

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

AB-9904

File: 21-477575; Reg: 20090300

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store #9151
600 West Main Street
Santa Paula, CA 93060-3124,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: August 6, 2021
Telephonic

ISSUED AUGUST 9, 2021

Appearances: *Appellants:* Jade Quintero, of Solomon, Saltsman & Jamieson, as
counsel for Garfield Beach CVS, LLC and Longs Drug Stores
California, LLC,

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

ORDER

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing
business as CVS Pharmacy Store #9151 (appellants), appeal from a decision of the
Department of Alcoholic Beverage Control (Department)¹ suspending their license for 5
days because their clerk sold an alcoholic beverage to a Department minor decoy, in
violation of Business and Professions Code section 25658, subdivision (a).

¹ The decision of the Department, dated March 9, 2021, is set forth in the
appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. There is no record of departmental discipline against the license.

On July 26, 2020, the Department filed a single-count accusation against appellants charging that, on February 8, 2020, appellants' clerk, Jahaira Valencia (the clerk), sold an alcoholic beverage to 18-year-old Ashley Hernandez (the decoy). Although not noted in the accusation, the decoy was working for Department at the time.

At the administrative hearing held on November 19, 2020, documentary evidence was received and testimony concerning the sale was presented by the decoy and by Department Agent Kimberly Rodriguez. Appellants presented no witnesses.

Testimony established that on February 8, 2020, the decoy entered the licensed premises followed shortly thereafter by Agent Rodriguez. The decoy went to the alcoholic beverage section and selected a 25-ounce can of Bud Light beer which she took to the sales counter. The clerk asked to see her identification. The decoy handed the clerk her California driver's license (exh. 2) which had a portrait orientation and contained her correct date of birth, showing her to be 18 years of age, as well as a red stripe indicating "AGE 21 IN 2022." The clerk looked at the identification, handed it back, and completed the sale without asking any age-related questions.

The decoy exited the premises and described the transaction to the agents waiting outside. The agents entered the premises followed shortly thereafter by the decoy. They went to a back room and the decoy was asked to identify the person who sold her the beer. She identified the clerk, a photograph of the two of them was taken (exh. 4), and the clerk was issued a citation.

The administrative law judge (ALJ) issued a proposed decision on December 2, 2020, sustaining the accusation and recommending a 5-day suspension. The Department adopted the proposed decision in its entirety on March 1, 2021 and a certificate of decision was issued on March 9, 2021.

Appellants then filed a timely appeal contending: (1) the ALJ's finding that the decoy's appearance complied with rule 141(b)(2)² was not based on substantial evidence, and (2) the face-to-face identification of the clerk did not comply with rule 141(b)(5).

DISCUSSION

I

DECOY'S APPEARANCE

Appellants contend that the ALJ improperly considered the decoy's in-person appearance at the hearing in determining whether her appearance during the decoy operation complied with rule 141(b)(2). (AOB at p. 8.) Appellants further contend that the finding of compliance is not supported by substantial evidence because the ALJ failed to explain how he reached this conclusion. (*Ibid.* at pp. 10-11.)

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

5. Hernandez appeared and testified at the hearing. On February 8, 2020, she was 5'4" tall and weighed 160 pounds. She wore blue jeans, a gray shirt, and a beige sweatshirt. Her hair was parted in the middle and hung past her shoulders. She wore a watch and a necklace with a gold and silver butterfly pendant. She did not wear any make-up. (Exhibits 3-4.) At the hearing her appearance was similar, but she was 15 pounds heavier.

¶ . . . ¶

8. Hernandez learned of the decoy program through her role as an Explorer for Oxnard P.D. At the time of the sale, she had been an Explorer for two years. Her duties as an Explorer were to help out at community events, attend monthly meetings, and participate in ride-alongs. In December 2019 she was promoted to Senior Explorer. In that role she was in charge of a squad of six Explorers. Her duties included making sure the squad was prepared and their paperwork was properly completed and filed. She had been a decoy once or twice before. She was not nervous when she visited the Licensed Premises.

9. Hernandez appeared her age, 18 years old, 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 the Licensed Premises on February 8, 2020, Hernandez displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Valencia.

