

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

AB-9920

File: 20-589280; Reg: 19089587

7-ELEVEN, INC. and HARMAN 2017, INC.,
dba 7-Eleven Store #34470C
16975 Sierra Lakes Parkway, Unit 101
Fontana, CA 92336-172,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: November 5, 2021
Telephonic

ISSUED NOVEMBER 9, 2021

Appearances: *Appellants:* Jade Quintero, of Solomon, Saltsman & Jamieson, as
counsel for 7-Eleven, Inc. and Harman 2017, Inc.,

Respondent: Bryan Rouse, as counsel for the Department of
Alcoholic Beverage Control.

ORDER

7-Eleven, Inc. and Harman 2017, Inc., doing business as 7-Eleven Store #34470C (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 under Government Code §11517(c), dated June 8, 2021, is set forth in the appendix, as is the Proposed Decision dated October 19, 2020.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 19, 2018. There is no record of prior departmental discipline against the license.

On December 9, 2019, the Department filed a single-count accusation against appellants charging that, on June 7, 2019, appellants' manager, Manpreet Singh (the manager), sold an alcoholic beverage to 18-year-old Parjeet Dhillon (the decoy). Although not noted in the accusation, the decoy was working for the Fontana Police Department (FPD) at the time.

At the administrative hearing held on September 18, 2020, documentary evidence was received and testimony concerning the sale was presented by the decoy and FPD Officer Richard Guerrero. The manager of the premises, Manpreet Singh, who is also president of Harman 2017, Inc., testified on appellants' behalf.

Testimony established that on June 7, 2019, the decoy entered the licensed premises alone, followed shortly thereafter by FPD Officer Guerrero in plain clothes. The decoy went to the coolers where he selected a three-pack of 25-ounce Bud Light beer in cans. He took the beer to the front of the store and waited in line. The manager emerged from a back room and was about to leave for the day, but decided to help out and shorten the line by opening another register.

The manager summoned the decoy to his register and the decoy set the beer down on the counter. The manager scanned the beer and a screen prompt appeared, advising him to check the customer's identification (ID). Two options appeared on the screen — "manual enter" for entering the customer's birthdate and "exit." The manager pressed the "manual enter" selection and entered his own birthdate into the register. He then completed the sale without asking the decoy for his ID. Officer Guerrero

observed the transaction from inside the store from a distance of about five feet. The decoy then exited the store.

As the manager left the register and started to leave for the day he was contacted by Officer Guerrero and informed of the violation. The manager led Officer Guerrero to a small multi-purpose room in the back of the store. The decoy reentered the premises with other officers and they went to the back of the store. Officer Guerrero asked a female employee in the multi-purpose room to move aside to make room, then asked the decoy who sold him the beer. The decoy stood next to the manager, pointing to him and indicating that the manager had sold him the beer. Officer Guerrero also asked the decoy if the manager asked for his ID and the decoy said that he did not. A photograph was taken of the decoy and manager together (exh. 4) and the manager was issued a citation.

The administrative law judge (ALJ) issued a proposed decision on October 19, 2020, sustaining the accusation and recommending a 15-day suspension. Initially, on January 13, 2021, the Department declined to adopt the proposed decision and invited the parties to submit written arguments. After consideration of the written arguments submitted by the parties, and the entire record, the Department issued a decision under Government Code 11517(c), on June 8, 2021, adopting the proposed decision in its entirety.

Appellants then filed a timely appeal contending: (1) the face-to-face identification did not comply with rule 141(b)(5),² and 2) the penalty is excessive and fails to take into consideration all factors in mitigation.

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.

DISCUSSION

I

FACE-TO-FACE IDENTIFICATION

Appellants contend that the face-to-face identification of the clerk did not comply with rule 141(b)(5), contending:

Here, Officer Guerrero exceeded his role under Rule 141(b)(5). Even though the minor decoy pointed at Mr. Singh inside this room, it is Officer Guerrero who brought the minor into this secluded room and told him what to do from there. In effect, the officer and not the minor decoy, identified Mr. Singh as the person who allegedly sold the decoy alcohol.

(AOB at p. 10.)

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 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.)

