

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

AB-9888

File: 20-484551; Reg: 19088814

7-Eleven, Inc. and Coastal Convenience Service Solutions Incorporated,
dba 7-Eleven Store #2174-19003D
837 South Gaffey Street
San Pedro, CA 90731-3612,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: January 8, 2021
Telephonic

ISSUED JANUARY 13, 2021

Appearances: *Appellants:* Adam N. Koslin, of Solomon, Saltsman & Jamieson, as
counsel for Coastal Convenience Service Solutions Incorporated,

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

OPINION

7-Eleven, Inc. and Coastal Convenience Service Solutions Incorporated, doing
business as 7-Eleven Store #2174-19003D (appellants), appeal from a decision of the
Department of Alcoholic Beverage Control (Department)¹ suspending their license for
10 days because their clerk sold an alcoholic beverage to a police minor decoy, in
violation of Business and Professions Code section 25658, subdivision (a).

¹ The Department's Decision Under Government Code section 11517(c), dated
August 31, 2020, is set forth in the appendix, as is the proposed decision of the
administrative law judge (ALJ) dated November 20, 2019.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 23, 2010. There is no prior record of departmental discipline against the license.

On May 16, 2019, the Department filed an accusation against appellants charging that, on December 20, 2018, appellants' clerk, Onyelukachukwu Ajufoh (the clerk), sold an alcoholic beverage to 18-year-old Jesus Reyes (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 October 14, 2019, documentary evidence was received and testimony concerning the sale was presented by the decoy and by LAPD Officer Jessica Gutierrez-Gonzalez. Franchisee Robert Lee, president and sole shareholder of Coastal Convenience Service Solutions Incorporated, testified on behalf of appellants regarding store policies, procedures, and employee training.

Testimony established that on December 20, 2018, Officer Gutierrez-Gonzalez entered the licensed premises in a plainclothes capacity, followed shortly thereafter by the decoy. The decoy went to the coolers where he selected a 24-ounce can of Bud Light beer. He took the beer to the checkout counter and waited in line. When it was his turn, the decoy set the beer on the counter and the clerk asked for his identification.

The decoy handed the clerk his California driver's license, which had a portrait orientation, contained his correct date of birth (showing him to be 18 years of age), and had a red stripe indicating "AGE 21 IN 2021." (Exh. 2.) The clerk looked at the ID for approximately six seconds, pressed a bypass key to allow the sale to go forward, then completed the sale without asking any age-related questions. The decoy exited the premises. Officer Gutierrez-Gonzalez witnessed the transaction while standing

approximately three feet away, then also exited the store. The decoy re-entered the premises with several LAPD officers and made a face-to-face identification of the clerk. A photograph of the clerk and decoy was taken (exh. 3) and the clerk was issued a citation.

The ALJ issued a proposed decision on November 20, 2019, sustaining the accusation and recommending a 10-day suspension. The Department initially notified the parties that it had considered but not adopted the proposed decision and would decide the matter itself pursuant to Government Code section 11517(c)(2)(E). The parties were invited to submit comments addressing several issues in regards to the penalty:

Are the following appropriate for mitigation or aggravation:

- 1) The action of checking an ID of a minor, and proceeding with the sale even though the ID clearly shows the minor is underage;
- 2) Having a bypass key on the register that allows employees to make a sale without checking the ID of the customer; and
- 3) Choosing to keep a bypass key on the register after an incident similar to the facts in this case where it was used to make a sale to a minor.

Both parties submitted comments. Thereafter, the Department issued its Decision Under Government Code section 11517(c), adopting the proposed decision in its entirety.

Appellants then filed an appeal contending the Department failed to proceed in the manner prescribed by law when determining the penalty. (AOB at p. 6.)

DISCUSSION

Appellants contend that the ALJ failed to sufficiently mitigate the penalty. They maintain a lesser penalty, or outright reversal, would be more appropriate in light of

appellants' nearly nine years of discipline-free operation, its implementation of training and procedures to prevent sales to minors, and the absence of factors in aggravation.