(Findings of Fact, ¶¶ 5-9.) Based on these findings, the Department addressed appellants' rule 141(b)(2) arguments:

5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)^[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that the photographs of Hernandez taken on February 8, 2020 were the best evidence of the photographs of her appearance and showed a person who appeared to be over the age of 21. The Respondents further argued that Hernandez's experience as an Explorer and a Senior Explorer and her lack of nervousness gave her the appearance of a person over the age of the 21.

This argument is rejected. There is no evidence that Hernandez's experience had any affect upon her appearance. Since the clerk never testified, there is no evidence what factors the clerk may have considered in evaluating Hernandez's appearance. Hernandez's appearance in both the photographs and while testifying was consistent with that of an 18-year-old. Phrased another way, Hernandez had the appearance generally expected of a person under the age of 21. (Finding of Fact 9.)

Conclusions of Law, ¶ 5.) We agree with this assessment.

As this Board has said many times, minors come in all shapes and sizes and we are reluctant to suggest that a minor decoy automatically violates the rule based on physical characteristics. (See, e.g., *7-Eleven/ NRG Convenience Stores* (2015) AB-9477; *7-Eleven Inc./Lobana* (2012) AB-9164.) 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 9, and Conclusions of Law paragraph 5, the Department found that the decoy met this standard, notwithstanding appellants' assertion that she displayed the appearance of someone over 21.

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. 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.)*

While appellants contend that the ALJ impermissibly based his findings on the appearance of the decoy at the hearing, rather than at the time of the decoy operation the decision very clearly states:

9. Hernandez appeared her age, 18 years old, **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 the Licensed Premises** on February 8, 2020, Hernandez displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Valencia.

(Findings of Facts, ¶ 9, emphasis added.) This argument is entirely without merit and is not supported by the record.

Appellants further assert that the ALJ is required to not just make findings, but that he must explain his findings:

Prior courts have held that it is important for administrative agencies to explain their reasoning in their decisions and orders. (*Garfield Beach CVS, LLC and Longs Drug Stores California, LLC v. Department of Alcoholic Beverage Control*, AB-9211 a at p. 5 (2014) (citing *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 506, 515.) By failing to provide any explanation behind his conclusion on Appellant's Rule 141(b)(2) defense, it cannot be said that ALJ Ainley's conclusion that the minor decoy's appearance complied with Rule 141 (b)(2) was supported by substantial evidence. Therefore, the Department's decision must be reversed.

(AOB at p. 11.) However, such a requirement has been rejected by this Board numerous times. For example, in *7-Eleven, Inc./Cheema* (2004) AB-8181 at p. 6, the Board said: "Appellants misapprehend *Topanga*.³ It does not hold that findings must be explained, only that findings must be made." (Also see: *No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 258-259 [242 Cal.Rptr. 760]; *Jacobson v. Co. of Los Angeles* (1977) 69 Cal.App.3d 374, 389 [137 Cal.Rptr. 909].) This Board has stated very clearly, "The omission of analysis alone is not grounds for reversal, provided findings have been made." (*Garfield Beach CVS, LLC/Longs Drug Stores Cal., LLC* (2015) AB-9514, at pp. 6-7.)

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.

³*Topanga Assn. for a Scenic Community v. Co. of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836].

II

FACE-TO-FACE IDENTIFICATION

Appellants contend that the face-to-face identification of the clerk was “impermissibly and unduly suggestive.” (AOB at p. 12.)

Rule 141(b)(5) provides:

Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

This rule provides an affirmative defense. The burden is, therefore, on appellants to show non-compliance. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.) The rule requires “strict adherence.” (See *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126] (*Acapulco*) [finding in that case that no attempt, reasonable or otherwise, was made to identify the clerk in that case].)

This issue was not raised at the administrative hearing. It is settled law that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*Araiza v. Younkin* (2010) 188 Cal.App.4th 1120, 1126-1127 [116 Cal.Rptr.3d 315]; *Hooks v. Cal. Personnel Bd.* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Bd. of Med. Examiners* (1978) 81 Cal.App.3d 564, 576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Harris v. Alcoholic Bev. Control Appeals Bd.* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].) Nevertheless, we will briefly address this issue.

