

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

**AB-9881**

File: 21-477540; Reg: 19089152

GARFIELD BEACH CVS, LLC and  
LONGS DRUGS STORES CALIFORNIA, LLC,  
dba CVS Pharmacy Store #9937  
4445 Mission Boulevard  
San Diego, CA 92109,  
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Hubel

Appeals Board Hearing: November 6, 2020  
Telephonic

**ISSUED NOVEMBER 12, 2020**

*Appearances:*        *Appellants:* Adam N. Koslin, of Solomon, Saltsman & Jamieson, as  
counsel for Garfield Beach CVS, LLC and Longs Drugs Stores  
California, LLC,

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

**OPINION**

Garfield Beach CVS, LLC and Longs Drugs Stores California, LLC, doing  
business as CVS Pharmacy Store #9937 (appellants), appeal from a decision of the  
Department of Alcoholic Beverage Control<sup>1</sup> suspending their license for 10 days

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<sup>1</sup> The decision of the Department, dated April 30, 2020, is set forth in the  
appendix.

because their clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code<sup>2</sup> section 25658(a).

#### FACTS AND PROCEDURAL HISTORY

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

On August 27, 2019, the Department filed a single-count accusation against appellants charging that, on April 14, 2019, appellants' clerk, Amy Hernandez (the clerk), sold an alcoholic beverage to 18-year-old Sergio Alejandro Rivera (the decoy). Although not noted in the accusation, the decoy was working for the San Diego Police Department (SDPD) at the time.

At the administrative hearing held on February 19, 2020, documentary evidence was received, and testimony concerning the sale was presented by the decoy and SDPD Officer Michael Wasco. Pablo Heredia Munoc, store manager at the licensed premises, testified on appellants' behalf.

Evidence established that, on April 14, 2019, the decoy entered the licensed premises followed by Officer Wasco, who was in a plain clothes capacity. The decoy selected a 12-pack of Bud Light beer, which he brought to the sales counter area. Upon reaching the sales counter, the decoy presented the beer to the clerk for purchase. After the clerk scanned the beer, the cash register's point of sale system prompted her to enter the decoy's date of birth. However, the clerk entered a false birth date into the register to indicate the decoy was over the age of 21. She told him

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<sup>2</sup> All statutory references are to the Business and Professions Code unless otherwise stated.

the cost of the beer, and after the decoy paid, the clerk gave him his change and a receipt. The decoy then exited the store. At no time during the transaction did the clerk ask the decoy for his identification or ask any age-related questions. Officer Wasco observed the entire transaction from an unobstructed and clear vantage point approximately 15 feet away.

After the decoy exited the licensed premises, Officer Wasco approached the clerk, identified himself as an officer, and informed the clerk of the violation. The decoy then re-entered the licensed premises with other SDPD officers and approached Officer Wasco and the clerk. An officer asked the decoy to identify the person who sold him the beer. The decoy pointed at the clerk and verbally identified her as the person who sold him the beer. The decoy and the clerk were standing approximately five to 10 feet apart and were facing each other at the time of the identification. Officers later took a photograph of the clerk and the decoy standing together in the manager's office.

On February 24, 2020, the administrative law judge (ALJ) issued a proposed decision sustaining the accusation and recommended a 10-day suspension. The Department adopted the proposed decision February 24, 2020 and issued a certificate of decision on April 30, 2020. Appellants filed a timely appeal contending the record does not support the Department's finding that a face-to-face identification occurred, as required by rule 141(b)(5).<sup>3</sup>

## DISCUSSION

Appellants contend that the Department's finding that a face-to-face identification took place is not supported by substantial evidence. (AOB at pp. 5-9.) Specifically,

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<sup>3</sup> All references to rule 141 and its subdivisions are to title 4, section 141 of the California Code of Regulations.

appellants contend that the evidence suggests the face-to-face identification occurred after the citation was written. (*Id.* at p. 6.)

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.

