoy went to the coolers where he selected a three-pack of Modelo tall beer cans. He then went to the register and waited in line. When it was his turn, the decoy set the beer on the counter. The clerk briefly walked away from the register. As he returned, the decoy held out some money which the clerk accepted. The clerk scanned the beer and completed the sale without asking for identification.

As the decoy started to leave, the clerk said something to him and the decoy leaned in and said “what?” because he did not hear clearly what the clerk said. The decoy testified that the clerk said something like “hey, you don’t look 21, you look young,” but that the clerk did not ask him any questions and therefore he did not respond.

The decoy exited the premises. Subsequently, he made a face-to-face identification of the clerk and the two of them were photographed together. (Exh. 4A.)

The administrative law judge (ALJ) issued her proposed decision on June 26, 2019, sustaining the accusation and recommending that the license be suspended for 15 days. The Department adopted the proposed decision in its entirety on August 12, 2019 and a certificate of decision was issued on August 20, 2019.

Appellants then filed a timely appeal contending (1) the decoy failed to answer a question about his age, in violation of rule 141(b)(4),[2] and (2) the findings in the decision are not supported by substantial evidence. These issues will be discussed together.

DISCUSSION

Appellants contend that they established a defense under rule 141(b)(4) and that the ALJ's finding to the contrary is not supported by substantial evidence. (AOB at pp. 12-17.)

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

[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.

> 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.)

Department rule 141(b)(4) provides: "A decoy shall answer truthfully any questions about his or her age." If the rule is violated, a licensee has a complete defense to a sale-to-minor charge pursuant to rule 141(c).

In the instant case, the ALJ made extensive findings on the interaction between the clerk and the decoy, and whether rule 141(b)(4) was violated. Based on the testimony of Ofcr. Valenzuela and the decoy, as well as video evidence, the ALJ concluded:

> This rule 141(b)(4) argument is rejected. The decoy presented credible testimony that he only heard the clerk make a statement about how young the decoy looked and that the clerk did not ask him any questions on December 12, 2018. Even the Respondents acknowledged that the video depicts the decoy leaning in. It is more probable than not that the decoy leaned in, in an attempt to hear what the clerk was saying. . . .

(Conclusions of Law, ¶ 7.)

The ALJ further determined that Ofcr. Valenzuela's testimony (that the clerk *did* ask how old the decoy was) was less credible than that of the decoy (who testified that the clerk did *not* ask his age) because the decoy's testimony was based on his independent recollection of the event whereas the officer's was not. (*Ibid*.)

It is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Bd*. (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) "The trier of fact . . . is the sole judge of the credibility of the witnesses [and] may disbelieve them even though they are uncontradicted if there is any rational ground for doing so . . ." (*Pescosolido v. Smith* (1983) 142 Cal.App.3d 964, 970-971 [191 Cal.Rptr. 415].) The Appeals Board may not interfere with credibility determinations absent a clear showing of abuse of discretion, and we find none here. The ALJ determined that the officer's testimony, based solely on his report – not on his independent recollection of events – was less credible than the testimony of the decoy. The Board may not reach a different conclusion absent a finding that the ALJ abused her discretion and we find no basis for that here.

In an analogous case before this Board involving rule 141(b)(4), a clerk made a statement to the decoy to the effect of, "I would never have guessed it. You must get asked a lot." The decoy said nothing in response. In that case appellants maintained, and the Board agreed, that since the statement was about the decoy's apparent age, rule 141(b)(4) had been violated and that the decoy should have spoken up and told the clerk he was underage. (*Garfield Beach CVS, LLC* (2015) AB-9434 at pp. 7-9.) On appeal, however, the Court of Appeals disagreed. It annulled the Board's decision and found that there is no affirmative duty on the part of the decoy to clarify or correct a clerk's age-related statement:

> Rule 141, subdivision (b)(4) provides that "[a] decoy shall answer truthfully any questions about his or her age." The rule's guidance is clear and unambiguous. **Minor decoys do not need to respond to statements of any kind nor do they need to respond truthfully to questions other than those concerning their ages.** Thus, Rule 141 does not require minor decoys to correct mistakes articulated by licensed alcohol sellers. Instead, the minor decoys need to respond truthfully only to questions about their ages. In short, Rule 141 sets forth clear, unambiguous, and fair guidance for minor decoys to follow during the Department's operations. Consequently, the Department properly construed the plain language of Rule 141 in determining the minor decoy in this case was not required to respond to the clerk's statement that might have related to the decoy's age.

