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

AB-9925
File: 21-517464; Reg: 21090991

GOLETA CONTINENTAL LIQUOR, INC.,
dba Continental Liquors
290 Stroke Road, Suite C
Goleta, CA 93117-2966,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: November 5, 2021
Telephonic

ISSUED NOVEMBER 9, 2021

Appearances: *Appellant:* Jeffrey S. Weiss, of Weiss and Stepanian, LLP, as counsel for Goleta Continental Liquor, Inc.,

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

OPINION

Goleta Continental Liquor, Inc., doing business as Continental Liquors (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for 15 days (with all 15 days conditionally stayed) because its agent sold, furnished, or gave an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658(a).

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[1]The decision of the Department, dated July 6, 2021, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on February 21, 2021. There is no record of prior departmental discipline against the license. On March 3, 2021, the Department filed a single-count accusation against appellant charging that, on October 22, 2020, appellant, through its agent or employee, sold, furnished, or gave an alcoholic beverage to 19-year-old Ashley Hernandez (the decoy).

At the administrative hearing held on April 28, 2021, documentary evidence was received, and testimony concerning the sale was presented by the decoy and Department Agent Kimberly Rodriguez (Rodriguez). Mohanad Flaih[2] (Flaih), co-owner of the licensed premises, testified for appellant. Testimony established that on October 22, 2020, the decoy participated in a minor decoy operation conducted by the Department. The decoy was 19 years old on the date of the operation. On that day, an order was placed with the licensed premises—through Grubhub[3]—for Corona Extra beer. The decoy waited for the order to arrive outside the lobby door of a hotel. After arriving at this location, the delivery driver, Heherson Maranion (the driver), exited his vehicle and approached the decoy. Due to the pandemic, the decoy wore a mask during all interactions with the driver.

The driver handed the bag containing the beer to the decoy and asked for her identification. The decoy handed him her valid ID to the driver, who then scanned it with his phone before returning it to the decoy. Following this exchange, the decoy

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[2] The Department's decision uses the name "Mohaned Flaiah" while appellant refers to him as "Mohanad Flaih". For the purposes of this decision, we shall refer to him by the latter.

[3] Grubhub is an online and mobile ordering and delivery platform.

approached one of the Department agents' vehicles. Department agents then alerted the driver, identified themselves, and explained the violation. When asked by Agent Rodriguez to exit the vehicle and identify the person who delivered the alcohol to her, the decoy identified the driver. The decoy made the identification while she and the driver were facing each other from their respective vehicles. The driver was subsequently cited for the violation.

Afterwards, Agent Rodriguez and her partner entered the licensed premises and spoke with the on-duty employee, a clerk, who indicated that he had filled the Grubhub order. The clerk also confirmed that he recognized the driver as the individual who picked up the order from the licensed premises.

The administrative law judge (ALJ) issued a proposed decision on May 13, 2021. The ALJ sustained the accusation and recommended suspending appellant's license for 15 days, with all 15 days stayed upon the condition that no cause for disciplinary action occur within one year of the decision. The Department adopted the proposed decision in its entirety. Appellant then filed a timely appeal contending that 1) the Department's findings—that the driver was appellant's agent—are not supported by substantial evidence, and; 2) the Department failed to comply with the face-to-face identification process as outlined in rule 141.1.[4]

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[4] All references to rules herein are contained in title 4 of the California Code of Regulations.

DISCUSSION

I

AGENCY OF DELIVERY DRIVER

Appellant argues the Department erred when it held it liable for the actions of the delivery driver. Specifically, appellant contends that the driver was not its agent and "therefore the suspension should be set aside." (Appellant's Opening Brief, p. 4 (AOB).)

In determining whether a decision of the Department is supported by substantial evidence, this Board's review is limited to determining, in light of the entire administrative record, whether substantial evidence exists—even if contradicted—to reasonably support the Department's factual findings, and whether the decision is supported by those findings. (*Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113] (*Boreta*).) The Board is bound by the factual findings of the Department. (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1963) 212 Cal.App.2d 106, 113 [28 Cal.Rptr. 74] (*Harris*).) A factual finding of the Department may not be overturned or disregarded merely because a contrary finding would have been equally or more reasonable. (*Boreta*, at p. 94.) The Board may not exercise independent judgment regarding the weight of the evidence; it must resolve any evidentiary conflicts in favor of the Department's decision. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].) The Board must also accept all reasonable inferences from the evidence which support the Department's decision. (*Harris*, at p. 113.)

“Substantial evidence” is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. N.L.R.B.* (1951) 340 U.S. 474, 477 [71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) Moreover, it is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Department of Alcoholic Beverage Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].).

