

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

AB-9970

File: 20-558887; Reg: 22092465

APRO, LLC,
dba United Oil #5748
6401 Dublin Boulevard
Dublin, CA 94568,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: David W. Sakamoto

Appeals Board Hearing: September 15, 2023
Sacramento, CA/Telephonic

ISSUED SEPTEMBER 19, 2023

Appearances: *Appellant:* Adam N. Koslin, of Solomon, Saltsman & Jamieson, as
counsel for Apro, LLC,

Respondent: Trisha Pal, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

Apro, LLC, doing business as United Oil #5748 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for ten days, because its clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code² section 25658(a).

¹The decision of the Department, dated May 2, 2023, is set forth in the appendix.

² All statutory references are to the California Business and Professions Code unless otherwise stated.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale retail beer and wine license was issued on January 27, 2016. There is no evidence of prior departmental discipline against the license.

On August 19, 2022, the Department filed a single-count accusation against appellant charging that, on May 19, 2022, appellant's clerk, Jamil West (the clerk), sold an alcoholic beverage to 19-year-old Cassandra Devenney (the decoy). Although not noted in the accusation, the decoy was working for the Department at the time.

At the administrative hearing held on January 11, 2023 and March 9, 2023, documentary evidence was received, and testimony concerning the sale was presented by the decoy, and Agents Katrina Johnson and Matt Elvander. Cody Kucsak (Kucsak), a second decoy involved in Department minor decoy operations on May 19, 2022, testified on behalf of appellant.

Evidence established that on May 19, 2022, the decoy and Kucsak were with Department agents at a Best Western Inn in Pleasanton, California. From the hotel, Agent Johnson placed an order with appellant's premises for a six pack of Bud Light beer using her smart-phone and an Uber Eats application. As part of the electronic order process, Agent Johnson affirmed she was at least 21 years old and gave the name "Katrina" for the order.

A short time later, West, an Uber Eats delivery driver, arrived at the hotel carrying a white plastic bag containing the six pack of beer Agent Johnson ordered. West arrived at the decoy's hotel room and knocked on the door. After the decoy opened the door, West handed her the plastic bag containing the beer and left the area. West did not verify if the decoy was at least 21 years of age. He did not ask to view her

identification, did not ask her age, or otherwise take any step to determine she was at least 21 years old.

After the decoy took delivery of the beer from West, agents detained West and identified themselves as peace officers. West indicated that he did not check the decoy's identification. He told agents that he worked for Uber Eats and picked up the beer at appellant's licensed premises. West advised that he was not aware of any Uber Eats' policy about alcoholic beverage deliveries. Agent Elvander took a photo that depicted West and the decoy, who was holding the plastic bag containing the beer. (Exhibit 4.)

Agent Elvander went to the licensed premises and met with store manager Ashly Black ("Black"). Black provided a sales receipt for the beer delivered to the decoy. Agent Elvander also asked Black a series of questions. Black told Agent Elvander that appellant received the order for beer and it was to be delivered via Uber Eats, a third party vendor. The beer was bagged and tagged in the driver's presence, and the bag had a red tag on it indicating the bag contained alcohol. Appellant understood that it would be responsible if the delivery driver delivered alcoholic beverages to a minor, and that its bag had a tag stating "Proof of Age and Identify must be shown prior to delivery." (Exh. 8.) Appellant also cancelled a previous delivery driver because he was under 21 years old.

After the hearing, the administrative law judge (ALJ) issued a proposed decision sustaining the single count against appellant and recommending a 10-day suspension. The department adopted the proposed decision in its entirety on May 2, 2023. Appellant filed a timely appeal contending that the Department's findings are not supported by substantial evidence.

DISCUSSION

I

DECOY'S AGE

Appellant contends that the Department's findings regarding the decoy's age are not supported by substantial evidence. (Appellant's Opening Brief, at pp. 5-6.) Namely, appellant contends that a case report (exhibit A) shows a date of birth for the decoy that would have made her well over 21 on the date of the operation. (*Id.* at p. 5.) This report is contradicted by the decoy's testimony that she was 19 years old on the date of the operation. Based on the above, appellant contends that the Department failed to offer "clear and convincing evidence [...] showing Decoy Cassandra to be a minor at the time of the alleged delivery." (*Id.* at p. 6.)