(*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (*Garfield Beach*) (2017) 7 Cal.App.5th 628, 637 [213 Cal.Rptr.3d 130], emphasis added.)

In another case involving 141(b)(4), the clerk said to the decoy, "oh, you are so young" and the decoy nodded and laughed a little, but did not respond, and no any age-related questions were asked. (*7-Eleven/Johal* (2014) AB-9403 at p. 2.) The Board held in that case:

> We decline to . . . include a requirement that any and all statements by a clerk require a response from the decoy, or that the decoy in this case had a duty to speak when there was no ambiguity which required clarification and no miscalculation as to age by the clerk.

(*Id. at p. 12*.) As the Court of Appeals in *Garfield Beach* noted: "[u]nder the reasoning of *7-Eleven*, the Appeals Board should have affirmed the license suspension in this case as well." (*Garfield Beach, supra,* 7 Cal.App.5th at p. 639.)

We find that the facts of the instant case require us to reach the same conclusion, and for the same reasons, as *7-Eleven* and *Garfield Beach.* The statement of the clerk, "hey, you don't look 21, you look young" is not a question. As instructed by the Court of Appeal, "[m]inor decoys do not need to respond to statements of any kind nor do they need to respond truthfully to questions other than those concerning their ages." (*Garfield Beach, supra,* 7 Cal.App.5th at p. 637.) Rule 141(b)(4) cannot be enlarged by this Board to include an additional requirement that decoys respond to statements – even when those statements may be age-related.

ORDER

The decision of the Department is affirmed.[3]

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

---

[3]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:

7-ELEVEN, INC., AND TERA TERA, INC.
7-ELEVEN STORE 39521B
1324 WEST 7TH STREET
LOS ANGELES, CA 90017-2304

OFF-SALE GENERAL - LICENSE

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

CERRITOS ENFORCEMENT OFFICE

File: 21-568276

Reg: 19088509

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on August 12, 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 September 30, 2019, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: August 20, 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 Tera Tera, Inc. Dba: 7-Eleven Store 39521B 1324 West 7th Street Los Angeles, California 90017-2304 Respondents	}	File: 21-568276 Reg.: 19088509 License Type: 21 Word Count: 11,357 Reporter: Ernalyn M. Alonzo California Reporting
Off-Sale General License	}	**PROPOSED DECISION**

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Cerritos, California, on May 29, 2019.

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

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

The Department seeks to discipline the Respondents' license on the grounds that, on or about December 12, 2018, the Respondents-Licensees' agent or employee, Mohit Sharma, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Dominic Michael Malachi, 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 May 29, 2019.

FINDINGS OF FACT

1. The Department filed the accusation on January 31, 2019.

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

2. The Department issued a type 21, off-sale general license to the Respondents for the above-described location on May 16, 2016 (the Licensed Premises).

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

4. At the hearing, the Respondents produced a DVD (Exhibit B) and flash drive (Exhibit C), which were both admitted into evidence, in the event that one or the other was not viewable by the undersigned. The Respondents played at the hearing three video files (20181212-0009-2305-116, 20181212-0009-2306-117, and 20181212-0009-2306-128). The undersigned has incorporated in the Findings of Facts some of what is depicted in the video files below, with a footnote inserted to reference when a scene from a video file is referenced and/or included along with witness testimony.

5. Dominic Michael Malachi (hereinafter referred to as decoy Malachi) was born on January 20, 2000. On December 12, 2018, he was 18 years old. On that date he served as a minor decoy in an operation conducted by the Los Angeles Police Department (hereinafter referred to as LAPD).

6. Decoy Malachi appeared and testified at the hearing. On December 12, 2018, he was 5 feet 11 inches tall and weighed approximately 195 pounds. He wore a blue sweatshirt, blue pants and white shoes. He wore a black Raiders baseball-style cap on his head. He described his hair as a buzz cut with the clippers at half-length. (Exhibits 2A, 2B and 4A.) His appearance at the hearing was similar in respect to his facial appearance. He otherwise wore a grey suit with a white shirt, and clear eye glasses. He did not wear the baseball cap. The top of his hair was four inches longer and styled in a comb-over. He was 6 feet tall and weighed approximately 205 pounds.