The ALJ made the following findings regarding the face-to-face identification:

Decoy Dhillon re-entered the Licensed Premises, was escorted towards the multi-purpose room and stood outside of it. Manager Singh asked Officer Guerrero if he could “have everybody back here,” referring to inside the multi-purpose room because manager Singh was concerned that customers would see what was happening with the officers, decoy and him. Officer Guerrero asked the decoy, who was still standing outside the multi-purpose room, to stand “over here” pointing to inside the narrow standing space at the entrance of the room, and asked the female employee, who was standing just inside the entrance, “Could you move please ma'am,” motioning with his right index finger, and then asked the decoy, “Can you point to the person that sold you the alcohol?” The female employee walked behind manager Singh and decoy Dhillon walked into the entrance of the multi-purpose room, stood next to manager Singh, pointed at manager Singh and identified him as the person who sold him the beer. An officer took a photograph of manager Singh and decoy Dhillon as the face-to-face identification occurred, with decoy Dhillon holding the three-pack of Bud Light beer in his right hand while pointing at manager Singh with his left index finger. (Exhibit 4.) Decoy Dhillon and Manager Singh were standing approximately three feet apart at the time of this identification, with nothing between them. Officer Guerrero asked the decoy if manager Singh had asked for his age and ID, to which the decoy replied in the negative.

(Findings of Fact, ¶ 9, internal footnotes omitted.) Based on these findings, the ALJ addressed this issue at length, and reached the following conclusions:

8. With respect to rule 141(b)(5), the Respondents argued there was an improper face-to-face identification in violation of that rule because the circumstances of the face-to-face identification created an “extremely suggestive environment, there was no option for the minor decoy to make any other identification than [that] of manager Singh.” The Respondents argued Officer Guerrero asked the female employee in the back room to move out of the way and showed the minor where to stand next to manager Singh before the minor made the identification of manager Singh. Furthermore, the Respondents argued the decoy testified there was no other face-to-face identification other than when the photograph was taken, which was admitted as Exhibit 4, and as confirmed in the video in Exhibit F.

9. This rule 141(b)(5) argument is rejected as without merit. The credible testimony of decoy Dhillon was that he willingly pointed out and identified manager Singh as the person who sold him the three-pack of Bud light beer. The Respondents could have questioned the minor to ask if he felt coerced to identify manager Singh, but curiously the Respondents did not.

Nevertheless, there was no evidence decoy Dhillon was pressured into identifying manager Singh during the face-to-face identification. The fact that a photograph captured the face-to-face identification does not make the identification improper. Rule 141(b)(5) does not require that two face-to-face identifications occur. It only requires that “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.” The record is clear, there was compliance with rule 141(b)(5).

10. Furthermore, in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board/Keller* (2003) 109 Cal.App.4th 1687, 1698 [1 Cal.Rptr.3d 339], the court said it is not inherently unfair to conduct an identification where there is only one person presented to identify, citing *In re Carlos M*, in which the alleged assailant was wearing handcuffs when transported to a hospital to be identified by the victim. The court in *Carlos M* rejected the contention the identification was unduly suggestive, stating, “A single-person show-up is not inherently unfair.” In the matter at hand, the Respondents failed to meet the burden of proof of their affirmative defense that rule 141 was not complied with, simply because Officer Guerrero, asked the female employee to move so decoy Dhillon could step into the narrow space of the multi-purpose room to identify the clerk who sold him the beer. The evidence is clearly non-suggestive. The decoy chose to stand directly next to manager Singh. Officer Guerrero asked the decoy, “Can you point to the person that sold you the alcohol?” The decoy was free to point to whomever he wanted, and he chose to point to manager Singh. Again, there was no evidence decoy Dhillon was pressured in anyway during the face-to-face identification.

(Conclusions of Law, ¶¶ 8-10, internal footnotes omitted.) We agree with the analysis and conclusions reached by the ALJ.

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.*)

Looking at the *entire identification procedure* — including the officer asking the decoy who sold him the beer, the decoy pointing out the manager, and the manager and decoy being photographed together — it seems clear that the manager knew, or reasonably should have known, that he was being identified as the person who sold alcohol to a minor. That is all that is required. As in *CVS*, the manager here “had ample opportunity to observe the minor and to object to any perceived misidentification.” (*CVS, supra*, at 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.)

