

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

AB-9804

File: 47-543368; Reg: 18087269

LAY, INC.,
dba Mariscos Las Islitas
1601 Panama Lane, Suite D108-D110
Bakersfield, CA 93307-0003,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: November 7, 2019
Los Angeles, CA

ISSUED NOVEMBER 19, 2019

Appearances: *Appellant:* Adam N. Koslin, of Solomon, Saltsman & Jamieson, as
counsel for Lay, Inc.,

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

OPINION

Lay, Inc., doing business as Mariscos Las Islitas, appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 25 days because its bartender sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

¹The decision of the Department, dated March 28, 2019, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on June 12, 2014.

There is one prior instance of departmental discipline against the license.

On August 6, 2018, the Department filed a single-count accusation charging that on June 20, 2018, appellant's clerk, Mariana Ruiz Rivera² (the bartender), sold an alcoholic beverage to 19-year-old Jesica³ Gonzalez-De La Cruz (the decoy). Although not noted in the accusation, the decoy was working for the Bakersfield Police Department (BPD) at the time.

At the administrative hearing held on November 6, 2018, documentary evidence was received, and testimony concerning the sale was presented by the decoy and BPD Detective David Jordan. Leonardo Gabriel Valderrama, the manager of the licensed premises, testified on behalf of appellant.

Testimony established that on June 20, 2018, two BPD officers entered the licensed premises in an undercover capacity and sat at the bar. The decoy entered the premises with another decoy (the second decoy) and sat at the bar about 15 feet from the officers. The bartender asked them what they wanted and the decoy ordered a Bud Light beer for herself and water for the second decoy.

The bartender asked to see the decoy's identification and the decoy handed her

²Throughout the transcript, the bartender is referred to as Riviera, but we use the spelling used in both the accusation and the Department's decision here.

³The decoy's first name here utilizes the spelling on her California ID card. (Exh. 3.) At the administrative hearing, however, she spelled her name Jessica. (RT at p. 10.)

California identification card to the bartender. The ID card had a portrait orientation, contained her correct date of birth — showing her to be 19 years of age — and a red stripe indicating “AGE 21 IN 2020.” (Exh. 3.) The bartender glanced at the ID, handed it back to the decoy, and then served the beer to the decoy and water to the second decoy.

Det. Jordan walked over and took the beer from the decoy. He contacted the bartender, identified himself as a police officer, and asked her to step to one side. Det. Jordan asked the decoy who sold her the beer and she pointed to the bartender. A photo of the bartender and decoy was taken (exh. 4) and the bartender was cited.

The administrative law judge (ALJ) issued his proposed decision on December 6, 2018 sustaining the accusation and recommending a 25-day suspension. The Department adopted the proposed decision in its entirety on March 15, 2019 and a Certificate of Decision was issued on March 28, 2019.

Appellant then filed a timely appeal contending: (1) the ALJ erred by failing to make findings regarding the appearance of the second decoy, and (2) the ALJ’s finding that the face-to-face identification complied with rule 141(b)(5)⁴ is not supported by substantial evidence.

DISCUSSION

I

ISSUE CONCERNING THE SECOND DECOY

Appellant contends that the ALJ erred by failing to make findings regarding the appearance of the second decoy. (AOB at pp. 6-7.) Appellant maintains that the

⁴References 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.

failure to make findings violates the mandate in *Acapulco Restaurants, Inc.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126] (*Acapulco*), which “requires strict compliance

to be found with all elements of Rule 141(b), and is grounds for reversal.” (AOB at p. 2.)

Decoy operations are governed by rule 141, which the Court of Appeal has described as follows:

Rule 141 provides specific guidance regarding how to preserve fairness in minor decoy operations. Subdivision (b) of Rule 141 implements the goal of fairness by imposing five specific requirements for every minor decoy operation. Decoys must be under the age of 20; have the appearance of a person under 21; carry their own actual identification and present that identification upon request; truthfully answer any questions about their ages; and make face-to-face identifications of the persons who sold the alcoholic beverages. (Rule 141, subd. (b)(1)–(5).) Fairness under Rule 141 is assured by a set of five expressly defined safeguards, all of which must be fulfilled during a minor decoy operation. [Citation.]

