

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

AB-9870

File: 20-577742; Reg: 19089156

7-ELEVEN, INC. and PUMMAY, INC.,
dba 7-Eleven Store #37624
3295 Palm Avenue
San Diego, CA 92154,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: September 10, 2020
Telephonic

ISSUED SEPTEMBER 14, 2020

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

Respondent: Patrice Huber, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Pummay, Inc., doing business as 7-Eleven Store #37624
(appellants), appeal from a decision of the Department of Alcoholic Beverage Control
(Department)¹ suspending their license for 15 days because their clerk sold an alcoholic
beverage to a police minor decoy, in violation of Business and Professions Code
section 25658, subdivision (a).

¹ The decision of the Department, dated March 19, 2020, is set forth in the
appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 21, 2018. There is no record of departmental discipline against the license.

On August 27, 2019, the Department filed a single-count accusation against appellants charging that, on April 14, 2019, appellants' clerk, Adriana Gomez (the clerk), sold an alcoholic beverage to 18-year-old Sergio Rivera (the decoy). Although not noted in the accusation, the decoy was working for the San Diego Police Department (SDPD) at the time.

At the administrative hearing held on December 11, 2019, documentary evidence was received and testimony concerning the sale was presented by the decoy and SDPD Detective Derek Miller. Appellants did not present any witnesses.

Testimony established that on April 14, 2019, the decoy entered the licensed premises followed shortly thereafter by SDPD Officer Mondello in a plainclothes capacity. The decoy went to the coolers and selected a three-pack of Bud Light beer. He took the beer to the register and set it down on the counter.

The decoy greeted the clerk in Spanish and she asked him if the refrigerator door was open. He said "yes." The clerk then asked for his identification and he handed her his California driver's license which had a portrait orientation, contained his correct date of birth (showing him to be 18 years old), and a red stripe indicating "AGE 21 IN 2022." (Exh. 3.) She looked at the ID for a few seconds then handed it back to the decoy and completed the sale without asking any age-related questions. The decoy exited the premises.

Officer Mondello identified herself to the clerk as a police officer and informed her of the violation. The decoy re-entered the premises with Det. Miller and was asked

to identify the person who sold him the beer. The decoy made a face-to-face identification of the clerk, a photograph was taken of the two of them together (exh. 2), and the clerk was issued a citation.

The administrative law judge (ALJ) issued a proposed decision on January 21, 2020, sustaining the accusation and recommending a 15-day suspension of the license. The Department adopted the proposed decision in its entirety on March 4, 2020, and a certificate of decision was issued on March 19, 2020.

Appellants then filed a timely appeal contending: (1) the decoy's appearance was improperly evaluated by the ALJ, and (2) compliance with rule 141(b)(2)² is not supported by substantial evidence.

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). Appellants maintain that the ALJ's findings on this issue are not supported by substantial evidence and that the decoy's appearance did not comply with the rule. (AOB at pp. 5-6.)

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.)

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.

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 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 Rivera appeared and testified at the hearing. On April 14, 2019, he wore a white t-shirt, over which he wore a thin blue sweater, blue jeans and burgundy shoes. (Exhibits 2, 4a, 4b, 4c.) His appearance at the hearing was similar.

¶ . . . ¶

10. Decoy Rivera appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of clerk Gomez at the Licensed Premises on April 14, 2019, decoy Rivera 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 Rivera has a youthful appearance.

11. April 14, 2019, was approximately the sixth day of decoy operations in which decoy Rivera participated. He had never been to the Licensed Premises prior to April 14, 2019. Decoy Rivera learned about the decoy program through his volunteer service as a cadet explorer with the SDPD, which he joined on August 8, 2017. He has held the rank of lieutenant as of December 2018. His duties as a lieutenant include overseeing the administrative program. He has been on ride-a-longs with officers in which he presents himself in a professional manner when he interacts with the general public. Decoy Rivera believes his cadet explorer training has made him more confident and mature, both of which he feels he carries over into his every day life and to the decoy operations.