II

PENALTY

Appellants contend that the penalty is excessive because it fails to take into consideration all of the factors in mitigation presented by appellants. They specifically complain:

In her decision, Judge Huebel provided no weight to the length of licensure at subject premises without prior discipline or problems, the positive action by licensee to correct problem, the testimony of the training provided to employees, and cooperation by licensee in investigation.

(AOB at p. 11.)

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].) “‘Abuse of discretion’ in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.]” (*Brown v. Gordon* (1966) 240 Cal.App.2d 659, 666-667 [49 Cal.Rptr. 901].)

If the penalty imposed is reasonable, the Board must uphold it even if another penalty would be equally, or even more, reasonable. “If 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].)

Rule 144 provides:

In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act (Bus. and Prof. Code Sections 23000, *et seq.*), and the Administrative Procedures Act (Govt. Code Sections 11400, *et seq.*), the Department shall consider the disciplinary guidelines entitled “Penalty Guidelines” (dated 12/17/2003) which are hereby incorporated by reference. Deviation from these guidelines is appropriate where the Department in its sole discretion determines that the facts of the particular case warrant such a deviation - such as where facts in aggravation or mitigation exist.

(Cal. Code Regs., tit. 4, § 144.)

Among the mitigating factors provided by the rule are the length of licensure without prior discipline, positive actions taken by the licensee to correct the problem,

cooperation by the licensee in the investigation, and documented training of the licensee and employees. Aggravating factors include, *inter alia*, prior disciplinary history, licensee involvement, lack of cooperation by the licensee in the investigation, and a continuing course or pattern of conduct. (*Ibid.*)

The Penalty Policy Guidelines further address the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

Penalty Policy Guidelines:

The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

(*Ibid.*)

Appellants fault the decision for failing to mitigate the penalty further. However, as we have said time and again, this Board's review of a penalty looks only to see whether it can be considered reasonable, and, if it is reasonable, the Board's inquiry ends there. The *extent* to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion — pursuant to rule 144 — and the Board may not interfere with that discretion absent a clear showing of abuse of discretion.

Appellants have not established that the Department abused its discretion by imposing a 15-day penalty in this matter.

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 Harman 2017, Inc.	}	File: 20-589280
Dbas: 7-Eleven Store 34470C	}	
16975 Sierra Lakes Parkway, Unit 101	}	Reg.: 19089587
Fontana, California 92336-1272	}	
	}	License Type: 20
Respondents	}	
	}	Word Count: 17,565
	}	
	}	i-Depo Reporters:
	}	Court Reporter: Joann Thomas
	}	Video Hosts: Addison Green &
	}	Syed Hassan
	}	
<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 September 18, 2020, by stipulation of the parties via video/audio hearing, for Riverside County, California, via waiver that the administrative hearing be held in a particular city, county or geographic location. (Exhibit 1.)

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

Ralph Saltsman and Megan Wolniewicz, Attorneys, represented Respondents, 7-Eleven Inc., and Harman 2017, Inc.

The Department seeks to discipline the Respondents' license on the grounds that, on or about June 7, 2019, the Respondent-Licensee Manpreet Singh, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Parjeet Dhillon, 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 September 18, 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 December 9, 2019.
2. The Department issued a type 20, off-sale beer and wine license to the Respondents for the above-described location on March 19, 2018 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Parjeet Dhillon (hereinafter referred to as decoy Dhillon) was born on April 25, 2001. On June 7, 2019, he was 18 years old. On that date he served as a minor decoy in an operation conducted by the Fontana Police Department (Fontana PD).
5. Decoy Dhillon appeared and testified at the hearing. On June 7, 2019, he was approximately 6'1" tall and weighed 210 pounds. He wore a blue Volcom t-shirt, khaki jogger pants, blue Adidas shoes, and a black android smart watch. He wore his hair short along the sides with slight height on the top of his head, combed straight back. (Exhibits 3A, 3B, 4, B and F.) His appearance at the hearing was similar except that he was 6'2" tall, weighed 220 pounds, had grown a full beard and the sides of his hair were trimmed shorter.
6. On June 7, 2019, decoy Dhillon entered the Licensed Premises, followed shortly thereafter by Fontana PD Officer Guerrero. There were five patrons in the store. Decoy Dhillon walked straight to the back of the store, where the alcoholic beverage refrigerators were located, and selected a three-pack of 25-ounce Bud Light beer cans. He brought the beer to the front of the store where the cash registers were located and waited in line to purchase the beer. There was one person in line in front of the decoy. A store manager was training a newly hired clerk at one of the cash registers and assisted the customer in front of the decoy. A third employee, another store manager later identified as Manpreet Singh (hereinafter referred to as manager Singh), had emerged from a back room² and was about to leave for the day but instead chose "to reduce the line prior to leaving." Manager Singh walked behind the sales counter to a second cash register and called the decoy to his register to assist the decoy with his purchase.
7. Decoy Dhillon placed the three-pack of Bud Light beer upon the sales counter. Manager Singh scanned the beer. A yellow screen prompt appeared on the register monitor advising the manager to check and scan the customer's identification (ID). There were two options from which to select, "Manual Enter" or "Exit." The "Manual Enter" option required the entry of the customer's birthdate. The "Exit" button was used to refuse the sale of age-restricted merchandise. Manager Singh did not ask decoy

