

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

AB-9873

File: 20-538205; Reg: 19089206

Ali Oil, Inc.
1325 West Foothill Boulevard
Rialto, CA 92376,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: October 1, 2020
Telephonic

ISSUED OCTOBER 5, 2020

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

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

OPINION

Ali Oil, Inc. (appellant) appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 25 days because its clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code² section 25658(a).

¹The decision of the Department, dated April 10, 2020, is set forth in the appendix.

² All statutory references are to the California Business and Professions Code unless otherwise stated.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on January 24, 2014.

There is one instance of prior departmental discipline against the license for violation of section 25658(a) on November 9, 2018.

On September 13, 2019, the Department filed a single-count accusation against appellant charging that on February 22, 2019, appellant's clerk, Shannon Shelton (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 January 23, 2020, documentary evidence was received and testimony concerning the sale was presented by the decoy, RPD Officer Anthony Glass, and appellant's operations manager, Isela Hernandez.

Testimony established that on February 22, 2019, Officer Glass entered the licensed premises in a plain clothes capacity, followed by the decoy. The decoy walked straight to the alcoholic beverage refrigerator and selected a 12-pack of Bud Light beer. The decoy brought the beer to the sales counter and handed money to the clerk. The clerk did not ask the decoy for her identification (ID) or ask any age-related questions. The clerk completed the sales transaction and the decoy took the beer and exited the store. Officer Glass also exited the store and met with the decoy in the parking lot.

The decoy and Officer Glass re-entered the licensed premises and contacted the clerk. The decoy identified the clerk as the person who sold her the beer. The clerk admitted to selling the beer to the decoy and claimed he usually asks customers for

their IDs when they attempt to purchase alcohol. The clerk told Officer Glass that he “assumed” the decoy was old enough to buy alcohol, but said he “just screwed up,” and that “there was no reason not to check [the decoy’s ID].” (Findings of Fact, ¶ 9.) A photograph of the clerk and the decoy was taken (exh. 3A) and the clerk was issued a citation.

The administrative law judge (ALJ) issued a proposed decision on February 10, 2020, sustaining the accusation and recommending a 25-day suspension. The Department adopted the proposed decision in its entirety on April 6, 2020 and issued a certificate of decision four days later. Appellant filed a timely appeal contending that the Department was barred from filing the accusation by the doctrine of *res judicata* and that the penalty is excessive.

DISCUSSION

I

RES JUDICATA

Appellant argues that the accusation is barred by *res judicata*. (AOB, at pp. 6-9.) Specifically, appellant argues that the instant violation is barred because the Department waited until the November 2018 violation was “procedurally complete before filing the instant accusation against Appellant.” (*Id.* at p. 8.) Stated another way, appellant contends that the Department was required to bring both the instant violation and the November 2018 violation at the same time.

The Department counters that *res judicata* does not apply since the accusations entail two separate violations, occurring on different dates and times. (RRB, at pp. 6-8.) The Department stated that the present matter “involved a 2019 sale of alcohol to a

minor that occurred on a different date, sold by a different clerk to a different minor than the 2018 violation. [...] The prior 2018 violation and decision never litigated any aspect of the 2019 violation.” (*Id.* at p. 7.) We agree with the Department.

There are several threshold requirements that appellant must meet before applying *res judicata*:

First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.

(*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 [272 Cal.Rptr. 767, 769, 795 P.2d 1223, 1225].) Here, appellants have not satisfied any of the five threshold requirements because the current violation was not litigated as part of the accusation for the prior 2018 violation. Thus, *res judicata* does not apply. (*Ibid.*)

Further, as this Board has said before, there is no legal authority requiring the Department to bring two separate violations together within the same accusation or amend an accusation to include a later-occurring violation. (See e.g. Government Code § 11507 [allowing permissive amendment of an accusation].) Therefore, the Department did not err by filing separate accusations for the 2018 and 2019 violations.