(Findings of Fact, ¶¶ 5-11.) 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 Rivera did not have the appearance of someone under the age of 21 because of several factors, including (1) the photographs of the decoy display a mature young man with visible stubble, neatly coiffed hair and an athletic build, (2) the decoy said himself he has been a law enforcement cadet for under two years at the time of the operation, with substantial responsibilities as a cadet lieutenant, interacting with the public on ride-a-longs, and admitted he obtained a professional demeanor and training in how to deal with the general public which rendered him mature and confident - with that training on full display during the decoy operation.

7. This rule 141(b)(2) argument is rejected. The Respondents presented no evidence as to why clerk Gomez allegedly believed decoy Rivera to be over 21 years of age or that any of these factors had an impact upon clerk Gomez complying with the law. Clerk Gomez did not testify. In fact, the evidence indicates clerk Gomez knew or at least should have known the decoy was a minor. She was presented with a very youthful appearing decoy Rivera, whose vertical formatted minor's ID she held in her hand, and which had a red stripe to alert the clerk he would not turn 21 until the year 2022. Regardless, there was nothing about decoy Rivera's hair, stature, cadet experience or demeanor which made him appear older than his actual age. The Respondents' speculation that the photographs of Exhibit 4 depict stubble on the decoy's face is just that, speculation. The decoy countered that contention testifying that it was simply the lighting in the photographs. All photographs of decoy Rivera depict him to be youthful and appearing his age. (Exhibits 2 and 4.) In fact, the photograph of the decoy and clerk (Exhibit 2) depicts decoy Rivera as he appeared at the hearing, with no visible stubble on his face, and appearing quite youthful, at the age of 18. In other words, decoy Rivera had the appearance generally expected of a person under the age of 21.

(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 his appearance on the date of the operation. In contrast to that contention, observations were made throughout the ALJ's findings about the decoy's appearance on the date of the operation, as reflected in the photographs taken that day. (Exhs. 2, 4a, 4b, 4c.) These photographs support the ALJ's findings that the

decoy met the requirements of rule 141(b)(2). As we have said many times in regards to photographs of the decoy in the record:

[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 11, and Conclusions of Law paragraphs 6 and 7, the ALJ found that the decoy met this standard - as established by his appearance on the date of the operation. We agree. While the ALJ mentions the decoy's appearance at the hearing, this is done in the context of highlighting the fact that the decoy looked the same at the hearing as on the day of the operation. This does not constitute error.

Appellants also argue that the decoy displayed a demeanor which was not typical for a teenager because of his experience as an Explorer. (AOB at pp. 7-8.) They maintain this experience gave him a confident demeanor which made him 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 him 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 her mind in the course of the transaction, or why she 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., PUMMAY GROUP, INC.
DBA: 7-ELEVEN STORE 37624
3295 PALM AVE
SAN DIEGO, CA 92154

SAN DIEGO DISTRICT OFFICE

File: 20-577742

Reg: 19089156

AB: 9870

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 June 4, 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 ACCUSATION
AGAINST:**

7-ELEVEN, INC. AND PUMMAY GROUP, INC.
7-ELEVEN STORE 37624
3295 PALM AVENUE
SAN DIEGO, CA 92154

OFF-SALE BEER AND WINE - LICENSE

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

SAN DIEGO DISTRICT OFFICE

File: 20-577742

Reg: 19089156

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 4, 2020. 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 April 29, 2020, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: March 19, 2020



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

7-Eleven, Inc., and Pummay Group, Inc.
Dbas: 7-Eleven Store 37624
3295 Palm Avenue
San Diego, California 92154

Respondents

Off-Sale Beer and Wine License

} File: 20-577742

} Reg.: 19089156

} License Type: 20

} Word Count: 10,836

} Reporter:

} Shelia McQueen

} Kennedy Court Reporters

} **PROPOSED DECISION**

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at San Diego, California, on December 11, 2019.

Patrice Huber, Attorney, represented the Department of Alcoholic Beverage Control (the Department).

Adam Koslin, Attorney, represented Respondents, 7-Eleven, Inc., and Pummay Group, Inc.

The Department seeks to discipline the Respondents' license on the grounds that, on or about April 14, 2019, the Respondents-Licensees' agent or employee, Adriana Gomez, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Sergio Rivera, 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 December 11, 2019.

