

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

**AB-9800**

File: 21-479654; Reg: 18087473

GARFIELD BEACH CVS, LLC and  
LONGS DRUGS STORES CALIFORNIA, LLC,  
dba CVS Pharmacy #9727  
2456 South Grove Avenue  
Ontario, CA 91761,  
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: Doris H. Huebel

Appeals Board Hearing: October 3, 2019  
Los Angeles, CA

**ISSUED OCTOBER 15, 2019**

*Appearances:*      *Appellants:* Adam N. Koslin, of Solomon, Saltsman & Jamieson, as  
counsel for Garfield Beach CVS, LLC and Longs Drugs Stores  
California, LLC,

*Respondent:* Joseph J. Scoleri III, as counsel for the Department of  
Alcoholic Beverage Control.

**OPINION**

Garfield Beach CVS, LLC and Longs Drugs Stores California, LLC, doing  
business as CVS Pharmacy #9727, appeal from a decision of the Department of  
Alcoholic Beverage Control<sup>1</sup> suspending their license for 10 days because their clerk  
sold an alcoholic beverage to a police minor decoy, in violation of Business and  
Profession Code section 25658(a).

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<sup>1</sup>The decision of the Department, dated March 11, 2019, is set forth in the  
appendix.

## FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 10, 2009. There is no record of prior departmental discipline against the license.

On September 11, 2018, the Department filed a single-count accusation against appellants charging that, on March 17, 2018, appellants' clerk, Jacob Juldán Dewit (the clerk), sold an alcoholic beverage to 19-year-old Jair Eduardo Torres Adame (the decoy). Although not noted in the accusation, the decoy was working for the Ontario Police Department (OPD) at the time.

At the administrative hearing held on January 9, 2019, documentary evidence was received and testimony concerning the sale was presented by the decoy and by OPD Officer Erich Kemp. Appellants presented no witnesses.

Testimony established that on March 17, 2018, the decoy entered the licensed premises followed shortly thereafter by Officer Kemp. The decoy walked straight to the alcoholic beverage coolers and selected a tall can of Bud Light beer. The decoy took the beer to the cash register area for purchase. When it was his turn, the decoy placed the beer on the counter for sale.

The clerk asked the decoy for his identification. The decoy handed the clerk his valid California Driver's license, which had several indicators that the decoy was under 21 years of age, including: 1) a vertical orientation; 2) the decoy's correct date of birth, and; 3) a red stripe which read, "AGE 21 IN 2019." (Exh. 3.) The clerk looked at the identification for two seconds and handed it back to the decoy and continued with the sales transaction.

After the decoy paid the clerk, the clerk handed the decoy a receipt and the beer. The decoy took the beer and exited the store. Officer Kemp witnessed the above-

described events and, from inside the store, notified other officers that a violation had occurred. The other officers entered the licensed premises and contacted the clerk, identified themselves as peace officers, and explained the violation.

The decoy then reentered the premises and positively identified the clerk as the person who sold him the beer. A photograph of the decoy and the clerk was taken. (Exh. 4.) Afterwards the decoy left the licensed premises and the clerk was cited.

After the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established. The Department ordered that appellants' license be suspended for 10 days. Appellants filed a timely appeal contending that: (1) The administrative law judge (ALJ) failed to proceed in a manner required by law when she admitted photographs of the decoy's appearance which were not properly authenticated, and; (2) the Department's finding — that the decoy displayed the appearance which would generally be expected of a person under the age of 21 — is not supported by substantial evidence, in violation of rule 141(b)(2).<sup>2</sup>

## DISCUSSION

### I

#### ISSUE CONCERNING AUTHENTICATION

Appellants contend the ALJ erred by admitting two photographs of the decoy that were not properly authenticated. (AOB, at pp. 7-11.) Specifically, appellants contend “[t]here was simply insufficient authentication for [the Department’s] evidence to be considered reliable ... .” (*Id.* at p. 11.)

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<sup>2</sup> 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.

"Photographs and video recordings with imprinted data are writings as defined by the Evidence Code." (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266 [172 Cal.Rptr.3d 637].) "Authentication of a writing is required before it may be received in evidence." (Evid. Code, § 1401(a).) "Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." (*Id.* at § 1400.)

