

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

AB-9901

File: 20-603104; Reg: 20090232

7-ELEVEN, INC. and DAY-TO-DAY STORE, INC.,
dba 7-Eleven Store #35480B
899 3rd Avenue
Chula Vista, CA 91911,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: June 11, 2021
Telephonic

ISSUED JUNE 11, 2021

Appearances: *Appellants:* Alexandra Angel, of Solomon, Saltsman & Jamieson,
as counsel for 7-Eleven Inc. and Day-To-Day Store, Inc.,

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

ORDER

7-Eleven, Inc and Day-To-Day Store, Inc., doing business as 7-Eleven Store #35480B (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 February 12, 2021, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 30, 2019. There is no record of departmental discipline against the license.

On July 2, 2020, the Department filed a single-count accusation against appellants charging that, on February 27, 2020, appellants' clerk, Raul Zuniga (the clerk), sold an alcoholic beverage to 19-year-old Josimar Gonzalez (the decoy). Although not noted in the accusation, the decoy was working for the Chula Vista Police Department (CVPD) at the time.

At the administrative hearing held on October 13, 2020, documentary evidence was received and testimony concerning the sale was presented by the decoy and CVPD Special Agent Casey Rose. Appellants presented no witnesses.

Testimony established that on February 27, 2020, Agent Rose entered the licensed premises in a plainclothes capacity, followed shortly thereafter by the decoy. The decoy went to the coolers where he selected a three-pack of Coors Light beer. He took the beer to the sales counter and set it down.

The clerk asked for the decoy's identification (ID) and the decoy handed him his valid California ID card, which had a portrait orientation. (Exh. 4.) The ID contained the decoy's correct date of birth — showing him to be 19 years of age, and a red stripe indicating "AGE 21 IN 2021." The clerk looked at the ID for three to five seconds, then completed the sale without asking any age-related questions. Officer Rose observed the transaction from a few feet away.

The decoy exited the premises then re-entered with several CVPD officers. The decoy made a face-to-face identification of the clerk who sold him the beer and a photograph was taken of the clerk and decoy together. (Exh. 5.)

The administrative law judge (ALJ) issued a proposed decision on November 23, 2020, sustaining the accusation and recommending a 15-day suspension of the license. The Department adopted the proposed decision in its entirety on January 21, 2021 and a certificate of decision was issued on February 12, 2021.

Appellants then filed a timely appeal contending the decoy did not display the appearance required by rule 141(b)(2).²

DISCUSSION

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.)

Appellants contend:

A decoy with experience as a police cadet, who is admittedly confident, composed, and mature, who has been called upon to exercise leadership and has engaged in numerous prior decoy operations cannot have an appearance which generally can be expected of someone under 21 years of age.

(AOB at p. 7.)

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.]

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.

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, at p. 114.*)

This Board has stated many times that, in the absence of compelling reasons, it will ordinarily defer to the Department'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 experience:

5. Decoy Gonzalez appeared and testified at the hearing. On February 27, 2020, he was 5' 8" tall and weighed 125 pounds. He wore a black sweatshirt over a red t-shirt with the word "Carrots" printed on the front in white, black pants, black shoes and eyeglasses. His hair was shaved close on the side of his head with a trim cut on top. (Exhibits 2, 3 and 5.) His appearance at the hearing was the same.

¶ . . . ¶

9. Decoy Gonzalez appeared youthful for 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 Zuniga at the Licensed Premises on February 27, 2020, and as depicted in the photographs taken that date, decoy Gonzalez 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 Gonzalez has a youthful appearance.

10. Decoy Gonzalez learned about the decoy program through his police cadet experience with the Chula Vista PD. At the time of the decoy operation he had been on approximately five prior decoy operations and held no rank. As a police cadet he held a leadership role and received training on how to comport himself when with the public. Decoy Gonzalez believes his cadet training has filtered into his daily life and thinks it makes him a more mature, less nervous and composed person. Decoy Gonzalez was not nervous when he entered the Licensed Premises on February 27, 2020.

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

6. With respect to rule 141(b)(2) the Respondents argued the minor displayed the appearance of someone over 21 years of age because of certain factors including that the decoy (1) had significant experience conducting purchases of alcoholic beverages, (2) was not nervous, pursuant to his testimony, (3) wore a stylish haircut and pair of glasses,

and (4) exercised leadership, maturity, as well as received interpersonal skills training as part of his police cadet training.