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd./ Garfield Beach* (2017) 7 Cal.App.5th 628, 638 [213 Cal.Rptr.3d 130].)

Notably, all aspects of rule 141 are directed at, and impose requirements upon, the *actual decoy* — i.e., the person who actually attempts to purchase alcohol.

Therefore, the critical inquiry in cases involving more than one decoy is the appearance of the *actual person who participates in the decoy operation*. Appellant has cited no authority to support its contention that the ALJ was obligated to include findings on the appearance of the second decoy and we are aware of none.

As the Board has noted in prior cases, “the real question to be asked when more than a single decoy is used is whether the second decoy engaged in some activity intended or having the effect of distracting or otherwise impairing the ability of the clerk to comply with the law.” (*7-Eleven, Inc./Janizeh Corp.* (2002) AB-7790, at p. 4.)

To support its argument that the ALJ was required to make findings on the appearance of the second decoy, appellant principally relies on two previous decisions of this Board, *Hurtado* (2000) AB-7246 and *7-Eleven, Inc./Smith* (2001) AB-7740. However, these cases are readily distinguishable from the instant case on their facts. In *Hurtado*, a 27-year old, plain-clothed police officer sat at a table with the decoy in a bar and each ordered a beer. (AB-7246 at pp. 2-3.) The Board reversed the Department's decision, finding "the officer's active participation in the decoy operation to be highly likely to affect how the decoy appeared and to mislead the seller." (*Id.* at p. 5.) Similarly, in *Smith*, the second decoy's actions at the sales counter, coupled with instructions given to the decoys by the Department, were found to have created the potential for distraction. (AB-7740 at pp. 3-4.) Thus, the Board found the operation was not conducted in a fashion that promotes fairness and reversed the Department's decision. (*Id.* at p. 5.)

In both *Hurtado* and *Smith*, the decoys' respective companions *actively participated* in the minor decoy operation. That is not the situation in this case. The second decoy in this matter simply sat next to the actual decoy, and did not even speak to the bartender. In a case where the second decoy did not actively participate, or engage in any activity intended or having the effect of distracting or otherwise impairing the ability of the bartender to comply with the law, the ALJ is not required to make findings on their appearance.

Appellant also cites *BP West Coast Products, LLC* (2004) AB-8131, and encourages the Board to follow that case, which reversed the Department's decision for failure of the ALJ to make findings on whether the second decoy complied with rule

141. What appellant fails to note, however, is that the Board's decision in AB-8131 was reversed by the Court of Appeal in an unpublished decision. (*Department of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (2004) Cal.App.Unpub.LEXIS 8340.)

In sum, the requirements of rule 141 and *Acapulco* were satisfied in this case. Ample findings were made to establish that the Department complied with the rule. We decline appellant's request to enlarge the rule to require findings on the appearance of a second decoy who did not actively participate in the decoy operation and who did not engage in any activity intended or having the effect of distracting or otherwise impairing the ability of the bartender to comply with the law.

II

ISSUE CONCERNING FACE-TO-FACE IDENTIFICATION

Appellant contends that the ALJ's finding that the face-to-face identification complied with rule 141(b)(5) is not supported by substantial evidence. Appellant argues that the failure to provide a translator for the bartender during the identification violated the rule. (AOB at pp. 7-10.)

Rule 141(b)(5) provides:

Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

This rule provides an affirmative defense. The burden is, therefore, on appellant to show non-compliance. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.) The rule requires "strict adherence." (See *Acapulco, supra* 67

Cal.App.4th at p. 581 [finding that no attempt, reasonable or otherwise, was made to identify the clerk in that case].)

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 findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department's decision.

(Kirby v. Alcoholic Bev. Control Appeals Bd. (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; Harris v. Alcoholic Beverage Control Appeals Board (1963) 212 Cal.App.2d 106, 112, [28 Cal.Rptr.74].)

Therefore, the issue of substantial evidence when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the

Department's findings of fact, and whether the decision is supported by the findings. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; *Harris, supra*, 212 Cal.App.2d 106, 114.)

In *Chun* (1999) AB-7287, this Board made the following observation about the purpose of face-to-face identifications:

The phrase "face to face" means that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

(*Id.* at p. 5.)