Section 25658(a) states, “[e]xcept as otherwise provided in subdivision (c), 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.”

As an initial matter, appellant defines “agency” and “authority” by citing to the Civil Code. (AOB, pp. 4-5.) Appellant presents these definitions by merely stating it is its “belief” that these definitions are “relevant” to the instant appeal. (*Id.* at p. 4.) Other than this conclusory statement, however, appellant makes no case as to why these definitions should hold or control. Accordingly, we dismiss such arguments as without merit. (See, e.g., *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 [183 Cal.Rptr.3d 654] [“. . . citing cases [or statutes] without any discussion of their application to the present case results in forfeiture.”] (*Allen*).)

In any case, both this Board and the courts have consistently found that a licensee may be held liable for the actions of his agents or employees:

> The owner of a liquor license has the responsibility to see to it that the license is not used in violation of law and as a matter of general law the knowledge and acts of the employee or agent are imputable to the licensee. [Citation.]

(*Harris v. Alcoholic Beverage Control Appeals Bd.* (1961) 197 Cal.App.2d 172, 180 [17 Cal.Rptr. 315].) The *Laube* court noted:

> A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly.

(*Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779].) Similarly, in *Reimel*, the court stated:

> [A] licensee can draw no protection from his lack of knowledge of violations committed by his employees or from the fact that he has taken reasonable precautions to prevent such violations. There is no requirement . . . that the licensee have knowledge or notice of the facts constituting its violation. [Citations.]

(*Reimel v. Alcoholic Beverage Control Appeals Bd.* (1967) 252 Cal.App.2d 520, 522 [60 Cal.Rptr. 641], internal quotations omitted.)

The doctrine of *respondeat superior* provides that an employee or principal is vicariously liable for the wrongful conduct of his or her employees or agents committed within the scope of the employment or agency. (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967 [227 Cal.Rptr. 106].) It is well-settled in alcoholic beverage case law that an agent or employee's on-premises knowledge and misconduct is imputed to the licensee or employer. (See *Yu v. Alcoholic Beverage Control Appeals Bd.* (1992) 3 Cal.App.4th 286, 295 [4 Cal.Rptr.2d 280]; *Kirby v. Alcoholic Beverage Control Appeals Bd.* (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291].) Actual knowledge of the acts is not required; constructive knowledge will suffice. (*Morell v. Department of Alcoholic Beverage Control* (1962) 204 Cal.App.2d 504, 514 [22 Cal.Rptr.405].)

Moreover, as the court stated in *McFaddin San Diego 1130, Inc. v. Stroh*:

> It is not necessary for a licensee to knowingly allow its premises to be used in a prohibited manner in order to be found to have permitted its use. . . . Further, the word "permit" implies no affirmative act. It involves no intent. It is mere passivity, *abstaining from preventative action*.

(*McFaddin San Diego 1130, Inc. v. Stroh* (1989) 208 Cal.App.3d 1384, 1389-1390 [257 Cal.Rptr. 8], internal quotations omitted, emphasis in original.) In other words, if a licensee does not know or have reason to know something is occurring, it may not be found to have permitted the activity in question. However, the court in *McFaddin* makes clear that if a licensee does know something is occurring or should know, then it may be found to have permitted the activity if it fails to take preventive action. (*Ibid.*)

Appellant argues that the relationship between themselves and the driver remains an unresolved question. (AOB, pp. 4-5.) Appellant emphasizes it did not consider the driver to be an employee or agent, and that it does not provide workers' compensation insurance for such drivers. (*Id.* at p. 5.) This claim, however, does not withstand scrutiny. In the decision below, the ALJ made the following finding:

> 10. Agent Rodriguez and her partner went to the Licensed Premises and contacted the clerk, who contacted a representative of the [appellant]. The clerk indicated that he had filled the order. He further indicated that he recognized [the driver] as the person who picked up the order.

(Findings of Fact, ¶ 10.) Furthermore, the ALJ explained how rule 141.1 applies to the exact circumstances at issue in the instant case:

> (b) For purposes of this section, "delivery" shall mean any transfer of alcoholic beverages by a licensee, or an employee *or agent of a licensee*, to a person under the age of 21, subsequent to an order made by way of the Internet, telephone, or other electronic means.
>
> (c) For purposes of this section, "agent" shall mean any entity or person the licensee uses or contracts or agrees with, who is not an employee of the licensee, *including but not limited to a third-party delivery person or*

> *service, to deliver alcoholic beverages to persons* who place orders by way of the Internet, telephone, or other electronic means.