² Also referred to as the back office or multi-purpose room.

Dhillon for his ID or his age and did not scan any ID on the point of sale (POS) system. Manager Singh pressed the "Manual Enter" button and entered his own date of birth, which allowed the sale of alcohol to proceed, because manager Singh was over the age of 21. Decoy Dhillon had on his person his valid California Driver's License, which has a vertical orientation, depicts his correct date of birth and includes a red stripe which reads, "AGE 21 IN 2022." (Exhibit 2.) Manager Singh told the decoy the cost of the beer. Decoy Dhillon gave manager Singh \$10 and paid for the beer. Decoy Dhillon exited the store with the three-pack of Bud Light beer. Officer Guerrero observed the sales transaction with a clear, unobstructed view from approximately five feet away. Decoy Dhillon did not communicate with Officer Guerrero while he was inside the Licensed Premises. Officer Guerrero remained in the store and waited for other officers to enter the premises.

8. In the meantime, manager Singh walked around the sales counter to the customer side to leave for the day, whereupon Officer Guerrero contacted manager Singh and informed him of the violation. Manager Singh led Officer Guerrero to a multi-purpose room. The multi-purpose room served as storage for supplies, merchandise, refrigeration, and had a small desk space with office equipment, a chair and a rolling cart at the entrance of the room that caused a narrow walking space at the entrance of the room. Manager Singh sat on the chair just inside the door of the multi-purpose room and Officer Guerrero continued to explain the violation while standing outside of the door to the room. A female employee, wearing a 7-Eleven logo shirt, entered the narrow walking space of the multi-purpose room and stood next to manager Singh. There did not appear to be much space for a third person with the female employee and manager Singh just inside the entrance of the room.³

9. Decoy Dhillon re-entered the Licensed Premises, was escorted towards the multi-purpose room and stood outside of it. Manager Singh asked Officer Guerrero if he could "have everybody back here," referring to inside the multi-purpose room because manager Singh was concerned that customers would see what was happening with the officers, decoy and him. Officer Guerrero asked the decoy, who was still standing outside the multi-purpose room, to stand "over here" pointing to inside the narrow standing space at the entrance of the room, and asked the female employee, who was standing just inside the entrance, "Could you move please ma'am," motioning with his right index finger, and then asked the decoy, "Can you point to the person that sold you the alcohol?" The female employee walked behind manager Singh and decoy Dhillon walked into the entrance of the multi-purpose room, stood next to manager Singh, pointed at manager Singh and identified him as the person who sold him the beer. An officer took a photograph of manager Singh and decoy Dhillon as the face-to-face identification occurred, with decoy Dhillon holding the three-pack of Bud Light beer in his right hand,

³ The above facts were elicited from witness testimony and the audio/video of Exhibit F.

while pointing at manager Singh with his left index finger. (Exhibit 4.) Decoy Dhillon and Manager Singh were standing approximately three feet apart at the time of this identification, with nothing between them. Officer Guerrero asked the decoy if manager Singh had asked for his age and ID, to which the decoy replied in the negative.⁴

10. A citation was issued to manager Singh after the face-to-face identification. There was no evidence Manager Singh was distracted during the sales transaction or the face-to-face identification.