(Emphasis added.) This rule provides an affirmative defense, and the burden of proof lies with appellants. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

The Department found that the face-to-face identification complied with rule 141(b)(5). (Conclusions of Law ¶ 8.) Therefore, this Board is required to defer to those findings so long as they are supported by substantial evidence. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Southland)* (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652, 659] [citing *Kirby v. Alcoholic Beverage Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628] ["In considering the sufficiency of the evidence issue the court is governed by the substantial evidence rule[;] any conflict in the evidence is resolved in favor of the decision; and every reasonably deducible inference in support thereof will be indulged. [Citations.]"; see also *Kirby v. Alcoholic Bev. etc. Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815] ["When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the department."].) "Substantial evidence" is "evidence of ponderable legal significance, which is 'reasonable in nature, credible and of solid value.'" (*County of Los Angeles v. Commission on State Mandates* (1995) 32

Cal.App.4th 805, 814 [38 Cal.Rptr.2d 304, 307–308], internal citations omitted.) Rule 141(b)(5) requires "strict adherence." (See *Acapulco Restaurants, Inc.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126] [finding that no attempt, reasonable or otherwise, was made to identify the appellant in that case].)

Here, appellants try to piece together a timeline which puts the citation *before* the face-to-face identification, even though the times and sequence Officer Wasco testified to were "approximate." (RT, at p. 43:7-20.) That approximate timeline is insufficient to prove that the citation was issued after the face-to-face identification. Even if it were, appellants fail to note Officer Wasco testified unequivocally that the citation occurred after the face-to-face identification. (*Id.* at p. 36:18-20.) Officer Wasco's testimony constitutes substantial evidence, which cannot be overcome by approximate or theoretical timelines. The Department explicitly rejected appellants' argument on this issue and found that the face-to-face identification complied with rule 141(b)(5). (Conclusions of Law, ¶ 8.) On appeal, we are prohibited from reweighing Officer Wasco's testimony and exercising independent judgment to reach a contrary result. (*Southland, supra*, at p. 1094.) The decision must, therefore, stand.

ORDER

The decision of the Department is affirmed.<sup>4</sup>

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

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<sup>4</sup> 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:**

GARFIELD BEACH CVS LLC,  
LONGS DRUG STORES CALIFORNIA, LLC  
CVS PHARMACY STORE 9937  
4445 MISSION BLVD  
SAN DIEGO, CA 92109-3919

OFF-SALE GENERAL - LICENSE

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

SAN DIEGO DISTRICT OFFICE

File: 21-477540

Reg: 19089152

**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 April 24, 2020. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after June 10, 2020, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: April 30, 2020



Matthew D. Botting  
General Counsel



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

IN THE MATTER OF THE ACCUSATION AGAINST:

Garfield Beach CVS LLC, and Longs Drug Stores	}	File: 21-477540
California LLC	}	
Dbas: CVS Pharmacy Store 9937	}	Reg.: 19089152
4445 Mission Boulevard	}	
San Diego, California 92109-3919	}	License Type: 21
	}	
Respondents	}	Word Count: 11,260
	}	
	}	Reporter:
	}	Shelia McQueen
	}	Kennedy Court Reporters
	}	
<u>Off-Sale General License</u>	}	<b><u>PROPOSED DECISION</u></b>

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at San Diego, California, on February 19, 2020.

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

Adam Koslin, Attorney, represented Respondents, Garfield Beach CVS LLC, and Longs Drug Stores California LLC.

The Department seeks to discipline the Respondents' license on the grounds that, on or about April 14, 2019, the Respondents-Licensees' agent or employee, Amy Hernandez, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Sergio Rivera, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).<sup>1</sup> (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 February 19, 2020.

**FINDINGS OF FACT**

1. The Department filed the accusation on or about August 27, 2019.

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<sup>1</sup> All statutory references are to the Business and Professions Code unless otherwise noted.