FINDINGS OF FACT

1. The Department filed the accusation on or about August 27, 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 February 21, 2018 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Sergio Rivera (hereinafter referred to as decoy Rivera) was born on February 5, 2001. On April 14, 2019, he was 18 years old. On that date he served as a minor decoy in an operation conducted by the San Diego Police Department (SDPD) in conjunction with the Department.
5. Decoy Rivera appeared and testified at the hearing. On April 14, 2019, he wore a white t-shirt, over which he wore a thin blue sweater, blue jeans and burgundy shoes. (Exhibits 2, 4a, 4b, 4c.) His appearance at the hearing was similar.
6. On April 14, 2019, decoy Rivera entered the Licensed Premises, followed by SDPD Officer Mondello, who was in a plain clothes capacity. Decoy Rivera walked straight to the alcoholic beverage refrigerator, opened the door, and selected a three-pack of Bud Light beer. Bud Light beer is an alcoholic beverage. He brought the beer to the sales counter for purchase.
7. Decoy Rivera placed the three-pack of Bud Light beer upon the sales counter and greeted, in Spanish, clerk Adriana Gomez (hereinafter clerk Gomez). Clerk Gomez and decoy Rivera both spoke in Spanish to each other. Spanish is clerk Rivera's first language, with which he is fluent. Clerk Gomez spoke in Spanish to decoy Rivera and asked him if the refrigerator door was open. Decoy Rivera replied, "yes." Clerk Gomez and decoy Rivera understood the Spanish spoken between them. Clerk Gomez asked for the decoy's identification (ID). Decoy Rivera handed clerk Gomez his valid California Driver License, which clerk Gomez accepted and held in her hand. Decoy Rivera's California Driver License had a vertical orientation, showed his correct date of birth and included a red stripe which read, "AGE 21 IN 2022." (Exhibit 3.) Clerk Gomez looked at the ID for a couple of seconds and handed it back to the decoy. Clerk Gomez continued with the sales transaction and told the decoy the cost of the beer. Decoy Rivera paid for the beer and received change. Decoy Rivera took the change, the three-pack of Bud Light beer and exited the store. Clerk Gomez did not ask the decoy any questions about his age. There was no evidence clerk Gomez asked the decoy any questions about his ID. Officer Mondello remained in the store, approached clerk Gomez, identified herself as an officer and informed the clerk of the violation.
8. Decoy Rivera re-entered the Licensed Premises with SDPD Detective Miller. Officer Mondello and other SDPD officers were already inside the store speaking with clerk Gomez at the cash register. Decoy Rivera and Detective Miller approached clerk Gomez and the other officers. Detective Miller asked decoy Rivera to identify the person who

sold him the beer. Decoy Rivera pointed at clerk Gomez and verbally identified her as the person who sold him the beer. Decoy Rivera and clerk Gomez were standing approximately two feet apart and facing each other at the time of this identification. A photograph of clerk Gomez and decoy Rivera was taken after the face-to-face identification in a back office, with decoy Rivera holding the three-pack of Bud Light beer in his right hand, while standing next to clerk Gomez. (Exhibit 2.) The face-to-face identification was conducted in English, which clerk Gomez understood.

9. Clerk Gomez was issued a citation. There was no evidence that clerk Gomez was distracted, in distress, or did not understand either the Spanish or English spoken, during the sales transaction or the face-to-face identification. Clerk Gomez did not appear at the hearing. There was no evidence that anything prevented clerk Gomez from properly performing her duties during the sales transaction or that anything had any affect upon or impaired clerk Gomez' ability to comply with law.

10. Decoy Rivera appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of clerk Gomez at the Licensed Premises on April 14, 2019, decoy Rivera 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 Rivera has a youthful appearance.

11. April 14, 2019, was approximately the sixth day of decoy operations in which decoy Rivera participated. He had never been to the Licensed Premises prior to April 14, 2019. Decoy Rivera learned about the decoy program through his volunteer service as a cadet explorer with the SDPD, which he joined on August 8, 2017. He has held the rank of lieutenant as of December 2018. His duties as a lieutenant include overseeing the administrative program. He has been on ride-a-longs with officers in which he presents himself in a professional manner when he interacts with the general public. Decoy Rivera believes his cadet explorer training has made him more confident and mature, both of which he feels he carries over into his every day life and to the decoy operations.

