

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

AB-9812

File: 20-444617; Reg: 18087617

CHEVRON STATIONS, INC.,
dba Chevron 20219
3633 North Sepulveda Boulevard,
Manhattan Beach, CA 90266,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

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

ISSUED NOVEMBER 19, 2019

Appearances: *Appellant:* Ralph Barat Saltsman, of Solomon, Saltsman &
Jamieson, as counsel for Chevron Stations, Inc.,

Respondent: Matthew Gaughan, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

Chevron Stations, Inc., doing business as Chevron 20219, appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 10 days (with 5 days conditionally stayed) because its clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Profession Code section 25658(a).

¹The decision of the Department, dated May 7, 2019, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on April 17, 2008. There is no record of prior departmental discipline against the license.

On October 16, 2018, the Department filed a single-count accusation against appellant charging that, on September 21, 2018, appellant's clerk, Edgar Rodriguez (the clerk), sold an alcoholic beverage to 19-year-old Valentina Narino (the decoy). Although not noted in the accusation, the decoy was working for the Manhattan Beach Police Department (MBPD) at the time.

At the administrative hearing held on February 6, 2019, documentary evidence was received and testimony concerning the sale was presented by the decoy and MBPD Officer Michael Allard. Sonia Medina, store manager for the licensed premises, testified on appellant's behalf.

Testimony established that on September 21, 2018, the decoy entered the licensed premises followed by Officer Allard, who was in an undercover capacity. The decoy walked straight to the alcoholic beverage section and selected a six-pack of 12-ounce Bud Light beer bottles. The decoy brought the beer to the sales counter for purchase and presented the beer to the clerk. The clerk scanned the beer and told the decoy the cost. The clerk did not ask the decoy for her identification or any age-related questions. Instead, the clerk pressed a visual identification override button on the register to process the sale of alcohol. After the decoy paid for the beer and received her change, she exited the store. Officer Allard, who witnessed the purchase, exited the store soon after the decoy.

The decoy and Officer Allard re-entered the licensed premises and walked back to the front sales counter. After the decoy performed a face-to-face identification² of the clerk, a photograph was taken of the two of them while the decoy was holding the beer. (Exh. 2.) Officer Allard told the clerk that the decoy was only 19 years old. The clerk claimed that he thought the decoy looked 21 years old but gave no explanation as to why he thought so. Officer Allard then cited the clerk.

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 appellant's license be suspended for 10 days, with 5 days conditionally stayed. Appellant filed a timely appeal contending that 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).³

DISCUSSION

Appellant contends the Department's finding that the decoy complied with rule 141(b)(2) is not supported by substantial evidence. (AOB, at pp. 4-5.) Specifically, appellant cites exhibits 3 and 4, and claims those photographs show the decoy's appearance "was clearly that of a person older than 21" (*Id.* at p. 5.) Further, appellant argues that the Department failed to consider the decoy's physical appearance "in the context of her experience at the teen academy" (*Ibid.*)

² The facts regarding the face-to-face identification are not in dispute.

³ References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

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 required to defer to the Department's findings on rule 141(b)(2), so long as those findings are supported by substantial evidence. (See *Kirby v. Alcoholic Bev. etc. Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815] ["When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the department."].) Our 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].)

Here, the Department made the following findings regarding the decoy's appearance:

5. Decoy Narino appeared and testified at the hearing. On September 21, 2018, she was 5'3" tall and weighed 150 pounds. She wore a jacket over a blue shirt, with jeans and navy blue checkered shoes. She did not wear any jewelry or makeup. Her hair was worn down, the length of

which ran to the middle of her back. (Exhibits 2, 3 and 4.) Her appearance at the hearing was the same.

[¶ . . . ¶]

10. Decoy Narino appeared her age at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of clerk Rodriguez at the Licensed Premises on September 21, 2018, decoy Narino 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 Narino has a youthful appearance, appearing younger than her actual age.