(Conclusions of Law, ¶ 4, emphasis added.) Appellant does not provide any argument rebutting this conclusion.

As this Board has previously noted:

> The types of misconduct which have been historically imputed to the licensee are those that are foreseeable in the operation of a licensed premises. Such misconduct includes: prostitution (see AB-8331), keeping a disorderly house (see AB-9008), gambling (see AB-8699), B-girl activity (see AB-9250), and the sale of illegal drugs (see AB-9179). Similarly, when a clerk sells alcohol to a minor, even though the licensee is not present, he or she is liable for that sale as if he or she had made the sale themselves – the conduct is imputed to the licensee because it is foreseeable, and is therefore the type of conduct the licensee has an obligation to prevent.

(*Zartosht, Inc.* (2013) AB-9295 at p. 10.) In the instant case, the ALJ noted that "[t]he widespread use of delivery services is a byproduct of the pandemic." (Conclusions of Law, ¶ 6.) Flaih testified at the hearing that he had various policies in place to prevent the sale of alcohol to minors. For example, if an order includes alcohol, delivery drivers must be informed of that fact and instructed to check for IDs. (Findings of Fact, ¶ 11.) In other words, it was foreseeable to the appellants that alcohol from the licensed premises could be sold and delivered to a minor. Appellant's disclaimer of any employment relationship between themselves and the driver is a red herring. Since the driver's misconduct was foreseeable, it may properly be imputed to the appellant.

Flaih further testified about the preventive measures he had enacted at the licensed premises. He testified that when alcohol is involved, employees must inform delivery drivers that there is alcohol in the delivery and instruct the drivers to check all IDs. (RT 38:21-39:1.) Despite such measures, alcohol was still furnished to the

decoy. There is also no evidence that the clerk ever instructed the driver or reviewed the appellant's policies with him before handing the alcoholic beverage to the driver for delivery. Even if, for argument's sake, the driver was not the appellant's agent, the clerk's knowledge and actions are still imputable to appellant. (See, e.g., *B & J Entertainment*, Inc. (2018) AB-9656 [Concluding that employee's knowledge of women working as escorts on the licensed premises was properly imputed to the licensee/appellant].)

In *Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Bd.* (1999) 76 Cal.App.4th 570 [90 Cal.Rptr.2d 523] (*Santa Ana*), the court explained that the only exception to the general rule that employee knowledge is imputed to a licensee is when there is "no per se nexus" between a licensee's sale of alcoholic beverages and the unlawful employee action. (*Santa Ana*, *supra*, at p. 575.) Even then, the exception applies only when the circumstances meet four required elements: 1) the employee commits a single criminal act unrelated to alcohol sales, 2) the licensee has taken strong steps to prevent and deter such crime before the criminal action took place, 3) the licensee is unaware of the criminal act beforehand, and 4) license discipline has no rational effect on public welfare or morals. (*Id.* at p. 576.)

Here, the *Santa Ana* test for an exception to the general rule fails. Although the ALJ noted appellant's efforts to prevent alcohol being furnished to minors (Decision, Penalty Determination, p. 6), the incident at issue was clearly related to the sale of alcohol. (Conclusions of Law, ¶ 9 ["It is clear from the evidence that the sale of alcoholic beverages to [the decoy] was made pursuant to the [appellants'] license."].)

Similarly, we cannot conclude that discipline of appellant's license has no rational effect on public welfare or morals. The law requires that the provisions of the Alcoholic

Beverage Control Act—which includes section 25658—be applied broadly in order to effectuate the Act's purposes:

> This division is an exercise of the police powers of the State for the protection of the safety, welfare, health, peace, and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages. *It is hereby declared that the subject matter of this division involves in the highest degree the economic, social, and moral well-being and the safety of the State and of all its people*. All provisions of this division *shall be liberally construed for the accomplishment of these purposes*.

(Bus. & Prof. Code, § 23001, emphasis added.) Section 25658(a), which prohibits selling or furnishing alcohol to minors, is part of the division referenced and therefore implicates the economic, social, and moral well-being and safety of the public. Accordingly, we are obligated to liberally construe this provision to accomplish the purposes of the Act. The mere fact that the driver, "a Grub Hub driver, is the person who delivered the alcoholic beverages does not vitiate the [appellant's] legal obligation not to sell or furnish alcoholic beverages to minors." (Conclusions of Law, ¶ 9.)

