

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

AB-9856

File: 20-311466; Reg: 19089013

7-ELEVEN, INC., LAZERES P. CORREIA, and RONA CORREIA,
dba 7-Eleven Store #2171 13971
1833 North Riverside Avenue
Rialto, CA 92376,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: August 14, 2020
Telephonic

ISSUED AUGUST 20, 2020

Appearances: *Appellants:* Adam N. Koslin, of Solomon, Saltsman & Jamieson, as
counsel for 7-Eleven, Inc., Lazeres P. Correia, and Rona Correia,

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

OPINION

7-Eleven, Inc., Lazeres P. Correia, and Rona Correia, doing business as 7-Eleven Store #2171 13971 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control (Department)¹ suspending their license for 10 days (with the execution of all 10 days conditionally stayed for a period of one year, provided no further cause for discipline arises during that time) because their clerk sold an alcoholic beverage to a police minor

¹ The decision of the Department, dated January 7, 2020, is set forth in the appendix.

decoy, in violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on September 25, 1995. There is no record of prior departmental discipline against the license.

On July 2, 2019, the Department filed a single-count accusation against appellants charging that, on February 22, 2019, appellants' clerk, Akinyemi Faleye (the clerk), sold an alcoholic beverage to 19-year-old Adamari Romano (the decoy). Although not noted in the accusation, the decoy was working for the Rialto Police Department (RPD) at the time.

At the administrative hearing held on October 16, 2019, documentary evidence was received and testimony concerning the sale was presented by the decoy and by RPD Corporal Javier Pulido. Co-licensee Lazeres P. Correia testified on behalf of appellants.

Testimony established that on February 22, 2019, Cpl. Pulido entered the licensed premises, followed shortly thereafter by the decoy. The decoy selected a 12-pack of Bud Light beer, took it to the sales counter, and set it down. The clerk asked for the decoy's identification (ID), and she handed the clerk her valid California driver's license which had a vertical format, contained her correct date of birth (showing her to be 19 years old), and displayed a red stripe indicating "AGE 21 IN 2020." (Exh. 2.) The clerk looked at the ID for a moment then completed the sale without asking any age-related questions and without swiping the ID into the register. Cpl. Pulido observed the transaction from a distance of about 15 feet.

The decoy exited the store, then re-entered with RPD officers to make a face-to-face identification of the clerk. Cpl. Pulido identified himself to the clerk and they moved to the back of the store. Cpl. Pulido asked the decoy who sold her the beer and she identified the

clerk. A photograph was taken of the decoy and clerk together (exh. 5) and the clerk was issued a citation. During questioning, the clerk admitted to selling beer to the decoy.

The administrative law judge (ALJ) issued a proposed decision on November 20, 2019, sustaining the accusation and recommending a 10-day suspension, with all 10 days conditionally stayed for one year. The Department adopted the proposed decision in its entirety on December 26, 2019 and issued a certificate of decision on January 7, 2020. Appellants then filed a timely appeal.

DISCUSSION

Appellants contend the ALJ relied on the decoy's appearance at the hearing, rather than on the date of the operation, to conclude that the decoy operation complied with rule 141(b)(2).² Appellants maintain, therefore, that the ALJ's findings on this issue are not supported by substantial evidence. (AOB at pp. 6-7.)

Rule 141(b)(2) provides:

The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense.

This rule provides an affirmative defense, and the burden of proof lies with appellants.

(*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

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

² 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.

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 at p. 114.)

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 and

demeanor:

5. Decoy Romano appeared and testified at the hearing. On February 22, 2019, she was 5'2" tall and weighed approximately 135 pounds. She wore a burgundy sweater, black leggings, and boots . She wore an Apple watch on her left wrist. (Exhibits 3 and 5.) Her appearance at the hearing was the same, except that she had high-lights in her hair.

[¶ . . . ¶]

12. Decoy Romano 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 Faley at the Licensed Premises on February 22, 2019, decoy Romano 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 Corporal Pulido' s opinion decoy Romano appeared 18 to 19 years of age on February 22, 2019. In-person decoy Romano looks her age.