In *Chun* (1999) AB-7287, this Board made the following observation about the purpose of face-to-face identifications:

The phrase “face to face” means that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other’s presence, by the decoy’s identification, and the seller’s presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

(*Id.* at p. 5.)

In *7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983, the Board clarified application of the rule in cases where, as here, an officer initiates contact with the seller following the sale:

As long as the decoy makes a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error, we do not believe that the officer’s contact with the clerk before the identification takes place causes the rule to be violated.

(*Id.* at pp. 7-8; see also *7-Eleven, Inc./Morales* (2014) AB-9312; *7-Eleven, Inc./Paintal Corp.* (2013) AB-9310; *7-Eleven, Inc./Dars Corp.* (2007) AB-8590; *West Coasts Products LLC* (2005) AB-8270; *Chevron Stations, Inc.* (2004) AB-8187.)

The court of appeals has found compliance with rule 141(b)(5) even where police escorted a clerk outside the premises in order to complete the identification. (See *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Keller)* (2003) 109 Cal.App.4th 1687, 1697 [3 Cal.Rptr.3d 339] [finding that the rule leaves the location of the identification to the discretion of the peace officer].)

More recently, the court found rule 141(b)(5) was not violated when:

[T]he decoy made a face-to-face identification by pointing out the clerk to the officer inside the store while approximately 10 feet from her, standing next to her when the officer informed her she had sold alcohol to a minor, and taking a photograph with her as the minor held the can of beer he

purchased from her. She had ample opportunity to observe the minor and to object to any perceived misidentification. The rule requires identification, not confrontation.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (CVS)* (2017) 18 Cal.App.5th 541, 547 [226 Cal.Rptr.3d 527, 531].) The court explained that the exact moment of the identification could not be severed from the entire identification procedure, which in that case included the decoy pointing out the clerk to the police, the decoy accompanying the police officer to the counter, the officer informing the clerk she had sold beer to the minor at his side, and the clerk and decoy being photographed together. (*Id.* at p. 532.) The court said, “[t]he clerk in these circumstances certainly knew or reasonably ought to have known that she was being identified” because of the totality of the circumstances. (*Ibid.*)

The ALJ made the following findings on the face-to-face identification in this case:

7. Outside, Hernandez met up with various agents, who asked her to describe the transaction. She did so. The agents entered the Licensed Premises; she re-entered a little later and went to a back room. Agent Rodriguez asked Hernandez to identify the person who sold her the beer. Hernandez identified Valencia. A photograph of the two of them was taken (exhibit 4), after which Valencia was cited.

(Findings of Fact, ¶ 7.)

Looking at the *entire identification procedure* — including the agents asking the decoy who sold her the beer, the decoy pointing out the clerk to the agents, and the clerk and decoy being photographed together with the decoy holding her identification — it seems clear that the clerk knew, or reasonably should have known, that she was being identified as the person who sold alcohol to a minor. That is all that is required. As in *CVS*, the clerk here “had ample opportunity to observe the minor and to object to

any perceived misidentification.” (*CVS, supra*, 18 Cal.App.5th 541, 547.) As the Court said, “the rule requires identification, not confrontation.” (*Ibid.*)

The ALJ’s findings are supported by substantial evidence and the face-to-face identification in this matter fully complies with rule 141(b)(5). The Board is prohibited from reweighing the evidence or exercising its independent judgment to overturn the Department’s factual findings to reach a contrary, although perhaps equally reasonable, result. (*Masani, supra*, at 1437.)

ORDER

The decision of the Department is affirmed.⁴

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

⁴This 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:**

GARFIELD BEACH CVS & LONGS DRUG
STORES CALIFORNIA LLC
CVS PHARMACY 9151
600 W. MAIN ST.
SANTA PAULA, CA 93060-3124

OFF-SALE GENERAL - LICENSE

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

VENTURA DISTRICT OFFICE

File: 21-477575

Reg: 20090300

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 1, 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 April 19, 2021, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: March 9, 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:

Garfield Beach CVS & Longs Drug Stores	}	File: 21-477575
California LLC	}	
dba CVS Pharmacy 9151	}	Reg.: 20090300
600 W. Main St.	}	
Santa Paula, California 93060-3124	}	License Type: 21
	}	
Respondents	}	Word Count: 7,000
	}	
	}	Reporter:
	}	Melina Homan
	}	iDepo
	}	
<u>Off-Sale General License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Ventura, California, on November 19, 2020.