2. The Department issued a type 21, off-sale general license to the Respondents for the above-described location on June 22, 2009 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Sergio Alejandro Rivera (hereinafter referred to as decoy Rivera) was born on February 5, 2001. On April 14, 2019, he was 18 years old. On that date he served as a minor decoy in an operation conducted by the San Diego Police Department (SDPD).
5. Decoy Rivera appeared and testified at the hearing. On April 14, 2019, he was 5'8" tall and weighed 165 pounds. He wore a white t-shirt over which he wore a blue sweater, blue jeans and burgundy shoes. (Exhibits 3 and 4.) His appearance at the hearing was the same except his hair was a little shorter.
6. On April 14, 2019, decoy Rivera entered the Licensed Premises, followed by SDPD Officer Wasco, who was in a plain clothes capacity. Decoy Rivera walked straight to the alcoholic beverage coolers, opened the door, and selected a nationally recognized beer, a 12-pack of Bud Light beer. He brought the beer to the sales counter area for purchase and stood in line behind two persons.
7. Upon reaching the sales counter, decoy Rivera placed the 12-pack of Bud Light beer upon the sales counter. Clerk Amy Hernandez (hereinafter referred to as clerk Hernandez), stood behind the cash register, and scanned the 12-pack of beer. The cash register's point of sale (POS) system prompted the decoy's date of birth, whereupon clerk Hernandez keyed in an age-appropriate birth date (over the age of 21) into the register, and told the decoy the cost of the beer (\$9.26). Clerk Hernandez did not ask decoy Rivera for his Identification (ID) or any questions about his age. Decoy Rivera carried on his person his valid California Driver License, which had a vertical orientation, showed his correct date of birth and included a red stripe which read, "AGE 21 IN 2022." (Exhibit 2.) Decoy Rivera gave clerk Hernandez a \$20 bill and paid for the beer. Clerk Hernandez gave decoy Rivera his change (\$10.74) and the receipt for the purchase of the beer.<sup>2</sup> Decoy Rivera took the change, the 12-pack of Bud Light beer and exited the store. Officer Wasco witnessed these events from 15 feet away; he had a clear unobstructed view and was able to hear any potential conversation between the clerk and decoy during the transaction. Decoy Rivera did not speak to Officer Wasco while he was inside the premises. Officer Wasco remained in the store after the decoy exited, approached clerk Hernandez, identified himself as an officer and informed the clerk of the violation.

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<sup>2</sup> Exhibit A contains two black and white photocopies - the CVS sales receipt is depicted on the left of the page, and the SDPD citation is depicted on the right of the page.

8. Decoy Rivera re-entered the Licensed Premises with other SDPD officers and walked up to Officer Wasco and clerk Hernandez at the cash register, which was near the front door. An officer asked decoy Rivera to identify the person who sold him the beer. Decoy Rivera pointed at clerk Hernandez and verbally identified her as the person who sold him the beer. Decoy Rivera and clerk Hernandez were standing approximately five to 10 feet apart and facing each other at the time of this identification. A photograph of clerk Hernandez and decoy Rivera was taken in the manager's office, after the face-to-face identification, with decoy Rivera holding the 12-pack of Bud Light beer in his left hand, while standing next to clerk Hernandez. (Exhibit 4.)

9. Officer Wasco issued to clerk Hernandez a citation after the face-to-face identification. (Exhibit A.) There was no evidence that clerk Hernandez was distracted, in distress during the sales transaction or the face-to-face identification. Clerk Hernandez did not appear at the hearing. There was no evidence that anything prevented clerk Hernandez from properly performing her duties during the sales transaction or that anything had any affect upon or impaired clerk Hernandez' ability to comply with law.

10. Decoy Rivera appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of clerk Hernandez at the Licensed Premises on April 14, 2019, decoy Rivera displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk. In-person decoy Rivera has a youthful appearance.

11. April 14, 2019, was approximately the sixth day of decoy operations in which decoy Rivera participated. Decoy Rivera learned about the decoy program through his volunteer service as a cadet explorer with the SDPD, which he joined two years prior to the date of the hearing. On April 14, 2019, he held the rank of lieutenant. His duties as a cadet lieutenant include overseeing the administrative program with the cadet captain, which involves exercising a leadership role and providing instruction to lower-ranked cadets. He has been on ride-a-longs with officers in which he presents himself in a professional/respectful manner when he interacts with the general public. Decoy Rivera believes he carries himself responsibly and maturely.