II

PENALTY

Appellant contends its 25-day penalty is unreasonable because the “ALJ and Department abused its discretion by misrepresenting testimony in its analysis of the penalty assessed against Appellant.” (AOB, at p. 9.) Specifically, appellant argues

that the ALJ and Department gave too much weight to the “bypass function” which “enable[ed] clerks to complete sales of alcohol without manually entering a purchaser’s birth-date or scan/swiping the ID.” (*Ibid.*)

This Board may examine the issue of excessive penalty if it is raised by an appellant. (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183].) However, the Board will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) An administrative agency abuses its discretion when it “exceeds the bounds of reason.” (*County of Santa Cruz v. Civil Service Commission of Santa Cruz* (2009) 171 Cal.App.4th 1577, 1582 [90 Cal.Rptr.3d 394, 397].) However, “[i]f reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within its discretion.” (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

In determining disciplinary action, the Department is required to consider the penalty guidelines incorporated in California Code of Regulations, title 4, section 144. The standard penalty for a second³ violation of section 25658(a) within 36 months is 25 days, which is exactly the penalty appellant received here. (Cal. Code Regs., tit. 4, § 144.) Nevertheless, rule 144 allows the Department to deviate from the standard penalty when, “*in its sole discretion*[, it] determines that the facts of the particular case

³ Appellant had a violation of section 25658(a) on November 9, 2018, within 36 months of the instant violation on February 22, 2019.

warrant such deviation — such as where facts in aggravation or mitigation exist.”

(*Ibid.*, emphasis added.)

Factors in aggravation include prior disciplinary history, prior warning letters, licensee involvement, premises located in high crime area, lack of cooperation by the licensee in investigation, appearance and actual age of minor, and continuing course or pattern of conduct. (Cal. Code Regs., tit. 4, § 144.) Factors in mitigation include the length of licensure at the subject premises without prior discipline or problems, positive action by the licensee to correct the problem, documented training of the licensee and the employees, and cooperation by the licensee in the investigation. However, neither list of factors is exhaustive; the Department may use its discretion to determine whether other aggravating or mitigating circumstances exist. (*Ibid.*)

Here, appellant takes issue with the fact that the Department did not deviate from the standard 25-day suspension. (AOB, at pp. 9-10.) Specifically, appellant disagrees with the fact that the appellant’s “bypass function” was enough to outweigh its “praiseworthy” mitigation measures. (*Id.* at p. 9.) The Department’s reasons were that appellant’s “policy did not change in regard to requiring its clerks to swipe/scan the ID or manually enter a birth date.” (Decision, at p. 9.) In fact, the Department found that the policy remained after February 22, 2019, and there was “no evidence [appellant] addressed the problem related to the sale at hand.” (*Ibid.*) The Board cannot say that the Department abused its discretion in reaching this conclusion.

As the Board has said many times over the years, the extent to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion. Rule 144 provides a standard 25-day suspension for a second violation of

section 25658(a) violation within 36 months, which is what appellant received. Rule 144 also allows the Department to exercise discretion to consider aggravation and mitigation. The Department's rejection of appellant's mitigation evidence because it failed to address the underlying issue with the instant sale was reasonable and not an abuse of discretion. Therefore, the penalty 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 APPEAL BY:

ALI OIL, INC.
1325 W FOOTHILL BLVD
RIALTO, CA 92376-8705

OFF-SALE BEER AND WINE - LICENSE

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

RIVERSIDE DISTRICT OFFICE

File: 20-538205

Reg: 19089206

AB: 9873

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 July 10, 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:**

ALI OIL, INC.
1325 W. FOOTHILL BLVD.
RIALTO, CA 92376-8705

OFF-SALE BEER AND WINE - LICENSE

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

RIVERSIDE DISTRICT OFFICE

File: 20-538205

Reg: 19089206

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 6, 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 May 21, 2020, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: April 10, 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:

Ali Oil, Inc.	}	File: 20-538205
Dbas: None Listed	}	
1325 West Foothill Boulevard	}	Reg.: 19089206
Rialto, California 92376-8705	}	
	}	License Type: 20
Respondent	}	
	}	Word Count: 9,669
	}	
	}	Reporter:
	}	Joanna Hammock
	}	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 January 23, 2020.

Alanna Ormiston, Attorney, represented the Department of Alcoholic Beverage Control (the Department).

Adam Koslin, Attorney, represented Respondent, Ali Oil, Inc.

The Department seeks to discipline the Respondent's license on the grounds that, on or about February 22, 2019, the Respondent-Licensee's agent or employee, Shannon Shelton, 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 January 23, 2020.

FINDINGS OF FACT

1. The Department filed the accusation on September 13, 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 Respondent for the above-described location on January 24, 2014 (the Licensed Premises). The Licensed Premises has a gas station and convenience store.

3. The following is the record of prior Department discipline against the Respondent's license as established by official records introduced by the Department, which matter is final (Exhibit 2):

<u>Date of Violation</u>	<u>Reg. No.</u>	<u>Violation</u>	<u>Penalty</u>
November 9, 2018	19088511	BP §25658(a)	POIC in lieu of 15-day suspension

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) in conjunction with the Department.