11. Decoy Dhillon appeared youthful and 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 manager Singh at the Licensed Premises on June 7, 2019, as depicted in both the video and photographs taken that date, decoy Dhillon displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to manager Singh.

12. Officer Guerrero questioned manager Singh about any safety protocols for age-restricted sales in the Licensed Premises. Manger Singh said he and the employees watch an on-line training video for sales to minors. Manager Singh informed Officer Guerrero all employees are supposed to scan customer IDs, and he instructs all employees that once they ask for the customer's ID to swipe the ID on the POS system, which will display whether the customer is of legal age to purchase age-restricted products. Officer Guerrero inquired why manager Singh did not scan the decoy's ID, to which manager Singh explained that it was busy, it was lotto day, and 80% of their regular customers were getting off work and coming into the store, plus they get more people on lotto day. Manager Singh further advised Officer Guerrero that at each of the registers a sign informs clerks what year the customer has to be born on or before to be of legal age to purchase alcohol, tobacco and lottery tickets.⁵

(Respondents' Witness)

13. Manpreet Singh appeared and testified at the hearing. Mr. Singh described himself as the franchisee/store manager since December of 2017. Mr. Singh is the corporate president of the Respondent-Licensee Harman 2017, Inc. He said he received the 7-Eleven Excel University computer-based alcohol-related training once in September of 2017. Respondents' new-hire employees usually receive this computer-based training and inform Mr. Singh they have completed the same. Mr. Singh is not sure whether a certificate of completion is available after employees complete said training but believed

⁴ The above facts were elicited from witness testimony and the audio/video of Exhibit F.

⁵ Facts based on witness testimony and the audio/video in Exhibit F.

there was such a certificate. There was no credible evidence of employee retraining or documented training of employees. Mr. Singh said he tells his employees his “point of view, if they believe the person doesn’t look of age or doesn’t have ID or is intoxicated to refuse the sale regardless of what is said by them.”

14. Mr. Singh recalled June 7, 2019 was a Friday. He said the Licensed Premises usually has a “higher traffic in the afternoon” on Fridays and that on June 7, 2019, the California Lottery played a mega-million jack pot of a little over one-half a billion dollars, so a lot of people came in to get lotto tickets. He said he recalled the time of the decoy operation was somewhere between 5:30 p.m. and 6:00 p.m. because Mr. Singh was getting off of work after coming into work at 6:00 a.m. that morning. He said there were between four to five customers in line prior to the sale transaction with the decoy. At the hearing, Mr. Singh reviewed the video surveillance footage, marked Exhibit F. After reviewing the video, he pointed out that he was not behind the sales counter when the decoy and Officer Guerrero entered the Licensed Premises because he was in the back room getting his belongings since he was ready to get off of work. He said that once he came out of the back room, he saw the line of customers and “jumped behind the counter to reduce the line prior to leaving.”

15. Mr. Singh testified that Respondents’ Exhibit B, the same photo as the Department’s Exhibit 3B, which depicts a full body shot of the decoy, was an accurate representation of how decoy Dhillon appeared during the decoy operation on June 7, 2019.

16. After the said violation, Mr. Singh replaced worn-out signs that informed customers, “We Check I.D.” on the counter and an alcoholic beverage cooler door, as well as another sign behind the POS system that informs clerks what birth year a customer must be born on or before to legally purchase alcohol, tobacco and lottery products. The Respondents produced four photographs of the said signs which are posted in the store that were replaced. (Exhibit A.) The video in Exhibit F depicts the “We Check I.D.” signs on the sales counter and three of the alcoholic beverage cooler doors at the time of the operation.