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

R. Bruce Evans, attorney-at-law, represented respondents Garfield Beach CVS & Longs Drug Stores California LLC.

The Department seeks to discipline the Respondents' license on the grounds that, on or about February 8, 2020, the Respondents, through their agent or employee, sold, furnished, or gave alcoholic beverages to Ashely Hernandez, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibits 1 & 4.)

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 November 19, 2020.

FINDINGS OF FACT

1. The Department filed the accusation on July 26, 2020.

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

2. The Department issued a type 21, off-sale general license to the Respondents for the above-described location on June 22, 2009 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Ashley Hernandez was born on March 13, 2001. On February 8, 2020, she served as a decoy during an operation conducted by the Department. On that date she was 18 years old.
5. Hernandez appeared and testified at the hearing. On February 8, 2020, she was 5'4" tall and weighed 160 pounds. She wore blue jeans, a gray shirt, and a beige sweatshirt. Her hair was parted in the middle and hung past her shoulders. She wore a watch and a necklace with a gold and silver butterfly pendant. She did not wear any make-up. (Exhibits 3-4.) At the hearing her appearance was similar, but she was 15 pounds heavier.
6. On February 8, 2020, Hernandez entered the Licensed Premises. Agent K. Rodriguez entered a few moments later. Hernandez went to the alcoholic beverage section and selected a 25-oz. can of Bud Light beer, which she took to the counter. The clerk, Jahaira Valencia, asked to see her ID. Hernandez handed her California driver license (exhibit 2) to Valencia, who looked at it, then handed it back. Valencia completed the sale, after which Hernandez exited with the beer.
7. Outside, Hernandez met up with various agents, who asked her to describe the transaction. She did so. The agents entered the Licensed Premises; she re-entered a little later and went to a back room. Agent Rodriguez asked Hernandez to identify the person who sold her the beer. Hernandez identified Valencia. A photograph of the two of them was taken (exhibit 4), after which Valencia was cited.
8. Hernandez learned of the decoy program through her role as an Explorer for Oxnard P. D. At the time of the sale, she had been an Explorer for two years. Her duties as an Explorer were to help out at community events, attend monthly meetings, and participate in ride-alongs. In December 2019 she was promoted to Senior Explorer. In that role she was in charge of a squad of six Explorers. Her duties included making sure the squad was prepared and their paperwork was properly completed and filed. She had been a decoy once or twice before. She was not nervous when she visited the Licensed Premises.
9. Hernandez appeared her age, 18 years old, 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 the Licensed Premises on February 8, 2020, Hernandez displayed the appearance which could

generally be expected of a person under 21 years of age under the actual circumstances presented to Valencia.

10. 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 8, 2020, the Respondents' employee, Jahaira Valencia, inside the Licensed Premises, sold an alcoholic beverage to Ashley Hernandez, 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 that 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). Specifically, the Respondents argued that the photographs of Hernandez taken on February 8, 2020 were the best evidence of the photographs of her appearance and showed a person who appeared to be over the age of 21. The Respondents further argued that Hernandez's experience as an Explorer and a Senior Explorer and her lack of nervousness gave her the appearance of a person over the age of the 21.

This argument is rejected. There is no evidence that Hernandez's experience had any affect upon her appearance. Since the clerk never testified, there is no evidence what factors the clerk may have considered in evaluating Hernandez's appearance. Hernandez's appearance in both the photographs and while testifying was consistent with

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

that of an 18-year-old. Phrased another way, Hernandez had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 9.)

PENALTY


The Department requested that the Respondent's license be suspended for a period of 10 days. The Respondents did not recommend a penalty in the event that the accusation were sustained. There was no evidence of aggravation. By way of mitigation, the Respondents have nearly 11 years of discipline-free operation. The penalty recommended herein complies with rule 144.

ORDER

The Respondents' off-sale general license is hereby suspended for a period of 5 days.

Dated: December 2, 2020


Matthew G. Ainley
Administrative Law Judge 

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By:  _____
Date: <u>03/01/21</u> _____