After reviewing the entire record, we conclude that the decision is supported by substantial evidence. Here, evidence established that an order for a can of Corona Extra beer was placed through Grubhub, a third-party delivery service. (Reporter's Transcript, 23:22-24 (RT).) The clerk confirmed that he had filled the order and that he recognized the driver as the person who picked up the order from the licensed premises. (RT 28:20-29:2.) The decoy testified that the ID she had with her on the day of the operation displayed that she was underaged and that she turns 21 in 2022. (RT 12:12-25.) The driver delivered the alcohol to her outside of the lobby door of a hotel. (RT 13:8-19.) The decoy testified, however, that the driver handed the alcohol to her *before* asking for her ID. (RT 13:21-24; 17:21-24.) Although the decoy's ID put

the driver on notice that she was under the age of 21, the decoy testified that the driver never asked specifically about her age aside from asking for her ID. (RT 15:12-15.) In short, the misconduct of the driver was properly imputed to appellant in this case. The Board cannot reweigh the evidence to reach a contrary conclusion.

II

FACE-TO-FACE IDENTIFICATION

Appellant contends that the Department's failure to properly conduct a face-to-face identification gives them a complete defense. Specifically, appellant alleges that face-to-face meant that "[t]he decoy should have removed her mask when she made her identification of the driver and that was not done." (AOB, p. 7.) Appellant also alleges that it was improper for the identification to take place 25 to 30 feet apart. (*Ibid*.)

As an initial matter, rule 141.1—at issue here—and rule 141 are virtually identical. They both outline requirements for minor decoy operations. The former applies to the delivery services context, the latter in all other contexts. In the decision, the ALJ noted the following:

> 13. Rule 141(b)(5), dealing with minor decoy operations in all contexts other than via delivery services, provides that, after the sale, "*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*." The emphasized language is identical to the language used in rule 141.1(e)(5). As the Court of Appeal in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* makes clear, the purpose of the face-to-face identification requirement is to ensure that, soon after the sale, the seller be provided with the opportunity to come face to face with the decoy. [Citation.]
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> 14. Since rule 141.1(e) is derived from rule 141(b), the same reasoning is applicable here.

(Conclusions of Law, ¶¶ 13-14, emphasis in original.) Appellant conceded that rules 141.1 and 141 are “virtually identical” to one another, and that there were no changes to the Department’s face-to-face identification requirements when it amended its regulations to add rule 141.1. (AOB, p. 6.) Thus, for purposes of this Board’s decision, precedent and case law regarding rule 141(b)(5) shall similarly extend to and govern rule 141.1(e)(5).[5]

As pointed out by appellant, failure by the Department to comply with this rule provides a licensee with an affirmative defense. However, the burden of proof lies with appellant. (*7-Eleven, Inc./Arman Corporation* (2014) AB-9393; *Chevron Stations, Inc*. (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.) The Department is not required to make a *prima facie* showing of compliance with rule 141(b)(5). (See, e.g., *Garfield Beach CVS, LLC* (2012) AB-9188; *The Von’s Corporation* (2002) AB-7819.)

While failure to comply with the rule provides an affirmative defense, the rule’s requirements are phrased broadly. For example, it does not address the location or manner of the face-to-face identification. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (2003) 109 Cal.App.4th 1687, 1697 [1 Cal.Rptr.3d 339, 346].) Neither does it require the identification “to be done within a certain distance.” (*Department of Alcoholic Beverage Control v. Alcoholic Beverage*

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[5] The Department noted in its reply brief that “since the inception of the original Rule 141.1 emergency regulation, the Department decided to remove the face-to-face identification requirement formerly in 141.1, subdivision (e)(5) from the final regulation. Therefore, this issue will be moot in future decoy delivery operations. Regardless, precedential case law establishes that the Department complied with the face-to-face identification requirement set forth in Rule 141.1, subdivision (e)(5).” (Respondent’s Reply Brief, p. 9 (RRB).)

Control Appeals Bd. (2017) 18 Cal.App.5th 541, 546 [226 Cal.Rptr.3d 527, 531].) Simply put, face-to-face is "not defined in the rule." (*Ibid*.)

While the rule does not define precisely what the identification process entails, this Board and various courts have addressed in numerous cases what is required to establish that an appropriate face-to-face identification took place. The Board has defined "face to face" in the context of rule 141(b)(5) as the following:

> . . . 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.

(*Chun* (1999) AB-7287.) Not only is this consistent with ordinary dictionary definitions, it also takes into consideration the context of a decoy operation, where "the safety of the decoy is a concern, and the face-to-face identification is merely one part of the overall situation, not some theatrical confrontation." (*Chevron Stations, Inc.* (2013) AB-9340.)

