

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

AB-9879

File: 20-558798; Reg: 19089321

APRO, LLC,
dba United Oil #5250
190 West San Marcos Boulevard
San Marcos, CA 92069,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Hubel

Appeals Board Hearing: November 6, 2020
Telephonic

ISSUED NOVEMBER 12, 2020

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

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

OPINION

Apro, LLC, doing business as United Oil #5250 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 20 days because its clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658(a).

¹The decision of the Department, dated April 30, 2020, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on January 27, 2016.

There is one instance of prior departmental discipline against the license for violation of section 25658(a) that occurred on February 2, 2018.

On October 8, 2019, the Department filed a single-count accusation² against appellant charging that, on October 19, 2018, appellant's clerk, Thobhanbhai Varevadia (the clerk), sold an alcoholic beverage to 19-year-old Isabella Alvarez Dela Campa (the decoy). Although not noted in the accusation, the decoy was working for the San Diego Sherriff's Office (SDSO) at the time.

At the administrative hearing held on February 11, 2020, documentary evidence was received, and testimony concerning the sale was presented by the decoy and appellant's District Manager, Mark Fuller. Evidence established that on October 19, 2018, a peace officer entered the licensed premises in a plain clothes capacity followed by the decoy. The decoy walked straight to the alcoholic beverage section and selected a six-pack of Coors Light beer cans, which she brought to the sales counter for purchase. The clerk scanned the beer but did not ask the decoy for her identification or any age-related questions. The clerk told the decoy the cost of the beer and completed the transaction.

The decoy exited the store and walked to a vehicle in the parking lot, where she met with another peace officer. The officer brought her back inside the licensed premises and asked the decoy to identify who sold her the beer. The decoy pointed at

² The Department filed a First Amended Accusation on January 29, 2019.

the clerk and said, “[h]e sold me the beer.” (Findings of Fact, ¶ 8.) A photograph of the decoy standing next to the clerk was taken. (Exh. 6.)

The administrative law judge (ALJ) issued a proposed decision on February 24, 2020 sustaining the accusation and recommending a 20-day suspension. The Department adopted the proposed decision on April 24, 2020 and issued a certificate of decision on April 30, 2020. Appellant filed a timely appeal contending that substantial evidence does not support the Department’s finding that the decoy displayed an appearance of a person under the age of 21 years old, and that the penalty is excessive.

DISCUSSION

I

SUBSTANTIAL EVIDENCE

Appellant contends that the Department’s finding that the decoy’s appearance complied with rule 141(b)(2) is not supported by substantial evidence. (AOB, at pp. 6-8.) Specifically, appellant argues that the decoy’s “physical appearance, stature, clothing and experience as an Explorer for the California Highway Patrol for over 5 years at the time of the operation, which included law enforcement training, ride-alongs with police officers, and other activities involving interaction with the public ... gave the Decoy the appearance of an adult female of at least 21 years of age.” (*Id.* at p. 7.)

Rule 141(b)(2) provides:

The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual 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 appellants. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

Here, the Department found that the decoy's appearance complied with rule 141(b)(2). (Conclusions of Law ¶ 7.) Therefore, this Board is required to defer to those findings so long as they are supported by substantial evidence. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Southland)* (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652, 659] [citing *Kirby v. Alcoholic Beverage Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628] ["In considering the sufficiency of the evidence issue the court is governed by the substantial evidence rule[;] any conflict in the evidence is resolved in favor of the decision; and every reasonably deducible inference in support thereof will be indulged. [Citations.]"; see also *Kirby v. Alcoholic Bev. etc. Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815] ["When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the department."].) "Substantial evidence" is "evidence of ponderable legal significance, which is 'reasonable in nature, credible and of solid value.'" (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 814 [38 Cal.Rptr.2d 304, 307–308], internal citations omitted.)