Rule 141.1(a)³ requires that a "law enforcement agency may only use a person under 21 years of age to attempt to purchase alcoholic beverages for delivery" Here, the Department found that the decoy was 19 years old on the date of the operation. (Findings of Fact ¶ 4.) 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.

³ All references to rule 141 and its subdivisions are to Title 4, section 141 of the California Code of Regulations.

[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.)

At the hearing on January 11, 2023, the decoy testified that she was 19 years old on May 19, 2022, the date of the operation. (Reporter’s Transcript, p. 66:17-21.) Based on that testimony, the Department determined the decoy complied with rule 141.1. Although the Department’s report (exh. A) lists a different date of birth for the decoy, a date which would have made the decoy older than 21 years of age on the date of the operation, the Department impliedly rejected the date of birth in the report as a typographical error. In any event, it is clear that the Department gave greater weight to the decoy’s testimony of her age, rather than the age listed in exhibit A. The Board sees no error with the Department’s weighing of the evidence. The decoy’s testimony as to her age is “reasonable in nature, credible and of solid value.” (*County of Los Angeles, supra*, 32 Cal.App.4th at 814.)

Based on the above, the Department’s findings regarding the decoy’s age must stand. Ultimately, appellants are asking this Board second-guess the Department and reach a different result. Extensive legal authority prohibits this Board from doing so. (*Southland, supra*, 103 Cal.App.4th at 1094.)

II

DELIVERY TO THE DECOY

Appellant contends that the Department's finding that appellant "delivered" alcohol to the decoy is not supported by substantial evidence. (AOB, at pp. 6-7.) Specifically, appellant argues that the decoy merely "took delivery on behalf of the actual purchaser" (*Id.* at 7.) Appellant contends that the actual purchaser was Agent Johnson, who was in the adjacent room. (*Ibid.*)

Rule 141.1(b) states:

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.

Here, the Department made the following determinations:

6. Based on the evidence presented at the hearing, cause for suspension or revocation of respondent's license exists ... because on May 19, 2022, Jamil West, one of respondent's agents, delivered or furnished an alcoholic beverage, to-wit: a six pack of Bud Light beer, to Cassandra Devenney, a person who was under the age of 21

(Determination of Issues, ¶ 6.)

We agree with the Department. Substantial evidence supports the Department's findings that West was appellant's agent, and that he delivered alcoholic beverages to the decoy, who was under the age of 21 years old. The fact that Agent Johnson placed the order for the alcoholic beverages is immaterial. West ultimately did not *deliver* the beverages to Agent Johnson. Appellant's argument that the decoy was merely accepting delivery on behalf of Agent Johnson attempts to override common sense. Further, the Board is prohibited from reweighing the evidence or exercising its independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps

equally reasonable, result. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826, 837].) The Department found that delivery was made to the decoy, not Agent Johnson. That finding is supported by substantial evidence. Therefore, the Department's decision regarding this issue must be affirmed.

ORDER

The decision of the Department is affirmed.⁴

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

⁴ 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.* Service on the Board pursuant to California Rules of Court (Rule 8.25) should be directed to: 400 R Street, Ste. 320, Sacramento, CA 95811 and/or electronically to: abcboard@abcappeals.ca.gov.

APPENDIX

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

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

APRO, LLC
UNITED OIL #5748
6401 DUBLIN BLVD.
DUBLIN, CA 94568

OFF-SALE BEER AND WINE - LICENSE

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

CONCORD DISTRICT OFFICE

File: 20-558887

Reg: 22092465

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 28, 2023. 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, 400 R St, Suite 320, Sacramento, CA 95811. 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.

On or after June 12, 2023, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: May 2, 2023



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

APRO, LLC	}	File: 20-558887
Dbas: United Oil #5748	}	
6401 Dublin Blvd.	}	Reg: 22092465
Dublin, CA 94568	}	
	}	License Type: 20
	}	
Respondent	}	<u>PROPOSED DECISION</u>
	}	
	}	Court Reporters:
	}	1-11-23: Patty Lindsey, CSR-8697
	}	Word Count Est: 16,439
Regarding Its Type-20 Off-Sale Beer and Wine Retail	}	
License Under the California Constitution and the	}	3-7-2023: Shelby Maske
<u>California Business and Professions Code</u>	}	Word Count Est: 6,432

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter via video hearing on January 11, 2023, and March 9, 2023.