17. The Respondents participate in the BARS secret shopper program, which sends undercover persons to the Licensed Premises to attempt to purchase age-restricted merchandise to see if the Respondents’ clerks are asking for customer IDs. If a clerk asks the secret shopper for an ID, the clerk is given a green card. If a clerk fails to ask the secret shopper for an ID, the clerk is given a red card. Mr. Singh relies on the clerks to inform him of whether they receive red cards. If Mr. Singh wanted, he could e-mail the BARS program field consultant to get in touch with the asset protection department to email the reports of their visits to the Licensed Premises. If a clerk receives a red card Mr. Singh said he would review the surveillance tape to see why the clerk did not ask for the customer’s ID, to see “what was going on during that time and we ... basically discuss why it happened - was there anything going on, was there any other issue going

on in [the] store and they just wanted [the] customers out.” The Respondents produced copies of BARS reports, which reflect six secret shopper visits at the Licensed Premises for the year of 2019, one secret shopper visit from January 1, 2020 to February 18, 2020, and four secret shopper visits for the time period of January 1, 2020 through September 9, 2020. The report reveals that with each afore-described visit the Respondents’ clerks requested the ID of the secret shopper attempting to purchase an age-restricted product. (Exhibits C, D, and E.)

18. Mr. Singh admitted that during the sales transaction with decoy Dhillon he chose to complete the sales transaction without asking for the decoy’s ID and pressed the “Manual Enter” option to enter his own birthdate, which enabled the sales transaction to proceed. Mr. Singh is over the age of 21. As of the date of the hearing, the “Manual Enter” option is still available to Respondents’ clerks to use during age-restricted sales. On June 7, 2019, the Respondents had six employees, and currently have five employees.

19. Mr. Singh claimed that prior to the said violation, while scanning IDs was an option available to Respondents’ clerks, he did not require that the clerks comply with that policy but instead permitted them to look at the ID, make sure the picture matched the customer and enter the birthdate in the “Manual Enter” field. Mr. Singh said 7-Eleven policy for age-restricted sales is to ask for customer IDs if they appear under 30 years of age. Mr. Singh claimed he implemented a new, stricter policy after the said violation, to “try to tell [the employees] to always scan the ID.” Mr. Singh admits that he leaves it to the employees’ own discretion whether to ask for and scan customers’ IDs based on each clerks’ own judgment of the customer’s age.

20. Mr. Singh acknowledged having told Officer Guerrero on June 7, 2019, that (1) the Respondents’ policy at that time was that all employees are supposed to scan customer IDs, and (2) he deviated from that policy because it was busy, lotto day, and 80% of Respondents’ regular customers were getting off of work and coming into the store. In the audio of Exhibit F beginning at time stamp 9:10 Mr. Singh can be heard saying the foregoing, in addition to adding, “trying to get them out.” During his testimony Mr. Singh claimed that as of June 7, 2019, scanning customer IDs was “an option” for the Respondents’ clerks. Mr. Singh said that it is often busy in the Licensed Premises and “on the weekends its rather busier.”

21. 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 June 7, 2019, the Respondents-Licensees' corporate president, store manager Manpreet Singh, inside the Licensed Premises, sold alcoholic beverages, to-wit: a three-pack of Bud Light beer, to Parjeet Dhillon, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-11.)
5. The Respondents argued the decoy operation at the Licensed Premises failed to comply with rules 141(b)(2) and 141(b)(5)⁶, 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, (1) the decoy's weight and height, with the decoy approximately five inches taller than manager Singh, and (2) the android smart watch the decoy wore, which the Respondents claimed someone under 21 would not typically be expected to wear or afford.
7. This rule 141(b)(2) argument is rejected. There was no evidence that any of these alleged factors had any impact upon manager Singh's ability to discern the decoy's appearance or comply with the law in conducting his job. In fact, manager Singh did not say, either in testimony or to Officer Guerrero on the day of the operation, that any of these alleged factors were the cause of his selling alcohol to the decoy. Manager Singh testified that the reason he sold alcohol to the decoy was because it was a busy night, lotto day, and a lot of customers were coming in after work. That was the same thing he told Officer Guerrero on June 7, 2019, as the reason why he chose not to scan the decoy's

