

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

AB-9928

File: 47-258199; Reg: 20090633

TROPHY PROPERTIES, INC.,
dba Café Coyote
2461 San Diego Avenue
Suite 100, 109 & 110
San Diego, CA 92110,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: December 3, 2021
Telephonic

ISSUED DECEMBER 3, 2021

Appearances: *Appellant:* Ralph Saltsman, of Solomon, Saltsman & Jamieson, as
counsel for Trophy Properties, Inc.,

Respondent: Jason T. Liu, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

Trophy Properties, Inc., doing business as Café Coyote (appellant), appeals from a decision of the Department of Alcoholic Beverage Control (Department)¹ suspending its license for five days (with all five days stayed for a period of one year, provided no further cause for discipline arises during that time) because its delivery driver furnished an alcoholic beverage to a Department minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

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

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on May 2, 1991.

There is no record of prior departmental discipline against the license.

On November 24, 2020, the Department filed a single-count accusation charging that appellant's delivery driver, Graziella Da Rosa (the driver), furnished an alcoholic beverage to 18-year-old Sophia Clinkscales (the decoy) on August 13, 2020. Although not noted in the accusation, the decoy was working for the Department at the time.

At the administrative hearing held on March 18, 2021, documentary evidence was received, and testimony concerning the sale was presented by the decoy and by Department Agent Andrew De La Torre. Lehn Goetz, the general manager of the premises, and spouse of the corporate officer of Trophy Properties, Inc., testified on appellant's behalf.

Testimony established that on August 13, 2020, Agent De La Torre ordered a 16-ounce margarita and tortilla soup from the premises, using a GrubHub app on his cell phone. He entered instructions for the items to be delivered in front of the Double Tree Hotel, where the decoy was waiting. He received confirmation that the order was supposed to be delivered by a driver named Adriana F. (Finding of Fact, ¶ 6.) In fact, the driver was not Adriana F., but Graziella Da Rosa — using her friend Adriana's phone and GrubHub account.

The driver arrived in front of the Double Tree Hotel and handed the decoy a brown bag containing the soup and margarita. The driver did not confirm the decoy's identity, nor did she ask for the decoy's age or identification before delivering the items. (Finding of Fact, ¶ 7.)

Department agents stopped the driver as she began to leave and informed her that she had furnished alcohol to a minor. The agents asked the decoy who gave her the alcohol and she identified the driver while standing approximately six feet away and facing the driver. A photograph of the decoy and driver was taken; neither was wearing a face mask. (Exh. 3; Findings of Fact, ¶¶ 8-9.)

Agent De La Torre contacted the premises and delivered to the manager an ABC-330 form, which informed the premises that during a minor decoy operation conducted that day, the premises was unsuccessful in preventing the delivery of alcohol to a minor. The form also notes that a criminal complaint will be filed with the District Attorney's Office against the driver. (Exh. D.) After receiving the form, the licensee terminated all third-party delivery services of alcoholic beverages. (Findings of Fact, ¶ 18.)

The administrative law judge (ALJ) issued a proposed decision on April 26, 2021, sustaining the accusation and recommending the license be suspended for a period of five days (with all five days stayed for a period of one year, dependent upon discipline-free operation during that period). The Department adopted the proposed decision in its entirety on June 25, 2021 and issued a certificate of decision eleven days later.

Appellant then filed a timely appeal contending the ALJ erred when determining that the driver was an authorized agent under rule 141.1.²

DISCUSSION

Appellant contends that the driver was not its agent and that it should not be held liable for her actions. (AOB at pp. 9-13.)

² References to rule 141.1 and its subdivisions are to section 141.1 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department's decision.

(Kirby v. Alcoholic Bev. Control Appeals Bd. (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; Harris v. Alcoholic Beverage Control Appeals Board (1963) 212 Cal.App.2d 106, 112 [28 Cal.Rptr.74].)

Therefore, the issue of substantial evidence when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. The Appeals Board cannot disregard or overturn a finding of fact by the Department

merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2Cal.3d 85, 94 [84 Cal.Rptr. 113]; *Harris, supra*, at p. 114.)

In the accusation, the driver is described as follows:

On or about August 13, 2020, **respondent-licensee's agent**, Graziela DA ROSA, sold, furnished, gave, or caused to be sold, furnished, or given, an alcoholic beverage, to-wit: distilled spirits, to Sophia CLINKSCALES, a person under the age of 21 years, in violation of Business and Professions Code section 25658, subdivision (a).