The Board will not disturb the Department's penalty order in the absence of an abuse of discretion. (Martin v. Alcoholic Bev. Control Appeals Bd. & Haley (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) "Abuse of discretion" in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.] (Brown v. Gordon (1966) 240 Cal.App.2d 659, 666-667 [49 Cal.Rptr. 901].) If the penalty imposed is reasonable, the Board must uphold it even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within its discretion." (Harris v. Alcoholic Bev. Control Appeals Bd. (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Rule 144 provides:

In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act (Bus. and Prof. Code Sections 23000, et seq.), and the Administrative Procedures Act (Govt. Code Sections 11400, et seq.), the Department shall consider the disciplinary guidelines entitled "Penalty Guidelines" (dated 12/17/2003) which are hereby incorporated by reference. Deviation from these guidelines is appropriate where the Department in its sole discretion determines that the facts of the particular case warrant such a deviation - such as where facts in aggravation or mitigation exist.

(Cal. Code Regs., tit. 4, § 144.)

Among the mitigating factors provided by the rule are the length of licensure without prior discipline, positive actions taken by the licensee to correct the problem, cooperation by the licensee in the investigation, and documented training of the licensee and employees. Aggravating factors include, inter alia, prior disciplinary

history, licensee involvement, lack of cooperation by the licensee in the investigation, and a continuing course or pattern of conduct. (Ibid.)

The Penalty Policy Guidelines further address the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

Penalty Policy Guidelines:

The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

(Ibid.)

The ALJ explained the basis and rationale for the penalty imposed as follows:

PENALTY

The Department requested the Respondents' license be suspended for a period of 10 days, based on the following factors: (1) the minor decoy's very youthful appearance and actual age of 18 at the time of the violation, (2) the record indicates clerk Ajufoh had received training and despite that training and Respondents' policies it did not prevent the violation as he still violated the law, (3) the only training given after said violation, occurred in August of 2019, not immediately after the said violation, and only one to two additional signs were posted to remind employees to check IDs, (4) the record indicates clerk Ajufoh was able to proceed with the sale of alcohol to the minor decoy by pressing the bypass key, which has not been removed.

The Respondents recommended a substantially mitigated penalty based on the following: (1) Respondents' nearly 9-year discipline-free history, as well as the LAPD letter for successfully preventing the sale of tobacco to a minor on April 29, 2019, and three green cards received by employees in

2019, (2) documented training of Respondents' employees, (4) Respondents' participation in the BARS program, and (5) positive action taken by Respondents' by speaking with clerk Ajufoh and each employee individually reminding them to ask for IDs, and adding additional signs.

The Respondents are correct that their approximate eight-year, eight-month discipline-free operation, and documented training warrant mitigation. Although the Respondents argue they have taken positive steps by reminding employees to ask for IDs, merely asking for an ID without more does not ensure the prevention of future sales to minors, as evidenced by clerk Ajufoh' s actions. The preponderance of the evidence indicates clerk Ajufoh, despite asking for the decoy's ID and looking at a vertical-oriented, red-striped minor's ID, pressed the bypass key to enable the sale of alcohol to decoy Reyes. There was no evidence the Respondents instruct their clerks on the red flags of minor's IDs or, more importantly, removed the bypass key, which remains an option for its clerks to override any safety protocol the cash register may have in place. The penalty recommended herein complies with rule 144.

(Decision, at pp. 6-7.)

Appellants argue that evidence of mitigation was presented at the hearing, but not considered, regarding positive actions taken by the licensee to correct the problem and documented training of employees. Appellants contend that these efforts should have merited additional mitigation of the penalty in light of their assertion that no factors in aggravation exist.

The decision itself debunks appellants' assertion that these factors were ignored. (See Decision, at pp. 6-7.) The ALJ takes note of all of these factors in mitigation, but simply reaches the conclusion that a 10-day suspension is appropriate when looking at all the evidence. While appellants argue against this determination, it fails to acknowledge that the penalty is less than the standard 15-day suspension, due to these factors in mitigation considered by the ALJ.