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 sweatshirt, black leggings, and brown boots. Her hair was black, with some high-lights. She wore the front strands of her hair pinned back, with the remaining hair falling past her shoulders. (Exhibits 3A, 3B and 3C.) Her appearance at the hearing was the same, except she wore black tennis shoes, she wore her hair down past her shoulders (not pinned back) and did not have high-lights in her hair.

6. On February 22, 2019, Rialto PD Officer Glass entered the Licensed Premises, in a plain clothes capacity, followed shortly thereafter by decoy Romano. Decoy Romano walked straight to the alcoholic beverage refrigerator 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 and handed money to clerk Shannon Shelton (hereinafter referred to as clerk Shelton). Clerk Shelton did not ask decoy Romano for her identification (ID). Decoy Romano had on her person her California Driver License, which has a vertical orientation, depicts her correct date of birth and includes a red stripe which reads, "AGE 21 IN 2020." (Exhibit 4.) Clerk Shelton continued with the sales transaction. Decoy Romano, having paid the clerk for the beer, took the 12-pack of Bud Light beer and exited the store. Clerk Shelton did not ask the decoy any age-related questions. Officer Glass witnessed the transaction from approximately 20 feet away. While decoy Romano was inside the Licensed Premises she did not communicate or interact with Officer Glass.

8. Officer Glass exited the premises shortly after decoy Romano, both of whom walked to a vehicle in the parking lot. Officer Glass put on his police vest, which contained a camera affixed to his vest at the shoulder, and which he turned on.²

9. Decoy Romano re-entered the Licensed Premises with Officer Glass and Rialto PD Officer Martinez. Officer Glass contacted clerk Shelton at the cash register, had clerk Shelton step away from the cash register, which the clerk did. Decoy Romano was present with Officer Glass and clerk Shelton. Officer Glass asked decoy Romano who sold you the beer. Simultaneously, as decoy Romano pointed at clerk Shelton and said, "He did," clerk Shelton responded, "I did." Officer Glass asked decoy Romano her age, to which she responded, "I'm 19." Officer Glass asked clerk Shelton if he understood he was just identified as having sold alcohol to a minor, to which the clerk responded in the affirmative. Clerk Shelton admitted to selling the 12-pack of beer to decoy Romano without asking for her ID. He claimed he usually asks customers for their IDs when they attempt to purchase alcohol. Clerk Shelton knew a person had to be 21 years of age to purchase alcohol. He took full responsibility for his actions. There was no evidence that clerk Shelton 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. Clerk Shelton admitted he "assumed" the decoy was old enough to buy alcohol, said "there was no reason not to check" her ID, and that he "just screwed up."³

10. A photograph of clerk Shelton 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 Shelton. (Exhibit 3A.)

11. Officer Martinez issued a citation⁴ to clerk Shelton after the face-to-face identification. There was no evidence that clerk Shelton was distracted during the sales transaction or the face-to-face identification. Clerk Shelton 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 Shelton 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

² The Respondent produced at the hearing a flash drive which was marked and admitted as Exhibit A. The flash drive contained the video and audio captured from Officer Glass' body camera when he re-entered the Licensed Premises with the decoy and Officer Martinez on February 22, 2019.

³ The evidence in this paragraph 9 is based on witness testimony and the video and audio from Officer Glass' body camera, on the flash drive admitted as Exhibit A.

⁴ Exhibit B is a color photocopy of the yellow citation issued to clerk Shelton.

the actual circumstances presented to the clerk. In-person, at the hearing, decoy Romano appeared her age.

13. Prior to February 22, 2019, decoy Romano had been on more than 20 decoy operations.⁵ Decoy Romano learned about the decoy program through her service as a police explorer with the Rialto PD. Her duties as a police explorer include attending public events, wearing clothing attire which identifies her as a police explorer, and where she interacts with the public. As a police explorer she has not received any training on how to deal with members of the general public, however, she is instructed to be friendly. Her responsibilities at public events include her guiding people to places. She believes the explorer program has taught her to be more respectful toward others, and 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. After February 22, 2019, decoy Romano participated in approximately another 50 minor decoy operations. Despite the number of operations decoy Romano has participated in prior to and after February 22, 2019, decoy Romano has a clear and independent recollection of the events of the minor decoy operation at the Licensed Premises on February 22, 2019, because she said "it's rare when they let me purchase alcohol."