(Accusation, emphasis added.)

Appellant, however, maintains: “Appellant at no point agreed to employ, either directly or as an agent, Graziela De Rosa to fulfill the delivery at issue and therefore, Ms. De Rosa was not an agent of Appellant.” (AOB at p. 10.)

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.)

In *Garcia v. KND Development 52, LLC* (2020) 58 Cal.App.5th 736, 744 [272 Cal.Rptr.3d 706], the Court stated, “[a]n agent has such authority as the principal, actually or ostensibly, confers upon him.” “The issue of ostensible agency does not deal with whether an individual is in fact an actual employee, but rather, what the alleged principal by his acts has led others to believe.” (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 506 [61 Cal.Rptr.3d 754], internal citation and quotation marks omitted.)

In the instant matter, the driver became appellant’s ostensible (i.e., apparent) agent when she was handed the package containing alcohol, which she then delivered, pursuant to a GrubHub agreement. No other conduct was required to create an agency relationship. The doctrine of *respondeat superior* provides that an employer 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].)

Business and Professions Code 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.

Rule 141.1 sets forth the requirements for an operation in which alcoholic beverages are delivered to a minor decoy:

(a) A law enforcement agency may only use a person under 21 years of age 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 21 years of age), 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 21 years of age, pursuant to an order made by internet, telephone, other electronic means, or any method of ordering other than in person at the licensed premises.

(c) For purposes of this section, "agent" shall mean any entity or person the licensee uses to deliver alcoholic beverages to persons who place orders by internet, telephone, other electronic means, or any method of ordering other than in person at the licensed premises, whether by contract or agreement, even if not an employee of the licensee, including but not limited to a third-party delivery person or service.

(d) For purposes of this section, "minor decoy" shall mean a person used by law enforcement pursuant to Business and Professions Code section 25658(f).

(e) The following minimum standards shall apply to actions filed pursuant to Business and Professions Code Section 25658 in which it is alleged a minor decoy has been furnished an alcoholic beverage by delivery:

(1) At the time of the alleged violation, the minor decoy shall be under 20 years of age;

(2) The minor decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to person delivering the alcoholic beverages at the time of the alleged violation;

(3) A minor decoy shall either carry their own identification showing their correct date of birth or shall carry no identification; a minor decoy who carries identification shall present it upon request of the person delivering the alcoholic beverages;

(4) A minor decoy shall answer truthfully any questions about their age, asked by the person delivering the alcoholic beverages, at the time of delivery. This requirement shall not apply to questions asked about the age of the minor decoy at the time the alcoholic beverages are ordered.

(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.

(Cal. Code Regs., tit. 4, §141.1.)

The ALJ addressed appellant's argument that it did not authorize the driver to deliver the alcohol, since it thought it was giving the order to someone named Adriana, as follows:

6. The Respondent argued that delivery driver Da Rosa "was not authorized by everyone [*sic.*] except maybe Adriana F." to be a GrubHub delivery driver or "was not part of the GrubHub delivery system," since delivery driver Adriana F. was assigned to be the delivery driver for the said order. This argument is rejected as without merit. Respondent's argument is speculative as there was no evidence Da Rosa was not a GrubHub delivery driver or "part of the GrubHub delivery system." In fact, the evidence established that Da Rosa was a GrubHub delivery driver, and pursuant to rule 141.1(c) Respondent contracted with GrubHub, a third-party delivery service, as Respondent's agent to deliver the said alcoholic beverage to the decoy.

(Conclusions of Law, ¶ 6.)

The ALJ was not persuaded, nor are we, that it was improper to consider the driver an agent of the licensee.

The regulation itself defines "agent" in the context of a minor decoy operation: For purposes of this section, "agent" shall mean any entity or person the licensee uses to deliver alcoholic beverages to persons who place orders by internet, telephone, other electronic means, or any method of ordering other than in person at the licensed premises, whether by contract or agreement, even if not an employee of the licensee, including but not limited to a third-party delivery person or service.

(Cal. Code Regs, tit. 4, §141.1(c).) Clearly, the driver is an agent of appellant under this definition.