In its decision, the Department rejected appellants' arguments that the decoy's physical appearance did not comply with rule 141(b)(2). The Department found that "[i]n-person decoy Isabella looks her age." (Conclusions of Law, ¶ 7.) The Department further noted that the clerk did not testify and that "[t]here was no evidence that any of [the decoy's prior law enforcement experiences] had an impact upon clerk Barevadia." (*Ibid.*) As noted above, "we are bound to construe the evidence in the

light most favorable to the ALJ's decision” and will uphold the findings so long as they are supported by substantial evidence. (*Southland, supra*, 103 Cal.App.4th at 1087.)

To support its findings, the Department relied on several photographs of the decoy from the day of the operation. (Exhs. 3, 4, and 6; Findings of Fact, ¶¶ 5, 8.) Photographs of a decoy from the day of the operation are “arguably the most important piece of evidence in considering whether the decoy displayed the physical appearance of someone under 21 years of age.” (*Southland, supra*, 103 Cal.App.4th at 1094.)

Here, the Board sees no error with the Department’s findings regarding the decoy’s appearance, which are supported by the photographs of the decoy from the date of the operation. These photos are “reasonable in nature, credible and of solid value.” (*County of Los Angeles, supra*, 32 Cal.App.4th at 814.)

However, appellant contends that certain non-physical factors, such as the decoy’s law enforcement experience, made her appear older than 21 years old. (AOB at p. 7.) However, as noted by the Department, there is no evidence in the record that the clerk sold alcohol to the decoy based on her experience or demeanor. As the Department noted, the clerk did not testify. Thus, there is no evidence as to why the clerk sold beer to the decoy, much less any evidence to establish that the clerk’s error was the result of the decoy’s demeanor.

Based on the above, the Department’s findings regarding the decoy’s appearance must stand. Ultimately, appellant is asking this Board to second-guess the Department and reach a different result. Extensive legal authority prohibits this Board from doing so. (*Southland, supra*, 103 Cal.App.4th at 1094.)

II

PENALTY

Appellant contends its 20-day penalty is unreasonable, and that the Department should reconsider it on the grounds that the Department “failed to consider mitigating circumstances when determining the penalty” (AOB, at p. 8.) In other words, appellant believes its penalty is excessive.

This Board may examine the issue of excessive penalty if it is raised by an appellant. (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183].) However, 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].) An administrative agency abuses its discretion when it “exceeds the bounds of reason.” (*County of Santa Cruz v. Civil Service Commission of Santa Cruz* (2009) 171 Cal.App.4th 1577, 1582 [90 Cal.Rptr.3d 394, 397].) However, “[i]f 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].)

In determining disciplinary action, the Department is required to consider the penalty guidelines incorporated in California Code of Regulations, title 4, section 144. The standard penalty for a second-time³ violation of section 25658(a) is 25 days, which is five more days than the penalty appellant received here. (Cal. Code Regs., tit. 4, § 144.) Rule 144 allows the Department to deviate from the standard penalty when, “in

³ Appellant had a prior violation for 25658(a) within 36 months of the current violation.

its sole discretion[, it] determines that the facts of the particular case warrant such deviation — such as where facts in aggravation or mitigation exist.” (*Ibid.*, emphasis added.)

Factors in aggravation include prior disciplinary history, prior warning letters, licensee involvement, premises located in high crime area, lack of cooperation by the licensee in investigation, appearance and actual age of minor, and continuing course or pattern of conduct. (Cal. Code Regs., tit. 4, § 144.) Factors in mitigation include the length of licensure at the subject premises without prior discipline or problems, positive action by the licensee to correct the problem, documented training of the licensee and the employees, and cooperation by the licensee in the investigation. However, neither list of factors is exhaustive; the Department may use its discretion to determine whether other aggravating or mitigating circumstances exist. (*Ibid.*)

Here, appellant takes issue with the fact that the Department only mitigated appellant’s penalty by five days. (AOB, at pp. 8-11.) Appellant clearly feels it was entitled to more. (*Ibid.*) However, the Department clearly did afford appellant some mitigation, as evidenced by the five-day reduction from the standard penalty. The Board cannot say the Department erred in its decision.