⁶ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

ID and sold alcohol to the decoy, but added that he was “trying to get them out.” There was nothing about decoy Dhillon’s height or weight, let alone his watch, which made him appear older than his actual age. Decoy Dhillon did not look 21 or 30 years of age, the latter of which is pursuant to Respondents’ policy to ask for the ID of anyone appearing under 30 years of age. During the decoy operation and under the actual circumstances presented to manager Singh decoy Dhillon appeared as a youthful minor, as evidenced by the record, including, but not limited to, the video footage and photographs depicting decoy Dhillon. (Exhibits 3A, 3B, 4, B, and F.) In fact, Officer Guerrero testified that exhibits 3A and 3B accurately depicted how the minor appeared during the decoy operation and decoy Dhillon testified to the same, including exhibit 4. Even manager Singh acknowledged that Exhibit B, which is the same photo as Exhibit 3B, accurately depicted how decoy Dhillon appeared on June 7, 2019. The Department attorney was correct to reference Precedential Decision No. 19-02-E⁷ which states, “many minors are tall and heavy-set, and being so does not lead to the conclusion that the minor’s appearance disqualifies the minor in having the appearance generally expected of a person under the age of 21. Minors come in all shapes and sizes, and a minor decoy of large stature does not automatically violate the rule.” In other words, decoy Dhillon had the appearance generally expected of a person under the age of 21. (Findings of Fact ¶¶ 5 and 11.)

8. With respect to rule 141(b)(5), the Respondents argued there was an improper face-to-face identification in violation of that rule because the circumstances of the face-to-face identification created an “extremely suggestive environment, there was no option for the minor decoy to make any other identification than [that] of manager Singh.” The Respondents argued Officer Guerrero asked the female employee in the back room to move out of the way and showed the minor where to stand next to manager Singh before the minor made the identification of manager Singh. Furthermore, the Respondents argued the decoy testified there was no other face-to-face identification other than when the photograph was taken, which was admitted as Exhibit 4, and as confirmed in the video in Exhibit F.

9. This rule 141(b)(5) argument is rejected as without merit. The credible testimony of decoy Dhillon was that he willingly pointed out and identified manager Singh as the person who sold him the three-pack of Bud light beer. The Respondents could have questioned the minor to ask if he felt coerced to identify manager Singh, but curiously the Respondents did not. Nevertheless, there was no evidence decoy Dhillon was pressured into identifying manager Singh during the face-to-face identification. The fact that a photograph captured the face-to-face identification does not make the identification improper. Rule 141(b)(5) does not require that two face-to-face identifications occur. It

⁷ *7-Eleven and Gytari*, Precedential Decision No. 19-02-E (April 12, 2019) at p. 7 ¶ 9.

only requires that "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." The record is clear, there was compliance with rule 141(b)(5).

10. Furthermore, in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board/Keller* (2003) 109 Cal.App.4th 1687, 1698 [1 Cal.Rptr.3d 339], the court said it is not inherently unfair to conduct an identification where there is only one person presented to identify, citing *In re Carlos M.*,⁸ in which the alleged assailant was wearing handcuffs when transported to a hospital to be identified by the victim. The court in *Carlos M.* rejected the contention the identification was unduly suggestive, stating, "A single-person show-up is not inherently unfair."⁹ In the matter at hand, the Respondents failed to meet the burden of proof of their affirmative defense that rule 141 was not complied with, simply because Officer Guerrero asked the female employee to move so decoy Dhillon could step into the narrow space of the multi-purpose room to identify the clerk who sold him the beer. The evidence is clearly non-suggestive. The decoy chose to stand directly next to manager Singh. Officer Guerrero asked the decoy, "Can you point to the person that sold you the alcohol?" The decoy was free to point to whomever he wanted, and he chose to point to manager Singh. Again, there was no evidence decoy Dhillon was pressured in anyway during the face-to-face identification.

PENALTY

The Department requested the Respondents' license be suspended for a period of 15 days, given the decoy's age, youthful appearance and aggravating factor that manager Singh intentionally entered his own birthdate into the POS system to enable the sale of alcohol to the minor. The Department further argued there was insufficient evidence of mitigation relating to positive action taken by the licensee to correct the problem and documented training and retraining of the licensee and employees.

The Respondents argued that, if the accusation were not dismissed, a mitigated penalty of five-days, all-stayed was warranted based on the following: (1) after the violation manager Singh incorporated a stricter policy to require clerks scan every customer ID, for the exception of leaving discretion to the clerks if someone is obviously over 21 years of age, (2) stickers/signs were replaced, and (3) cooperation by the licensee in the investigation.