As the ALJ found:

7. Nonetheless, a person may be either an actual or an ostensible agent. (Civil Code §2298.) An ostensible agent is created "when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." (Civil Code §2300). Here, the Respondent utilized the GrubHub delivery service, to deliver an alcoholic beverage under Respondent's license. The Respondent accepted Da Rosa as a GrubHub delivery driver when it provided her with the alcoholic beverage and soup for delivery on August 13, 2020. The Respondent, at the hearing, to benefit its argument, then claimed it did not accept Da Rosa as the GrubHub delivery driver. The Respondent cannot have it both ways. Da Rosa had access to the GrubHub order, which Respondent prepared, placed in a brown bag and handed to Da Rosa at the Licensed Premises pursuant to Respondent's contract with GrubHub. Da Rosa then hand-delivered, pursuant to the GrubHub order, the brown bag containing the alcoholic beverage and soup from the Licensed Premises, to decoy Clinkscales. In fact, both the brown bag and margarita-filled mason jar identified the merchandise as coming from "Café Coyote," the Respondent's DBA. The decoy understood Da Rosa to be the GrubHub delivery person. Da Rosa not only appeared to have authority to make the said delivery, but that apparent authority was confirmed when Da Rosa actually made the delivery based on the GrubHub order placed by Agent De La Torre for the Original Margarita and Famous Tortilla Soup from Café Coyote. Under the totality of the circumstances, the Respondent, either intentionally or by want of ordinary care, caused the decoy, a third party, to believe Da Rosa to be the GrubHub delivery person and Respondent's agent. There was nothing to indicate otherwise. In other words, there was no notice to the decoy that Da Rosa's authority was restricted. (Civil Code §2318.)

(Conclusions of Law, ¶ 7.) We agree.

After reviewing the entire record, we conclude that the decision is supported by substantial evidence. The misconduct of the driver was properly imputed to appellant in this case. The Board cannot reweigh the evidence to reach a contrary conclusion.

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:**

TROPHY PROPERTIES, INC.
CAFÉ COYOTE
2461 SAN DIEGO AVE, STE 100, 109 & 110
SAN DIEGO, CA 92110

ON-SALE GENERAL EATING PLACE - LICENSE

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

SAN DIEGO DISTRICT OFFICE

File: 47-258199

Reg: 20090633

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 25, 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:

Trophy Properties, Inc.	}	File: 47-258199
Dbas: Cafe Coyote	}	
2461 San Diego Avenue, Suites 100, 109 & 110	}	Reg.: 20090633
San Diego, California 92110	}	
	}	License Type: 47
Respondent	}	
	}	Word Count: 18,939
	}	
	}	i-Depo Reporters:
	}	Paige Hutchinson, Court Reporter
	}	Shaz Hassan, Video Moderator
	}	
<u>On-Sale General Eating Place License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter by video conference in California, on March 18, 2021.

Lisa Wong, attorney, represented the Department of Alcoholic Beverage Control (the Department or ABC).

Ralph Saltsman, attorney, represented Respondent, Trophy Properties, Inc.

The Department seeks to discipline the Respondent's license on the grounds that, on or about August 13, 2020, the Respondent-Licensee's agent, Graziela Da Rosa, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: distilled spirits, to Sophia Clinkscales, 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 March 18, 2021.