14. On February 22, 2019, decoy Romano visited 19 licensed premises, with two of those 17 establishments having sold alcohol to the minor, including the Licensed Premises. Decoy Romano had been to the Licensed Premises prior to February 22, 2019, to buy gas for her vehicle because she lives in the city, but she had not ever been inside the convenience store to purchase anything or to use the restroom.

(Respondent's Witness)

15. Isela Hernandez appeared and testified at the hearing. Ms. Hernandez is the operations manager for the Respondent corporation. At the time of the decoy operation of February 22, 2019, Ms. Hernandez was responsible for hiring and training employees at the Licensed Premises. Ms. Hernandez hired and trained clerk Shelton. Clerk Shelton was hired on or about October 26, 2017. Clerk Shelton received training on the Respondent's policy against selling alcoholic beverages to minors under the age of 21. That training included requiring clerks to, (1) ask for ID if persons appear to be under 30 years of age, who are purchasing age-restricted merchandise, (2) compare the picture on the ID to the customer, and (3) scan or swipe the customer's ID through the point of sale (POS) system or using the Viage Verifier to verify a customer's age. Clerk Shelton signed, as part of his hiring packet, on October 26, 2017, a Clerk's Affidavit, ABC-299, a

⁵ Decoy Romano approximated that she visited on average 10 premises on each minor decoy operation; and that she visited roughly 200 licensed premises prior to the decoy operation of February 22, 2019.

“Daily Safety & Restricted Sales” form as well as a “Restricted Sales Agreement” acknowledging the Respondent’s policies and promising not to sell age-restricted products to minors. (Exhibits C and E⁶.) The latter two documents included his acknowledgement that his employment would be immediately terminated if he sold age-restricted merchandise to a minor. (Exhibit C.) The documents also point out further consequences to the employee and licensee for violating the restricted sales policy, including, but not limited to, that criminal charges may be filed against the employee and the licensee disciplined (through warning, suspension, fine, and revocation.) Immediately after the sale in question, clerk Shelton’s employment was terminated for having violated the Respondent’s policy against selling alcohol to minors.

16. At all times, including as of February 22, 2019, and through to the date of the hearing, the Respondent’s POS system allows its clerks to process the sale of alcohol, or age-restricted products, by either scanning or swiping the customer’s ID, or by manually entering into the cash register the customer’s date of birth. There was also a sign posted at the cash registers reminding its clerks to ask customers purchasing alcohol or tobacco products, “Are you old enough to buy beer/cigarettes.” (Exhibit D.)

17. After February 22, 2019, the Respondent required all its employees to sign, each day, a LEAD declaration prior to logging on to a cash register, acknowledging the Respondent’s policies regarding age-restricted sales and to review the birth date, before which a customer must be born, in order to purchase alcohol. (Exhibit F.) The POS registers were also changed in that when an age-restricted product is scanned the register now reminds employees of the afore-described birth date and requests the clerk either scan/swipe the customer’s ID or manually enter the customer’s birth date.⁷

18. The Respondent presented no documented proof of retraining of its employees or whether the Respondent has incorporated annual or more regular training other than the initial training its employees receive at hire. There was no evidence clerk Shelton received additional training other than the training at his hire.

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

⁶ At the hearing, Ms. Hernandez used a red pen to underline the sale to minor “Restricted Sales” Policy clerk Shelton acknowledged with his initials in Ms. Hernandez’ presence.

⁷ The testimony and evidence were not clear as to how this was a change in the POS system since the same options were available as of the decoy operation of February 22, 2019; however, the testimony indicated it was more likely than not a screen prompt reminder that was added.

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 February 22, 2019, the Respondent-Licensee's employee, clerk Shannon Shelton, 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 ¶¶ 4-13.)
5. The Respondent argued the decoy operation at the Licensed Premises failed to comply with rules 141(b)(2)⁸, and 141(b)(5), and, therefore, the accusation should be dismissed pursuant to rule 141(c).
6. With respect to rule 141(b)(2), the Respondent argued decoy Romano did not have the appearance of someone under the age of 21 because of certain factors including, (1) clerk Shelton was heard on the video saying he thought the decoy was old enough, and the fact clerk Shelton did not ask for the decoy's ID meant she did not appear under 21, and (2) of the 17 licensed premises the decoy visited on February 22, 2019, only four clerks asked her age, therefore, using the word "generally" from rule 141(b)(2), "generally" the clerks did not ask her age, in other words, it can be reasonably inferred that the 13 clerks who did not ask the decoy's age "they did not believe her to be obviously under 21."
7. This rule 141(b)(2) argument is rejected. While in the said video (Exhibit A) clerk Shelton commented he "thought she was old enough," the Respondent presented no evidence as to why clerk Shelton allegedly believed decoy Romano to be 21 years of age or older. There was no evidence that clerk Shelton made any comment that decoy Romano's demeanor or appearance had any effect on his discerning her appearance or

