

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

AB-9845

File: 20-421771; Reg: 19088712

7-ELEVEN, INC. and PAWAN and POONAM KUMAR,
dba 7-Eleven Store #2133-18823E
5810 Hollister Avenue
Goleta, CA 93117,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: May 7, 2020
Telephonic

ISSUED MAY 12, 2020

Appearances: *Appellants:* Megan Wolniewicz, of Solomon, Saltsman & Jamieson,
as counsel for 7-Eleven, Inc. and Pawan and Poonam Kumar,

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

OPINION

7-Eleven, Inc. and Pawan and Poonam Kumar, doing business as 7-Eleven Store #2133-18823E (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 25 days because their clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code² section 25658(a).

¹ The decision of the Department, dated November 4, 2019, is set forth in the appendix.

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

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 14, 2005.

There is one prior instance of departmental discipline against the license for violation of section 25658(a), which occurred 25 months before the violation at issue in this appeal.

On April 10, 2019, the Department filed a single-count accusation against appellants charging that, on December 29, 2018, appellants' clerk, Hernan Gasparin (the clerk), sold an alcoholic beverage to 19-year-old Alexia Soliz (the decoy).

Although not noted in the accusation, the decoy was working for the Santa Barbara Sheriff's Office (SBSO) at the time.

At the administrative hearing held on August 7, 2019, documentary evidence was received, and testimony concerning the sale was presented by the decoy and SBSO Deputy M. Reynoso. Co-licensee Pawan Kumar testified on appellants' behalf.

Testimony established that on December 29, 2018, the decoy entered the licensed premises and selected a three-pack of Bud Light beer to purchase. After scanning the beer, the clerk asked the decoy for her identification. The decoy handed the clerk her California driver's license (exh. 3), paid for the beer, and exited the premises without incident.

After completing the purchase, the decoy re-entered the licensed premises with Dep. Reynoso. When Dep. Reynoso asked the decoy to identify who sold her the beer, the decoy indicated it was the clerk. She identified the clerk while standing less than five feet away from him. During the identification, there was no obstruction between the decoy and clerk.

The clerk demonstrated to Dep. Reynoso how the register's point of sale system operates. Whenever an alcoholic beverage is scanned, a yellow prompt appears on

the register screen. The prompt requires, in part, for the clerk to “scan or swipe [an identification] or if the birthdate is on or before 12-29-97 press [manual enter].”

(Decision, p. 2.) Since the decoy’s birthday was after December 29, 1997, the clerk was required to either scan or swipe the decoy’s identification. Instead, the clerk admitted he manually entered his own date of birth in order to complete the transaction.

On September 12, 2019, the administrative law judge (ALJ) issued his proposed decision sustaining the accusation and recommending a 25-day suspension. The Department adopted the decision in full on October 30, 2019 and issued a certificate of decision on November 4, 2019.

Appellants filed a timely appeal contending that the Department’s findings—that the decoy’s appearance complied with rule 141(b)(2)³ and the face-to-face identification complied with rule 141(b)(5)—are not supported by substantial evidence. Appellants also contend that the penalty is excessive.

DISCUSSION

I

SUBSTANTIAL EVIDENCE

³ 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.

Appellants contend that the Department's findings regarding 141(b)(2)⁴ and 141(b)(5)⁵ are not supported by substantial evidence. (Appellants' Opening Brief, pp. 9-14 (AOB).) Specifically, appellants contend that the decoy did not display the appearance generally expected of a person under the age of 21 because of her "mature" physical stature and prior experience with decoy operations. (*Id.* at pp. 13-14.) Further, appellants argue that the operation violated rule 141(b)(5) because the clerk was unaware that he was being identified as the person who sold the alcoholic beverage to the decoy. (*Id.* at pp. 9-12.)

When it is alleged that a decision of the Department is not supported by substantial evidence, this Board's review is limited to determining, in light of the entire administrative record, whether substantial evidence exists—even if contradicted—to reasonably support the Department's factual findings, and whether the decision is supported by those findings. (*Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113] ("*Boreta*").) The Board is bound by the factual findings of the Department. (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1963) 212 Cal.App.2d 106, 113 [28 Cal.Rptr. 74].) A factual finding of the Department may not be overturned or disregarded merely because a contrary finding would have

⁴ Rule 141(b)(2) requires that a "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."