11. September 21, 2018, was the second day of decoy operations in which decoy Narino participated. She did not feel comfortable entering the Licensed Premises and trying to purchase alcohol on that date. She had never been to the licensed Premises prior to September 21, 2018. Decoy Narino learned about the decoy program through her service as a police explorer, which she began in 2016. Her duties as a police explorer include participating in domestic violence and active shooter scenarios. Her training and activities do not include dealing or interacting with the public.

(Findings of Fact, ¶¶ 5, 10-11.) Based on these findings, the Department addressed appellant's rule 141(b)(2) arguments:

6. With respect to rule 141(b)(2), Respondent argued decoy Narino did not have the appearance of someone under 21 because clerk Rodriguez had told Officer Allard the clerk thought the decoy appeared 21 years of age.

7. This rule 141(b)(2) argument is rejected. In applying the factors of Evidence Code section 780, the undersigned finds clerk Rodriguez' hearsay statement to Officer Allard as self-serving and not credible; especially in light of the fact clerk Rodriguez was facing certain discipline for the said violation. In addition, at the time of the decoy operation clerk Rodriguez made no mention of why he allegedly believed the decoy to be 21. Furthermore, during questioning of clerk Rodriguez by Ms. Medina on his termination day of September 27, 2018, clerk Rodriguez never said anything about decoy Narino's appearance or demeanor as a reason for proceeding with the sale. In fact, he informed Ms. Medina the reason he failed the sting operation was because he was using his cellular telephone during the sales transaction and did not pay attention to the customer at the time. Under those circumstances, clerk Rodriguez would not have

had an opportunity to reasonably look at the decoy to consider her age. If the clerk had truly thought the decoy looked 21, according to store policy he would have at least asked for her ID. Ms. Medina testified that in the video footage she reviewed clerk Rodriguez had asked three to four customers for their IDs just prior to the decoy's transaction. Based on Ms. Medina's credible testimony, in addition to her determination clerk Rodriguez had bypassed and overrode the safety protocol of the POS system, it is more likely clerk Rodriguez simply did not look at the decoy's appearance, did not request the decoy's ID and overrode the POS to quickly get rid of the customer so he could resume his telephone call. Nevertheless, there was nothing about decoy Narino's appearance, whether it was her stature or demeanor or anything else, which made her appear older than her actual age. In fact, when viewing decoy Narino in-person at the hearing, she has a youthful appearance and the undersigned agrees with Officer Allard, that she appears younger than her actual age. In other words, decoy Narino had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 10.)

(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, the Department's findings regarding the decoy's appearance are supported by substantial evidence in the form of Officer Allard's testimony, photographs of the decoy on the day of the operation, and the ALJ's personal observations of the decoy at the hearing. Further, the Department's conclusions regarding appellant's rule 141(b)(2) arguments, based upon its findings, are reasonable. As a result, this Board is prohibited from reweighing the evidence or exercising independent judgment to reach a contrary result. The Department's decision must stand.

ORDER

The decision of the Department is affirmed.⁴

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

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

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

APPENDIX

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

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

CHEVRON STATIONS, INC.
CHEVRON 20219
3633 NORTH SEPULVEDA BLVD.
MANHATTAN BEACH, CA 90266-3632

OFF-SALE BEER AND WINE - LICENSE

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

LAKWOOD DISTRICT OFFICE

File: 20-444617

Reg: 18087617

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on April 24, 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 June 17, 2019, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: May 7, 2019



Matthew D. Botting
General Counsel

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

**IN THE MATTER OF THE ACUUSATION
AGAINST:**

Chevron Stations, Inc.
Dbas Chevron 20219
3633 North Sepulveda Blvd.
Manhattan Beach, CA 90266-3632

File No.: 20-444617

Reg. No.: 18087617

Respondent(s)/Licensee(s).