As the Board has said many times over the years, the extent to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion. Rule 144 provides a standard 25-day suspension for a second section 25658(a) violation within 36 months, which is more than what appellant received. Rule 144 allows the Department to exercise discretion to consider aggravation and mitigation. The Department’s failure to give appellant’s mitigation evidence more

weight than it did was not unreasonable or an abuse of discretion. Therefore, the penalty must stand.

ORDER

The decision of the Department is affirmed.⁴

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

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

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

APPENDIX

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

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

APRO, LLC
UNITED OIL #5250
190 WEST SAN MARCOS BLVD
SAN MARCOS, CA 92069-2933

OFF-SALE BEER AND WINE - LICENSE

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

SAN MARCOS DISTRICT OFFICE

File: 20-558798

Reg: 19089321

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 April 24, 2020. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

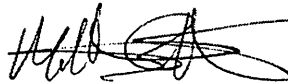
Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date 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 June 10, 2020, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: April 30, 2020



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

APRO, LLC.
Dbas: United Oil #5250
190 West San Marcos Boulevard
San Marcos, California 92069-2933

Respondent

} File: 20-558798

} Reg.: 19089321

} License Type: 20

} Word Count: 6,576

} Reporter:

} Joanna Hammock

} Kennedy Court Reporters

Off-Sale Beer and Wine License

PROPOSED DECISION

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at San Marcos, California, on February 11, 2020.

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

Brian Washburn, Attorney, represented Respondent, APRO, LLC.

The Department seeks to discipline the Respondent's license on the grounds that, on or about October 19, 2018, the Respondent-Licensee's agent or employee, Thobhanbhai Barevadia, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Isabella Alvarez Dela Campa, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on February 11, 2020.

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

FINDINGS OF FACT

1. The Department filed the accusation on October 8, 2019. The Department filed a First Amended Accusation on or about January 29, 2020.
2. The Department issued a type 20, off-sale beer and wine license to the Respondent for the above-described location on January 27, 2016 (the Licensed Premises). The Licensed Premises has a gas station and convenience store.
3. The following is the record of prior Department discipline against the Respondent's license as established by official records introduced by the Department, which matter is final (Exhibit 2):

<u>Date of Violation</u>	<u>Reg. No.</u>	<u>Violation</u>	<u>Penalty</u>
February 2, 2018	18086995	BP §25658(a)	15-day suspension ²

4. Isabella Alvarez Dela Campa (hereinafter referred to as decoy Isabella) was born on January 14, 1999. On October 19, 2018, she was 19 years old. On that date she served as a minor decoy in an operation conducted by the San Diego Sheriff's Department – San Marcos Branch in conjunction with the Department.
5. Decoy Isabella appeared and testified at the hearing. On October 19, 2018, she was 5'3" tall and weighed approximately 180 pounds. She wore a blue and white striped, three-quarter length shirt, blue jeans, black shoes and a gray, front-zipped sweatshirt with a hoody³. There was no evidence she wore the hoody on her head during the operation. Her hair was pulled back in two tight braids. She wore no make-up or jewelry. (Exhibits 3, 4 and 6.) Her appearance at the hearing was similar, except she weighed 160 pounds, was half an inch taller and wore a black dress with gray cardigan tights and brown booties. Her hair was worn down, past her shoulders.
6. On October 19, 2018, an officer entered the Licensed Premises, in a plain clothes capacity, followed shortly thereafter by decoy Isabella. Decoy Isabella walked straight to the alcoholic beverage section and selected a six-pack of Coors Light beer cans. Decoy Isabella brought the six-pack of beer to the sales counter.

² The First Amended Accusation states a "\$3000 POIC in lieu of 15 days suspension," however, Exhibit 2, the certified priors package relating to Registration Number 18086995, does not contain any evidence of a POIC, hence the 15-day suspension was cited above.

³ The decoy testified the sweatshirt brand was Victoria Secret; the sweatshirt did not contain the brand name but what appeared to be the word "PINK" in white along the sleeves and a small, white silhouetted cat on the front at the top left of the sweatshirt. (Exhibit 6.)