⁵ Rule 141(b)(5) requires that "following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages."

been equally or more reasonable. (*Boreta, supra*, 2 Cal.3d at p. 94.) The Board may not exercise independent judgment regarding the weight of the evidence; it must resolve any evidentiary conflicts in favor of the Department's decision. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].) The Board must also accept all reasonable inferences from the evidence which support the Department's decision. (*Harris, supra*, 212 Cal.App.2d at p. 113.)

Rule 141(b)(2)

Appellants offer two arguments as to why the Department did not comply with rule 141(b)(2). First, they contend the decoy's physical stature has "significantly more heft than would be expected from an adolescent." (AOB, p. 13.) Second, they contend "most people would not expect someone who carried themselves with the experience of multiple decoy operations to be under 21." (*Id.* at p. 14.)

The ALJ observed the decoy at the hearing, reviewed the evidence, and made the following relevant findings:

4. Alexia Soliz was born on May 20, 1999. On December 29, 2018, she served as a minor decoy during an operation conducted by the Santa Barbara Sheriff's Department. On that date, she was 19 years old.
5. Soliz appeared and testified at the hearing. On December 29, 2018, she wore a black t-shirt, blue Adidas pants, Converse shoes, and a blue hoodie. Her hair was parted toward the top of her head and hung down past her shoulders. (Exhibits 4-5.) She was 5'1½" tall and weighed approximately 155 pounds. At the hearing her appearance was the same, except that her hair was six or seven inches shorter.

¶ . . . ¶

10. Soliz appeared her age, 19 years old, at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in the

Licensed Premises on December 29, 2018, Soliz displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Gasparin.

(Findings of Fact, ¶¶ 4-5, 10.) Accordingly, the ALJ reached the following legal conclusion, which the Department adopted:

5. . . . With respect to rule 141(b)(2), the [appellants] argued that Soliz was very confident and presented herself well and that her figure was more mature. This argument is rejected. There was nothing about Soliz's appearance which was inconsistent with the appearance of a typical 19 year old. As noted above, Soliz had the appearance generally expected of a person under the age of 21.

(Conclusions of Law, ¶ 5.)

Appellants argue that "most" people would not expect someone with the decoy's physical build to be under the age of 21. (AOB, p. 14.) Even if a contrary finding were reasonable, however, this Board may not overturn or disregard the ALJ's findings. Moreover, appellants present their argument as a matter of fact. They do not point to any support, such as a case with similar facts. In the absence of supporting authority, the decoy's height and weight alone have little probative value.

The appellants also argue that "most" people would not expect someone with the decoy's level of experience to be under 21. (AOB, p. 14.) It is possible such prior experience might have caused the decoy to appear calm and confident. However, there is no evidence showing that the decoy's lack of nervousness made her appear older to the clerk. There is no such evidence because the clerk did not testify. In addition, the decoy's level of confidence is only one of several factors to consider.

In contrast, the ALJ's determination was based on a comprehensive review of *all* the factors, including overall appearance, mannerisms, and dress. The ALJ relied on photographic evidence of the decoy created right after the transaction. A photograph

of the decoy taken “immediately after the sale . . . is arguably the most important piece of evidence in considering whether the decoy displayed the physical appearance of someone under 21 years of age.” (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652, 659].)

The ALJ also observed the decoy’s overall appearance at the hearing, found her appearance to be the same as her appearance from the operation, and concluded that her appearance was consistent with the that of a typical 19-year-old. This Board has long held that an ALJ’s in-person observations of a decoy provides substantial evidence to support the determination of the decoy’s apparent age. (*7-Eleven, Inc./Nagra & Sunner* (2004) AB-8064 at p. 4.) Where there is no evidence that the decoy’s appearance changed substantially between the operation and the hearing, the ALJ’s observation of the decoy at the hearing provides sufficient evidence on which to base a finding. (*GMRI, INC.* (2004) AB-7336c at p. 6.)

While one could look at the record and reasonably conclude the decoy appeared to be older than 21, we cannot say as a matter of law that it was unreasonable for the Department to conclude otherwise. Implicit in 141(b)(2)’s language of “could generally be expected” is the recognition that not every person will agree how old a decoy appears. Therefore, even if the clerk believed the decoy appeared older than 21, that alone is no defense if someone else could reasonably believe the decoy appeared younger than 21.

Here, there is no evidence as to what the clerk was thinking since he did not testify. Under the actual circumstances presented, however, it appears the clerk had reason to believe the decoy was under 21. He looked at the decoy’s driver license—

containing her correct date of birth—but completed the transaction by inputting his own birthdate instead. (AOB, p. 3; Decision, p. 2.) The decoy’s license was vertical in orientation, “stated her date of birth in red[,] and indicated she’ll be 21 in 2020 in a red bar.” (RRB, p. 2.) The reasonable inference this Board must draw from the evidence is that even the appellants’ own “clerk viewed [the decoy] as . . . having an appearance generally expected of a person under the age of 21.” (*Id.* at p. 13.)