ORDER

The Department hereby adopts the Proposed Decision of the Administrative Law Judge dated February 21, 2019, in the above-entitled matter, and pursuant to Business and Professions Code section 24211, the Department reduces the discipline in this matter as follows:

Respondent's off-sale beer and wine license is hereby suspended for a period of 10 days, with 5 days of such suspension stayed for a period of one year commencing the date when the decision in this matter becomes final upon the condition that no subsequent final determination is made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred during the period of the stay. Should such a determination be made, the Director of the Department of Alcoholic Beverage Control may, in the Director's sole discretion and without further hearing, vacate the stay and revoke the license, and should not such determination be made, the stay shall become permanent.

Sacramento, California

Dated: May 6, 2019



for Jacob Appelsmith
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:

Chevron Stations, Inc.	}	File: 20-444617
Db: Chevron 20219	}	
3633 North Sepulveda Blvd.,	}	Reg.: 18087617
Manhattan Beach, California 90266-3632	}	
	}	License Type: 20
Respondent	}	
	}	Word Count: 11,205
	}	
	}	Reporter:
	}	Miranda Perez
	}	Kennedy Court Reporters
	}	
<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 February 6, 2019.

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

Brian Washburn, Attorney, represented Respondent, Chevron Stations, Inc.

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

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on February 6, 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 October 16, 2018. At the hearing, the Department amended the accusation by interlineation, without objection by the Respondent, replacing the date of "September 2" with "September 21" in count 1.
2. The Department issued a type 20, off-sale beer and wine license to the Respondent for the above-described location on April 17, 2008 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondent's license.
4. Valentina Narino (hereinafter referred to as decoy Narino) was born on August 26, 1999. On September 21, 2018, she was 19 years old. On that date she served as a minor decoy in an operation conducted by the Manhattan Beach Police Department (Manhattan Beach PD).
5. Decoy Narino appeared and testified at the hearing. On September 21, 2018, she was 5'3" tall and weighed 150 pounds. She wore a white jacket over a blue shirt, with jeans and navy blue checkered shoes. She did not wear any jewelry or make-up. Her hair was worn down, the length of which ran to the middle of her back. (Exhibits 2, 3 and 4.) Her appearance at the hearing was the same.
6. On September 21, 2018, at approximately 9:00 p.m., decoy Narino entered the Licensed Premises followed shortly thereafter by Manhattan Beach PD Officer Allard, who was in a plain clothes capacity and posing as a customer. Decoy Narino walked straight to the alcoholic beverage section and selected a six-pack of 12 ounce bottles of Bud Light beer. (Exhibit 2.) Decoy Narino brought the six-pack of beer to the sales counter, where a sole clerk stood behind the sales counter. There were no other customers inside the store.
7. Decoy Narino placed the six-pack of Bud Light beer upon the counter. Clerk Edgar Rodriguez (hereinafter referred to as clerk Rodriguez), scanned the beer and told decoy Narino the cost of the beer. Clerk Rodriguez did not ask decoy Narino for her identification (ID) or age. Clerk Rodriguez pressed a visual ID override button to enable the point of sale (POS) system to process the sale of alcohol. Decoy Narino gave \$20 to the clerk, who then gave change to the decoy. Decoy Narino took the change, the six-pack of Bud Light beer and exited the store. Decoy Narino did not engage in conversation with clerk Rodriguez. Officer Allard witnessed these above-described events. Decoy Narino and Officer Allard did not communicate while inside the Licensed Premises. Officer Allard exited the store soon after decoy Narino.

8. Decoy Narino re-entered the Licensed Premises with Officer Allard and Sergeant Vargas of the Manhattan Beach PD. Upon entering they walked to the front sales counter, behind which stood clerk Rodriguez. Officer Allard asked the decoy to identify the person who sold her the beer. Decoy Narino pointed at clerk Rodriguez and said that he had sold the beer to her. Decoy Narino and clerk Rodriguez were standing three to five feet apart, and facing each other at the time of this identification. A photo of clerk Rodriguez and decoy Narino was taken after the face-to-face identification, with decoy Narino holding the six-pack of Bud Light beer in her hands, while standing next to clerk Rodriguez. (Exhibit 2.) Officer Allard explained to clerk Rodriguez that decoy Narino was 19 years old. Clerk Rodriguez claimed he thought the decoy looked 21. Clerk Rodriguez gave no explanation as to why he thought the decoy was 21 years old. Officer Allard believed decoy Narino looked younger than her actual age and not 21 years old.