7. On December 12, 2018, Los Angeles Police Department (LAPD) Officer Valenzuela entered the Licensed Premises, in a plain clothes capacity, followed shortly thereafter by decoy Malachi. Decoy Malachi walked straight to the alcoholic beverage coolers and selected a three-pack of Modelo tall beer cans. (Exhibit 4B.) Decoy Malachi brought the three-pack of beer to the front sales counter and waited in line behind one other customer. Decoy Malachi had on his person his valid California Driver License.

8. Decoy Malachi reached the sales counter behind which stood a male clerk, Mohit Sharma (hereinafter referred to as clerk Sharma). Decoy Malachi placed the three-pack of Modelo beer cans on the counter. The video depicts clerk Sharma walking away from the sales counter. As clerk Sharma returned to the sales the video depicts decoy Malachi holding out money ($20), which clerk Sharma accepts, without looking at the decoy, scans the beer, and makes change.[2] The video appears to depict that as clerk Sharma is

[2] Exhibit B or C, video file 20181212-0009-2305-116.

handing the change to the decoy he looks at the customers entering the store and not at the decoy. Decoy Malachi accepts the change from clerk Sharma and places it in the front pocket of his sweatshirt.[3] The sales transaction is completed. Up to this point, clerk Sharma did not ask the decoy for his ID, age or any age-related questions. The video appears to depict that clerk Sharma did not look at the decoy during the entire transaction.[4]

9. The video then goes on to depict that as the decoy is placing his right hand on top of the three-pack of Modelo beer, it is then that clerk Sharma looks at the decoy and makes a comment, the decoy leans in, as if to hear what is being said, the decoy appears to mouth the word, "what," the clerk places his hand over his mouth, as if realizing his mistake, neither the clerk or decoy appear to say anything else but look at each other, the clerk smiles.[5] The decoy heard clerk Sharma make a statement about the decoy appearing young. The decoy did not hear the clerk ask any questions, including any question about his age. The video appears to depict the decoy to remain standing at the counter looking at the clerk, who smiles and eventually walks away while continuing to smile at the decoy, and then the clerk attends to another customer, allowing the decoy to take the beer and leave the store.[6] The decoy exits the store with the beer. Clerk Sharma did not ask the decoy for his ID. There is no evidence clerk Sharma repeated anything to the decoy.

10. Officer Valenzuela witnessed the above-described sales transaction while posing as a customer. Officer Valenzuela did not hear decoy Malachi respond in any way. Officer Valenzuela exited the store shortly after the decoy.

11. Decoy Malachi re-entered the Licensed Premises with two other LAPD officers. One of the officers asked decoy Malachi to identify the person who sold him the beer. Decoy Malachi pointed at clerk Sharma and identified clerk Sharma as the person who sold him the three-pack of Modelo beer. Decoy Malachi and clerk Sharma were standing two to three feet apart and made eye contact at the time of this identification. A photo of clerk Sharma and decoy Malachi was taken after the face-to-face identification, with decoy Malachi holding the three-pack of Modelo beer in his right hand while standing next to clerk Sharma. (Exhibit 4A.)

---

[3] Exhibit B or C, video file 20181212-0009-2306-117.
[4] Exhibit B or C, video files 20181212-0009-2305-116 and 20181212-0009-2306-117.
[5] Exhibit B or C, video files 20181212-0009-2306-117 and 20181212-0009-2306-128. The latter video angle appears to depict the decoy leaning in, mouthing "what" and saying nothing else but looking at the clerk and waiting.
[6] Exhibit B or C, video file 20181212-0009-2306-117.

12. Clerk Sharma did not appear and did not testify at the hearing. There was no evidence that clerk Sharma was distracted during the sales transaction or the face-to-face identification.

13. Decoy Malachi 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 Sharma at the Licensed Premises on December 12, 2018, decoy Malachi displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk.

14. Four hours after the completion of the sales transaction officer Valenzuela wrote in his investigative report that he overheard clerk Sharma say to the decoy, "Hey you don't look 21, you look young. How old are you?" (Exhibit A.) During the giving of his testimony Officer Valenzuela had no direct, independent recollection as to the timing of the clerk's statements and relied entirely upon his report in that regard and as to what was said. Officer Valenzuela admitted his report had inaccuracies in it.