In addition, we fail to see how appellants can assert that no factors in aggravation exist in this matter. As the ALJ notes:

The preponderance of the evidence indicates clerk Ajufoh, despite asking for the decoy's ID and looking at a vertical-oriented, red-striped minor's ID, pressed the bypass key to enable the sale of alcohol to decoy Reyes. There was no evidence the Respondents instruct their clerks on the red flags of minor's IDs or, more importantly, removed the bypass key, which remains an option for its clerks to override any safety protocol the cash register may have in place.

(Decision, at p. 7.) While these facts are not specifically identified by the ALJ as factors in aggravation, we believe they may well be treated as such. In case after case, this Board is presented with clerks who look directly at an ID with a vertical orientation — containing a red stripe clearly indicating the year that the individual will be 21 — who then go on to make a sale of alcohol by pressing an override key on the cash register. While this may or may not be labeled as aggravation, it certainly suggests less weight should be given to countervailing factors in mitigation when balancing the equities in such cases.

Appellants' disagreement with the penalty imposed does not mean the Department abused its discretion. This Board's review of a penalty looks only to see whether it can be considered reasonable, and, if it is reasonable, the Board's inquiry ends there. The penalty here is within the bounds of the Department's discretion, and the Board is simply not empowered to reach a contrary conclusion from that of the Department — and substitute its own judgment — when, as here, the underlying decision is reasonable and supported by substantial evidence. We find no abuse of discretion and the penalty imposed complies with the guidelines of rule 144.

ORDER

The decision of the Department is affirmed.²

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

² 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 Coastal Convenience Service
Solutions Incorporated
Db a 7 Eleven Store 2174 19003
837 South Gaffey Street
San Pedro, CA 90731-3612

Licensee(s).

File No.: 20-484551

Reg. No.: 19088814

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Alcoholic Beverage Control
Office of Legal Services

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department on August 31, 2020 for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held on October 14, 2019, before Administrative Law Judge D. Huebel, and the written arguments of the parties, and good cause appearing, the proposed decision of the Administrative Law Judge dated November 20, 2019, is hereby adopted as the decision of the Department.

Sacramento, California

Dated: August 31, 2020



Eric Hirata
Director

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

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

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

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

7-ELEVEN, INC., AND COASTAL CONVENIENCE
SERVICE SOLUTIONS INCORPORATED
7-ELEVEN STORE 2174 19003
837 SOUTH GAFFEY STREET
SAN PEDRO, CA 90731-3612

OFF-SALE BEER AND WINE - LICENSE

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

LAKWOOD DISTRICT OFFICE

File: 20-484551

Reg: 19088814

CERTIFICATE OF DECISION

NOTICE CONCERNING PROPOSED DECISION

To the parties in the above-entitled proceedings:

You are hereby advised that the Department considered, but did not adopt, the Proposed Decision in the above titled matter and that the Department will itself decide the case pursuant to the provisions of Section 11517(c)(2)(E). A copy of the Proposed Decision has previously been sent to all parties.

The Department has requested that a transcript of the hearing be prepared. A copy of the record will be made available to you. Upon receipt of the hearing transcript, the Department will notify you of the cost of a copy of the record. At that time, you all also be advised of the date by which written argument if any, is to be submitted.

Sacramento, California

Dated: January 7, 2020



Matthew D. Botting
General Counsel

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**Alcoholic Beverage Control
Office of Legal Services**

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

IN THE MATTER OF THE ACCUSATION AGAINST:

7-Eleven, Inc., and Coastal Convenience Service	}	File: 20-484551
Solutions Incorporated	}	
Dbas: 7-Eleven Store 2174 19003	}	Reg.: 19088814
837 South Gaffey Street	}	
San Pedro, California 90731-3612	}	License Type: 20
	}	
Respondents	}	Word Count: 10,120
	}	
	}	Reporter:
	}	Dalauna Cardoza
	}	California Reporting
	}	
<u>Off-Sale Beer and Wine License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Cerritos, California, on October 14, 2019.