7. Decoy Isabella placed the six-pack of Coors Light beer upon the sales counter. Clerk Thobhanbhai Barevadia (hereinafter referred to as clerk Barevadia) scanned the beer. Clerk Barevadia did not ask decoy Isabella for her identification (ID). Decoy Isabella had on her person her valid California Driver License, which had a vertical orientation, depicted her correct date of birth and included a red stripe which read, "AGE 21 IN 2020." (Exhibit 5.) Clerk Barevadia did not ask the decoy any age-related questions. Clerk Barevadia continued with the sales transaction and told the decoy the cost of the beer. Decoy Isabella paid the clerk for the beer, took the six-pack of Coors Light beer and exited the store. While decoy Isabella was inside the Licensed Premises she did not communicate or interact with the undercover officer.

8. Decoy Isabella walked to a vehicle in the parking lot, where she met up with an officer who brought decoy Isabella back inside the Licensed Premises and asked the decoy to identify who sold her the beer. Decoy Isabella pointed at clerk Barevadia and said, "He sold me the beer." Decoy Isabella and clerk Barevadia were standing approximately 10 feet apart and facing each other at the time of this identification. Decoy Isabella remembered the face-to-face identification because she was nervous having to face and identify the clerk after the sale of alcohol. A photograph of clerk Barevadia and decoy Isabella was taken after the face-to-face identification, with decoy Isabella holding the six-pack of Coors Light beer in her hands, while standing next to clerk Barevadia. (Exhibit 6.)

9. There was no evidence clerk Barevadia was distracted during the sales transaction or the face-to-face identification. Clerk Barevadia did not appear at the hearing.

10. Decoy Isabella appeared her age 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 front of clerk Barevadia at the Licensed Premises on October 19, 2018, decoy Isabella displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk. In-person, at the hearing, decoy Isabella appeared her age.

11. Decoy Isabella believed that October 19, 2018, was the first day of decoy operations in which she had participated; she was nervous. Decoy Isabella learned about the decoy program through her service as an explorer with the California Highway Patrol (CHP). As of October 19, 2018, she had been a CHP Explorer for approximately five and one-half years. Her duties as a CHP Explorer included helping allied agencies, going on ride-a-longs, and doing mostly paperwork. Her responsibilities when helping allied agencies included traffic control, decoy operations and a lot of volunteer work. She interacted with the public during these activities. The training she received as a CHP Explorer involved safety training, CPR, and simulated gun control where the explorers used

simulated guns in their competitions. Decoy Isabella believes her time as a CHP Explorer was a positive experience wherein it equipped her to be a better, more caring and aware person, helped her to interact with the public, as well as made her a more confident and mature person.

(Respondent's Witness)

12. Mark Fuller appeared and testified at the hearing. Mr. Fuller has been the district manager for the Respondent corporation for 11 years. His responsibilities as a district manager include making sure employees are trained, the "stores are stacked, just overall following policy and making sure we're open for business 24 hours a day, seven days a week." For the last three months, as of the date of the hearing, Mr. Fuller has been responsible for the district which includes the Respondent's Licensed Premises, United Oil number 5250. The policies across different districts are similar.

13. When Respondent's employees are first hired, they participate in a new-hire program with trainers, which program includes reviewing all company policy, training employees on how to "card" customers, and what to look for, such as the birth date and to make sure the ID picture matches the customer. After the employee completes each age-restricted handbook training session the employee signs an "Age-Restricted Products Remedial Training Acknowledgment." The form acknowledges the employee's requirement to request ID from all customers who appear to be under the age of 30 years or younger, to scan the ID using the register scanner, and if the ID fails to scan to input the birth date from the ID into the register system. The policy form further provides the employee's acknowledgment that "If the customer appears to be over 30 years of age, I do not need to request ID, but I must enter today's month, today's date, and the year 1970 as the birth date into the register system." The employee further acknowledges by signing the said form that if they sell an age-restricted product to a minor, an investigation will occur and they could receive possible disciplinary action, up to and including possible termination, as well as criminal charges which may be filed directly against the employee. (Exhibit A - dated February 8, 11 and 15, 2018, September 8, 13, 14, 15, 16, 17, 18 and 22, 2018, and October 23 and 24, 2018.) Employees are retrained on a yearly basis on age-restricted sales. Employees also are required to complete a Department LEAD training course. (Exhibit C - Multiple copies of LEAD certificate of completion forms dated "May 19, 2"[year cut off], May 30, 2019, June 2 and 4, 2019, July 14, 2019, October 20 and 25, 2019, December 16, 2019.)