7. This rule 141(b)(2) argument is rejected. There was no evidence that any of these alleged factors had any impact upon clerk Zuniga's ability to discern the decoy's appearance or comply with the law in conducting his job. There was nothing about decoy Gonzalez' decoy or police cadet experience and training, his hair cut, eyeglasses, demeanor or otherwise which made him appear older than his actual age. During the decoy operation and under the actual circumstances presented to clerk Zuniga decoy Gonzalez appeared as a youthful minor, as evidenced by the record, including, but not limited to, the photographs depicting decoy Gonzalez on the day of the operation. (Exhibits 2, 3, and 5.) In other words, decoy Gonzalez had the appearance generally expected of a person under the age of 21. (Findings of Fact 1, 5 and 9.)

(Conclusions of Law, ¶¶ 6-7.) We agree with this assessment.

Appellants maintain the decoy's experience as a minor decoy and as a police cadet gave him a confident demeanor which made him appear mature and not in compliance with rule 141(b)(2). 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.

In a similar minor decoy case, where the Court of Appeal was tasked with determining whether an ALJ's assessment of the decoy's appearance was correct, the Court said that under the facts before them, while:

[O]ne could reasonably look at the photograph [of the decoy] and reasonably conclude that the decoy appeared to be older than 21 years of age, we cannot say that, as a matter of law, a trier of fact could not reasonably have concluded otherwise.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (2002) 103 Cal.App.4th 1084, 1087 [127 Cal.Rptr.2d 652].) The instant case is no different. The ALJ made a finding, based on the photographs presented in exhibits 2, 3, and 5, that the decoy's appearance met the requirements of rule 141(b)(2). (Findings of Fact, ¶ 9.) We do not believe the evidence supports a finding that the ALJ "could not reasonably have concluded otherwise." (*Ibid.*) As stated above, case law instructs us that when, as here, "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, supra*, 25 Cal.App.3d at p. 335.)

Appellants presented no evidence that the decoy's physical appearance 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 his mind in the course of the transaction, or why he made the sale in spite of having seen the decoy's identification showing him to be under 21. There is simply no evidence to establish that the decoy's physical appearance 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
SHARLYNE PALACIO, 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 ACCUSATION
AGAINST:**

7-ELEVEN INC., AND DAY-TO-DAY STORE, INC.
7-ELEVEN STORE 35480B
899 3RD AVENUE
CHULA VISTA, CA 91911

OFF-SALE BEER AND WINE - LICENSE

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

SAN DIEGO DISTRICT OFFICE

File: 20-603104

Reg: 20090232

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 January 21, 2021. 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 March 25, 2021, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: February 12, 2021



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 Day-To-Day Store, Inc.	}	File: 20-603104
Dbas: 7-Eleven Store 35480B	}	
899 3 rd Avenue	}	Reg.: 20090232
Chula Vista, California 91911	}	
	}	License Type: 20
Respondents	}	
	}	Word Count: 5,047
	}	
	}	Court Reporter:
	}	Paige Hutchinson
	}	i-Depo 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, on October 13, 2020, in San Marcos, California. (Exhibit 1.)

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

Adam Koslin, Attorney, represented Respondents, 7-Eleven Inc., and Day-To-Day Store, Inc.

The Department seeks to discipline the Respondents' license on the grounds that, on or about February 27, 2020, the Respondents-Licensees' agent or employee, Raul Zuniga, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Josimar Gonzalez, 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 13, 2020.

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

FINDINGS OF FACT

1. The Department filed the accusation on or about July 2, 2020.
2. The Department issued a type 20, off-sale beer and wine license to the Respondents for the above-described location on April 30, 2019 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Josimar Gonzalez (hereinafter referred to as decoy Gonzalez) was born on September 19, 2000. On February 27, 2020, he was 19 years old. On that date he served as a minor decoy in an operation conducted by the Chula Vista Police Department (Chula Vista PD).
5. Decoy Gonzalez appeared and testified at the hearing. On February 27, 2020, he was 5'8" tall and weighed 125 pounds. He wore a black sweatshirt over a red t-shirt with the word "Carrots" printed on the front in white, black pants, black shoes and eyeglasses. His hair was shaved close on the side of his head with a trim cut on top. (Exhibits 2, 3 and 5.) His appearance at the hearing was the same.
6. On February 27, 2020, Chula Vista PD Agent Rose, in a plain clothes capacity, entered the Licensed Premises followed shortly thereafter by decoy Gonzalez. Decoy Gonzalez walked straight to the alcoholic beverage coolers and selected a three-pack of Coors Light beer, which he brought to the sales counter.
7. Decoy Gonzalez placed the three-pack of Coors Light beer upon the sales counter. Clerk Raul Zuniga (hereinafter clerk Zuniga) scanned the three-pack of Coors Light beer and asked the decoy for his identification (ID). Decoy Gonzalez handed the clerk his valid California ID Card, which was vertical in orientation, contained his correct date of birth, and had a red stripe stating, "AGE 21 IN 2021." (Exhibit 4.) Clerk Zuniga looked at the ID for approximately three to five seconds and handed the ID back to decoy Gonzalez. There was no evidence clerk Zuniga asked the decoy any age-related questions or questions about the ID. Clerk Zuniga told the decoy the price of the beer. Decoy Gonzalez paid for the three-pack of Coors Light beer, received change and exited the store with the beer. Agent Rose witnessed the said sales transaction with a clear view from a couple of feet away. The decoy did not communicate with anyone other than with the clerk while he was inside the Licensed Premises.
8. Decoy Gonzalez re-entered the Licensed Premises with Chula Vista detectives and agents. Decoy Gonzalez was asked to identify the person who sold him the alcohol. Decoy Gonzalez pointed at clerk Zuniga and identified clerk Zuniga as the person who sold him the three-pack of Coors Light beer. A photograph was taken of clerk Zuniga