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

Brian Washburn, Attorney, represented Respondents, 7-Eleven, Inc., and Coastal Convenience Service Solutions Incorporated.

The Department seeks to discipline the Respondents' license on the grounds that, on or about December 20, 2018, the Respondents-Licensees' agent or employee, Onyelukachukwu Ajufoh, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Jesus Reyes, 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 October 14, 2019.

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

FINDINGS OF FACT

1. The Department filed the accusation on or about May 16, 2019.
2. The Department issued a type 20, off-sale beer and wine license to the Respondents for the above-described location on March 23, 2010 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Jesus Reyes (hereinafter referred to as decoy Reyes) was born on June 17, 2000. On December 20, 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 (LAPD) in conjunction with the Department.
5. Decoy Reyes appeared and testified at the hearing. On December 20, 2018, he was 5'9" tall and weighed approximately 210 pounds. He wore a white t-shirt, black pants and black and white Vans shoes. (Exhibit 3.) His appearance at the hearing was the same.
6. On December 20, 2018, LAPD Officer Gutierrez-Gonzalez entered the Licensed Premises, in a plain clothes capacity, followed shortly thereafter by decoy Reyes. Decoy Reyes walked straight to the alcoholic beverage refrigeration aisle and selected a 24-ounce can of Bud Light beer. He brought the beer to the sales counter for purchase and waited in line behind three customers.
7. Decoy Reyes eventually reached the sales counter, upon which he placed the Bud Light beer. Clerk Onyelukachukwu Ajufoh (hereinafter referred to as clerk Ajufoh) scanned the beer and asked for the decoy's identification (ID). Decoy Reyes handed clerk Ajufoh his valid California Driver License, which clerk Ajufoh accepted and held in his hand. Decoy Reyes' California Driver License had a vertical orientation, showed his correct date of birth and included a red stripe which read, "AGE 21 IN 2021." (Exhibit 2.) Clerk Ajufoh looked at the ID for approximately six seconds and handed it back to the decoy. Clerk Ajufoh did not swipe or scan the ID into the cash register. Clerk Ajufoh did not enter anything into the register from the ID or while looking at the ID. Clerk Ajufoh continued with the sales transaction by pressing on the cash register a bypass key, which permitted the sales transaction to proceed. Clerk Ajufoh told the decoy the cost of the beer. Decoy Reyes paid for the beer and received change. Decoy Reyes took the change, the Bud Light beer and exited the store. Clerk Ajufoh did not ask the decoy his age or questions about his ID. Officer Gutierrez-Gonzalez could hear and witnessed the transaction with a clear, unobstructed view from approximately three feet away. Officer Gutierrez-Gonzalez exited the store soon after decoy Reyes. While decoy

Reyes was inside the Licensed Premises he did not communicate with Officer Gutierrez-Gonzalez or anyone else.

8. Decoy Reyes re-entered the Licensed Premises with other LAPD officers. Decoy Reyes was asked to identify the person who sold him the alcohol. Decoy Reyes pointed at clerk Ajufoh indicating he was the one who sold him the beer. Decoy Reyes and clerk Ajufoh were standing approximately three feet apart, facing each other, with the sales counter between them, at the time of this identification.² A photograph of clerk Ajufoh and decoy Reyes was taken after the face-to-face identification, with decoy Reyes holding the Bud Light beer in his left hand, while standing next to clerk Ajufoh. (Exhibit 3.)

9. Clerk Ajufoh was issued a citation after the face-to-face identification. There was no evidence that clerk Ajufoh was distracted during the sales transaction or the face-to-face identification. Clerk Ajufoh did not appear at the hearing.

10. Decoy Reyes 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 Ajufoh at the Licensed Premises on December 20, 2018, decoy Reyes 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 decoy Reyes has a baby-face and appears very youthful. On December 20, 2018, decoy Reyes appeared to Officer Gutierrez-Gonzalez to be 18 years old or younger.