**(Respondents' Witness)**

12. Pablo Heredia Munoz appeared and testified at the hearing. Mr. Heredia was hired by the Respondents in September of 2018 to work at the Licensed Premises as a store manager through September of 2019. As the store manager Mr. Heredia was responsible for the overall operations of the Licensed Premises.

13. Each of the Respondents' newly hired employees attend a four-hour, off-site training with an instructor on all company policy and procedure, which includes rules on age-restricted merchandise sales. At the Licensed Premises, Mr. Heredia spends one-on-one time with each employee wherein he reviews with the employees the CVS Affidavit they received during the off-site training. The employees sign the affidavit acknowledging CVS policies. The employees take a computerized training course in the store, reviewing policy scenarios - after which they must receive a 100 percent score for correctly answering all questions. If they fail to correctly answer any question the employee must review the entire topic related to the particular question missed. A large portion of the training which Respondents' employees receive includes the review of age-restricted merchandise sales policy, including, but not limited to requiring clerks ask for the ID of anyone appearing under the age of 40 and input the actual birth date listed on the customer's ID into the POS system. Any employee who sells age-restricted products to a minor will have their employment terminated. Each quarter of the year the employees receive a refreshment course on all CVS policy, including age-restricted merchandise sales policy. Clerk Amy Hernandez received all of the formal training referred to above and was terminated after the sale of alcohol to minor decoy Rivera.

14. On April 14, 2019, the Licensed Premises had signs posted around the store informing customers of the policy that they request the ID of anyone appearing under the age of 40. After the said sales transaction of April 14, 2019, Mr. Heredia printed five-inch by seven-inch signs of that same policy and posted them every eight feet apart in all alcohol and liquor sections of the store to make it "very clear to customers" of the carding policy. Mr. Heredia re-printed the CVS Affidavit and had a one-on-one with each employee to review policy relating to age-restricted merchandise sales; he had each employee re-sign the Affidavit.

15. 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 April 14, 2019, the Respondents-Licensees' employee, clerk Amy Hernandez, inside the Licensed Premises, sold alcoholic beverages, to-wit: a 12-pack of Bud Light beer, to Sergio Rivera, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-10.) Clerk Hernandez' actions and knowledge are imputed to the Respondents/Licensees.

5. The Respondents argued the decoy operation at the Licensed Premises failed to comply with rules 141(a), 141(b)(2)<sup>3</sup> and 141(b)(5), and, therefore, the accusation should be dismissed pursuant to rule 141(c).

6. The Respondents combined their argument with respect to rule 141(a) and 141(b)(2), that decoy Rivera did not have the appearance of someone under the age of 21, citing certain factors, including (1) decoy Rivera's experience, rank and leadership role as a cadet lieutenant, and (2) the claim decoy Rivera appears to have a five-o'clock shadow.

7. This rule 141(a) and 141(b)(2) argument is rejected. The Respondents presented no evidence as to why clerk Hernandez allegedly believed decoy Rivera to be over 21 years of age or that any of these factors had any impact upon clerk Hernandez complying with the law in performing her duties. Clerk Hernandez did not testify. In fact, the evidence indicates clerk Hernandez knew or at least should have known the decoy was a minor. She was presented with a youthful appearing decoy Rivera. There was nothing about decoy Rivera's demeanor, decoy or cadet experience, let alone his rank or leadership role, which made him appear older than his actual age. The Respondents' claim that he had a five-o'clock shadow is without merit. The undersigned did not observe decoy Rivera to have a five-o'clock shadow at the hearing. If the Respondents were claiming there was such a shadow in any of the pictures of him in the exhibits such claim was mere conjecture as there was no testimony or evidence in that regard. Any shadow cast in Exhibit 3 on the right side of decoy Rivera's face could easily have been a shadow cast by the lighting; there was no such shadowing on the left side of his face which, if there had been, would have bolstered Respondents' claim. All photographs of decoy Rivera depict him to be youthful and appearing his age. (Exhibits 3 and 4.) In fact, the photograph of the decoy and clerk (Exhibit 4) depicts decoy Rivera as he appeared at the hearing, with no visible stubble or "five-o'clock shadow" on his face, and appearing quite

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<sup>3</sup> All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

youthful, at the age of 18. In other words, decoy Rivera had the appearance generally expected of a person under the age of 21.