(Respondents' Witness)

15. Amal Estrada appeared and testified at the hearing. Mrs. Estrada said that she was the licensee of the premises since October 12, 2012, with ownership originally under her name, until 2016 when she incorporated under Tera Tera, Inc. There was no evidence presented as to whether the original license under Mrs. Estrada's name had any prior disciplinary action.

16. Mrs. Estrada became aware of the said sale to minor violation on December 12, 2018. Thereafter she spoke with clerk Sharma, who said he was making a pizza prior to the said sales transaction. Clerk Sharma told Mrs. Estrada he mistakenly recognized the decoy as a regular customer. Clerk Sharma told Mrs. Estrada he asked how old the decoy was. Mrs. Estrada did not know whether clerk Sharma received any discipline or admonishment for the said sale. Clerk Sharma quit his employment with the Respondents approximately one week after December 12, 2018. There was no evidence as to why he quit. Mrs. Estrada tried to contact clerk Sharma for the hearing, and received no response from him.

17. Mrs. Estrada was asked to explain what the Respondents do to prevent alcohol sales to minors. She explained that the Respondents have a training module called, "Coming of Age," which employees are required to take when they are hired and repeat annually. She further explained that store policy relating to age-restricted sales is "that we card anyone who looks under 30."

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 December 12, 2018, the Respondents-Licensees' employee, clerk Mohit Sharma, inside the Licensed Premises, sold alcoholic beverages, to-wit: a three-pack of Modelo beer, to Dominic Michael Malachi, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 5-13.)

5. The Respondents argued the decoy operation at the Licensed Premises failed to comply with rule 141(b)(4) and, therefore, the accusation should be dismissed pursuant to rule 141(c).

6. With respect to rule 141(b)(4), the Respondents argued clerk Sharma asked the decoy his age and the "decoy must have choked and didn't answer it, there is no evidence he answered [the question] truthfully."

7. This rule 141(b)(4) argument is rejected. The decoy presented credible testimony that he only heard the clerk make a statement about how young the decoy looked and that the clerk did not ask him any questions on December 12, 2018. Even the Respondents acknowledged that the video depicts the decoy leaning in. It is more probable than not that the decoy leaned in, in an attempt to hear what the clerk was saying. Officer Valenzuela had no independent recollection of the timing of the clerk's statements, relying on his report in that regard and as to what the clerk said. Officer Valenzuela admitted he incorrectly reported that the clerk rang up the beer twice, before and after the clerk's statements, when the clerk had only rung up the beer once. The report is therefore not reliable, including not reliable as to the order of the two sentences written in the

report. In other words, it is possible the clerk asked how old the decoy was first before stating that he looked young. This is more probable since the decoy only heard the clerk's statement that he looked young and did not hear a question. While both the decoy and officer testified credibly, the decoy's sworn, direct testimony is found to be the more credible as to when the clerk made the statement (after the transaction was completed) and what the decoy heard the clerk say. The decoy testified based on his independent recollection of the said operation. The decoy did not exhibit a bias or motive in the presentation of his testimony as argued by the Respondents. The decoy credibly maintained upon cross-examination that clerk Sharma did not ask him how old he was but had only made a comment. While the decoy could not recall the exact words the clerk used the decoy was adamant the clerk did not pose a question but made a comment about the decoy appearing young. Officer Valenzuela on the other hand had no independent recollection and relied wholly on his report, which he admitted had inaccuracies. As such, the officer's testimony and report are not as reliable as the decoy's sworn, direct testimony.

8. The preponderance of the evidence established the decoy did not hear the question posed. The video also appears to depict the decoy mouthing the word, "What?" (Exhibit B or C, video file ending 2306-128). While Officer Valenzuela did not hear the decoy say anything, the decoy's voice was projected in an opposite direction from where the officer stood. The video also appears to depict that neither the clerk nor the decoy says anything else. (Exhibit B or C, video file ending 2306-117.) The clerk appears only to put his hand to his mouth, smile, continue to smile and then walk away. There was no evidence presented that the clerk repeated the question. The decoy clearly gave the clerk ample opportunity to say something else by remaining at the counter and looking the clerk in the eye for an extended period of time. However, it appears from the video that it was not until after the completion of the transaction that the clerk appeared to look at the decoy and then realized he made a mistake as depicted by the placement of his hand to his mouth. Even the clerk's smile shows, it is more likely than not, that he realized his mistake in selling the beer to the minor. However, the clerk made no further effort to confirm the decoy's age and correct his mistake, but instead allowed the minor to exit the store with the beer.