9. Officer Allard issued a citation to clerk Rodriguez after the face-to-face identification. Clerk Rodriguez did not appear at the hearing.

10. Decoy Narino appeared her age at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of clerk Rodriguez at the Licensed Premises on September 21, 2018, decoy Narino 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 Narino has a youthful appearance, appearing younger than her actual age.

11. September 21, 2018, was the second day of decoy operations in which decoy Narino participated. She did not feel comfortable entering the Licensed Premises and trying to purchase alcohol on that date. She had never been to the Licensed Premises prior to September 21, 2018. Decoy Narino learned about the decoy program through her service as a police explorer, which she began in 2016. Her duties as a police explorer include participating in domestic violence and active shooter scenarios. Her training and activities do not include dealing or interacting with the public.

12. On September 21, 2018, decoy Narino visited 11 locations, with two of those locations selling alcoholic beverages to her, including the Licensed Premises.

(Respondent's Witness)

13. Sonia Medina appeared and testified at the hearing. Ms. Medina has worked at the Licensed Premises as the store manager for 12 years. She participates in training Respondent's employees.

14. Respondent's new-hires are required to take a two-day annual certification training class and attend monthly safety meetings where all company policy related to age-restricted sales is reviewed. (Exhibits A and C.) Part of the two-day annual recertification includes an oral quiz, the questions of which are read by Ms. Medina, who seeks in-class participation and review thereof with the class attendants. The employees are not required to obtain any particular score on the quiz, whether passing or not. The training includes advising employees to ask anyone appearing under 30 years of age for their ID, to post signs in the premises stating the same, and what types of IDs are acceptable for age-restricted sales. After completing their training employees sign an "Age Restricted Products/Youth Access Acknowledgement" form. Respondent produced such a form which was signed by Edgar Rodriguez on July 26, 2018. (Exhibit B.)

15. After employees complete the two-day training they attend monthly safety meetings at the store where company policy is reviewed. On September 18, 2018, Ms. Medina conducted such a meeting where she discussed that the Manhattan Beach PD conducts sting operations for age-restricted product sales and the company's requirement that its clerks request IDs of customers appearing under 30 years of age. Clerk Rodriguez was present for the meeting and signed the meeting roster. (Exhibit H - "CSI - Operational Excellence Monthly Meeting - September 2018.") Ms. Medina also provides daily reminders to employees to card everyone who appears under 30 years of age and to ensure all proper signage is placed throughout the store that they card for alcohol and tobacco related sales.

16. The Licensed Premises has a POS system that when an age-restricted item is scanned a screen appears on the monitor alerting the clerk that the merchandise is age-restricted and instructing the clerk to scan the customer's ID or to enter the customer's date of birth. The clerk may bypass the POS safety protocol and avoid scanning the ID or entering a customer's true date of birth by pressing an override button which permits the age-restricted sale to occur. (Exhibit C.) This same above-described system which was in place on September 21, 2018, remained in place as of the date of the hearing.

17. Ms. Medina "most of the time" reviews on a daily basis a report generated from the cash register which indicates the number of times any employee has pressed the override button. Ms. Medina will then review the video surveillance footage of the overridden transaction to confirm the customer appeared old enough for the purchase and it was proper for the clerk to override the POS safety protocol system and not request an ID or enter a date of birth.

18. The Licensed Premises uses a mystery shopper program for age-restricted sales once every quarter. (Exhibit D.) The Licensed Premises receives an e-mailed mystery shop report reflecting whether clerks requested IDs or did not request IDs of the mystery shopper. (Exhibit G - "Age Restricted Overall Summary by Shop Type.") In the year

2018, four mystery shops occurred at the Licensed Premises and it passed each mystery shop for age-restricted attempted purchases. If an employee asks for the secret shopper's ID the employee is rewarded with a \$50 credit on their paycheck. (Exhibit F – "Recognition and Awards.") The discipline to an employee who fails to request the ID of a mystery shopper includes, for the first occurrence, a written warning and one day suspension; on the second occurrence, a final warning and three day suspension; and on the third occurrence, disciplinary action, up to and including termination. (Exhibit E – "HR Guideline Third Party Compliance Standards.")