FINDINGS OF FACT

1. The Department filed the accusation on or about November 24, 2020.

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

2. The Department issued a type 47, on-sale general eating place license to the Respondent for the above-described location on May 2, 1991 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondent's license.
4. Sophia Clinkscales (hereinafter referred to as decoy Clinkscales) was born on August 3, 2002. On August 13, 2020, she was 18 years old. On that date she served as a minor decoy in an operation conducted by the Department.
5. Decoy Clinkscales appeared and testified at the hearing. On August 13, 2020, she was 5'7" tall and weighed 115 pounds. She wore a blue striped t-shirt, black pants, white shoes, glasses, a necklace, rings, and a blue face mask covering from her nose to her chin. Her hair was cut short and in a left-comb-over style. (Exhibits 2 and 3.) Her appearance at the hearing was the same, except she did not wear a mask. At one point during the hearing the undersigned asked the decoy to stand and back up to see her more fully, which the decoy did. She appeared quite youthful and her voice sounded very young when she spoke, as that of a young teenager.
6. On August 13, 2020, Department Agent De La Torre ordered a 16 ounce "Original Margarita" (an alcoholic beverage) and a "Famous" Tortilla Soup from the Respondent's menu using a cellular telephone and the GrubHub delivery application (hereinafter GrubHub App). Agent De La Torre entered the information and payment method into the GrubHub App. The total paid for the order was \$26.03.² The instructions input into the application requested the order be delivered to 7450 Hazard Center Drive, in San Diego, California and that the customer "will be in front of Double tree hotel [*sic*]." Agent De La Torre took a picture of the GrubHub order confirmation/receipt and order information for the said purchase. (Exhibit 4.) The order information listed the Licensed Premises as Cafe Coyote at 2461 San Diego Avenue (619) 291-4695. Under the "1 Original Margarita 16 oz \$9.95" it read, "I confirm I am at least 21 and ordering food with my purchase of alcohol. I understand the restaurant or delivery driver will need to verify my age, which may include scanning my valid government ID." Decoy Clinkscales waited for the delivery in front of the entrance doors of the DoubleTree Hotel by Hilton at 7450 Hazard Center Drive.
7. While waiting for the delivery Agent De La Torre received a GrubHub update of the said order on his cellular phone indicating the delivery driver would be Adriana F. At some point, a vehicle entered the parking lot of the DoubleTree Hotel and a GrubHub delivery person exited the vehicle. The GrubHub delivery person was later identified as

² Exhibit 4, "Order Information" depicts 1 Original Margarita 16 oz. \$9.95, 1 Famous Tortilla Soup \$8.00, Subtotal \$17.95, sales tax \$1.65, delivery fee \$2.49, service fee \$0.94, tip \$3.00, for total of \$26.03.

Graziela Da Rosa (hereinafter referred to as Da Rosa). Da Rosa walked to decoy Clinkscales and handed her a brown bag sealed with a Cafe Coyote logo sticker. The bag contained the tortilla soup and a mason jar labeled, "Cafe Coyote" and filled with the alcoholic margarita beverage. Decoy Clinkscales took the bag from Da Rosa, who then walked away from the decoy. Prior to making the delivery Da Rosa did not confirm who the decoy was and did not ask the decoy for her age or identification (ID). Agent De La Torre, from a position of 25 to 30 feet away, had a clear, unobstructed view of the delivery made to the decoy.

8. Department agents stopped Da Rosa and informed her she had just furnished alcohol to a minor. The agents and Da Rosa communicated in Spanish. Da Rosa confirmed she picked up the said order from the Licensed Premises and was delivering the alcoholic beverage based on the said GrubHub order. When Da Rosa picked up the order at the Licensed Premises an employee there informed Da Rosa the order contained an alcoholic beverage but did not provide Da Rosa with instructions to check the customer's ID before delivering the alcohol.

9. An agent asked decoy Clinkscales to identify the person who furnished her the alcohol. Decoy Clinkscales pointed at Da Rosa and replied, "That's the woman who gave me the alcohol." Decoy Clinkscales and Da Rosa were standing approximately six feet apart and facing each other at the time of the identification. A photograph of Da Rosa and decoy Clinkscales was taken after the face-to-face identification, with decoy Clinkscales holding the mason jar of margarita while standing approximately six feet from Da Rosa, neither of whom were wearing face masks. (Exhibit 3.)

10. Decoy Clinkscales appeared younger than her actual age at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of Da Rosa on August 13, 2020, decoy Clinkscales displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Da Rosa. At the hearing, decoy Clinkscales had a very youthful appearance, as that of a young teenager.

11. On August 13, 2020, Agent De La Torre visited the Licensed Premises and made contact with the manager, Christine Smith (hereinafter manager Smith). Agent De La Torre handed manager Smith an ABC-330 form informing her that the Licensed Premises was unsuccessful in preventing the delivery of an alcoholic beverage to a minor decoy that date. (Exhibit D.) Manager Smith confirmed the said margarita and tortilla soup order had come from the Licensed Premises and showed the agent the GrubHub delivery order on the GrubHub tablet in the Licensed Premises. Agent De La Torre took a photograph of the said screen with his cellular phone. (Exhibit 5.) Manager Smith confirmed that all employees inform delivery persons when an order contains alcoholic

beverages, but they do not provide any instructions to the delivery drivers. Manager Smith confirmed the Respondent has a contract with the GrubHub delivery service. Manager Smith was very cooperative with Agent De La Torre's investigation at the Licensed Premises.