⁸ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

had any impact upon him in the performance of his duties. Clerk Shelton did not testify. In fact, clerk Shelton is heard admitting on the video that he “assumed” the decoy was old enough to buy alcohol, that “there was no reason not to check” her ID, and that he “just screwed up.” There was nothing about decoy Romano’s appearance, demeanor or decoy experience which made her appear older than her actual 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.) Finally, the Department attorney is correct, there is no legal standard that “generally” the clerks believe the decoy to be “obviously under 21.” The Respondent’s reasoning is based on unsupported assertions and conjecture. There was no evidence as to why the four clerks at the other licensed premises asked for the decoy’s age – perhaps that was store policy; just as there was no evidence as to why 13 clerks did not ask her age. It could be easily speculated the reason the majority of clerks did not ask for decoy Romano’s age was because they asked to see her ID pursuant to policy and/or she appeared her age, 19. While the foregoing is also speculation, it is more likely than not that the latter was the reason the majority of clerks on February 22, 2019, did not sell alcohol to decoy Romano, because she so clearly appears her age.

8. With respect to rule 141(b)(5) Respondent argued the video evidence (Exhibit A) depicts that at the time of the face-to-face identification Officer Martinez was already in the process of writing the citation for the clerk. The Respondent argued the citation was being written before and during the face-to-face identification, when the rule requires the citation be written after the face-to-face identification. The Respondent further argued that to promote fairness under rule 141, it must be strictly complied with so clerks may feel free to contest the circumstances of an identification.

9. This argument is rejected and without merit. First of all, the Department attorney was accurate in saying that rule 141(b)(5) does not require “when a citation is begun to be written” only that the citation be “issued” after the face-to-face identification and not before. There was no evidence the citation was issued prior to the face-to-face identification. In fact, the video evidence to which Respondent refers (Exhibit A, admitted into evidence without objection) confirms compliance with rule 141(b)(5). The video and audio established the face-to-face identification occurred at time-stamp 07:06:55. After the face-to-face identification decoy Romano walked to the sales counter, placed the 12-pack of Bud Light beer on the counter, and stood next to Officer Martinez. At time-stamp 07:07:46 the video depicts Officer Glass walking over to where decoy Romano was standing by Officer Martinez, the latter of whom was hunched over writing on a piece of white paper, not the citation, which yellow citation was laying on the counter to the left of the white paper. Officer Martinez was not writing out the citation. The citation appears to be blank. Officer Glass then asked the decoy to come back to stand next to the clerk to take a photograph. Officer Glass then handed to Officer Martinez clerk Shelton’s ID. At time-stamp 07:08:03 Officer Glass then took the

photograph of the decoy and clerk standing next to each other. At time-stamp 07:10:01 Officer Glass was heard saying to clerk Shelton, "He's scratching out your citation," referring to Officer Martinez. At the end of the video, at time-stamp 07:10:25 the video depicts Officer Martinez writing out the citation, well after the face-to-face identification had occurred. Finally, clerk Shelton, had ample opportunity to contest the identification, which he did not. In fact, he immediately volunteered, "I did," when Officer Glass asked decoy Romano who sold her the beer. (Exhibit A, time-stamp 07:06:56.)

10. The Respondent further argued it did not "permit" the said violation citing *McFaddin San Diego 1130 Inc. vs. Jay Stroh*, (1989) 208 Cal.App.3d 1384 at page 1390, and *Harris vs. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106 at pages 123 and 124. The Respondent argued that clerk Shelton knowingly violated Respondent's long-standing policy and the Respondent "would have had no way of knowing or reasonably preventing the act" therefore the Respondent "cannot, in equity, to have been said to permit it."

