

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

AB-9816

File: 20-214437; Reg: 18087584

7-ELEVEN, INC., COLLEEN L. MEHTA, and PREM N. MEHTA,
dba 7-Eleven Store #2171-13977
5684 Riverside Drive
Chino, CA 91710,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: January 9, 2020
Los Angeles, CA

ISSUED JANUARY 21, 2020

Appearances: *Appellants:* Adam N. Koslin, of Solomon, Saltsman & Jamieson, as
counsel for 7-Eleven, Inc., Colleen L. Mehta, and Prem N. Mehta,

Respondent: John P. Newton, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

7-Eleven, Inc., Colleen L. Mehta, and Prem N. Mehta, doing business as
7-Eleven Store #2171-13977, appeal from a decision of the Department of Alcoholic
Beverage Control¹ suspending their license for five days (with all five days conditionally
stayed for one year provided no further cause for discipline arises during that time)
because their clerk sold 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 May 8, 2019, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1998. There is no record of prior departmental discipline against the license.

On October 4, 2018, the Department filed a single-count accusation against appellants charging that, on July 21, 2018, appellants' clerk, Kiran Denee Cummins (the clerk), sold an alcoholic beverage to 18-year-old Stephanie De La Mora (the decoy). Although not noted in the accusation, the decoy was working for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on February 5, 2019, documentary evidence was received and testimony concerning the sale was presented by the decoy and Department Agent Jeff Holsapple.

Testimony established that on July 21, 2018, two Department agents entered the licensed premises in an undercover capacity, followed shortly thereafter by the decoy. The decoy went to the coolers and selected a 12-pack of Bud Light beer cans. (Exh. 4.) She took the beer to the register and set it on the counter. The clerk complimented her on the jeans she was wearing and then asked for identification.

The decoy handed the clerk her California identification card which had a portrait orientation, contained her correct date of birth — showing her to be 18 years of age — and a red stripe indicating “AGE 21 IN 2020.” (Exh. 3.) The clerk took note of the birth date (saying it out loud), handed the ID back to the decoy, and completed the sale without asking any age-related questions. The decoy exited the premises, followed by the two agents.

The decoy re-entered the premises with four Department agents. The agents asked the clerk to step away from the register and explained the violation to her. As

Agent Patel asked the decoy who sold her the beer, the clerk said "I did" and the decoy simultaneously said "she did" while pointing at the clerk. Agent Patel asked the decoy how old she was and she said "18." He asked the clerk if she understood she was being identified as the person who sold alcohol to a minor. Initially she said no, but then retracted her statement and said she did understand. A photograph was taken of the decoy and clerk together (exh. 4) and later the clerk was cited.

During the investigation, while viewing video surveillance footage, the clerk mentioned to Agent Patel that the decoy looked young. At some later date, after the date of the operation, the clerk went to the Riverside District Office to view the video footage again. At that time she told Department agents she "screwed up and made a mistake." (Decision at p. 3, fn. 3.) At that meeting, she claimed the decoy appeared to be 22 or 23 years old. (*Ibid.*)

The administrative law judge (ALJ) issued her proposed decision on February 22, 2019, sustaining the accusation and recommending an all-stayed suspension of five days — conditioned on discipline-free operation for one year. The Department adopted the proposed decision in its entirety on April 11, 2019 and issued a certificate of decision on May 8, 2019.

Appellants then filed a timely appeal contending that the ALJ's finding that the decoy's appearance complied with rule 141(b)(2)² is not supported by substantial evidence.

²References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

DISCUSSION

Appellants contend that the decoy did not have the appearance required by rule 141(b)(2) and that the ALJ's finding that her appearance complied with the rule is not supported by substantial evidence. (AOB at pp. 6-7.)

Rule 141(b)(2) provides:

The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense.

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

Appellants maintain the police used a decoy in this case that failed to comply with the standards set forth in rule 141(b)(2). They rely on the clerk's statement to Department agents (made on an unknown date sometime after the decoy operation) that she thought the decoy looked 22 or 23 years old, (decision, *supra*, at fn. 3) and on the decoy's testimony that "she is generally a mature person, and that her several years of Explorer training only emphasized this trait." (AOB at p. 7.) Appellants maintain "[t]he only conclusion supported by the evidence is that the increased maturity and professionalism that [the decoy] testified to had an 'observable effect' . . . on [the decoy's] appearance . . ." (*Ibid.*)

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

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court

may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004)

118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

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

(*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101

Cal.Rptr. 815]; *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212

Cal.App.2d 106, 112 [28 Cal.Rptr.74].)