12. Da Rosa and Christine Smith did not appear at the hearing.

13. Lehn Goetz appeared and testified at the hearing. Mrs. Goetz has been the general manager for the Licensed Premises for 30 years. She is married to Respondent's corporate officer, Rich Goetz. Mrs. Goetz has worked for the Respondent since it opened in 1988, when it had a beer and wine license. To Mrs. Goetz' knowledge the Respondent had no disciplinary history since 1988. Mrs. Goetz received an award for Restaurateur of the Year for 18 years in a row, which award was voted by her peers in the California Restaurant Association.

14. As the general manager Mrs. Goetz' duties include managing Respondent's managers. She said she used to be more hands-on, but as the years passed Respondent developed a solid management team upon whom Respondent could rely to ensure staff were complying with policy and procedure. Mrs. Goetz makes sure training of all staff complies with current rules and regulations. For 20 years the Respondent's staff have all received responsible alcoholic beverage training through LEAD and/or RABS, including those working on August 13, 2020.³ (Exhibits F⁴ and G.) The LEAD and RABS training is refreshed periodically.

15. To prevent sales of alcohol to minors, in March of 2020 the Respondent invested in a new point of sale (POS) computer system which randomly reminds employees to check customer IDs. Respondent also holds pre-shift meetings during which employees are reminded to check customer IDs for alcoholic beverage service. One week prior to holidays staff are reminded to verify customers' ages. Respondent's management team receives copies of the ABC Bulletins. Mrs. Goetz acknowledged that "during the middle of COVID things just got lost a little bit" and she did not check the Department's website for any industry advisories relating to the requirements of alcoholic beverage deliveries. Since the violation at hand Mrs. Goetz has been diligent in more actively checking the Department's website for updates and advisories.

16. Prior to the COVID-19 Pandemic, the Respondent contracted for a secret shopper to visit the Licensed Premises twice monthly to verify its staff were asking for customers' IDs relating to alcohol beverage service. The Respondent would receive a report within

³ The acronym LEAD stands for Licensee Education on Alcohol and Drugs. The acronym RABS stands for Responsible Alcoholic Beverage Service.

⁴ Only the first paragraph of exhibit F with its underlined heading, "FOODHANDLERS & RABS," was admitted as evidence.

two days with the results of that visit. The Respondent's policy is to terminate an employee who fails to ask for the secret shopper's ID. Years ago, a long-time employee's employment was terminated for that same reason because Respondent takes seriously its responsibilities as a licensee.

17. The Respondent executed a delivery service contract/agreement with GrubHub on March 14, 2020. (Exhibit A.) GrubHub provided the Respondent with a tablet to use in the Licensed Premises which displays the orders customers place through the GrubHub App for food and beverages from the Respondent's menu. The order Agent De La Torre placed on his cellular phone using the GrubHub App was captured on that tablet in the Licensed Premises. (Exhibits 5, C2 and C3.) One of Respondent's employees manually entered the said order from the GrubHub tablet into the Respondent's POS system. A copy of that duplicated order which was input into the Respondent's POS system was admitted as exhibit B17. When a GrubHub delivery person enters the Licensed Premises to pick-up an alcoholic beverage order employees are supposed to instruct the driver that the order contains an alcoholic beverage and make sure it is delivered to a person 21 years of age or older.

18. When the Respondent received the ABC-330 notice informing it they had unsuccessfully delivered an alcoholic beverage to a minor decoy the Respondent immediately terminated all third-party delivery services of alcoholic beverages. (Exhibit D.) The Respondent made this decision because the Respondent could not control what the delivery person did with the alcoholic beverages once they left the Licensed Premises. The Respondent has always had a zero-tolerance policy against sales/service of alcoholic beverages to minors. Mrs. Goetz said, "we've always been proud... of our reputation with the ABC." The only reason the Respondent engaged in third-party alcoholic beverage delivery services was to adapt to the growing changes after the COVID-19 Pandemic hit, to keep its employees working and prevent having to close.

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 141.1⁵ sets forth the requirements for an operation in which alcoholic beverages are delivered to a minor decoy. Specifically, rule 141.1 provides as follows:

(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.

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

(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 August 13, 2020, the Respondent-Licensee's agent, Graziela Da Rosa, sold, furnished, or gave alcoholic beverages, to-wit: distilled spirits, to Sophia Clinkscales, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-11.)