In *7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983, the Board clarified application of the rule in cases where, as here, an officer initiates contact with the seller following the sale:

As long as the decoy makes a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error, we do not believe that the officer's contact with the clerk before the identification takes place causes the rule to be violated.

(*Id.* at pp. 7-8; see also *7-Eleven, Inc./Morales* (2014) AB-9312; *7-Eleven, Inc./Paintal Corp.* (2013) AB-9310; *7-Eleven, Inc./Dars Corp.* (2007) AB-8590; *West Coasts Products LLC* (2005) AB-8270; *Chevron Stations, Inc.* (2004) AB-8187.)

The court of appeals has found compliance with rule 141(b)(5) even where police escorted a clerk outside the premises in order to complete the identification.

(See *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Keller)* (2003) 109 Cal.App.4th 1687, 1697 [3 Cal.Rptr.3d 339] [finding that the rule leaves the location of the identification to the discretion of the peace officer].)

More recently, the court found rule 141(b)(5) was not violated when:

[T]he decoy made a face-to-face identification by pointing out the clerk to the officer inside the store while approximately 10 feet from her, standing next to her when the officer informed her she had sold alcohol to a minor, and taking a photograph with her as the minor held the can of beer he purchased from her. She had ample opportunity to observe the minor and to object to any perceived misidentification. The rule requires identification, not confrontation.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (CVS)* (2017) 18 Cal.App.5th 541, 547 [226 Cal.Rptr.3d 527, 531].) The court explained that the exact moment of the identification could not be severed from the entire identification procedure, which in that case included the decoy pointing out the clerk to the police, the decoy accompanying the police officer to the counter, the officer informing the clerk she had sold beer to the minor at his side, and the clerk and decoy being photographed together. (*Id.* at p. 532.) The court said, “[t]he clerk in these circumstances certainly knew or reasonably ought to have known that she was being identified” because of the totality of the circumstances. (*Ibid.*)

The ALJ made the following findings on the face-to-face identification in this case:

7. Det. Jordan walked over to Gonzalez and obtained the beer from her. He subsequently contacted Rivera, identified himself, and asked her to step to one side, which she did. Gonzalez joined the officers and Rivera. Det. Jordan told Gonzalez to point out the person who sold her the beer. Gonzalez pointed to Rivera. A photo of the two of them was taken (exhibit 4), after which Rivera was cited.

(Findings of Fact, ¶ 7.) Based on these findings, the ALJ reached the following

conclusions:

5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rules 141(b)(2)^[fn.] and 141(b)(5) and , therefore, the accusation should be dismissed pursuant to rule 141(c). These arguments are without merit.

[¶ . . . ¶]

With respect to rule 141(b)(5), the Respondent argued that, since no one translated the identification for Rivera, she did not understand what was going on. This argument is rejected. What Rivera may or may not have understood is speculative since she did not testify. While Gonzalez and Leonardo Valderrama testified that Rivera spoke Spanish, there is **no** evidence that she could not understand English. There is also **no** evidence that she did not understand the identification process.

(Conclusions of Law, ¶ 5.)

At the administrative hearing, the following exchange took place with Det.

Jordan:

[BY MR. WASHBURN]:

Q . . . during the face to face identification, did anybody speak in Spanish?

[BY DET. JORDAN]:

A I spoke to Jessica in English and she spoke to me, so no.

[¶ . . . ¶]

At some point the manager showed up and he may have been speaking to her in Spanish. I don't recall that. But as far as my duty and my official [*sic*], no. Jessica spoke in English to me, I spoke in English to her and I briefly interacted with Ms. Riviera in English.

[BY MR. NGUYEN]:

Q Did Ms. Riviera ever tell you that she didn't understand what was going on?

A I don't remember her saying that she didn't understand what

was going on, no.

Q Did she - - and the statement that she made to you, that was in English; is that correct?

A That was in English, correct. I did not interview her so there was no - - she never asked for somebody to translate. I know the manager was there, they may have spoken in Spanish to each other. I didn't ask. But if I'm understanding correctly, I guess I'm kind of - - but I didn't ask for a translator to do my job if that's what you're asking.