Altogether, the ALJ concluded the decoy had the appearance generally expected of a person under the age of 21. We have not found, and the appellants have not pointed to, any legal error that would require our intervention. This Board has no authority to second-guess the ALJ’s factual determinations.

Rule 141(b)(5)

Failure by the Department to comply with rule 141(b)(5) provides the licensee or appellant with an affirmative defense. However, the burden of proof lies with appellants. (*7-Eleven, Inc./Arman Corporation* (2014) AB-9393.) The Department is not required to make a prima facie showing of compliance with rule 141(b)(5). (See, e.g., *Garfield Beach CVS, LLC* (2012) AB-9188; *The Von’s Corporation* (2002) AB-7819.) It is well established that the failure to “assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal.” (*Hooks v. State Personnel Bd.* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434].)

Appellants argue that Officer Reynoso did not testify that the clerk was aware of the identification at any point and there is “no indication in the record that . . . any law enforcement officer said so much as a word to the clerk.” (AOB, pp. 10-12.)

Appellants attempt to shift the burden to the Department by contending “the Department failed to produce any evidence that . . . Rule 141(b)(5) . . . was complied with.” (*Id.* at p. 12.) However, as established above, it is not the Department’s burden to establish that the clerk was aware he was being identified. The burden was on the appellants to introduce evidence at the hearing in support of their defense, which they failed to do.

While failure to comply with 141(b)(5) provides an affirmative defense, the rule’s requirements are phrased broadly. For example, it does not address the location or manner of the face-to-face identification. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (2003) 109 Cal.App.4th 1687, 1697 [1 Cal.Rptr.3d 339, 346].) Neither does it require the identification “to be done within a certain distance.” (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (2017) 18 Cal.App.5th 541, 546 [226 Cal.Rptr.3d 527, 531].) Simply put, face-to-face is “not defined in the rule.” (*Ibid.*) Appellants do not point to any language in the rule requiring that the clerk be conscious of the identification as it is taking place.

This Board is bound by the factual findings of the Department. We may not exercise independent judgment regarding the weight of the evidence. Here, there is no evidentiary conflict to resolve since the clerk did not testify about, for example, whether he was aware of the identification. What the record does show is that the clerk saw the decoy’s identification; Dep. Reynoso identified himself as a law enforcement officer to the clerk (RRB, p. 2); the decoy identified the clerk; a photograph was taken of the decoy and clerk standing next to each other as she held the beer and her identification (Exh. 5); and the clerk explained to the officers how he bypassed the register’s prompt in order to complete the sale to the decoy. In sum, there was substantial evidence to support the ALJ’s determination that “it can be inferred [the clerk] was aware that he

was being identified as the person who sold alcohol to [the decoy].” (Decision, p. 4.)

We see no grounds to disturb the ALJ’s findings.

II

EXCESSIVE PENALTY

Appellants contend that the penalty is excessive. (AOB, pp. 6-9.) Specifically, they argue that the ALJ ignored mitigating evidence regarding appellants’ re-training and measures taken after its previous violation. (*Id.* at pp. 8-9.) In appellants’ words, ignoring “all [the] mitigating factors is a refusal to adhere to the Penalty Guidelines and an abuse of discretion” by the ALJ. (*Id.* at p. 9.)

This Board may not “disturb” the Department’s penalty determinations “unless there is a clear abuse of discretion.” (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633]; *Cadilla v. Bd. of Med. Examiners* (1972) 26 Cal.App.3d 961, 966 [103 Cal.Rptr. 455].) An abuse of discretion takes place when a public official or agency acts arbitrarily or capriciously. (*Schwartz v. Poizner* (2010) 187 Cal.App.4th 592, 598 [113 Cal.Rptr.3d 610].) The possibility that reasonable minds may differ on the penalty only confirms “the conclusion that there was no abuse of discretion.” (*Lake v. Civil Serv. Comm’n* (1975) 47 Cal.App.3d 224, 228 [120 Cal.Rptr. 452]; *Harris*, at p. 594.)

Rule 144 provides penalty guidelines for Department discipline. That rule states, in relevant part:

In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act [citation] and the Administrative Procedures Act [citation], 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.