According to the court, the core objective of rule 141 is fairness to licensees when decoys are used to test their compliance with the law. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2003) 109 Cal.App.4th 1687, 1698 [1 Cal.Rptr.3d 339].) Rule 141(b)(5) is concerned with identifying the seller and providing an opportunity for the seller to look at the decoy again, soon after the sale. (*Ibid*.) It does not require a direct "face off" or any overt "acknowledgement" to accomplish these purposes.

In its brief, appellant cites to *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd.* (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126] (*Acapulco*). (AOB, p. 7.) However, other than citing *Acapulco*'s holdings, appellant provides little else. There is no discussion as to how *Acapulco* applies to or controls the instant

matter. When an appellant fails to meet its duty to establish that an error occurred, this Board may treat unsupported and unasserted contentions as forfeited. (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 [199 Cal.Rptr. 72] ["Where a point is merely asserted by appellant's counsel without any argument of or authority for the proposition, it is deemed to be without foundation and requires no discussion by the reviewing court."]; *Allen, supra, 234 Cal.App.4th at 52* ["In addition, citing cases [or statutes] without any discussion of their application to the present case results in forfeiture."].)

As outlined earlier, this Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. When two or more 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. Therefore, the issue of substantial evidence, leads to an examination by this 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. (*Boreta*, *supra*, 2 Cal.3d at 94.)

The ALJ made the following findings on the issue of the face-to-face identification in the instant case:

> 7. [The driver] handed a bag containing a can of Corona Extra (exhibit 4) to [the decoy] and asked to see her ID. She handed her ID (exhibit 3) to him and he scanned it with his phone. He handed the ID back to her and returned to his vehicle. [The decoy] walked over to one of the agents' vehicles.
>
> 8. Various agents contacted [the driver], identified themselves, and explained the violation. [Agent] Rodriguez asked [the decoy] to exit the vehicle she was in and identify the person who delivered the alcohol to her. She identified [the driver]. *[The decoy] and [the driver] were standing next to their respective vehicles, facing each other, 25 to 30 feet apart.*

> *[The decoy] testified that [the driver] was looking in her direction during the identification*; Agent Rodriguez testified that the conversation between [the driver] and the agents stopped during the identification. [The driver] was subsequently cited.
>
> 9. [The decoy] was wearing a mask at all times she interacted with [the driver].

(Findings of Fact, ¶¶ 7-9, emphasis added.) Based on these findings, the ALJ reached the following conclusions regarding the face-to-face identification:

> 11. With respect to rule 141.1(e)(2), [appellants] emphasized that [the decoy] was wearing a face mask at all times she interacted with [the driver], effectively preventing [him] from being able to evaluate [the decoy's] appearance. This argument is rejected. *The use of masks to prevent the spread of COVID-19 is part of the day-to-day reality of living during a pandemic*. Accordingly, virtually everyone wears masks when interacting with others and [the decoy] was no different. *There is no evidence that [the decoy] wore the mask to obscure her appearance. Since [the driver] did not testify, there also is no evidence that [he] had any trouble actually evaluating Hernandez's appearance*.
>
> 12. With respect to rule 141.1(e)(5), [appellant] argued that [the decoy] and [the driver] were standing 25-30 feet away from each other and that [the driver] was speaking to various agents at the time [the decoy] identified him. This argument is also rejected.
>
> [¶ . . . ¶]
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> 14. . . . In this case, [the driver] was provided with the opportunity to come face to face with the decoy. […] [E]ven though they were 25-30 feet apart, [the driver] was given the opportunity to see [the decoy] as she was identifying him.

(Conclusions of Law, ¶¶ 11-14, emphasis added.)

In the instant case, there was no evidence of misidentification or even the possibility of misidentification of the driver, and the driver had the opportunity to look at the decoy again. The opportunity was all that needed to be provided. A "face-to-face identification was conducted, and [the driver] had ample opportunity to observe the minor and object to any perceived misidentification." (RRB, p. 9.) In the decision, the

ALJ explained the necessity of wearing a mask during the pandemic, and concluded there was no evidence it was worn with the purpose of obscuring the decoy's appearance. Appellant's argument that the driver—whose relationship it simultaneously disavows—must have been able to identify the decoy is without merit. As this Board has explained before, the minor decoy "must identify the seller; there is no requirement that the seller identify the minor." (*Greer* (2000) AB-7403, at p. 4.) Here, the decoy was able to identify the driver despite the fact that he, too, wore a mask during the delivery. (RT 18:2-3.) In any case, there was no evidence that the driver had any trouble evaluating the decoy's appearance since he did not testify at the hearing. Whatever opposition appellant may raise about the mask, it is undisputed that the driver acknowledged he delivered alcohol to the individual identifying herself as the decoy. (RT 16:3-6; 36:4-10.) The driver only disputed the *fact* that she was a minor. (RT 47:24-48:1.)