13. Prior to February 22, 2019, decoy Romano had been on between five to 10 decoy operations. She was nervous during the said sales transaction and found it "nerve-racking." Decoy Romano learned about the decoy program through her service as a police explorer with the Rialto PD. As of the date of the hearing, decoy Romano had been a police explorer for approximately two years, and a minor decoy for one year. Her duties as a police explorer include attending city events, such as parades, and going on ride-a-longs. Her responsibilities include guiding people, walking around, smiling and greeting people, while wearing a uniform. She does not receive any training on how to interact with the general public. She believes the explorer program has taught her to be more respectful toward others, has made her more mature, responsible and confident, which traits carry over to her ordinary life when not an explorer and when acting as a minor decoy.

14. On February 22, 2019, the minor decoy operation included visiting 19 off-sale premises, with 2 of those 19 establishments having sold alcohol to the minor, including the Licensed Premises.

(Findings of Fact, ¶¶ 5-14.) Based on these findings, the ALJ addressed appellant's rule

141(b)(2) arguments:

6. With respect to rule 141 (b)(2), Respondents argued decoy Romano did not have the appearance of someone under the age of 21 because of certain factors including the decoy's experience as a police explorer and minor decoy "which rendered her a mature, confident and professional young woman."

7. This rule 141(b)(2) argument is rejected. The Respondents presented no evidence as to why clerk Faleye allegedly believed decoy Romano to be over 21 years of age. Clerk Faleye did not testify. There was no evidence that clerk Faleye made any comment that decoy Romano's demeanor or appearance had any effect on his discerning decoy Romano's appearance or had any impact upon him in the performance of his duties. In fact, the evidence indicates clerk Faleye knew or at least should have known the decoy was a minor. Pursuant to Mr. Correia's testimony clerk Faleye received training on how to identify a minor's vertical ID with its red and blue striping. Clerk Faleye was presented with a youthful appearing decoy Romano, along with her vertical formatted minor's ID, at which he looked briefly while holding in his hand. The ID had a red stripe to alert the clerk that the person standing before him would not turn 21 until the year 2020. Regardless, there was nothing about decoy Romano's minor decoy or police explorer training and experience, or demeanor which made her appear older than her actual age. At the time of the decoy operation, in Corporal Pulido's opinion decoy Romano appeared 18 to 19 years of age. In-person decoy Romano looks her age. In other words, decoy Romano had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 12.)

(Conclusions of Law, ¶¶ 6-7 .)

We agree with the ALJ's reasoning and conclusions, and question appellants' position that these findings are based only on observations of the decoy at the hearing, rather than on evidence of her appearance on the date of the operation. In contrast to that contention, throughout the ALJ's findings above, findings were made about the decoy's appearance on the date of the operation, and Cpl. Pulido's testimony (see RT at pp. 39-40) about her appearance on that day. All of these findings are supported by substantial evidence.

Furthermore, the record includes two photographs of the decoy on the date of the operation which support the ALJ's findings that the decoy met the requirements of rule 141(b)(2). (Exhs. 3 & 5.) As this Board has said:

[A]n appellate court has said that a photograph taken immediately following an illegal sale is "arguably the most important piece of evidence in considering whether the decoy displayed the physical appearance of someone under 21 years of age" . . .

(Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.

(*Southland Corporation*) (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652].)

This Board has noted that:

[a]n 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.) Notably, the standard is *not* that the decoy must display the appearance of a "childlike teenager" but "the appearance which could generally be expected of a person under 21 years of age." (Rule 141(b)(2).) In Findings of Fact paragraphs 5 through 14, and Conclusions of Law paragraphs 6 and 7, the ALJ found that the decoy met this standard - as established by her appearance on the date of the operation. We agree.

Appellants also argue that the decoy displayed a demeanor which was not typical for a teenager because of her experience as an Explorer and as a decoy. (AOB at p. 8.) They maintain this experience gave her a confident demeanor which made her appear more mature. The Board has, however, rejected the "experienced decoy" argument many times. As the Board previously observed:

A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. . . . There is no justification for contending that the mere fact of the decoy's experience violates rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.