11. December 20, 2018, was the seventh day of decoy operations in which decoy Reyes participated. He had never been to the Licensed Premises prior to December 20, 2018. Decoy Reyes learned about the decoy program through his service as a police cadet with the LAPD. He attended a leadership academy, where he was instructed on how to incorporate leadership skills into his life. As a cadet he helps out at community events such as the "Movies at the Park," and "Cook-outs" where he serves food. He has never acted as security for any community events.

(Respondents' Witness)

12. Robert Lee appeared and testified at the hearing. Mr. Lee described himself as the franchisee of the Licensed Premises since 2010, responsible for managing the operation of the store. Mr. Lee participates in training employees on store policy and procedure. Employee training consists of verbally informing employees of the rules relating to

² Officer Gutierrez-Gonzalez stood outside the front of the Licensed Premises and observed the face-to-face identification.

operating the store and on-the-job training via a computer-based training module relating to the sale of age-restricted items and the Patriot Act. The training includes instructing employees not to sell alcohol to anyone under 21, to ask for the ID of anyone appearing 35 years of age or under³ and verifying the customers' age. If the customer appears over 35 years of age the employee can press a bypass key on the cash register, which will allow the sale of age restricted merchandise to the customer. There was no evidence the said bypass key was removed after December 20, 2018. Employees are instructed to use the bypass key only if the customer is 35 years of age or older. Once the employees obtain a passing rate of 90 percent on the computer training they print out a certificate of completion. The Respondents presented nine Certificates of Completion which its employees completed in August of 2019, and which represented a complete packet of certificates after said violation of December 20, 2018. (Exhibit A.) Mr. Lee took the computer-based training in approximately 2014. Mr. Lee is not aware of the changes, if any, that may have been made to the computer-based training program since he took the training.

13. To ensure Respondents' employees comply with store policy the Respondents participate in the BARS program, which involves a secret shopper randomly visiting the premises approximately once monthly to verify the Respondents' clerks are asking for IDs for age-restricted merchandise sales. A green card is issued to a clerk who asks for an ID, and a red card is issued when the clerk fails to do so. Mr. Lee is notified when Respondents' clerks receive a red or green card based on a policy of trust, in that Mr. Lee trusts that employees will present the card to Mr. Lee when they receive either a red or green card. Otherwise Mr. Lee is not made aware of when the clerks receive either red or green cards. If an employee hands Mr. Lee a green card, Mr. Lee will generally hand the green card back to the employee and give them a \$25 AMC gift card. If an employee hands Mr. Lee a red card, Mr. Lee will sit down, one-on-one, with the employee and review why they received the red card, for failing to ask for ID, and remind the employee of store policy to ask for ID. Mr. Lee made black and white copies of three green cards that he had, dated January 6, 2019, May 1, 2019, and June 3, 2019. (Exhibit B.)

14. The Respondents received a letter from the LAPD for successfully preventing a sale of tobacco products to a minor decoy on April 29, 2019. (Exhibit D.) The Respondents have signs advising "We Check I.D." for age-restricted product sales, which signs are posted at the front doors, the window next to the front doors, on the beer cooler doors (Exhibit C), and on both cash registers. Prior to the said violation of December 20, 2018, the Respondents had approximately 10 to 15 said signs posted throughout the Licensed Premises. After the said violation Mr. Lee placed one or two memorandums behind the sales counter to remind employees to ask for IDs.

³ Respondents' store policy has always been to require its staff to ask for IDs of anyone appearing 35 years of age and under.

15. Clerk Ajufoh was hired by Respondents in November of 2018. After the said violation of December 20, 2018, Mr. Lee had a one-on-one discussion with clerk Ajufoh about the said violation and gave him a final warning that if it ever happened again, he would be terminated. The Respondents did not terminate clerk Ajufoh because their policy is to give employees a second opportunity and Respondents consider clerk Ajufoh to be a “very responsible individual,” and therefore determined a warning was appropriate for him. Mr. Lee also spoke to all Respondents’ employees reminding them to ID customers at all times. Thereafter, Mr. Lee saw good results from employees in the performance of their duties. Other than the said violation of December 20, 2018, the Respondents have had no other violations or discipline relating to alcohol sales.