19. The Respondent's policy has always required employees to ask for the ID of anyone appearing under 30 years old. The signs which were posted on September 21, 2018, remain posted around the store informing customers that if they appear under 30 years of age to have their ID ready.

20. Clerk Rodriguez was hired on or about June 29, 2018. Clerk Rodriguez underwent the new-hire certification training on July 26, 2018. (Exhibit B.) He attended three monthly in-store safety meetings at which were discussed policy and procedure relating to age-restricted sales.

21. Ms. Medina reviewed the video surveillance footage of the minor decoy operation of September 21, 2018, and saw that clerk Rodriguez had not asked for the decoy's ID. On September 21, 2018, at 10:10 p.m. clerk Rodriguez was suspended without pay pending management's review of the matter. On or about September 27, 2018, Ms. Medina spoke to clerk Rodriguez about the said violation, gave him his final paycheck and terminated his employment. Clerk Rodriguez told Ms. Medina the reason he failed the sting operation of September 21, 2018, was because he was using his cellular telephone during the sales transaction and did not pay attention to the customer at that time. Clerk Rodriguez refused to answer any further questions by Ms. Medina and "just grabbed his [final] paycheck" and left. Clerk Rodriguez did not say that he thought the decoy was 21 years of age or explain to Ms. Medina why he might have thought decoy Narino was of age. From Ms. Medina's review of the register log and video surveillance footage she determined clerk Rodriguez completed the said alcohol sales transaction by pressing the override button, to bypass the POS system's safety protocol for age-restricted product sales. (Exhibit I.) To Ms. Medina's knowledge, September 21, 2018, was the first time clerk Rodriguez has used the override button. It is against store policy for employees to use their cellular telephones while working.

22. On the Saturday and Sunday following the said violation of September 21, 2018, Ms. Medina telephoned each employee to advise them the store had failed a sting operation and to remind them to card anyone who appeared under the age of 30. In October of 2018, at a safety meeting following the said violation, Ms. Medina reviewed all policy and procedure relating to age-restricted sales, how to ID customers and properly scan IDs

into the cash register. In the 12 years Ms. Medina has been the store manager, the Licensed Premises had no other incidents or violations other than the violation of September 21, 2018.

23. 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 September 21, 2018, the Respondent-Licensee's employee, clerk Edgar Rodriguez, inside the Licensed Premises, sold alcoholic beverages, to-wit: a six-pack of Bud Light beer, to Valentina Narino, 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), therefore, the accusation should be dismissed pursuant to rule 141(c).
6. With respect to rule 141(b)(2), Respondent argued decoy Narino did not have the appearance of someone under 21 because clerk Rodriguez had told Officer Allard the clerk thought the decoy appeared 21 years of age.
7. This rule 141(b)(2) argument is rejected. In applying the factors of Evidence Code section 780, the undersigned finds clerk Rodriguez' hearsay statement to Officer Allard as self-serving and not credible; especially in light of the fact clerk Rodriguez was facing certain discipline for the said violation. In addition, at the time of the decoy operation clerk Rodriguez made no mention of why he allegedly believed the decoy to be 21. Furthermore, during questioning of clerk Rodriguez by Ms. Medina on his termination