Therefore, the issue of substantial evidence, when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; *Harris, supra*, at 114.)

This Board has stated many times that, in the absence of compelling reasons, it will ordinarily defer to the ALJ's findings on the issue of whether there was compliance

with rule 141(b)(2). The ALJ made the following findings regarding the decoy's appearance and demeanor:

12. Decoy Stephanie appeared her 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 the clerk Cummins at the Licensed Premises on July 21, 2018, decoy Stephanie 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 Stephanie has a youthful appearance and looks her age.

13. July 21, 2018 was the second day of decoy operations in which decoy Stephanie participated. Decoy Stephanie learned about the decoy program through her service as a police explorer with the Yucaipa Police Department. As of the date of the decoy operation, decoy Stephanie had been a police explorer for three years. She does not have a rank. Her duties as a police explorer include participating in ride-a-longs, building searches, traffic stops, crisis negotiation, raising money for charitable events, assisting at public events "just hanging around to make sure nothing happens," moving cars and directing parking. Decoy Stephanie said that she has always had the traits of acting mature and professional when interacting with people, but that she has taken those traits more seriously with her police explorer training because she believes, "we are an image to the public," and conducts herself in that manner generally. During the said decoy operation at the Licensed Premises decoy Stephanie did not use the latter described training when she interacted with clerk Cummins and purchased the beer.

(Findings of Fact, ¶¶ 12-13.) Based on these findings, the ALJ addressed appellants' rule 141(b)(2) arguments:

6. With respect to rule 141(b)(2), Respondents argued decoy Stephanie did not have the appearance of someone under the age of 21 because of certain factors which made her appear to be older than 21. Those factors, the Respondents argued, include that, (1) the clerk told Agents Patel and Holsapple at the Riverside District Office she thought the decoy looked 22 or 23 years old, and, (2) the decoy testified that she conducts herself at decoy operations in a mature and professional manner.

7. This rule 141(b)(2) argument is rejected. Respondents presented unsupported assertions and conjecture. Respondents presented no evidence as to why clerk Cummins allegedly believed decoy Stephanie to be 22 or 23 years old, let alone 21 years of age. Clerk Cummins did not

testify. At the time of the decoy investigation clerk Cummins told the agents she thought the decoy looked young. Clerk Cummins' inconsistent, hearsay statement to the agents at some later date after the decoy operation that she thought the decoy appeared 22 or 23 years of age is not credible and found self-serving, based on balancing the factors set forth in Evidence Code section 780. At no time did clerk Cummins mention anything specific relating to decoy Stephanie's demeanor as a reason for proceeding with the sale. In fact, the evidence indicates clerk Cummins knew or at least should have known the decoy was a minor. She was presented decoy Stephanie's vertical formatted minor's ID, which she not only looked at but specifically made note of the decoy's birthdate. The ID even had a red stripe to alert the clerk that the person standing before her would not turn 21 until the year 2020. Regardless, there was nothing about decoy Stephanie's police explorer training, experience, appearance or demeanor which made her appear older than her actual age. In fact, when viewing decoy Stephanie in-person at the hearing, she has a youthful appearance and looks her age. In other words, decoy Stephanie had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 12.)

(Conclusions of Law, ¶¶ 6-7.) We agree with the ALJ's reasoning and conclusions.

Appellants argue that the decoy displayed a demeanor which was not typical for a teenager because of her experience as a police Explorer. The Board has, however, rejected this "experienced decoy" argument many times. As the Board previously observed:

A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. . . . There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.

(Azzam (2001) AB-7631, at p. 5, emphasis in original.) This case is no different.

This Board has also noted that:

[a]n ALJ's task to evaluate the appearance of decoys is not an easy one, nor is it precise. To a large extent, application of such standards as the rule provides is, of necessity, subjective; all that can be required is reasonableness in the application. As long as the determinations of the ALJs are reasonable and not arbitrary or capricious, we will uphold them.