As the California Supreme Court held in *People v. Goldsmith*:

A photograph or video recording is typically authenticated by showing it is a fair and accurate representation of the scene depicted. [Citations.] This foundation may, but need not be, supplied by the person taking the photograph or by a person who witnessed the event being recorded. [Citations.] It may be supplied by other witness testimony, circumstantial evidence, content and location. [Citations.]

(*People v. Goldsmith, supra*, at pp. 267-268.)

Expanding on this principle, the court in *In re K.B.* (2015) 238 Cal.App.4th 989, 997 [190 Cal.Rptr.3d 287, 293], explained:

In making the initial authenticity determination, the court need only conclude that a *prima facie* showing has been made that the photograph is an accurate representation of what it purports to depict. The ultimate determination of the authenticity of the evidence is for the trier of fact, who must consider any rebuttal evidence and balance it against the authenticating evidence in order to arrive at a final determination on whether the photograph, in fact, is authentic. As our Supreme Court explained in *Goldsmith*, " '[t]he fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility.' [Citation.]"

(citing *Goldsmith, supra*, at p. 267.)

After showing the decoy the first photograph (exh. 2), Department's counsel questioned the decoy as follows:

Q. Do you recognize what's depicted there?

A. Yes, I do.

Q. What is that?

A. That is me with the same shirt, same pants, same shoes.

Q. Do you know when that photo was taken?

A. I believe it was March 11th.

Q. Okay. What was the date of this operation?

A. Yes, same date of the operation.

Q. Was that March 17th?

A. I don't remember the date, but that's the day of the operation.

Q. Okay. Was this - when, during the course of that operation, was this photo taken?

A. Yes, it was.

Q. When in the course? Was it before? during? after?

A. I believe it was after.

Q. After. And is that an accurate photo of what you wore?

A. Yes, it is.

(RT at pp. 10-11.)

In regard to the second color photograph (exh. 4), Department's counsel asked:

Q. ... [D]o you recognize what's depicted there?

A. It is a picture taken of me and the clerk, and I'm holding the beer and my driver's license.

(RT at p. 17.)

Appellants' counsel objected to both photographs on foundational grounds, stating:

My objection is that this picture, although clearly the decoy did recognize himself in the photo, it is not good enough to qualify to - it doesn't depict - because it's kind of a flash photograph or the face is burnt out, it does not depict any kind of wrinkling or non-wrinkling, gray hair, anything like that.

It's not a good enough picture to assess the age of the person in the photograph.

[...] If the photos are now going to be used in that way, which the Department has argued, the foundation hasn't been laid. We need to have the photographer in here. We need to know what kind of lighting there was, if they used a flash.

There's a myriad of information that would help us determine whether or not this was the best or most accurate depiction at the level of detail required to determine whether or not he looked like that at the time of the operation. So I'm objecting on that basis.

(RT at pp. 61-62.) Ultimately, the ALJ overruled appellants' counsel's objection and admitted exhibits 2 and 4 into evidence and cited them in the Proposed Decision.

(RT at pp. 62-63; Proposed Decision, at p. 2.)

Here, the decoy's testimony sufficiently authenticated the photographs as depicting him on the day of the operation. (See *People v. Bowley* (1963) 59 Cal.2d 855, 859 [31 Cal.Rptr. 471] ["It is well settled that the testimony of a person who was present at the time a film was made that it accurately depicts what it purports to show is a legally sufficient foundation for its admission into evidence."].) While appellants' counsel legitimately questioned the genuineness of the photographs, "equating authentication with proving genuineness would ignore a fundamental principal underlying authentication emphasized in *Goldsmith*." *In re K.B.*, *supra*, at p. 997. The purported deficiencies appellants claimed regarding exhibits 2 and 4 go to the weight of the evidence, not its admissibility. (*Goldsmith*, *supra*, at p. 267.) The Board sees no error.

## II

### ISSUE CONCERNING DECOY'S APPEARANCE

Appellants contend that the ALJ's finding that the decoy complied with rule 141(b)(2) was not supported by substantial evidence. (AOB, at pp. 11-14.)

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.)

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

"When 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." (*Kirby v. Alcoholic Bev. etc. Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815].) Simply stated, the Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr.

113]; *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106, 114 [28 Cal.Rptr.74].)

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

5. Decoy Jair appeared and testified at the hearing. On March 17, 2018, he was 5'7" tall and weighed approximately 140 pounds. He wore a black, long-sleeved sweatshirt with black pants, and tan shoes. His hair had a buzz cut along the sides of his head, with the top of his hair in a curly top, approximately four inches long. (Exhibits 2 and 4.) His appearance at the hearing was the same except he was 5'8" tall, weighed 155 pounds, and his hair was styled in a right comb-over, parted to the left. At the hearing he initially had a black jacket on which he removed during the hearing.