9. While the Respondents attempt to argue that the clerk's question was posed during the sales transaction, the Respondents then submit that the question was posed after the completion of the transaction. The decoy credibly and consistently testified that the clerk's statement to him was made after the transaction had been completed. The video corroborates this testimony. Had clerk Sharma made a *reasonable, diligent* attempt to look at the decoy at any time prior to and/or during the sales transaction he would have noticed the decoy's youthful appearance as he did when he finally looked at the decoy after the transaction was completed. Clerk Sharma made no reasonable attempt to look at decoy Malachi while he stood before him during the transaction. Even the clerk told

Mrs. Estrada he mistakenly thought the decoy was a regular customer, appearing, in the video, to quickly glance at him while the clerk walked to attend to the pizza.

10. When clerk Sharma walked back to the cash register he seemed to work in automation, simply accepting the $20 bill from the decoy, scanning the beer, making change, looking at the customers entering, and handing the change to the decoy without looking at the decoy. The clerk failed to abide by the sole rule Mrs. Estrada testified was store policy relating to age-restricted sales, which was simply to "card anyone who looks under 30" to confirm legal age to purchase. Despite the fact the clerk may have said, "Hey you don't look 21, you look young. How old are you?" or "Hey, how old are you? You don't look 21, you look young," the video depicts the decoy leaning in to hear but all he heard, per his credible testimony, was not a question but a statement that he looked young to the clerk. The video depicts the decoy mouthing something, which appears to be, and most likely was, "what," given the fact he leaned in, in a manner as not being able to hear the clerk. However, the clerk appeared embarrassed, having realized his mistake, but made no further efforts, for example, to ask the question again or to make sure the decoy heard him, to ask for an ID, or to rectify his error in taking the beer back and giving the decoy his $20. The decoy stood long enough at the counter so the clerk could have done any of a number of things. It appears from the video that the clerk succumbed to his mistake and decided to let it be, to allow the minor to leave the store with the beer.

11. As both counsel for the Department and Respondents point out in closing, in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2017) 7 Cal. App.5th 628, 638, the Court of Appeal held there to be no affirmative duty on the minor decoy to respond to clarify a clerk's age-related statement. Therefore, the parties were properly in agreement that as for the statement(s) the decoy heard, or the comment(s), "Hey you don't look 21, you look young," the decoy had no duty to speak up.

12. The Department counsel also pointed out, citing the *Wiechmann* court which found, "Courts uniformly distinguish between the misleading half-truth, or partial disclosure, and the case in which defendant says nothing at all. The general rule is that silence alone is not actionable."[7] The *Weichmann* court went on to explain that when "there is no representation of any kind...there was no disclosed fact which was likely to mislead..."[8] The same is true in the matter at hand. The decoy remained silent after what appeared to be his mouthing the word "What," because he did not hear a question being asked, and under these circumstances he did not disclose any fact which was likely to mislead the clerk into believing the decoy was 21 or above. In fact, it appeared from the video depiction, that it was not the decoy's silence but the decoy's youthful appearance which led the clerk to believe he was under 21, as the clerk held his hand to his mouth and

---

[7] *Wiechmann Engineers v. State of California ex rel. Dept. of Public Works* (1973) 31 Cal.App.3d 741, 751.
[8] *Id.* at 752.

smiled, in realization of his mistake. At that point it would have behooved the clerk to confirm his suspicion by posing the question again or asking for the decoy's ID.

13. The *Wiechmann* court further held a party "cannot convert his own lack of diligence into a case of fraudulent concealment against a public entity."[9] The clerk failed to act diligently in performing his duties. It is clear from the video the clerk realized he had made a mistake, and at that point it was incumbent upon him to attempt to correct it, as described above, rather than to let the decoy walk out of the store with the beer. Had the clerk done so a different outcome would have resulted.