(*O'Brien* (2001) AB-7751, at pp. 6-7.) Notably, the standard is not that the decoy must display the appearance of a "childlike teenager" but "the appearance which could generally be expected of a person under 21 years of age." (Rule 141(b)(2).) In Findings of Fact paragraphs 12-13, and Conclusions of Law paragraphs 6-7, the ALJ found that the decoy met this standard and we agree.

Appellants presented no evidence that the decoy's experience or demeanor *actually resulted* in her displaying the appearance of a person 21 years old or older on the date of the operation in this case. The clerk did not testify. We only have her statement made to Department agents, at some point after the decoy operation, that she thought the decoy looked 22 or 23 — contradicting her own statement on the day of the operation that she thought the decoy looked young. As the ALJ noted, this statement is contradictory and self-serving. There is simply no evidence to establish that the decoy's experience or demeanor were the *actual reason* the clerk made the sale.

Ultimately, appellants are simply asking this Board to second guess the ALJ and reach a different conclusion, despite substantial evidence to support the findings in the decision. This we cannot do.

ORDER

The decision of the Department is affirmed.³

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

³This 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

RECEIVED

MAY 09 2019

IN THE MATTER OF THE ACCUSATION
AGAINST:

7-ELEVEN, INC., COLLEEN L. MEHTA AND
PREM N. MEHTA
7-ELEVEN 2171 13977
5684 RIVERSIDE DRIVE
CHINO, CA 91710

OFF-SALE BEER AND WINE - LICENSE

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

RIVERSIDE DISTRICT OFFICE
Alcoholic Beverage Control
Office of Legal Services
File: 20-214497

Reg: 18087584

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 11, 2019. 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, 300 Capitol Mall, Suite 1245, Sacramento, CA 95814.

Sacramento, California

Dated: May 8, 2019



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

7-Eleven, Inc., Colleen L. Mehta, and Prem N. Mehta	}	File: 20-214437
Db: 7-Eleven 2171 13977	}	
5684 Riverside Drive	}	Reg.: 18087584
Chino, California 91710	}	
	}	License Type: 20
Respondents	}	
	}	Word Count: 13,084
	}	
	}	Reporter:
	}	Dalauna Cardoza
	}	California Reporting
	}	
<u>Off-Sale Beer and Wine License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Riverside, California, on February 5, 2019.

John Newton, Attorney, represented the Department of Alcoholic Beverage Control (the Department).

Donna Hooper, Attorney, represented Respondents, 7-Eleven, Inc., Colleen L. Mehta, and Prem N. Mehta.

The Department seeks to discipline the Respondents' license on the grounds that, on or about July 21, 2018, the Respondents-Licensees' agent or employee, Kiran Deneé Cummins, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Stephanie De La Mora, 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 February 5, 2019.