8. With respect to rule 141(b)(5), the Respondents argued Officer Wasco's testimony as to approximated durations between the sale of alcohol and the face-to-face identification, were more than the time stamp of 2:16 p.m. reflected on the CVS sales receipt and the hand-written time of 1420 hours (2:20 p.m.) on the SDPD citation. (Exhibit A.) This argument is rejected and without merit. The credible testimony of Officer Wasco maintained that the citation was issued after the face-to-face identification and that any approximated time references to which he testified were just that, approximations, and meant only to denote that a short period of time had elapsed.

9. The Respondents further argued they did not "permit" the said violation arguing clerk Hernandez acted as a rogue employee despite her extensive formal training. This argument is rejected. It is well settled case law that an employee's on-premises knowledge and misconduct are imputed to the licensee/employer.<sup>4</sup> The types of misconduct which have been historically imputed to licensees are those that are foreseeable in the operation of a licensed premises. Such misconduct includes: prostitution, keeping a disorderly house, gambling, drink solicitation activity, and the sale of illegal drugs. Similarly, when a clerk sells alcohol to a minor, as did clerk Hernandez, even though the licensee is not present, the licensee is liable for that sale as if the licensee 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.

### PENALTY

The Department requested the Respondents' license be suspended for a period of 15 days, given the decoy's age and youthful appearance. The Department argued that the Respondents' argued-for mitigation was outweighed by the clerk's intentional sale of alcohol to decoy Rivera. The Department further argued any mitigation is offset due to the Respondents' failure to address that its POS system still permits discretion to its clerks to enter a pseudo, age-appropriate birth date which will enable the sale of alcohol to a minor, as in the sales transaction at hand.

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<sup>4</sup> (See *Yu v. Alcoholic Bev. etc. Appeals Bd.* (1992) 3 Cal.App.4th 286, 295 [4 Cal.Rptr.2d 280]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 377 [3 Cal.Rptr.2d 779]; *Kirby v. Alcoholic Bev. Etc. Appeals Bd.* (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291]; *Harris v. Alcoholic Beverage Control Appeals Board* (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; *Morell v. Department of Alcoholic Beverage Control* (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; *Mack v. Department of Alcoholic Beverage Control* (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633].

The Respondents recommended a 5-day or all-stayed penalty based on its nearly 10-year discipline-free history, and the testified to mitigated evidence.

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. As to mitigation, there was evidence Respondents trained their employees, including, but not limited to one-on-one retraining of each employee. The Respondents are correct, mitigation is also warranted for its 9 years and over 9 months of discipline-free operation. It is unfortunate that despite clerk Hernandez' extensive formal training and quarterly refreshment training (which included the requirement she ask for the ID of anyone appearing under the age of 40 and input the customer's date of birth into the POS system) that she chose to input a pseudo, age-appropriate birth date for the 18 year old, youthful appearing decoy Rivera who stood before her. There was no way decoy Rivera appeared anything other than his age. There was no credible evidence that anything prevented clerk Hernandez from properly performing her duties during the sales transaction or that anything had any affect upon or impaired clerk Hernandez' ability to comply with law and her duties. The Department counsel brought up a good point - there was no evidence the Respondents' addressed the problem at hand. Specifically there was no evidence the Respondents' clerks no longer have the ability to enter a pseudo, age-appropriate birth date as clerk Hernandez did on April 14, 2019, which is of grave concern and compromises some of the mitigation present. While some of the points discussed above are not enumerated aggravating factors under Rule 144, they provide some small aggravation in the analysis of the penalty. The penalty recommended herein complies with rule 144.

### ORDER

The Respondents' off-sale general license is hereby suspended for a period of 10 days.

Dated: February 24, 2020



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D. Huebel  
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: <u>Joseph A. Appelquist</u>
Date: <u>4/24/20</u>