(*Azzam* (2001) AB-7631, at p. 5, emphasis in original.) This case is no different.

As stated above, case law instructs us that when, as here, "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.” (*Kirby, supra*, 25 Cal.App.3d at p. 335.) We find that in the instant case, substantial evidence supports the findings made by the ALJ.

Appellants presented no evidence that the decoy’s experience or demeanor, *actually resulted* in her displaying the appearance of a person 21 years old or older on the date of the operation in this case. 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. There is simply no evidence to establish that the decoy’s experience or demeanor were the *actual reason* the clerk made the sale.

Ultimately, appellants are simply asking this Board to second-guess the ALJ and reach a different conclusion, despite substantial evidence to support the findings in the decision. This we cannot do.

ORDER

The decision of the Department is affirmed.³

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

³ This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

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

APPENDIX

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

IN THE MATTER OF THE APPEAL BY:

7-ELEVEN, INC., LAZERES P. CORREIA,
RONA CORREIA
DBA: 7-ELEVEN STORE 2171 13971
1833 N RIVERSIDE AVE
RIALTO, CA 92376

RIVERSIDE DISTRICT OFFICE

File: 20-311466

Reg: 19089013

AB: 9856

OFF-SALE BEER AND WINE - LICENSE

Respondent(s)/Licensee(s)
under the Alcoholic Beverage Control Act.

CERTIFICATION

I, Yuri Jafarinejad, do hereby certify that I am a Senior Legal Analyst for the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that annexed hereto is a true, correct and complete record (not including the Hearing Reporter's transcript) of the proceedings held under Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code concerning the petition, protest, or discipline of the above-listed license heretofore issued or applied for under the provisions of Division 9 of the Business and Professions Code.

IN WITNESS WHEREOF, I hereunto affix my signature on May 8, 2020, in the City of Sacramento, County of Sacramento, State of California.



Office of Legal Services

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

**IN THE MATTER OF THE ACUSATION
AGAINST:**

7-ELEVEN, INC., LAZERES P. CORREIA AND
RONA CORREIA
7-ELEVEN STORE 2171 13971
1833 NORTH RIVERSIDE AVENUE
RIALTO, CA 92376

OFF-SALE BEER AND WINE - LICENSE

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

RIVERSIDE DISTRICT OFFICE

File: 20-311466

Reg: 19089013

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 December 26, 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.


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Alcoholic Beverage Control
Office of Legal Services

Sacramento, California

Dated: January 7, 2020



Matthew D. Botting
General Counsel

290

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

IN THE MATTER OF THE ACCUSATION AGAINST:

7-Eleven, Inc., Lazeres P. Correia, and	}	File: 20-311466
Rona Correia	}	
Dbas: 7-Eleven Store 2171 13971	}	Reg.: 19089013
1833 North Riverside Avenue	}	
Rialto, California 92376	}	License Type: 20
	}	
Respondents	}	Word Count: 15,583
	}	
	}	Reporter:
	}	Eileen Eldridge
	}	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 San Bernardino, California, on October 16, 2019.

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

Adam Koslin, Attorney, represented Respondents, 7-Eleven, Inc., Lazeres P. Correia, and Rona Correia.

The Department seeks to discipline the Respondents' license on the grounds that, on or about February 22, 2019, the Respondents-Licensees' agent or employee, Akinyemi Faleye, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Adamari Romano, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on October 16, 2019.