(Code Regs., tit. 4, § 144, emphasis added.) The penalty guidelines further state:

POLICY STATEMENT

It is the policy of this Department to impose administrative, non-punitive penalties in a consistent and uniform manner with the goal of encouraging and reinforcing voluntary compliance with the law.

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.

Higher or lower penalties from this schedule may be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances.

(Code Regs., tit. 4, § 144, Penalty Guidelines, emphasis added.)

The plain language of the penalty guidelines is permissive and leaves penalty determinations up to the Department's discretion. The guidelines list factors that *may* be considered in aggravation or mitigation, such as “[p]ositive action by licensee to correct problem” on the one hand or prior disciplinary history on the other. (See generally Penalty Guidelines.) The Department has the discretion to issue penalties greater or less than the suggested penalty depending on those factors. However,

presenting mitigating evidence does not *entitle* an appellant to a mitigated penalty.

The record does not support the contention that the ALJ ignored appellants' evidence. Indeed, considerable time was spent outlining all the corrective steps taken by appellants. (See Decision, p. 11.) Even the appellants admit that the ALJ acknowledged their mitigating efforts "during the [Department's] Closing Argument." (AOB, p. 8.)

Appellants' next argument is that the ALJ was required to "fully set forth their reasoning" behind their penalty determination. (AOB, p. 7.) They cite to *Topanga Assn. for a Scenic Cmty. v. Cty. of Los Angeles* (1974) 11 Cal.3d 506, 516 [113 Cal.Rptr. 836] to argue the ALJ was required to set forth "findings that bridge the analytical gap between the raw evidence and the decision or order." (AOB, p. 7.)

As an initial matter, an administrative agency's decision need not include findings with regard to mitigation unless some statute requires it. (*Vienna v. Cal. Horse Racing Bd.* (1982) 133 Cal.App.3d 387, 400 [184 Cal.Rptr. 64]; *Otash v. Bureau of Private Investigators* (1964) 230 Cal.App.2d 568, 574-575 [41 Cal.Rptr. 263].) Appellants have yet to refer to authority that imposes such requirements.

Moreover, *Topanga* is inapposite here. When *Topanga* refers to bridging the gap, it's referring to bridging the gap to the *ultimate* decision (i.e. "Did Appellants sell alcohol to a minor?"). (*Topanga, supra*, 11 Cal.3d at p. 516.) No analytical bridge of any sort is required in imposing a penalty. This Board's penalty review "looks only to see whether it can be considered reasonable, not what considerations or reasons led to it. If it is reasonable, our inquiry ends there." (*Garfield Beach CVS, LLC/Longs Drug Stores Cal., LLC* (2013) AB-9236, at p. 4; *7-Eleven, Inc. v. Ghuman & Sons, Inc.* (2011) AB-8997, at p. 4.)

The only question, then, is whether the 25-day suspension is a reasonable penalty. We conclude it is. The ALJ acknowledged appellants' mitigating evidence but emphasized this was their second violation of section 25658(a) in 25 months. The ALJ determined this warranted some aggravation in the penalty and imposed a 25-day suspension. This is the standard penalty for a second violation of section 25658 within 36 months. (See <https://www.abc.ca.gov/law-and-policy/penalty-guidelines>.) Rather than an abuse of discretion, the Department exercised the considerable flexibility granted to it under rule 144. Even if reasonable minds differ on the 25-day suspension, this fact only fortifies the conclusion that there was no abuse of discretion. We see no grounds for re-examining the penalty determination.

ORDER

The decision of the Department is affirmed.⁶

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

⁶ This final order is filed in accordance with Business and Professions Code section 23088 and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7.

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

APPENDIX

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

IN THE MATTER OF THE APPEAL BY:

7-ELEVEN INC., PAWAN KUMAR &
POONAM KUMAR
DBA: 7-ELEVEN STORE #2133-18823E
5810 HOLLISTER AVE
GOLETA, CA 93117

VENTURA DISTRICT OFFICE

File: 20-421771

Reg: 19088712

AB: 9845

OFF-SALE BEER AND WINE - LICENSE

Respondent(s)/Licensee(s)
under the Alcoholic Beverage Control Act.

CERTIFICATION

I, Yuri Jafarinejad, do hereby certify that I am a Senior Legal Analyst for the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that annexed hereto is a true, correct and complete record (not including the Hearing Reporter's transcript) of the proceedings held under Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code concerning the petition, protest, or discipline of the above-listed license heretofore issued or applied for under the provisions of Division 9 of the Business and Professions Code.