¶ . . . ¶

13. Decoy Jair 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 Dewit at the Licensed Premises on March 17, 2018, decoy Jair 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 Jair has a youthful appearance, as that of a teenager.

(Findings of Fact, ¶¶ 5, 13.) Based on these findings, the ALJ addressed appellants'

Rule 141(b)(2) arguments:

6. With respect to rule 141(b)(2), Respondents argued decoy Jair did not have the appearance of someone under 21 because of certain factors which made him appear to be older than 21. Those factors included, the Respondents' counsel's opinion that, (1) as decoy Jair sat in the hearing room he appeared much different than the photograph exhibits, in which counsel said the decoy appeared older, and (2) the decoy's hair during the operation was long and curly "much like a hipster," and he was "more clean cut looking" at the hearing.

7. This rule 141(b)(2) argument is rejected. Respondents' unsupported assertions are nothing but assumption and conjecture. Clerk Dewit did



not testify. The Respondents presented no evidence that any of these factors actually resulted in decoy Jair appearing 21 or older, let alone to clerk Dewit. In fact, there was nothing about decoy Jair's hair style, appearance or demeanor which made him appear older than his actual age. Decoy Jair had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 13.) In fact, in-person, decoy Jair has a youthful appearance, as that of a teenager, which Exhibits 2 and 4 depict.

(Conclusions of Law, ¶¶ 6-7.)

This Board has noted that:

An ALJ's task to evaluate the appearance of decoys is not an easy one, nor is it precise. To a large extent, application of such standards as the rule provides is, of necessity, subjective; all that can be required is reasonableness in the application. As long as the determinations of the ALJs are reasonable and not arbitrary or capricious, we will uphold them.

(*O'Brien* (2001) AB-7751, at pp. 6-7.)

Here, appellants presented no evidence that the decoy's physical appearance or demeanor *actually resulted* in his displaying the appearance of a person 21 years old or older on the date of the operation in this case. As the ALJ noted, the clerk did not testify. We cannot know what went through his mind in the course of the transaction, or why he made the sale — despite looking directly at the decoy's identification which showed him to be 19 years of age. There is simply no evidence to establish that the decoy's physical appearance or demeanor were the *actual reason* the clerk made the sale. Appellants have failed to meet their burden.

Further, appellants' sole reliance on the ALJ's personal observations of the decoy at the hearing is misplaced. While the ALJ notes her personal observations of the decoy in the proposed decision, she also cites to two exhibits which are photographs<sup>3</sup> of the decoy immediately after the sale. (Findings of Fact, ¶ at 5.)

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<sup>3</sup> Appellants argue at length that, since the photographs were not properly

These photographs, along with the ALJ's personal observations of the decoy at the hearing, constitute substantial evidence to support the Department's findings.

ORDER

The decision of the Department is affirmed.<sup>4</sup>

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

authenticated, the sole basis for the ALJ's findings were her personal observation of the decoy at the hearing, which is unreliable given the decoy's testimony that his appearance was significantly different at the time of the hearing. (AOB, at pp. 11-14.) However, based on the discussion in Section I, *supra*, the photographs were properly authenticated and the ALJ was entitled to consider the photographs as evidence.

<sup>4</sup> 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:**

GARFIELD BEACH CVS LLC,  
LONGS DRUG STORES CALIFORNIA LLC  
CVS PHARMACY 9727  
2456 SOUTH GROVE AVENUE  
ONTARIO, CA 91761-6224

OFF-SALE GENERAL - LICENSE

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

RIVERSIDE DISTRICT OFFICE

File: 21-479654

Reg: 18087473

**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 March 1, 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 (his 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 slated 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 April 22, 2019, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: March 11, 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:

Garfield Beach CVS LLC, and  
Longs Drug Stores California LLC  
Dbas: CVS Pharmacy 9727  
2456 South Grove Avenue  
Ontario, California 91761-6224

Respondents

Off-Sale General License

} File: 21-479654  
}  
} Reg.: 18087473  
}  
} License Type: 21  
}  
} Word Count: 12,355  
}  
} Reporter:  
} Susan Gallagher  
} Kennedy Court Reporters  
}  
} **PROPOSED DECISION**

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at San Bernardino, California, on January 9, 2019.