FINDINGS OF FACT

1. The Department filed the accusation on October 4, 2018.

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

2. The Department issued a type 20, off-sale beer and wine license to the Respondents for the above-described location on July 1, 1998 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Stephanie De La Mora (hereinafter referred to as decoy Stephanie) was born on November 11, 1999. On July 21, 2018, she was 18 years old. On that date she served as a minor decoy in an operation conducted by the Department.
5. Decoy Stephanie appeared and testified at the hearing. On July 21, 2018, she was 5'4" tall and weighed approximately 120 pounds. She wore a black shirt, dark blue jeans with a belt, and black Nike shoes. (Exhibits 2 and 4.) Her appearance at the hearing was the same.
6. On July 21, 2018, two Department Agents entered the Licensed Premises, in a plain clothes capacity, followed shortly thereafter by decoy Stephanie. Decoy Stephanie walked straight to the alcoholic beverage coolers and selected a 12-pack of Bud Light beer cans. (Exhibit 4.) Decoy Stephanie brought the 12-pack of beer directly to the check-out line and waited in line behind one patron. The decoy saw one female clerk working at the cash register.
7. Stephanie placed the 12-pack of Bud Light beer upon the sales counter. Clerk Kiran Denee Cummins (hereinafter referred to as clerk Cummins) commented that she liked the decoy's high waist jeans. Clerk Cummins asked decoy Stephanie for her identification (ID). Decoy Stephanie handed clerk Cummins her valid California Identification Card, which clerk Cummins accepted. Decoy Stephanie's California Identification Card had a vertical orientation, showed her correct date of birth and included a red stripe which read, "AGE 21 IN 2020." (Exhibit 3.) Clerk Cummins looked at the ID, took notice of the birthdate, saying, "11, 11, 1999," and handed the ID back to the decoy. Clerk Cummins continued with the sales transaction and told the decoy the cost of the beer. Decoy Stephanie gave money to the clerk, who provided the decoy with change. Decoy Stephanie took the change, the 12-pack of Bud Light beer and exited the store. Clerk Cummins did not ask decoy Stephanie her age. There was no evidence the clerk asked questions about the decoy's ID. The agents exited the store soon after decoy Stephanie.
8. Agent Holsapple, who was seated in his Department issued vehicle, observed as decoy Stephanie exited the store holding a 12-pack of Bud Light beer. Decoy Stephanie re-entered the Licensed Premises with Agents Patel, Holsapple, Rock and another agent. All four agents and decoy Stephanie approached clerk Cummins at the cash register. The agents asked clerk Cummins to step away from the cash register, which she did, and advised clerk Cummins of the violation.

9. Agent Patel asked decoy Stephanie, "Who sold you the beer." At the same time, both clerk Cummins replied, "I did," and decoy Stephanie pointed at clerk Cummins and replied, "She did." Decoy Stephanie and clerk Cummins were looking at each other at the time of this identification. Agent Patel asked the decoy her age, to which she replied, "18." Agent Patel then asked clerk Cummins if she understood she was being identified as having sold alcohol to a minor. Initially clerk Cummins replied, "No," and then retracted her response and said that she did understand. A photo of clerk Cummins and decoy Stephanie was taken after the face-to-face identification, with decoy Stephanie holding the 12-pack of Bud Light beer in her right hand and her California Identification Card in her left hand, while standing next to clerk Cummins. (Exhibit 4.) Agent Rock and decoy Stephanie thereafter exited the premises.

10. Agent Patel asked clerk Cummins to demonstrate how she conducted the sales transaction with decoy Stephanie. Clerk Cummins complied, by scanning the same 12-pack of Bud Light beer, and the 7-Eleven software prompted a yellow warning screen. The yellow screen advises the clerk that one must be 21 to purchase alcohol, to ID anyone under 30, and instructs the clerk to either scan the ID, enter the birthdate, or press a visual ID okay button.² There was no evidence that clerk Cummins said anything about decoy Stephanie's appearance or demeanor as a reason for proceeding with the sale. At one point Agent Patel asked to review video surveillance footage of the sales transaction, with which clerk Cummins complied and showed him the video in the store. During the investigation clerk Cummins commented that decoy Stephanie looked young.³

11. Agent Patel issued a citation to clerk Cummins after the face-to-face identification. There was no evidence that clerk Cummins was distracted during the sales transaction or the face-to-face identification. Clerk Cummins did not appear at the hearing.

12. Decoy Stephanie appeared her 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 clerk Cummins at the Licensed Premises on July 21, 2018, decoy Stephanie 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 Stephanie has a youthful appearance and looks her age.

² Agent Holsapple testified to the foregoing based on his hearing the conversation between clerk Cummins and Agent Patel during the investigation in addition to his training and experience with 7-Eleven licensed premises' cash register software safety protocol for age-restricted sales; finding the yellow screen to be standard with no variations from among 7-Eleven establishments.

³ Sometime after July 21, 2018, clerk Cummins went to the Riverside District Office to review the video surveillance footage of the said decoy operation. At that time, clerk Cummins told Agents Patel and Holsapple she "screwed up and made a mistake," took responsibility for her actions in having sold alcohol to decoy Stephanie, and claimed decoy Stephanie appeared 22 or 23 years old.