11. This argument is rejected. It is well settled case law that an employee's on-premises knowledge and misconduct is imputed to the licensee/employer.⁹ The types of misconduct which have been historically imputed to the licensee are those that are foreseeable in the operation of a licensed premises. Such misconduct includes: prostitution, keeping a disorderly house, gambling, drink solicitation activity, and the sale of illegal drugs. Similarly, when a clerk sells alcohol to a minor, as did clerk Shelton, even though the licensee is not present, the licensee is liable for that sale as if the licensee had made the sale themselves – the conduct is imputed to the licensee because it is foreseeable and is therefore the type of conduct the licensee has an obligation to prevent.

12. The Respondent further listed alternative defenses of laches, collateral estoppel or res judicata. These arguments are rejected and are without merit. The Respondent argued it is inequitable for violations to be stacked, "where the Department had the opportunity and legal right to amend its accusation in the prior case [registration number 19088511] to include this alleged violation" in the matter at hand, particularly in light of entering into a petition for an offer in compromise, upon which the Respondent relied, a full two months after the said February 22, 2019, minor decoy operation. The Respondent further argued the harm complained of in each accusation "is the same regulatory harm against

⁹ (See *Yu v. Alcoholic Bev. etc. Appeals Bd.* (1992) 3 Cal.App.4th 286, 295 [4 Cal.Rptr.2d 280]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 377 [3 Cal.Rptr.2d 779]; *Kirby v. Alcoholic Bev. Etc. Appeals Bd.* (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291]; *Harris v. Alcoholic Beverage Control Appeals Board* (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; *Morell v. Department of Alcoholic Beverage Control* (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; *Mack v. Department of Alcoholic Beverage Control* (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633].

the public caused by the alleged sale of alcohol to a minor under principles of res judicata; and where the harm is the same and was susceptible to having been adjudicated in a prior proceeding parties cannot come back for a second bite of the apple.”

13. These arguments are rejected and without merit. The Respondent provided no legal authority to support its position that the Department is required to amend an accusation. Government Code section 11507 provides in part that, “At any time before the matter is submitted for decision, the agency *may* file, or permit the filing of, an amended or supplemented accusation.” (Emphasis added.) The language provides that the Department *may* amend, not that it must amend. Furthermore, as Department counsel correctly pointed out, “The Department didn’t come back for a second bite [at the apple], it’s the [Respondent] that made the violations.”

PENALTY

The Department requested the Respondent’s license be suspended for a period of 25 days. The Department noted the current matter was the Respondent’s second sale-to-minor violation within 36 months, in fact occurring less than four months after the prior violation. The Respondent argued that, if the accusation were not dismissed, a substantially mitigated penalty was warranted based on subsequent remedial measures it put in place.

The recommended penalty under rule 144 for a second sale-to-minor violation within 36 months is a 25-day suspension.


The Respondent is commended for the remedial steps it took. However, the argued-for mitigation is compromised for the following reasons. The Respondent’s policy did not change in regard to requiring its clerks to swipe/scan the ID or manually enter a birth date. After February 22, 2019, it was the same policy, whether or not the register now alerts or reminds its clerks to do so. There was no evidence the Respondent addressed the problem related to the sale at hand. While there was no direct evidence how clerk Shelton completed the sale of alcohol to decoy Romano on February 22, 2019, circumstantial evidence indicates that since he did not swipe/scan the ID or enter decoy Romano’s birth date as he was trained, he either manually entered a pseudo, age-appropriate birth date or pressed an override button. This indicates there is some button or key strokes which serve as a bypass function to enable Respondent’s clerks to visually inspect an ID and proceed with the sale, thereby bypassing any safety protocol in place. There was no evidence ability to take such evasive measures were removed. As such, the Respondent’s clerks remain able to bypass any safety protocol to permit sales to minors, just as clerk Shelton had done. The latter is of grave concern, given the volume of alcohol purchased by decoy Romano, a 12-pack of beer, her youthful appearance, the lack of evidence clerk Shelton received additional training since his hire date on or about

October 26, 2017, or any documented proof of retraining of Respondent's employees. 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.

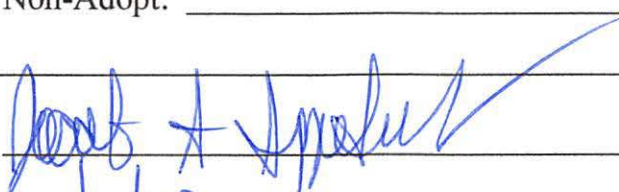
ORDER

The Respondent's off-sale beer and wine license is hereby suspended for a period of 25 days.

Dated: February 10, 2020



D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>4/6/20</u>