IN WITNESS WHEREOF, I hereunto affix my signature on January 2, 2020, in the City of Sacramento, County of Sacramento, State of California.


Office of Legal Services

2020 JAN -3 PM 2:19

RECEIVED
ABC APPEALS BOARD

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

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

7-ELEVEN INC., PAWAN KUMAR & POONAM
KUMAR
7-ELEVEN #2133-18823E
5810 HOLLISTER AVE
GOLETA, CA 93117

OFF-SALE BEER AND WINE - LICENSE

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

VENTURA DISTRICT OFFICE

File: 20-421771

Reg: 19088712

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 October 30, 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 December 16, 2019, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: November 4, 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., Pawan Kumar & Poonam Kumar
dba 7-Eleven #2133-18823E
5810 Hollister Ave.
Goleta, California 93117

Respondents

Off-Sale Beer and Wine License

} File: 20-421771

} Reg.: 19088712

} License Type: 20

} Word Count: 15,000

} Reporter:

} Lisa Berryhill

} Kennedy Court Reporters

} **PROPOSED DECISION**

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Santa Barbara, California, on August 7, 2019.

Lisa Wong, Attorney, represented the Department of Alcoholic Beverage Control.

Donna J. Hooper, attorney-at-law, represented respondents 7-Eleven Inc., Pawan Kumar, and Poonam Kumar. Pawan Kumar was present.

The Department seeks to discipline the Respondents' license on the grounds that, on or about December 29, 2018, the Respondents, through their agent or employee, sold, furnished, or gave alcoholic beverages to Alexia Soliz, 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 August 7, 2019.

FINDINGS OF FACT

1. The Department filed the accusation on April 10, 2019.

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 Respondents for the above-described location on February 14, 2005 (the Licensed Premises).

3. The Respondents' license has been the subject of the following discipline:

<u>Date Filed</u>	<u>Reg. No.</u>	<u>Violation</u>	<u>Penalty</u>
7/3/2017	17085714	BP §25658(a)	5-day susp.

The foregoing disciplinary matter is final. (Exhibit 2.) The accusation incorrectly alleges that the suspension in this matter was for 15 days. The documents contained in exhibit 2, however, clearly indicate that a 5-day suspension was imposed in connection with this prior violation.

4. Alexia Soliz was born on May 20, 1999. On December 29, 2018, she served as a minor decoy during an operation conducted by the Santa Barbara Sheriff's Department. On that date she was 19 years old.

5. Soliz appeared and testified at the hearing. On December 29, 2018, she wore a black t-shirt, blue Adidas pants, Converse shoes, and a blue hoodie. Her hair was parted toward the top of her head and hung down past her shoulders. (Exhibits 4-5.) She was 5'1½" tall and weighed approximately 155 pounds. At the hearing her appearance was the same, except that her hair was six or seven inches shorter.

6. On December 29, 2018, Soliz entered the Licensed Premises and walked to the coolers. She selected a 3-pack of Bud Light beer, which she took to the counter. The clerk, Hernan Gasparin, scanned the beer and asked to see her ID. She handed her California driver license (exhibit 3) to him. She paid for the beer, Gasparin gave her some change, then she exited with the beer.

7. Soliz re-entered the Licensed Premises. Dep. M. Reynoso asked her to identify the person who sold her the beer. At a distance of less than five feet, she indicated that Gasparin did. A photo of the two of them was taken (exhibit 5), after which Gasparin was cited.

8. After the sale, Gasparin demonstrated the register's point of sale system as it related to alcoholic beverages. When an alcoholic beverage is rung up, a yellow prompt appears on the screen. The prompt indicates, in part, that the clerk should "scan or swipe I. D. or if the birthdate is on or before 12-29-97 press [manual enter]." (Exhibit 6.) Gasparin told Dep. Reynoso that he had entered his own date of birth to complete the transaction.

9. Soliz learned of the decoy program through her sister, who works as a nanny for one of the deputies. She has been a decoy a number of times both before and after December

29, 2018. Soliz visited 23 locations on December 29, 2018. Twenty-one of these locations asked to see her ID and three of them sold alcohol to her. (Exhibit 7.)

10. Soliz appeared her age, 19 years old, at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in the Licensed Premises on December 29, 2018, Soliz displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Gasparin.