13. July 21, 2018, was the second day of decoy operations in which decoy Stephanie participated. Decoy Stephanie learned about the decoy program through her service as a police explorer with the Yucaipa Police Department. As of the date of the decoy operation, decoy Stephanie had been a police explorer for three years. She does not have a rank. Her duties as a police explorer include participating in ride-a-longs, building searches, traffic stops, crisis negotiation, raising money for charitable events, assisting at public events “just hanging around to make sure nothing happens,” moving cars and directing parking. Decoy Stephanie said that she has always had the traits of acting mature and professional when interacting with people, but that she has taken those traits more seriously with her police explorer training because she believes, “we are an image to the public,” and conducts herself in that manner generally. During the said decoy operation at the Licensed Premises decoy Stephanie did not use the latter described training when she interacted with clerk Cummins and purchased the beer.

14. On July 21, 2018, decoy Stephanie visited 18 locations, with 17 of those 18 establishments requesting her ID, and four of the 18 having sold alcohol to the decoy, including the Licensed Premises.

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 July 21, 2018, the Respondents-Licensees’ employee, clerk Kiran Denee Cummins, inside the Licensed Premises, sold alcoholic beverages, to-wit: a 12-pack of Bud Light beer, to Stephanie De La Mora, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-9,11-12.)

5. The Respondents argued the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)⁴ and, therefore, the accusation should be dismissed pursuant to rule 141(c).

6. With respect to rule 141(b)(2), Respondents argued decoy Stephanie did not have the appearance of someone under the age of 21 because of certain factors which made her appear to be older than 21. Those factors, the Respondents argued, included that, (1) the clerk told Agents Patel and Holsapple at the Riverside District Office she thought the decoy looked 22 or 23 years old, and, (2) the decoy testified that she conducts herself at decoy operations in a mature and professional manner.

7. This rule 141(b)(2) argument is rejected. Respondents presented unsupported assertions and conjecture. Respondents presented no evidence as to why clerk Cummins allegedly believed decoy Stephanie to be 22 or 23 years old, let alone 21 years of age. Clerk Cummins did not testify. At the time of the decoy investigation, clerk Cummins told the agents she thought the decoy looked young. Clerk Cummins' inconsistent, hearsay statement to the agents at some later date after the decoy operation that she thought the decoy appeared 22 or 23 years of age is not credible and found self-serving, based on balancing the factors set forth in Evidence Code section 780. At no time did clerk Cummins mention anything specific relating to decoy Stephanie's demeanor as a reason for proceeding with the sale. In fact, the evidence indicates clerk Cummins knew or at least should have known the decoy was a minor. She was presented decoy Stephanie's vertical formatted minor's ID, which she not only looked at but specifically made note of the decoy's birthdate. The ID even had a red stripe to alert the clerk that the person standing before her would not turn 21 until the year 2020. Regardless, there was nothing about decoy Stephanie's police explorer training, experience, appearance or demeanor which made her appear older than her actual age. In fact, when viewing decoy Stephanie in-person at the hearing, she has a youthful appearance and looks her age. In other words, decoy Stephanie had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 12.)

PENALTY

The Department requested the Respondents' license be suspended for a period of 15 days, taking into account its length of licensure, which it argued was outweighed by the manner in which the transaction was conducted, either on purpose or with extreme negligence, and with no evidence presented by the Respondents that they train their clerks to avoid sales to minors.

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

The Respondents recommended an "all-stayed" mitigated penalty based on the Licensed Premises' 30 year discipline-free operation.

The Respondents' are correct that their approximate 30 year discipline-free history warrants substantial mitigation. However, the Respondents presented no evidence whatsoever of documented training or any positive action taken by the Licensees to correct the problem which enabled clerk Cummins to proceed with the said sale of alcohol to a minor despite its safety protocol software and the red-flagged vertical formatted ID she held in her hand. The foregoing is of grave concern, given the appearance and actual age of minor decoy Stephanie. The penalty recommended herein complies with rule 144.

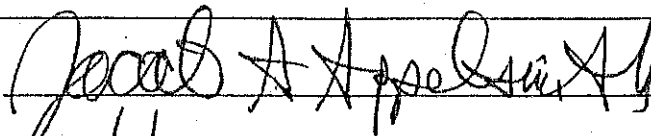
ORDER

The Respondents' off-sale beer and wine 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: February 22, 2019



D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>4/11/19</u>