and decoy Gonzalez after the face-to-face identification, with decoy Gonzalez holding the three-pack of Coors Light beer and his ID while standing next to clerk Zuniga. (Exhibit 5.) There was no evidence clerk Zuniga was distracted during the sales transaction or the face-to-face identification. Clerk Zuniga did not appear at the hearing.

9. Decoy Gonzalez appeared youthful for 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 Zuniga at the Licensed Premises on February 27, 2020, and as depicted in the photographs taken that date, decoy Gonzalez 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 Gonzalez has a youthful appearance.

10. Decoy Gonzalez learned about the decoy program through his police cadet experience with the Chula Vista PD. At the time of the decoy operation he had been on approximately five prior decoy operations and held no rank. As a police cadet he held a leadership role and received training on how to comport himself when with the public. Decoy Gonzalez believes his cadet training has filtered into his daily life and thinks it makes him a more mature, less nervous and composed person. Decoy Gonzalez was not nervous when he entered the Licensed Premises on February 27, 2020.

11. 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 27, 2020, the Respondents-Licensees' employee, Raul Zuniga, inside the Licensed Premises, sold alcoholic beverages, to-wit: a three-pack of Coors

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

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

6. With respect to rule 141(b)(2) the Respondents argued the minor displayed the appearance of someone over 21 years of age because of certain factors including that the decoy (1) had significant experience conducting purchases of alcoholic beverages, (2) was not nervous, pursuant to his testimony, (3) wore a stylish haircut and pair of glasses, and (4) exercised leadership, maturity, as well as received interpersonal skills training as part of his police cadet training.

7. This rule 141(b)(2) argument is rejected. There was no evidence that any of these alleged factors had any impact upon clerk Zuniga's ability to discern the decoy's appearance or comply with the law in conducting his job. There was nothing about decoy Gonzalez' decoy or police cadet experience and training, his hair cut, eyeglasses, demeanor or otherwise which made him appear older than his actual age. During the decoy operation and under the actual circumstances presented to clerk Zuniga decoy Gonzalez appeared as a youthful minor, as evidenced by the record, including, but not limited to, the photographs depicting decoy Gonzalez on the day of the operation. (Exhibits 2, 3, and 5.) In other words, decoy Gonzalez had the appearance generally expected of a person under the age of 21. (Findings of Fact ¶¶ 5 and 9.)

PENALTY

The Department requested the Respondents' license be suspended for a period of 15 days.

The Respondents argued that, if the accusation were not dismissed, some small mitigation was warranted for clerk Zuniga, at least, requesting the ID of decoy Gonzalez, "rather than simply completely refusing to care at all about the identity of the purchaser in front of him."

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

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

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 clerk Zuniga's intentions during the sales transaction as argued by the Respondents, specifically that he cared about the decoy's "identity" because he requested the decoy's ID. In fact, the record indicates otherwise. Clerk Zuniga briefly looked at the ID, despite a youthful appearing minor before him. There were several other red flags present to the clerk, including the decoy's vertically formatted minor's ID, with the red box indicating he would not be 21 until the year 2021. Simply requesting an ID without further reasonable diligence to verify the age of the purchaser does not warrant mitigation.

The penalty recommended herein complies with rule 144.

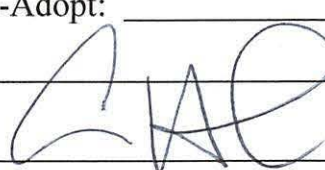
ORDER

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

Dated: November 23, 2020



D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By:  _____
Date: <u>01/21/21</u>