14. In determining the credibility of a witness, as provided in section 780 of the Evidence Code, the administrative law judge may consider any matter that has any tendency in reason to prove or disprove the truthfulness of the testimony at the hearing, including the manner in which the witness testifies, the extent of the capacity of the witness to perceive, to recollect, or to communicate any matter about which the witness testifies, a statement by the witness that is inconsistent with any part of the witness's testimony at the hearing, the extent of the opportunity of the witness to perceive any matter about which the witness testifies, the existence or nonexistence of any fact testified to by the witness, and the existence or nonexistence of a bias, interest, or other motive.

15. The Respondents' contentions that (1) when clerk Sharma was making a pizza and looked up he said, "Are you 21" and the decoy replied, "Yes, you know me" or that at any point the clerk asked, "Are you 21" and the decoy replied "yes, you know me," (2) the clerk's statements and questions occurred during the said sales transaction, and (3) decoy Malachi heard the question posed by the clerk, are disbelieved for the following reasons (and as to item 3 for those reasons stated above). Mrs. Estrada presented inconsistent testimony and exhibited a bias in the presentation of her testimony as the franchisee/licensee of the Licensed Premises subject to potential discipline.

16. In Mrs. Estrada's testimony as to what the clerk told her she initially testified, "*when* he was making a pizza and he looked up, and he said, 'Are you 21?' and the customer said, 'You know me.'" Then Respondents' counsel attempted to correct Mrs. Estrada's testimony by asking, "Okay that was *during* the transaction?" Whereupon Mrs. Estada replied, "Yes." Immediately thereafter Mrs. Estrada changed her testimony and acknowledged that clerk Sharma was making a pizza *prior* to the said sales transaction. Mrs. Estrada further presented conflicting testimony saying that clerk Sharma indicated he asked the decoy's age or how old he was, when Mrs. Estrada's initial testimony was that clerk Sharma specifically asked, "Are you 21?" This testimony conflicts with clerk Sharma's admitting he mistakenly thought the decoy was a regular customer. If clerk

---

[9] *Id.* at 753.

Sharma believed he was a regular customer, which infers he knows the customers age having checked the ID prior, then why would clerk Sharma ask the regular customer, "Are you 21?" It does not make sense, because it did not happen.

17. Furthermore, in balancing the factors of Evidence Code section 780, the hearsay statements of clerk Sharma to Mrs. Estrada are given little weight, especially in light of the fact he had a motive to fabricate his story when facing the licensee and explaining to her why he violated the law. As discussed above, decoy Malachi presented sworn, direct, credible testimony and exhibited no bias or motive in the presentation of his testimony. Also, Officer Valenzuela did not record or corroborate clerk Sharma's alleged question of "Are you 21," or decoy Malachi's alleged reply of "Yes, you know me," which clerk Sharma told the licensee he allegedly heard.

PENALTY

The Department requested the Respondents' license be suspended for a period of 15 days, given the short length of licensure without discipline and no indication of specific dates of employee retraining to demonstrate mitigation.

The Respondents recommended a mitigated 10-day penalty, based on its argument the length of licensure is longer than just the Tera Tera, Inc. licensing in that Mrs. Estrada has been licensed at the location since 2012, providing an additional five years of licensure, which the Respondents argue should account for a mitigated penalty.

There was no evidence presented as to the disciplinary history of the premises while it was licensed in Mrs. Estrada's name. Therefore, there is insufficient evidence to support a conclusion that any prior length of licensure alone, without evidence of disciplinary history, would provide mitigation to the matter at hand. The only evidence in the record regarding length of licensure without discipline relates to the Respondents, 7 Eleven Inc., and Tera Tera, Inc., which licensure was for only a short time period prior to the sale in question, and which does not warrant mitigation. There was no evidence presented as to discipline of clerk Sharma or any positive action taken by the Licensees to correct the problem. In fact, when asked to explain what the Licensed Premises does to prevent alcohol sales to minors, Mrs. Estrada merely referred to the "Coming of Age" training module and when asked about store policy relating to age-restricted sales all she said was "that we card anyone who looks under 30." There was insufficient evidence to prove the effectiveness of Respondents' training as it relates to preventing future sales to minor violations.

The penalty recommended herein complies with rule 144.

ORDER

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

Dated: June 26, 2019

D. Huebel
Administrative Law Judge

☒ Adopt

☐ Non-Adopt: _____

_____

By: _____

Date: 8/12/19