14. The employees are provided training through a TIPS program, which instructs employees on how to identify signs of someone who is intoxicated and the legal age to purchase alcohol. Employees receive a TIPS certification card upon completion of the program. (Exhibit B - six copies of TIPS certification cards - four issued 11/28/2018 and two issued 4/30/2019.)

15. The Licensed Premises participates in a BARS program, where a secret shopper visits the store and attempts to purchase alcohol to test whether Respondent's clerks ask for an ID. If the clerk asks for an ID the clerk receives a green card. If the clerk fails to request an ID the clerk receives a red card. After receiving a red card the employee is retrained on the age-restricted sales policy. No employee at the Licensed Premises has ever received a red card through the BARS program. The Licensed Premises participated in 24 BARS secret shopper programs and received 24 green cards. (Exhibit D -a four-page detailed report for the Licensed Premises for dates 05/01/18 – 01/14/20.)

16. Mr. Fuller testified that APRO LLC's general policy for age-restricted sales requires clerks card everyone who appear 50 years of age or younger and scan the ID into the register to confirm whether it's a valid ID or not. The Licensed Premises' policy differs from the general policy in that beginning February 3, 2020, its clerks acknowledged the new requirement to request the ID of everyone, regardless of age, and scan the ID. Employees are required to sign an "Age-Restricted Product Sales Training" form acknowledging this change in policy and the consequences of selling an age-restricted product to a minor. (Exhibit E – Age-Restricted Product Sales Training Acknowledgments dated February 3rd through the 7th of 2020.) The Licensed Premises also posted signs stating, "WE ID EVERYONE" in front of the lottery box and its two cash registers to inform customers and remind employees of store policy; there was no evidence as to when the signs were posted. (Exhibit F – two color photographs of posted signs, with an enlarged color copy of said sign.) The Respondent ensures employees comply with its new policy via the manager's review, three times a week, of store video in conjunction with cross-referencing a register journal to confirm clerks are requesting and scanning the ID of every customer. If an employee fails to follow this policy the manager issues a verbal warning, retraines the employee on the Age-Restricted Sales Handbook and has the employee acknowledge all required documentation. If an employee has repeated issues with failing to comply with policy the employee is reprimanded, up to and including termination of employment.

17. The Respondent received three letters from the Department for successfully preventing sales of alcohol to minors on October 21, 2016, November 27, 2017, and September 19, 2019. (Exhibit G.)

18. Clerk Barevadia's employment was terminated at some unknown date after the sale of alcohol to decoy Isabella on October 19, 2018. There was no evidence as to when his employment was terminated.

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

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.
2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.
3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.
4. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on October 19, 2018, the Respondent-Licensee's employee, clerk Thobhanbhai Barevadia, inside the Licensed Premises, sold alcoholic beverages, to-wit: a six-pack of Coors Light beer, to Isabella Alvarez Dela Campa, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-10.)
5. The Respondent argued the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)⁴ and, therefore, the accusation should be dismissed pursuant to rule 141(c).
6. With respect to rule 141(b)(2), the Respondent argued decoy Isabella did not have the appearance of someone under the age of 21 because of certain factors including, (1) decoy Isabella was 20 pounds heavier and one-half inch shorter at the time of the said decoy operation, therefore it "could be argued a heavier person carries an older appearance," (2) her extensive CHP Explorer experience, (3) decoy Isabella testified her CHP Explorer experience made her a more confident and mature individual, and (4) she wore on the day of the said decoy operation a Victoria Secrets brand sweatshirt with a hoody, which is commonly known as a female lingerie company and more associated with older individuals who would frequent such stores.
7. This rule 141(b)(2) argument is rejected. The Respondent presented no evidence as to why clerk Barevadia allegedly believed decoy Isabella to be 21 years of age or older. There was no evidence that any of these alleged factors had an impact upon clerk Barevadia. Clerk Barevadia did not testify. There was nothing about decoy Isabella's

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

appearance, demeanor, clothing or CHP Explorer experience which made her appear older than her actual age. In-person decoy Isabella looks her age. In other words, decoy Isabella had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 10.)