The object of the rule—fairness to licensees—required an opportunity for the driver to come face-to-face with the decoy during the identification process. We agree with the ALJ that this was satisfied in the instant matter. Appellant offered no evidence to the contrary. Further, even if there was conflicting evidence, 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 when, as here, appellant failed to satisfy their burden of proof to establish an affirmative defense. In sum, there is substantial evidence to support finding that a proper face-to-face identification took place in compliance with rule 141.1.

ORDER

The decision of the Department is affirmed.[6]

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

[6] This final order is filed in accordance with Business and Professions Code section 23088 and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 *et seq*.

APPENDIX

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

IN THE MATTER OF THE ACCUSATION AGAINST: GOLETA CONTINENTAL LIQUOR, INC. CONTINENTAL LIQUORS 290 STORKE RD, STE C GOLETA, CA 93117-2966 OFF-SALE GENERAL - LICENSE Respondent(s)/Licensee(s) Under the Alcoholic Beverage Control Act	VENTURA DISTRICT OFFICE File: 21-517464 Reg: 21090991 **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 June 28, 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. The appeal must be filed within 40 calendar days from the date of the decision, unless the decision states it is to be "effective immediately" in which case an appeal must be filed within 10 calendar days after the date of the decision. Mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814. For further information, and detailed instructions on filing an appeal with the Alcoholic Beverage Control Appeals Board, see: https://abcab.ca.gov or call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

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Alcoholic Beverage Control
Office of Legal Services

Sacramento, California

Dated: July 6, 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:

Goleta Continental Liquor, Inc. dba Continental Liquors 290 Storke Rd., Suite C Goleta, California 93117-2966 Respondent Off-Sale General License	File: 21-517464 Reg.: 21090991 License Type: 21 Word Count: 7,000 Reporter: Sharon Cahn iDepo **PROPOSED DECISION**

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter by video conference on April 28, 2021.

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

Jeffrey S. Weiss, attorney-at-law, represented respondent Goleta Continental Liquor, Inc.

The Department seeks to discipline the Respondent's license on the grounds that, on or about October 22, 2020, the Respondent, through its agent or employee, sold, furnished, or gave alcoholic beverages to Ashley Hernandez, 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 April 28, 2021.

FINDINGS OF FACT

1. The Department filed the accusation on March 3, 2021.

[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 Respondent for the above-described location on February 21, 2021 (the Licensed Premises).

3. There is no record of prior departmental discipline against the Respondent's license.

4. Ashley Hernandez was born on March 13, 2001. On October 22, 2020, she participated in a minor decoy operation conducted by the Department. On that date she was 19 years old.

5. Hernandez appeared and testified at the hearing. On October 22, 2020, she was 5'4" tall and weighed 175 pounds. She wore a pink sweatshirt and black jeans; her hair was long and dyed reddish. (Exhibit 2.) At the hearing, her appearance was the same, except that her hair was shorter and no longer dyed.

6. On October 22, 2020, an order for Corona Extra beer was placed with the Licensed Premises via Grub Hub. (Exhibit 5.) Hernandez waited outside the lobby door of a hotel and waited for the order to arrive. A driver, Heherson Maranion, arrived, exited his vehicle, and approached Hernandez.

7. Maranion handed a bag containing a can of Corona Extra (exhibit 4) to Hernandez and asked to see her ID. She handed her ID (exhibit 3) to him and he scanned it with his phone. He handed the ID back to her and returned to his vehicle. Hernandez walked over to one of the agents' vehicles.

8. Various agents contacted Maranion, identified themselves, and explained the violation. Agent K. Rodriguez asked Hernandez to exit the vehicle she was in and identify the person who delivered the alcohol to her. She identified Maranion. Hernandez and Maranion were standing next to their respective vehicles, facing each other, 25 to 30 feet apart. Hernandez testified that Maranion was looking in her direction during the identification; Agent Rodriguez testified that the conversation between Maranion and the agents stopped during the identification. Maranion was subsequently cited.

9. Hernandez was wearing a mask at all times she interacted with Maranion.

10. Agent Rodriguez and her partner went to the Licensed Premises and contacted the clerk, who contacted a representative of the Respondent. The clerk indicated that he had filled the order. He further indicated that he recognized Maranion as the person who picked up the order.

11. Mohaned Flaiah testified that the Respondent has been in business for 11 years without incurring any discipline. He informs drivers if a delivery includes alcohol and

instructs them to check IDs. There is a sign on the front counter of the Licensed Premises informing delivery drivers that they must check IDs.