Q And she didn't ask you for a translator; is that correct? Ms. Riviera.

A Not that I recall, no. Or I would have gotten a translator if there was an issue.

(RT at pp. 47-48.)

Looking at the *entire identification procedure* — including the officer asking the decoy who sold her the beer, the decoy pointing out the bartender to the police, and the bartender and decoy being photographed together with the decoy holding her identification — it seems clear that the bartender knew, or reasonably should have known, that she was being identified as the person who sold alcohol to a minor. That is all that is required. As in *CVS*, the bartender here “had ample opportunity to observe the minor and to object to any perceived misidentification.” (*CVS, supra*, 18 Cal.App.5th 541, 547.) As the Court said, “the rule requires identification, not confrontation.” (*Ibid.*)

The ALJ's findings are supported by substantial evidence and the face-to-face identification in this matter fully comply with rule 141(b)(5). The Board is prohibited from reweighing the evidence or exercising its independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (*Masani, supra*, 118 Cal.App.4th 1429, 1437.)

ORDER

The decision of the Department is affirmed.⁵

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

⁵This 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:**

LAY INC.
MARISCOS LAS ISLITAS
1601 PANAMA LN., STE D108-D110
BAKERSFIELD, CA 93307-0003

ON-SALE GENERAL EATING PLACE - LICENSE

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

BAKERSFIELD DISTRICT OFFICE

File: 47-543368

Reg: 18087269

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 15, 2019. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after May 8, 2019, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: March 28, 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:

Lay Inc.
dba Mariscos Las Islitas
1601 Panama Ln., Suites D108-D110
Bakersfield, California 93307-0003

Respondent

} File: 47-543368

} Reg.: 18087269

} License Type: 47

} Word Count: 12,000

} Reporter:

} Pamela Cox

} Kennedy Court Reporters

On-Sale General Eating Place License

PROPOSED DECISION

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Bakersfield, California, on November 6, 2018.

Jonathan V. Nguyen, Attorney, represented the Department of Alcoholic Beverage Control.

Brian Washburn, attorney-at-law, represented respondent Lay Inc.

The Department seeks to discipline the Respondent's license on the grounds that, on or about June 20, 2018, the Respondent, through its agent or employee, sold, furnished, or gave alcoholic beverages to Jessica Gonzalez-De La Cruz, 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 November 6, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on August 6, 2018.

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

2. The Department issued a type 47, on-sale general eating place license to the Respondent for the above-described location on June 12, 2014 (the Licensed Premises).
3. The Respondent's license has been the subject of the following discipline:

| <u>Date Filed</u> | <u>Reg. No.</u> | <u>Violation</u> | <u>Penalty</u> |
|-------------------|-----------------|------------------|----------------|
| 8/17/2017 | 17085835 | BP §25658(a) | 15-day susp. |

The foregoing disciplinary matter is final. (Exhibit 2.)

4. Jessica Gonzalez-De La Cruz was born on March 19, 1999. On June 20, 2018 she served as a minor decoy during an operation conducted by the Bakersfield Police Department. On that date she was 19 years old.
5. Gonzalez appeared and testified at the hearing. On June 20, 2018, she was five feet tall. She wore a blue shirt with white trim, blue jeans, and white Vans. Her hair was parted in middle and came down past her chest. She was not wearing any jewelry or make-up. (Exhibits 4-5.) At the hearing her appearance was the same, except that her hair came down to her waist.
6. On June 20, 2018, Det. David Jordan and Ofcr. Joe Woods entered the Licensed Premises and sat down at the bar counter. Gonzalez entered the Licensed Premises with another decoy, Christopher Apple. They sat down at the bar counter approximately 15 feet from the officers. One of the bartenders, Mariana Rivera, approached and asked what they wanted. Gonzalez ordered a Bud Light beer for herself and a water for Apple. Rivera asked to see her ID and Gonzalez handed her California identification card (exhibit 3) to her. Rivera quickly glanced at the ID before handing it back to Gonzalez. Rivera obtained a Bud Light beer and a water, serving the beer to Gonzalez and the water to Apple.
7. Det. Jordan walked over to Gonzalez and obtained the beer from her. He subsequently contacted Rivera, identified himself, and asked her to step to one side, which she did. Gonzalez joined the officers and Rivera. Det. Jordan told Gonzalez to point out the person who sold her the beer. Gonzalez pointed to Rivera. A photo of the two of them was taken (exhibit 4), after which Rivera was cited.
8. Gonzalez learned of the decoy program through her involvement in the Explorers. As of June 20, 2018, Gonzalez had been an Explorer for approximately 1½ years. As an Explorer, she performed volunteer work, including at fundraisers, and assisted with parking. Part of her training as an Explorer involved learning how to act in public.