day of September 27, 2018, clerk Rodriguez never said anything about decoy Narino's appearance or demeanor as a reason for proceeding with the sale. In fact, he informed Ms. Medina the reason he failed the sting operation was because he was using his cellular telephone during the sales transaction and did not pay attention to the customer at the time. Under those circumstances, clerk Rodriguez would not have had an opportunity to reasonably look at the decoy to consider her age. If the clerk had truly thought the decoy looked 21, according to store policy he would have at least asked for her ID. Ms. Medina testified that in the video footage she reviewed clerk Rodriguez had asked three to four customers for their IDs just prior to the decoy's transaction. Based on Ms. Medina's credible testimony, in addition to her determination clerk Rodriguez had bypassed and overrode the safety protocol of the POS system, it is more likely clerk Rodriguez simply did not look at the decoy's appearance, did not request the decoy's ID and overrode the POS to quickly get rid of the customer so he could resume his telephone call. Nevertheless, there was nothing about decoy Narino's appearance, whether it was her stature or demeanor or anything else, which made her appear older than her actual age. In fact, when viewing decoy Narino in-person at the hearing, she has a youthful appearance and the undersigned agrees with Officer Allard, that she appears younger than her actual age. In other words, decoy Narino had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 10.)

PENALTY

The Department requested the Respondent's license be suspended for a period of 15 days, factoring in its length of licensure, but arguing that was offset by the fact the Respondent has not made any changes, with all of the same protocols remaining in place including the same override button which clerk Rodriguez used to bypass the POS safety protocol. The Department also stressed the aggravating factors of the decoy's age and appearance, that, in fact, decoy Narino appears younger than her actual age and should have been carded alone for that reason, or the clerk should have at least asked her age.

The Respondent recommended a 5-day, all-stayed suspension, based on a number of factors, including, (1) Respondent's more than 10 year discipline-free operation since April 17, 2008, (2) clerk Rodriguez' termination of employment pursuant to policy, (3) Ms. Medina's re-training employees and reminding employees to ask for the ID of persons appearing under 30 years of age, (4) the mystery shopper program, daily reminders and monthly meetings, as well as (5) Licensee's cooperation.

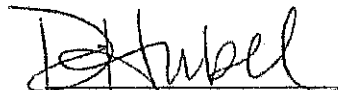
The Department is correct that decoy Narino's youthful appearance and age are aggravating factors. The Respondent is also correct that its approximate 10 year, five month discipline-free history, retraining of employees and immediate discipline of clerk Rodriguez would warrant some mitigation. However, despite, as Respondent's counsel argued, the "plethora" of documents submitted and Ms. Medina's testimony the

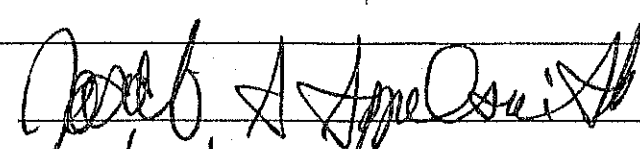
Respondent has not addressed the problem and reason why the said sales transaction was permitted to occur - the availability of the override button enabling its clerks to bypass the POS safety protocol, which remains in place. It is not clear to what Licensee cooperation Respondent's counsel was referring, no evidence was presented in that regard. Furthermore, Ms. Medina did not provide any evidence or testimony as to any changes the Respondent has made to address the above-referenced problem. Simply reminding employees to ask for IDs of anyone appearing under the age of 30, having the same signage around the store stating the same, or rewarding employees for simply asking for an ID through the mystery shopper program, and the re-training of employees does not address the underlying problem. The training provided clearly includes how to override the POS system. Ms. Medina testified that "most of the time" she reviews on a daily basis a report generated indicating the number of times any employee has pressed the override button. Because this function is not performed on a regular, daily basis it is quite possible that Ms. Medina or other management are unaware of the accurate number of instances when clerks (including clerk Rodriguez) use the override button. The override button is of grave concern since that is exactly what clerk Rodriguez utilized, despite receiving said training, attending three monthly safety meetings, and receiving daily reminders to ask for the IDs of customers appearing under 30, and the signage in the store stating the same. The penalty recommended herein complies with rule 144.

ORDER

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

Dated: February 21, 2019


D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt	Reduce penalty: 10 days, 5 stayed
<input type="checkbox"/> Non-Adopt:	_____
By:	
Date:	4/24/19