FINDINGS OF FACT

1. The Department filed the accusation on July 2, 2019.

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

2. The Department issued a type 20, off-sale beer and wine license to the Respondents for the above-described location on September 25, 1995 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Adamari Romano (hereinafter referred to as decoy Romano) was born on August 14, 1999. On February 22, 2019, she was 19 years old. On that date she served as a minor decoy in an operation conducted by the Rialto Police Department (Rialto PD).
5. Decoy Romano appeared and testified at the hearing. On February 22, 2019, she was 5'2" tall and weighed approximately 135 pounds. She wore a burgundy sweater, black leggings, and boots. She wore an Apple watch on her left wrist. (Exhibits 3 and 5.) Her appearance at the hearing was the same, except that she had high-lights in her hair.
6. On February 22, 2019, Rialto PD Corporal Pulido entered the Licensed Premises, in a plain clothes capacity, followed shortly thereafter by decoy Romano. Decoy Romano walked straight to the alcoholic beverage coolers and selected a 12-pack of Bud Light beer. Decoy Romano brought the 12-pack of beer to the sales counter.
7. Decoy Romano placed the 12-pack of Bud Light beer upon the sales counter. Clerk Akinyemi Faleye (hereinafter referred to as clerk Faleye) asked decoy Romano for her identification (ID). Decoy Romano handed clerk Faleye her valid California Driver License, which clerk Faleye accepted. Decoy Romano's California Driver License had a vertical orientation, showed her correct date of birth and included a red stripe which read, "AGE 21 IN 2020." (Exhibit 2.) Clerk Faleye looked at the ID briefly and handed it back to the decoy. Clerk Faleye did not swipe or scan the ID into the cash register, and did not enter anything into the cash register while looking at the ID. Clerk Faleye continued with the sales transaction and told the decoy the cost of the beer. Decoy Romano paid the clerk for the beer. Decoy Romano took the 12-pack of Bud Light beer and exited the store. There was no evidence clerk Faleye asked the decoy her age or questions about her ID. Corporal Pulido witnessed the transaction with a partially obstructed view from approximately 15 feet away. While decoy Romano was inside the Licensed Premises she did not communicate with Corporal Pulido.
8. Decoy Romano re-entered the Licensed Premises with Rialto PD Officers. Corporal Pulido contacted clerk Faleye at the cash register, identified himself as an officer, and asked clerk Faleye to step away from the cash register, which the clerk did. Clerk Faleye followed the officer to the back of the store, with decoy Romano also present.
9. Decoy Romano was asked by a Rialto PD Officer to identify the person who sold her the alcohol. Decoy Romano pointed at clerk Faleye and told the clerk she was 19 years

old and born in 1999. Decoy Romano and clerk Faley were standing approximately two feet apart, with nothing between them, at the time of this identification. A photograph of clerk Faley and decoy Romano was taken after the face-to-face identification, with decoy Romano holding the 12-pack of Bud Light beer in her hands, while standing next to clerk Faley. (Exhibit 5.)

10. Corporal Pulido asked clerk Faley questions, including whether he sold alcohol to decoy Romano, received training, how he ascertains a customer's age and whether he has to input the date of birth from the ID during age-restricted sales. Clerk Faley admitted to selling the 12-pack of beer to decoy Romano. Clerk Faley said that he received proper training. Despite clerk Faley's training relating to alcohol sales he does not enter the date of birth, scan or swipe the ID to verify a customer's age; he visually inspects the ID and makes a decision whether to sell alcohol or not. There was no evidence that clerk Faley made any comment that decoy Romano's demeanor or appearance had any effect on him in discerning the decoy's appearance or had any impact upon the clerk in the performance of his duties.

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

12. Decoy Romano 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 Faley at the Licensed Premises on February 22, 2019, decoy Romano 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 Corporal Pulido's opinion decoy Romano appeared 18 to 19 years of age on February 22, 2019. In-person decoy Romano looks her age.

13. Prior to February 22, 2019, decoy Romano had been on between five to 10 decoy operations.² She was nervous during the said sales transaction and found it "nerve-racking." Decoy Romano learned about the decoy program through her service as a police explorer with the Rialto PD. As of the date of the hearing, decoy Romano had been a police explorer for approximately two years, and a minor decoy for one year. Her duties as a police explorer include attending city events, such as parades, and going on ride-a-longs. Her responsibilities include guiding people, walking around, smiling and greeting people, while wearing a uniform. She does not receive any training on how to interact with the general public. She believes the explorer program has taught her to be more respectful toward others, has made her more mature, responsible and confident,

² Decoy Romano approximated that she visited on average 10 premises on each minor decoy operation.

which traits carry over to her ordinary life when not an explorer and when acting as a minor decoy.