9. Gonzalez appeared her age—19—at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in the Licensed Premises on June 20, 2018, Gonzalez displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Rivera.

10. Leonardo Valderrama, manager of the Licensed Premises, testified that the Respondent is owned by his parents. Overall, his parents have been in the restaurant business for approximately 20 years. His parents had never had any problems like this, so the Respondent did not have any formal training program.

11. After the earlier sale (exhibit 2), the Respondent began enforcing new rules, such as limiting sales of buckets of beer and party sales. After the sale at issue here, the Respondent sent all of its employees to responsible vendor training, while Valderrama and his brother took LEAD training online. The Respondent put up signs and a born-before calendar. The Respondent adopted Responsible Beverage Policies for the Sale of Alcoholic Beverages. In October 2018, all employees were required to sign a responsibility statement. (Exhibit B.) The Respondent also instructed its employees to card anyone who appeared to be under the age of 30.

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

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.

4. Cause for suspension or revocation of the 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 June 20, 2018, the Respondent's employee, Mariana Rivera, inside the Licensed Premises, sold an alcoholic beverage to Jessica Gonzalez-De La Cruz, a person

under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-9.)

5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rules 141(b)(2)² and 141(b)(5) and, therefore, the accusation should be dismissed pursuant to rule 141(c). These arguments are without merit.

With respect to rule 141(b)(2), the Respondent argued that Gonzalez's mannerisms and demeanor were that of a person over the age of 21, particularly in light of her training as an Explorer and her experience as a decoy. This argument is rejected. As noted above, Gonzalez had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 9.) Moreover, Mariana Rivera did not testify, so there is no evidence what impact Gonzalez's training and experience may have had on her evaluation of Gonzalez's appearance.

With respect to rule 141(b)(5), the Respondent argued that, since no one translated the identification for Rivera, she did not understand what was going on. This argument is rejected. What Rivera may or may not have understood is speculative since she did not testify. While Gonzalez and Leonardo Valderrama testified that Rivera spoke Spanish, there is no evidence that she could not understand English. There is also no evidence that she did not understand the identification process.

PENALTY

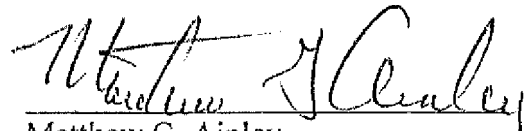
The Department requested that the Respondent's license be suspended for a period of 25 days since the sale at issue here qualified as a second strike. The Respondent argued that a mitigated penalty was appropriate since the Respondent implemented steps to prevent future sales to minors. (Findings of Fact ¶¶ 10-11.) Although the Respondent took steps after the first sale and took further steps on the eve of the hearing in this case, the fact that the sale in this case took place the same day that the Respondent held a meeting designed to prevent sales to minor is significant. The penalty recommended herein complies with rule 144.

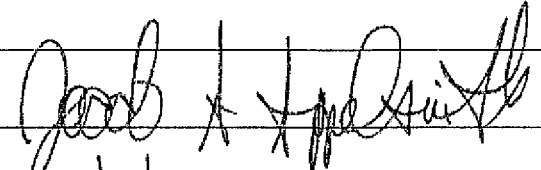
² All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

ORDER

The Respondent's on-sale general eating place license is hereby suspended for a period of 25 days.

Dated: December 6, 2018


Matthew G. Ainley
Administrative Law Judge

| |
|---|
| <input checked="" type="checkbox"/> Adopt |
| <input type="checkbox"/> Non-Adopt: _____ |
| By:  |
| Date: 3/15/19 |