⁸ *In re Carlos M.* (1990) 220 Cal.App.3d 372, 386 [269 Cal.Rptr. 447].

⁹ *People v. Floyd* (1970) 1 Cal.3d 694, 714 [83 Cal.Rptr.608].

In assessing an appropriate measure of discipline, the Department's penalty guidelines are in California Code of Regulations, Title 4, Division 1, Article 22, section 144, commonly referred to as rule 144. Under rule 144, the presumptive penalty for a first violation of selling or furnishing an alcoholic beverage to a minor in violation of section 25658 is a 15-day license suspension. Rule 144 also permits imposition of a revised penalty based on the presence of aggravating or mitigating factors.

While the Respondents claim to have changed their policy to a stricter policy of requiring all customer IDs be scanned, manager Singh acknowledged that he still leaves to the clerks the discretion whether to scan a customer's ID if they look obviously old enough to purchase the age-restricted product. Mr. Singh's claim of a stricter policy after the violation is not credible, given his statement to Officer Guerrero on the day of the operation that at the time that was already the policy in place.

Mr. Singh testified that he updated the four stickers/signs he purchased, explaining that what he meant by updating was to replace worn-out stickers/signs already in the Licensed Premises at the time of the decoy operation. The video in Exhibit F depicts three cooler doors with "We Check I.D." stickers, not two as manager Singh recalled. Whether Mr. Singh replaced or added stickers, however, does not address the problem at issue related to the sale at hand.

In the end, the Respondents still maintain the same policy with no change in policy. Prior to the violation, the Respondents gave their clerks discretion whether to ask for customers' ID and the ability to use the "Manual Enter" button to enter a birthdate. The Respondents still leave this option available to its clerks to do the same as manager Singh did on June 7, 2019. Based on manager Singh's testimony since the store is often busy, especially on the weekends (including Friday), if a clerk fails to ask for an ID manager Singh's explanation for their doing so was because there was something going on in the store "and they just wanted [the] customers out." This seems to be a common theme, with the store being so busy, to just get the "customers out," as manager Singh did on June 7, 2019, when he jumped "to reduce the line before leaving" because the store was busy, it was lotto day, and 80% of their regular customers were getting off work, so he was "trying to get them out."

There was no evidence that manager Singh himself retook the 7-Eleven Excel computer-based training after the said violation. He was not even sure whether the program allows one to print out a certification of completion. There was no evidence of documented training or any evidence to corroborate manager Singh's incredulous testimony that the Respondents retrained their employees. When manager Singh was asked whether employees receive retraining, he first replied, "I *try* to do it," then said "*probably* quarterly," then qualified his testimony to explain he did it "*if* we get an email from asset

protection – say there’s fake IDs going around,” then he notifies the employees of “what is going around, [to] be on the look-out.”

Licensee involvement was also considered. It was disconcerting that Mr. Singh, as both the store manager and corporate president for the Respondent Harman 2017 Inc., intentionally entered his own birthdate into the POS system, which enabled the sale of alcohol to the minor.

The penalty recommended herein complies with rule 144.

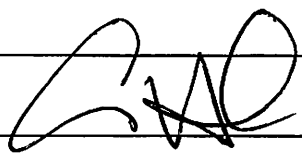
ORDER

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

Dated: October 19, 2020



D. Huebel
Administrative Law Judge

<input type="checkbox"/> Adopt
<input checked="" type="checkbox"/> Non-Adopt: _____
By:  _____
Date: <u>12/29/20</u>

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

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

7-Eleven, Inc., Harman 2017, Inc.
DbA 7-Eleven #34470C
16975 Sierra Lakes Pkwy, unit 101
Fontana, CA 92336

Licensee(s).

File No.: 20-589280

Reg. No.: 19089587

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department on June 8, 2021, for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held on September 18, 2020, before Administrative Law Judge D. Huebel, and the written arguments of the parties, and good cause appearing, the proposed decision of the Administrative Law Judge dated October 19, 2020, is hereby adopted as the decision of the Department.

Sacramento, California

Dated: June 8, 2021


Eric Hirata
Director

Pursuant to Government Code section 11521(a), any party may petition for reconsideration of this decision. The Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or on the effective date of the decision, whichever is earlier.

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9, of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.