16. 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 20, 2018, the Respondents-Licensees’ employee, clerk Onyelukachukwu Ajufoh, inside the Licensed Premises, sold alcoholic beverages, to-wit: a Bud Light beer, to Jesus Reyes, 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 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).

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

6. With respect to rule 141(b)(2), Respondents argued decoy Reyes did not have the appearance of someone under the age of 21 because his larger stature, of 5'9" and 210 pounds, is "more of a football player," and with which stature most persons would assume he was over the age of 21.

7. This rule 141(b)(2) argument is rejected. The Respondents presented no evidence as to why clerk Ajufoh allegedly believed decoy Reyes to be over 21 years of age. Clerk Ajufoh did not testify. In fact, the evidence indicates clerk Ajufoh knew or at least should have known the decoy was a minor. He was presented with a "baby-faced," very youthful appearing decoy Reyes, whose vertical formatted minor's ID, had a red stripe to alert the clerk he would not turn 21 until the year 2021. Regardless, there was nothing about decoy Reyes' stature or demeanor which made him appear older than his actual age. Officer Gutierrez-Gonzalez observed the decoy at the Licensed Premises on December 20, 2018, and thought he appeared to be 18 years old or younger. In-person the decoy has a baby-faced, youthful appearance. In other words, decoy Reyes had the appearance generally expected of a person under the age of 21.

PENALTY

The Department requested the Respondents' license be suspended for a period of 10 days, based on the following factors: (1) the minor decoy's very youthful appearance and actual age of 18 at the time of the violation, (2) the record indicates clerk Ajufoh had received training and despite that training and Respondents' policies it did not prevent the violation as he still violated the law, (3) the only training given after said violation, occurred in August of 2019, not immediately after the said violation, and only one to two additional signs were posted to remind employees to check IDs, (4) the record indicates clerk Ajufoh was able to proceed with the sale of alcohol to the minor decoy by pressing the bypass key, which has not been removed.

The Respondents recommended a substantially mitigated penalty based on the following: (1) Respondents' nearly 9-year discipline-free history, as well as the LAPD letter for successfully preventing the sale of tobacco to a minor on April 29, 2019, and three green cards received by employees in 2019, (2) documented training of Respondents' employees, (4) Respondents' participation in the BARS program, and (5) positive action taken by Respondents' by speaking with clerk Ajufoh and each employee individually reminding them to ask for IDs, and adding additional signs.

The Respondents are correct that their approximate eight-year, eight-month discipline-free operation, and documented training warrant mitigation. Although the Respondents argue they have taken positive steps by reminding employees to ask for IDs, merely asking for an ID without more does not ensure the prevention of future sales to minors, as

evidenced by clerk Ajufoh's actions. The preponderance of the evidence indicates clerk Ajufoh, despite asking for the decoy's ID and looking at a vertical-oriented, red-striped minor's ID, pressed the bypass key to enable the sale of alcohol to decoy Reyes. There was no evidence the Respondents instruct their clerks on the red flags of minor's IDs or, more importantly, removed the bypass key, which remains an option for its clerks to override any safety protocol the cash register may have in place. The penalty recommended herein complies with rule 144.

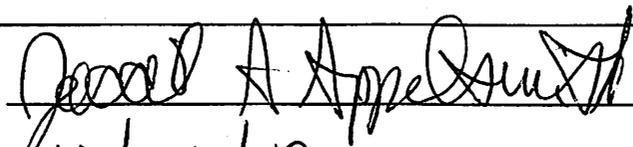
ORDER

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

Dated: November 20, 2019



D. Huebel
Administrative Law Judge

<input type="checkbox"/> Adopt
<input checked="" type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>12/20/19</u>