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

Donna Hooper, Attorney, represented Respondents, Garfield Beach CVS LLC, and Longs Drug Stores California LLC.

The Department seeks to discipline the Respondents' license on the grounds that, on or about March 17, 2018, the Respondents-Licensees' agent or employee, Jacob Juldan Dewit, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Jair Eduardo Torres Adame, a person under the age of 21, in violation of Business and Professions Code section 25658(a).<sup>1</sup> (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 January 9, 2019.

**FINDINGS OF FACT**

1. The Department filed the accusation on September 11, 2018.

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<sup>1</sup> All statutory references are to the Business and Professions Code unless otherwise noted.

2. The Department issued a type 21, off-sale general license to the Respondents for the above-described location on September 10, 2009 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Jair Eduardo Torres Adame (hereinafter referred to as decoy Jair) was born on December 28, 1998. On March 17, 2018, he was 19 years old. On that date he served as a minor decoy in an operation conducted by the Ontario Police Department (hereinafter referred to as Ontario PD).
5. Decoy Jair appeared and testified at the hearing. On March 17, 2018, he was 5'7" tall and weighed approximately 140 pounds. He wore a black, long-sleeved sweatshirt with black pants, and tan shoes. His hair had a buzz cut along the sides of his head, with the top of his hair in a curly top, approximately four inches long. (Exhibits 2 and 4.) His appearance at the hearing was the same except he was 5'8" tall, weighed 155 pounds, and his hair was styled in a right comb-over, parted to the left. At the hearing he initially had a black jacket on which he removed during the hearing.
6. On March 17, 2018, decoy Jair entered the Licensed Premises. Ontario PD Officer Kemp entered shortly thereafter in a plain clothes capacity, wearing his body worn video camera in his front, right jeans pocket. Decoy Jair walked straight to the alcoholic beverage coolers and selected a tall can of Bud Light beer. (Exhibit 4.) Beer is an alcoholic beverage. Decoy Jair took the beer to the cash register area for purchase and waited in line behind approximately five people.
7. After waiting approximately five minutes, decoy Jair reached the sales counter and placed the beer upon the counter. The clerk, Jacob Juldan Dewit (hereinafter referred to as clerk Dewit), asked the decoy for his ID. Decoy Jair handed clerk Dewit his valid California Driver License, which clerk Dewit accepted. Decoy Jair's California Driver license had a vertical orientation, showed his correct date of birth and included a red stripe which read, "AGE 21 IN 2019." (Exhibit 3.) Clerk Dewit looked at the ID for two seconds, and then handed the ID back to the decoy. Clerk Dewit did not scan the ID. Clerk Dewit did not ask decoy Jair any questions about his age or ID. Clerk Dewit continued with the sales transaction. Decoy Jair handed money to the clerk, who then provided the decoy with a receipt and the beer. Decoy Jair took the Bud Light beer can and exited the store. Officer Kemp witnessed these above-described events with a clear, unobstructed view, while posing as a customer. Decoy Jair and Officer Kemp did not communicate with each other while inside the Licensed Premises. Officer Kemp remained in the store and notified Officers Hernandez and Bertagna that a violation had occurred.

8. Ontario PD Officers Hernandez and Bertagna entered the Licensed Premises and met up with Officer Kemp. The officers walked to the front sales counter and made contact with clerk Dewit, who was standing behind the sales counter. The officers identified themselves as police officers to clerk Dewit and explained the violation to him. The officers requested the store manager and a private room to conduct their investigation. The officers and clerk Dewit waited for the manager. Eventually, the officers escorted clerk Dewit into a private office in the rear of the store.

9. Decoy Jair re-entered the Licensed Premises with an Ontario PD officer, both of whom walked to the back office where Officers Kemp, Hernandez, Bertagna and clerk Dewit were waiting. Officer Kemp asked decoy Jair to identify the person who sold him the beer, Decoy Jair pointed at clerk Dewit and said, "He sold me the beer and I'm only 19 years old." Decoy Jair and clerk Dewit were standing approximately three feet apart and facing each other at the time of this identification. A photo of clerk Dewit and decoy Jair was taken in the private office after the face-to-face identification, with decoy Jair holding the Bud Light beer can in his left hand and his California Driver License in his right hand, while standing next to clerk Dewit. (See Exhibit 4.) After the photograph was taken, decoy Jair left the private office and exited the store. A citation was later issued to clerk Dewit.