14. On February 22, 2019, the minor decoy operation included visiting 19 off-sale premises, with 2 of those 19 establishments having sold alcohol to the minor, including the Licensed Premises.

(Respondents' Witness)

15. Lazeres P. Correia appeared and testified at the hearing. Mr. Correia said he is the franchisee of the Licensed Premises. Since being licensed from September 25, 1995, he claimed that three to four times a year, law enforcement agencies enter the Licensed Premises and conduct decoy operations, all of which the premises has successfully passed; the Respondents offered no documented proof of the same. Mr. Correia occasionally works as a cashier at the Licensed Premises.

16. Mr. Correia interviews prospective clerks, asking them whether they know the legal age to purchase alcoholic beverages in California; he does not hire anyone who does not know the answer. Each new hire receives training on the 7-Eleven computer based on-line module, which informs employees the minimum age to purchase alcohol is 21, instructs how to operate the 7-Eleven point of sale (POS) system, and how to check IDs. Clerks must receive a passing score of 94 percent to be able to print a Certificate of Completion of said training. The Respondents' clerks cannot operate the cash registers until they successfully complete said training. Mr. Correia took the on-line training approximately three years prior (to the hearing date). Clerk Faley took the on-line training when he was hired, five years ago. Mr. Correia does not know whether clerk Faley has retaken the training. There was no evidence clerk Faley has been retrained. The Respondents presented no documented proof of training for the licensee(s) or its employees. Mr. Correia said the Respondents require annual on-line training. There was no evidence when the Respondents incorporated the annual training.

17. The Respondents' store policy has been to request the IDs of customers for age-restricted merchandise sales, to either scan or swipe the ID into the register, or enter the date of birth listed on the ID. Mr. Correia insists on the Respondents' clerks following the latter policy especially if they are presented with a vertical-oriented minor's ID with its red and blue stripes. The Respondents' alcoholic beverage cooler doors have signs advising customers they must be 21 years of age and present their ID for alcohol sales. Mr. Correia said that prior to the violation of February 22, 2019, clerk Faley was aware of the characteristics of minors' vertical IDs, and that he was required to examine the same as well as scan or swipe IDs or enter the date of birth listed thereon.

18. Mr. Correia admits that he cannot be at the Licensed Premises to ensure that the employees are complying with store policy with each sales transaction. The Respondents participate in the BARS program, which involves a secret shopper randomly visiting the premises on a monthly basis to verify that the Respondents' clerks are asking for customers' IDs for age-restricted merchandise sales transactions. A green card is issued to a clerk who asks for an ID and verifies the ID, and a red card is issued when the clerk fails to ask for an ID. Respondents' clerks leave the cards they receive at the cash register for Mr. Correia to see. To Mr. Correia's knowledge none of the Respondents' clerks have received a red card.

19. After the said violation of February 22, 2019, Mr. Correia had a store meeting with all employees to remind them of the importance of asking for customers' IDs, recognizing a minor's ID, and verifying the customer is 21 years of age or older before completing the sale of age-restricted merchandise. He also reminded them of the requirement to either swipe or scan an ID or enter the date of birth listed thereon into the cash register. Mr. Correia has also started sending group text reminders to employees of the same. Mr. Correia discussed the said violation with clerk Faleye and issued him a final warning - that if he sells alcohol to a minor again he will be fired. Mr. Correia also cut clerk Faleye's hours; he was working two days a week and now he works one night a week.

20. 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 February 22, 2019, the Respondents-Licensees' employee, clerk Akinyemi

Faleye, inside the Licensed Premises, sold alcoholic beverages, to-wit: a 12-pack of Bud Light beer, to Adamari Romano, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-12.)

5. The Respondents argued the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)³, and, therefore, the accusation should be dismissed pursuant to rule 141(c).

6. With respect to rule 141(b)(2), Respondents argued decoy Romano did not have the appearance of someone under the age of 21 because of certain factors including the decoy's experience as a police explorer and minor decoy "which rendered her a mature, confident and professional young woman."