11. Co-licensee Pawan Kumar testified that he and his wife are the franchisees at this location. Kumar did not observe the sale to Soliz, but learned of it later. Gasparin was terminated pursuant to the Respondents' policy. After the previous violation, Kumar changed the register's point of sale system to eliminate the manual override button. After this violation, he further changed the point of sale system to require that an ID be scanned or swiped—the option to manually enter a date of birth was removed. After both violations, the Respondents re-trained their employees. (See exhibit B.) Finally, Kumar installed a new camera system which allows him to remotely monitor the Licensed Premises.

12. 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 29, 2018, the Respondents' employee, Hernan Gasparin, inside the Licensed Premises, sold an alcoholic beverage to Alexia Soliz, a person under the age

of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-10.)

5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2) and rule 141(b)(5)² and, therefore, the accusation should be dismissed pursuant to rule 141(c). With respect to rule 141(b)(2), the Respondents argued that Soliz was very confident and presented herself well and that her figure was more mature. This argument is rejected. There was nothing about Soliz's appearance which was inconsistent with the appearance of a typical 19 year old. As noted above, Soliz had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 10.)

6. With respect to rule 141(b)(5), the Respondents argued that there was no evidence that Gasparin was aware that he was being identified. This argument misstates the burden of proof. Rule 141(b) sets forth the affirmative defenses to a sale of alcohol to a decoy. As an affirmative defense, the Respondents must demonstrate that Gasparin was not aware that he was being identified. Since Gasparin did not testify, there is no evidence that he was unaware and, therefore, the Respondents failed to establish a rule 141(b)(5) defense.

Moreover, the evidence established that Soliz identified Gasparin while they were less than five feet apart when she identified him and, immediately thereafter, a photo of the two of them standing side by side was taken with Soliz holding both the beer Gasparin had sold to her and her ID. Additionally, immediately after the identification, the deputies and Gasparin discussed how the register's point of sale system handled sales of alcohol, during which he explained how he had bypassed the yellow prompt. From this evidence, it can be inferred Gasparin was aware that he was being identified as the person who sold alcohol to Soliz, a minor.

PENALTY

The Department requested that the Respondents' license be suspended for a period of 25 days, arguing that the re-training and the mitigation measures undertaken after the prior violation were insufficient to prevent this violation. The Respondents argued that a 15-day suspension was appropriate, noting that this was only their second sale-to-minor violation over the course of over 13 years and that they took preventative measures after both incidents. Some aggravation is warranted since this is the Respondents' second sale of alcohol to a minor in 25 months. The penalty recommended herein complies with rule 144.

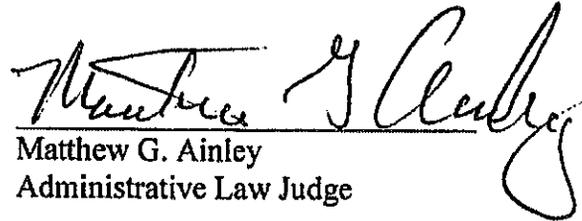
² All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

7-Eleven Inc., Pawan Kumar & Poonam Kumar
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ORDER

The Respondents' off-sale beer and wine license is hereby suspended for a period of 25 days.

Dated: September 12, 2019


Matthew G. Ainley
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: <u>Jacob A. Applegate</u>
Date: <u>10/30/19</u>

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

7-ELEVEN, INC., PAWAN and
POONAM KUMAR,
dba 7-Eleven Store #2133-18823E
5810 Hollister Avenue
Goleta, CA 93117,
Appellants/Licensees,

v.

DEPARTMENT OF ALCOHOLIC
BEVERAGE CONTROL,
Respondent.

) AB-9845

) File: 20-421771

) Reg: 19088712

) **DECLARATION OF SERVICE
BY MAIL**

I, MARIA SEVILLA, declare that I am over the age of eighteen (18) years, and not a party to the within action; that my place of employment and business is 1325 J Street, Suite 1560, Sacramento, CA; that on the 12th day of May, 2020, I served a true copy of the attached **Decision** of the Alcoholic Beverage Control Appeals Board in the above-entitled proceeding on each of the persons named below:

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent to the person(s) at the e-mail address(es) listed below:

Ralph Barat Saltsman
Solomon, Saltsman & Jamieson
426 Culver Boulevard
Playa Del Rey, CA 90203
rsaltsman@ssjlaw.com

Department of ABC
Office of Legal Services
3927 Lennane Drive, Suite 100
Sacramento, CA 95834
yuri.jafarinejad@abc.ca.gov

I declare under penalty of perjury that the foregoing is true and correct.
Executed at Sacramento, California, on the 12th day of May, 2020.

Maria Sevilla

MARIA SEVILLA