12. On April 14, 2019, decoy Rivera visited nine locations, with two of those nine establishments having sold alcohol to the decoy, including the Licensed Premises.

13. 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 April 14, 2019, the Respondents-Licensees' employee, clerk Adriana Gomez, inside the Licensed Premises, sold alcoholic beverages, to-wit: a three-pack of Bud Light beer, to Sergio Rivera, 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)² and, therefore, the accusation should be dismissed pursuant to rule 141(c).
6. With respect to rule 141(b)(2), Respondents argued decoy Rivera did not have the appearance of someone under the age of 21 because of several factors, including (1) the photographs of the decoy display a mature young man with visible stubble, neatly *coiffed* hair and an athletic build, (2) the decoy said himself he has been a law enforcement cadet for under two years at the time of the operation, with substantial responsibilities as a cadet lieutenant, interacting with the public on ride-a-longs, and admitted he obtained a professional demeanor and training in how to deal with the general public which rendered him mature and confident – with that training on full display during the decoy operation.
7. This rule 141(b)(2) argument is rejected. The Respondents presented no evidence as to why clerk Gomez allegedly believed decoy Rivera to be over 21 years of age or that any of these factors had an impact upon clerk Gomez complying with the law. Clerk Gomez did not testify. In fact, the evidence indicates clerk Gomez knew or at least

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

should have known the decoy was a minor. She was presented with a very youthful appearing decoy Rivera, whose vertical formatted minor's ID she held in her hand, and which had a red stripe to alert the clerk he would not turn 21 until the year 2022. Regardless, there was nothing about decoy Rivera's hair, stature, cadet experience or demeanor which made him appear older than his actual age. The Respondents' speculation that the photographs of Exhibit 4 depict stubble on the decoy's face is just that, speculation. The decoy countered that contention testifying that it was simply the lighting in the photographs. All photographs of decoy Rivera depict him to be youthful and appearing his age. (Exhibits 2 and 4.) In fact, the photograph of the decoy and clerk (Exhibit 2) depicts decoy Rivera as he appeared at the hearing, with no visible stubble on his face, and appearing quite youthful, at the age of 18. In other words, decoy Rivera had the appearance generally expected of a person under the age of 21.

8. All other contentions by the Respondents lack merit, including, but not limited to the Respondents' argument there was no evidence that clerk Gomez sold alcohol to decoy Rivera. Detective Miller credibly testified that the Licensed Premises was two out of nine licensed premises which sold alcohol to decoy Rivera on April 14, 2019. The evidence established that clerk Gomez sold a three-pack of Bud Light beer (an alcoholic beverage), which is depicted in the photograph Detective Miller took of the decoy and clerk after the face-to-face identification (Exhibit 2).

PENALTY

The Department requested the Respondents' license be suspended for a period of 15 days, given the decoy's age, and no evidence of mitigation presented by Respondents.

The Respondents recommended a 10-day mitigated penalty based on a claim made by clerk Gomez to officer Mondello as recited in the investigator's report (Exhibit 5). Clerk Gomez did not appear at the hearing to testify. In balancing the factors of Evidence Code section 780, any claims clerk Gomez made to the officer as excuses for having sold alcohol to decoy Rivera are not credible. There was no credible evidence that anything prevented clerk Gomez from properly performing her duties during the sales transaction or that anything had any affect upon or impaired clerk Gomez' ability to comply with law.

In assessing an appropriate measure of discipline, the Department's penalty guidelines are in California Code of Regulations, Title 4, Division 1, Article 22, section 144, commonly referred to as rule 144. Under rule 144, the presumptive penalty for a first violation of selling or furnishing an alcoholic beverage to a minor in violation of section 25658 is a 15-day license suspension. Rule 144 also permits imposition of a revised penalty based on the presence of aggravating or mitigating factors. There was no evidence of mitigation or aggravation in this matter. Accordingly, there is no reason to

deviate from the penalty set forth in rule 144. The penalty recommended herein complies with rule 144.

ORDER

The Respondents' off-sale beer and wine license is hereby suspended for a period of 15 days.

Dated: January 21, 2020



D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: <u>James A. Hapelquist</u>
Date: <u>3/4/20</u>