8. The Respondent further listed alternative defenses of (1) laches, arguing the Department's delay in filing the accusation just one month before the applicable statute of limitations unduly prejudiced the Respondent to adequately defend itself, and (2) the fact the Department had only one witness to testify to the transaction, the decoy, who the Respondent claimed had a spotty recollection at best. These arguments are rejected and without merit. The Respondent provided no legal grounds or authority to support its position that the Department is required to file an accusation earlier than one month before the statute of limitations (SOL). The Respondent acknowledged the Department met the SOL, having filed within the SOL. Furthermore, decoy Isabella credibly testified as to the events of the cited violation. The Respondent provided no authority which obligates the Department to produce the officer, agent or anyone other than the minor decoy. The Department met section 25666, requiring it to produce the minor at the hearing. The Respondent had the option of subpoenaing any person for its case in chief in the presentation of its defense.

PENALTY

The Department requested the Respondent's license be suspended for a period of 25 days. The Department noted the current matter was the Respondent's second, sale-to-minor violation within 36 months, in fact the two occurring less than nine months apart. The Respondent argued that, if the accusation were not dismissed, a substantially mitigated penalty was warranted based on the positive changes the Respondent made, in addition to the evidence of a subsequent minor decoy operation conducted at the Licensed Premises in September of 2019, in which the premises was successful in preventing the sale of alcohol to a minor decoy.

The recommended penalty under rule 144 for a second sale-to-minor violation within 36 months is a 25-day suspension.

The Respondent is commended for the positive steps it took, including, but not limited to, eventually changing its policy to require its clerks ask for and scan the ID of *every* customer regardless of age, and posting signs. By doing so the Respondent eventually addressed the problem related to the sale at hand, albeit not until February 2020. While there was no direct evidence how clerk Barevadia completed the sale of alcohol to decoy Isabella on October 19, 2018, circumstantial evidence indicates that since he did not request and scan decoy Isabella's ID, he entered October 19, "and the year 1970 as the birth date into the register system" pursuant to Respondent's policy at the time. (See

Exhibit A.) The new policy, as stated in the "Age-Restricted Product Sales Training" acknowledgment forms (Exhibit E) removed the language instructing clerks to input the current date, month and year of 1970 for those customers appearing over 30 years of age. There was no testimony from Mr. Fuller when this new policy change took effect or when the positive steps were made. However, it is more likely than not, the new policy change as recited in Exhibit E, did not take effect until February of 2020, with the first employee acknowledgment of this new policy signed February 3, 2020. The "Age-Restricted Products Remedial Training Acknowledgment" forms signed by Respondent's employees, were last dated October 23, 2018, and did not contain the new aforementioned policy. (Exhibit A.) These preventive measures are a good start; unfortunately, they were a little too late. As such, the argued-for mitigation is compromised based on failing to take immediate action to address the problem in its policy after the said violation of October 19, 2018. There was evidence of documented training of Respondent's employees, including their receiving LEAD Training in 2019 (Exhibit C) and annual Age-Restricted Products training and retraining on October 23, 2018 (Exhibit A) after said decoy operation of October 19, 2018. The penalty recommended herein complies with rule 144.

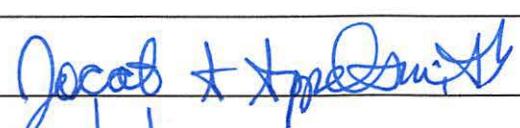
ORDER

The Respondent's off-sale beer and wine license is hereby suspended for a period of 20 days.

Dated: February 24, 2020



D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: 