10. Clerk Dewit did not appear and did not testify at the hearing. There is no evidence clerk Dewit was distracted during the sales transaction with the decoy or during the face-to-face identification.

11. March 17, 2018 was the first day of decoy operations in which decoy Jair had participated. He learned of the decoy program while volunteering with the Ontario PD Police Explorer Program. As of March 17, 2018, he was a police explorer for two months. Decoy Jair attended a 10-week recruitment training program which he had just finished prior to the said decoy operation. He attends weekly training, two to three hours every Wednesday, where he engages in physical training, tests and drills.

12. On March 17, 2018, decoy Jair visited a total of five locations, with two of those locations selling alcoholic beverages to him, including the Licensed Premises.

13. Decoy Jair 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 Dewit at the Licensed Premises on March 17, 2018, decoy Jair 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 Jair has a youthful appearance, as that of a teenager.

14. 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 March 17, 2018, the Respondents-Licensees' agent or employee, clerk, Jacob Juldan Dewit, inside the Licensed Premises, sold an alcoholic beverage to Jair Eduardo Torres Adame, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4 through 13.)
5. The Respondents argued the decoy operation at the Licensed Premises failed to comply with rule 141 (b)(2)<sup>2</sup> and, therefore, the accusation should be dismissed pursuant to rule 141(c).
6. With respect to rule 141 (b)(2), Respondents argued decoy Jair did not have the appearance of someone under the age of 21 because of certain factors which made him appear to be older than 21. Those factors included, the Respondents' counsel's opinion that, (1) as decoy Jair sat in the hearing room he appeared much different than the photograph exhibits, in which counsel said the decoy appeared older, and (2) the decoy's hair during the operation was long and curly "much like a hipster," and he was "more clean cut looking" at the hearing.
7. This rule 141(b)(2) argument is rejected. Respondents' unsupported assertions are nothing but assumption and conjecture. Clerk Dewit did not testify. The Respondents presented no evidence that any of these factors actually resulted in decoy Jair appearing

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



21 or older, let alone to clerk Dewit. In fact, there was nothing about decoy fair's hair style, appearance or demeanor which made him appear older than his actual age. Decoy Jair had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 13.) In fact, in-person, decoy Jair has a youthful appearance, as that of a teenager, which Exhibits 2 and 4 depict.

### **PENALTY**

The Department requested the Respondents' license be suspended for a period of 10 days, based on no evidence of mitigation efforts made, and taking into consideration Respondents' discipline-free history.

The Respondents recommended a 10-day, all stayed penalty, based on clerk Dewit having made a mistake and being the only clerk with three to five or more people in line, in addition to a "solid history" of 10 years without any violations.

It is unclear how the Respondents reached 10 years of discipline-free history. The Respondents have been licensed since September 10, 2009, and calculating that date to the date of the said violation, March 17, 2018, results in an eight year, six month and seven day discipline-free history. Nonetheless the undersigned agrees with Respondents' counsel that over eight years of discipline-free history warrants some mitigation.

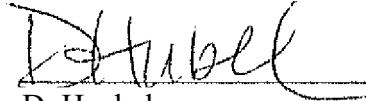
However, there was no evidence presented that the Respondents took any steps whatsoever to prevent future sales of alcohol to minors, or of their policy and training, if any, relating to age-restricted sales. While the Respondents argue clerk Dewit made a mistake, clerk Dewit held in his hand a vertically formatted minor's ID with a red stripe reading, "AGE 21 IN 2019." That alone should have been sufficient to alert him, during the two seconds he looked at the ID, that a minor stood before him. It behooves the Respondents to instruct their employees, at least, on the distinct red flags of minors' vertical formatted IDs, which are a simple tool for their clerks to use when presented with a minor's ID during a transaction involving age-restricted products.

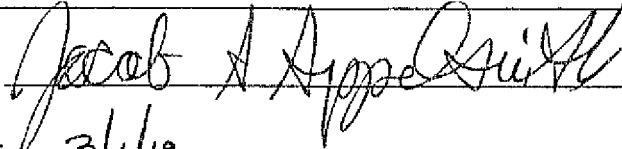
The penalty recommended herein complies with rule 144.

**ORDER**

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

Dated: January 28, 2019

  
\_\_\_\_\_  
D. Huebel  
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>3/1/19</u>