12. The Respondent does not employ any delivery drivers. It carries workers' comp insurance for all of its employees, none of whom are drivers for any of the delivery apps.

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

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.

4. Rule 141.1[2] sets forth the requirements for an operation in which alcoholic beverages are delivered to a minor decoy. Specifically, rule 141.1 provides that:

(a) A law enforcement agency may only use a person under the age of 21 to attempt to purchase alcoholic beverages for delivery to apprehend licensees or employees or agents of licensees who deliver alcoholic beverages to minors (persons under the age of 21) and to reduce deliveries of alcoholic beverages to minors in a fashion that promotes fairness. For purposes of this section, fairness is defined as compliance with all the conditions set forth in subdivision (e).

(b) For purposes of this section, "delivery" shall mean any transfer of alcoholic beverages by a licensee, or an employee or agent of a licensee, to a person under the age of 21, subsequent to an order made by way of the Internet, telephone, or other electronic means.

(c) For purposes of this section, "agent" shall mean any entity or person the licensee uses or contracts or agrees with, who is not an employee of the licensee, including but not limited to a third-party delivery person or service, to deliver alcoholic beverages to persons who place orders by way of the Internet, telephone, or other electronic means.

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

(d) This section shall not apply to questions asked about the age of the minor at the time the minor orders the alcoholic beverages by way of the Internet, telephone, or other electronic means.
(e) The following minimum standards shall apply to actions filed pursuant to Business and Professions Code Section 25658 in which it is only alleged that a minor decay has received an alcoholic beverage by delivery:
   (1) At the. time of the operation, the decoy shall be less than 20 years of age;
   (2) 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 person delivering the alcoholic beverages at the time of the alleged offense;
   (3) A decoy shall either carry their own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to the person delivering the alcoholic beverages;
   (4) At the time of delivery, the decoy shall answer truthfully any questions about their age asked by the person delivering the alcoholic beverages at the time of delivery.
   (5) Following any completed delivery, the peace officer directing the decoy shall make a reasonable attempt to have the minor decoy who purchased alcoholic beverages make a face to face identification of the person delivering the alcoholic beverages.
(f) Failure to comply with this rule shall be a defense to any action brought pursuant to Business and Professions Code Section 25658.

5. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that, on October 22, 2020, the Respondent's agent, Heherson Maranion, sold, furnished, or gave an alcoholic beverage to Ashley Hernandez, a person under the age of 21, in violation of section 25658(a). (Findings of Fact ¶¶ 4-12.)

6. The widespread use of delivery services is a byproduct of the pandemic. The Respondent emphasized that it does not hire delivery personnel, including the driver in this case. Rather, it noted that its role was to fill an order placed via Grub Hub, after which it turned the alcohol over to a driver employed by Grub Hub.

7. The Respondent argued that Rule 141.1(c) improperly imposes an agency between itself and a driver employed by another company. In the Respondent's view, there is no direct agency and the underlying facts are insufficient to establish an ostensible agency under existing case law.[3] As such, it believes that rule 141.1(c) is overbroad and should

[3] See, e.g., *Garcia v. KND Development 52, LLC*, 58 Cal App. 5th 736, 743-746, 272 Cal. Rptr. 3d 706, 711-714 (2020).

be struck down. The undersigned does not have the authority to rule on either (1) whether rule 141.1(c) was properly enacted or not or (2) whether rule 141.1(c) is unconstitutionally overbroad. Nonetheless, the Respondent has raised these issues in order to preserve its right to assert them on appeal.

8. Additionally, the Respondent argued that the Department is engaged in selective enforcement by filing this action but not taking any action against Grub Hub (which was neither cited nor warned). As such, the Respondent believes that this proceeding violates its rights of due process and equal protection. This argument is rejected. The Department does not license Grub Hub or other such delivery services. Accordingly, the Department cannot file any action against them—it can only take action against licensees such as the Respondent.[4]

9. It is clear from the evidence that the sale of alcoholic beverages to Hernandez was made pursuant to the Respondent's license. Grub Hub, which does not hold an alcoholic beverage license, merely delivered the alcoholic beverages on behalf of the Respondent. The mere fact that Maranion, a Grub Hub driver, is the person who delivered the alcoholic beverages does not vitiate the Respondent's legal obligation not to sell or furnish alcoholic beverages to minors.

10. Finally, the Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141.1(e)(2) and rule 141.1(e)(5) and, therefore, the accusation should be dismissed pursuant to rule 141.1(f).