6. The Respondent argued that delivery driver Da Rosa "was not authorized by everyone except maybe Adriana F." to be a GrubHub delivery driver or "was not part of the GrubHub delivery system," since delivery driver Adriana F. was assigned to be the delivery driver for the said order. This argument is rejected as without merit. Respondent's argument is speculative as there was no evidence Da Rosa was not a GrubHub delivery driver or "part of the GrubHub delivery system." In fact, the evidence established that Da Rosa was a GrubHub delivery driver, and pursuant to rule 141.1(c) Respondent contracted with GrubHub, a third-party delivery service, as Respondent's agent to deliver the said alcoholic beverage to the decoy.

7. Nonetheless, a person may be either an actual or an ostensible agent. (Civil Code §2298.) An ostensible agent is created "when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." (Civil Code §2300). Here, the Respondent utilized the GrubHub delivery service, to deliver an alcoholic beverage under Respondent's license. The Respondent accepted Da Rosa as a GrubHub delivery driver when it provided her with the alcoholic beverage and soup for delivery on August 13, 2020. The Respondent, at the hearing, to benefit its argument, then claimed it did not accept Da Rosa as the GrubHub delivery driver. The Respondent cannot have it both ways. Da Rosa had access to the GrubHub order, which Respondent prepared, placed in a brown bag and handed to Da Rosa at the Licensed Premises pursuant to Respondent's contract with GrubHub. Da Rosa then hand-delivered, pursuant to the GrubHub order, the brown bag containing the alcoholic beverage and soup from the Licensed Premises, to decoy Clinkscales. In fact, both the brown bag and margarita-filled mason jar identified the merchandise as coming from "Cafe Coyote," the Respondent's DBA. The decoy understood Da Rosa to be the GrubHub delivery person. Da Rosa not only appeared to have authority to make the said delivery, but that apparent authority was confirmed when Da Rosa actually made the

delivery based on the GrubHub order placed by Agent De La Torre for the Original Margarita and Famous Tortilla Soup from Cafe Coyote. Under the totality of the circumstances, the Respondent, either intentionally or by want of ordinary care, caused the decoy, a third party, to believe Da Rosa to be the GrubHub delivery person and Respondent's agent. There was nothing to indicate otherwise. In other words, there was no notice to the decoy that Da Rosa's authority was restricted. (Civil Code §2318.)

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

PENALTY

The Department requested the Respondent's license be suspended for a period of 15 days, with all 15 days stayed, based on aggravating factors of her actual age and very youthful appearance.

The Respondent did not recommend a penalty in the event the accusation was sustained. The Respondent argued for mitigation based on the Respondent's discipline-free history since 1991, as well as "the care they give to their duties and responsibilities" as providers of alcoholic beverages.

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 section 25658 is a 15-day suspension. Rule 144 also permits imposition of a revised penalty based on the presence of aggravating or mitigating factors.

There is evidence the Respondent takes its responsibility seriously as a licensee. Mitigation is warranted for the following reasons: (1) Respondent's over 29 years' of discipline-free operation; (2) Respondent's testimony relating to its policy in training its employees in responsible alcoholic beverage service; (3) Immediately upon learning that a single GrubHub delivery driver failed to comply with Respondent's standards, which resulted in the violation at hand, Respondent stopped all future alcoholic beverage deliveries to prevent similar violations; and (4) Respondent's cooperation in the investigation. However, that mitigation is limited due to the decoy's youthful, teenage-like appearance and Respondent's failure to confirm its responsibility and duties prior to engaging in the delivery of alcoholic beverages. Furthermore, there was no evidence the employee who provided Da Rosa with the brown paper bag was disciplined for failing to instruct the delivery driver to verify the age of the customer prior to delivery. There was no evidence the Respondent had any policy to prevent deliveries to minors of alcoholic beverages, such as packaging alcoholic beverages in a manner to remind delivery drivers to verify a customer's age and reminding drivers they face misdemeanor charges for

furnishing alcohol to a minor. While the foregoing is not required, it would behoove a responsible licensee to incorporate such policy.

The penalty recommended herein complies with rule 144.

ORDER

The Respondent's on-sale general eating place license is hereby suspended for a period of 5 days, with execution of 5 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 the Director's discretion and without further hearing, vacate this stay order and re-impose the stayed penalty; and that should no such determination be made, the stay shall become permanent.

Dated: April 26, 2021



D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By:  _____
Date: <u>06/25/21</u> _____