7. This rule 141(b)(2) argument is rejected. The Respondents presented no evidence as to why clerk Faleye allegedly believed decoy Romano to be over 21 years of age. Clerk Faleye did not testify. There was no evidence that clerk Faleye made any comment that decoy Romano's demeanor or appearance had any effect on his discerning decoy Romano's appearance or had any impact upon him in the performance of his duties. In fact, the evidence indicates clerk Faleye knew or at least should have known the decoy was a minor. Pursuant to Mr. Correia's testimony clerk Faleye received training on how to identify a minor's vertical ID with its red and blue striping. Clerk Faleye was presented with a youthful appearing decoy Romano, along with her vertical formatted minor's ID, at which he looked briefly while holding in his hand. The ID had a red stripe to alert the clerk that the person standing before him would not turn 21 until the year 2020. Regardless, there was nothing about decoy Romano's minor decoy or police explorer training and experience, or demeanor which made her appear older than her actual age. At the time of the decoy operation, in Corporal Pulido's opinion decoy Romano appeared 18 to 19 years of age. In-person decoy Romano looks her age. In other words, decoy Romano had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 12.)

PENALTY

The Department requested the Respondents' license be suspended for a period of 10 days for the violation, taking into consideration the Licensee's length of licensure without discipline and based on the following factors: (1) the minor decoy's actual age, (2) there was no evidence clerk Faleye received additional training since his hire date five years prior, or that employees were retrained on the on-line computer training module, (3) no documented proof of training of licensee(s) or its employees, (4) no documented proof of

³ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

the approximate 60 times the Respondents allegedly passed sting operations since 1995, (4) the Respondents failed to address the problem associated with the said sales transaction in that clerk Faley was able to proceed with the sale despite not swiping or scanning the ID or entering a date of birth from the ID, which indicates Respondents' clerks are able to bypass any safety protocol to allow sales to minors.

The Respondents recommended an all-stayed mitigated penalty based on its nearly 25 years discipline-free history and the testified-to positive action taken by the Licensees to correct the problem.

The Respondents are correct that their 23-year, four-month and 28-day discipline-free operation warrants substantial mitigation. The Respondents are commended in their discipline of clerk Faley for said violation and reminding all staff of store policies. However, the argued-for mitigation is compromised for the following reasons. There was no evidence that the Respondents addressed the problem related to the sale at hand; specifically, when clerk Faley did not scan or swipe the minor's ID and did not key in or enter anything while looking at the ID, yet he was still able to proceed with the sale of alcohol to decoy Ramono. Circumstantial evidence, as well as the preponderance of evidence, indicates there is some button or key strokes which serve as a bypass function to enable Respondents' clerks to visually inspect an ID and proceed with the sale, thereby bypassing any safety protocol in place. The latter is of grave concern, given the volume of alcohol purchased by decoy Romano, a 12-pack of beer, the lack of retraining clerk Faley since his hire date, and the fact the minor presented her vertically-formatted minor's ID with red stripe warning she would not be 21 until the year 2020. While some of the points discussed above are not enumerated aggravating factors under Rule 144 they provide some small aggravation in the analysis of the penalty. The penalty recommended herein complies with rule 144.

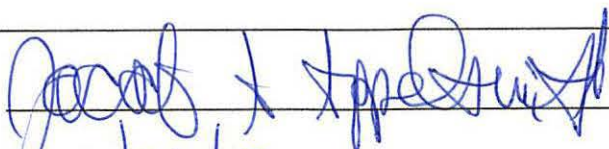
ORDER

The Respondents' off-sale beer and wine license is hereby suspended for a period of 10 days, with execution of 10 days of the suspension stayed upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within one year from the effective date of this decision; that should such determination be made, the Director of the Department of Alcoholic Beverage Control may, in the Director's discretion and without further hearing, vacate this stay order and re-impose the stayed penalty; and that should no such determination be made, the stay shall become permanent.

Dated: November 20, 2019



D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>12/26/19</u>