11. With respect to rule 141.1(e)(2), the Respondent emphasized that Hernandez was wearing a face mask at all times she interacted with Maranion, effectively preventing Maranion from being able to evaluate Hernandez's appearance. This argument is rejected. The use of masks to prevent the spread of COVID-19 is part of the day-to-day reality of living during a pandemic. Accordingly, virtually everyone wears masks when interacting with others and Hernandez was no different. There is **no** evidence that Hernandez wore the mask to obscure her appearance. Since Maranion did not testify, there also is **no** evidence that Maranion had any trouble actually evaluating Hernandez's appearance.

12. With respect to rule 141.1(e)(5), the Respondent argued that Hernandez and Maranion were standing 25-30 feet away from each other and that Maranion was speaking to various agents at the time Hernandez identified him. This argument is also rejected.

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[4] Whether charges should be filed against Grub Hub or any other such delivery service by another body is beyond the scope of this proceeding.

13. Rule 141(b)(5), dealing with minor decoy operations in all contexts other than via delivery services, provides that, after the sale, "*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.*" The emphasized language is identical to the language used in rule 141.1(e)(5). As the Court of Appeal in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* makes clear, the purpose of the face-to-face identification requirement is to ensure that, soon after the sale, the seller be provided with the opportunity to come face to face with the decoy.[5]

14. Since rule 141.1(e) is derived from rule 141(b), the same reasoning is applicable here. In this case, Maranion was provided with the opportunity to come face to face with the decoy. The percipient witnesses—Hernandez and Agent Rodriguez—testified that Maranion was not looking in Hernandez's direction during the identification and that the agents were not talking to him at the time. In other words, even though they were 25-30 feet apart, Maranion was given the opportunity to see Hernandez as she was identifying him.

PENALTY

The Department requested that the Respondent's license be suspended for a period of 15 days, with all 15 days stayed. The Respondent argued that, if the accusation were sustained, a substantially mitigated penalty was warranted given the Respondent's efforts to prevent minors from being provided with alcohol. The penalty recommended by the Department already represents substantial mitigation; no further mitigation is warranted. The penalty recommended herein complies with rule 144.

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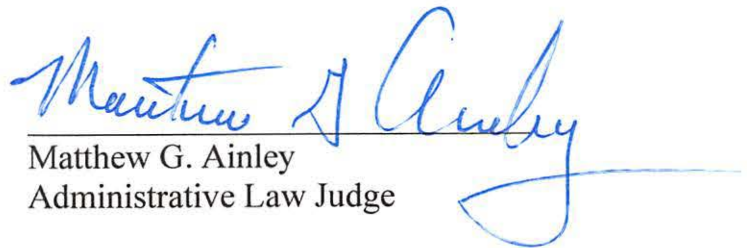
[5] 109 Cal. App. 4th 1687, 1698, 1 Cal. Rptr. 3d 339, 347 (2003).

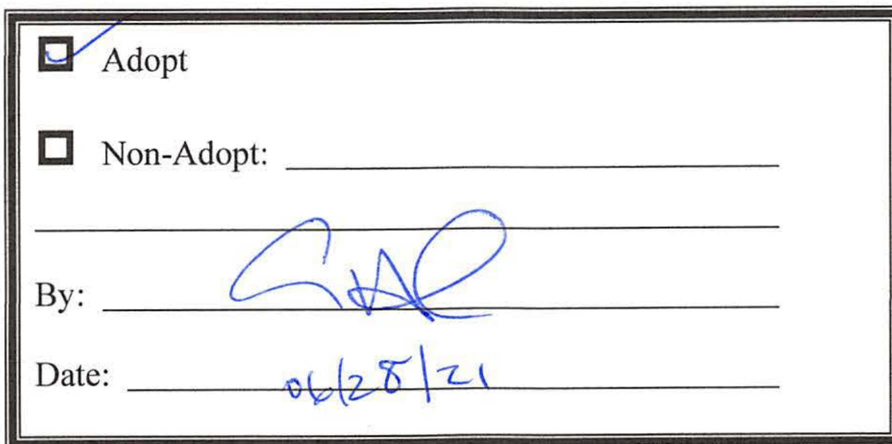
ORDER

The Respondent's off-sale general license is hereby suspended for a period of 15 days, with execution of all 15 days of the suspension stayed, upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within one year from the effective date of this decision; that should such determination be made, the Director of the Department of Alcoholic Beverage Control may, in his or her discretion and without further hearing, vacate this stay order and reimpose the stayed penalty; and that should no such determination be made, the stay shall become permanent.

Dated: May 13, 2021



Matthew G. Ainley
Administrative Law Judge



☑ Adopt

☐ Non-Adopt: ______________________

By: ______________________

Date: 06/28/21