Erin Lovelace, attorney, Office of Legal Services, Department of Alcoholic Beverage Control, represented the Department of Alcoholic Beverage Control (hereafter the Department).

Adam Koslin, attorney, of Solomon, Saltsman, and Jamieson, represented licensee-respondent APRO, LLC (hereafter respondent).

After testimony, documentary evidence, and evidence by stipulation on the record was received at the video hearing held for this matter on January 11, 2023, and March 9, 2023, it was submitted to the ALJ for a decision.

The Department's accusation alleged cause for suspension or revocation of respondent's license exists under California Constitution, article XX, section 22, and California Business and Professions Code, section 24200, subdivision (a) and (b), based on the following ground:¹

Count 1 : "On or about May 19, 2022, respondent-licensee's agent or employee, Jamil West, at said premises, sold, furnished, gave or caused to be sold, furnished, or given, an alcoholic beverage, to-wit: beer, to Cassandra Devenney, a person under the age of 21 years, in violation of Business and Professions Code Section 25658(a)." (Exhibit 1: Pre-hearing pleadings, accusation)

FINDINGS OF FACT

1. On January 27, 2016, the Department issued respondent a type 20 off-sale retail beer and wine license for its premises known as United Oil #5748 and/or Rocket Market, located at 6401 Dublin Boulevard, Dublin, California.² (hereafter the licensed premises)
2. The Department filed this accusation on August 19, 2022. The Department received respondent's Notice of Defense and Special Notice of Defense alleging defenses and requesting a hearing on the accusation. The Department set the matter for a video hearing. (Exhibit 1: Pre-hearing pleadings)
3. Since being licensed, respondent has not suffered any prior disciplinary action.
4. Cassandra Devenney (hereafter decoy Devenney) was born on May 26, 2002. On May 19, 2022, decoy Devenney, then 19 years old, assisted Department of Alcoholic Beverage Control agents in conducting a minor decoy operation involving the licensed premises. The focus of the operation was to determine if respondent would sell, furnish, or deliver an alcoholic beverage to decoy Devenney at a location away from the licensed premises, i.e., a local hotel, despite the fact decoy Devenney was under 21 years of age.
5. When operating as a decoy on May 19, 2022, decoy Devenney was approximately 5 feet 2 inches tall and weighed approximately 105 to 110 pounds. She had shoulder length blonde hair. She wore a long sleeved green sweatshirt, dark pants, and white sneakers. While she had acted as a decoy before, this was her first time operating as a decoy away from the actual licensed premises. Exhibit 2 and Exhibit 4 were photos taken of decoy

¹ All further section references are to the California Business and Professions Code unless noted otherwise.

² A type-20 license generally permits the holder to retail in beer and wine for consumption off the licensed premises.

Devenney on May 19, 2022, as part of the decoy operation. Decoy Devenney appears youthful in both images as she did when she testified at the video hearing.

6. On May 19, 2022, decoy Devenney and Alcoholic Beverage Control Agents Johnson, Elvander, and other agents were at a Best Western Inn (hereafter the hotel) in Pleasanton, a city adjacent to the City of Dublin, where respondent's licensed premises was located. Also present at the hotel was a second decoy. He was 19 year old Cody Kucsak (hereafter decoy Kucsak).

7. From the hotel, Agent Johnson placed an order with respondent's premises for a six pack of Bud Light beer using her smart-phone and an Uber Eats application. As part of the electronic order process, she affirmed she was at least 21 years old and gave the name "Katrina" for the order. She made payment at the time of the electronic order.

8. A short time later, an Uber Eats delivery driver, Jamil West (hereafter West), arrived at the hotel carrying a white plastic bag containing the six pack of beer Agent Johnson ordered. (Exhibit 5 and 6: photo of bag and six pack of beer)

9. West arrived at decoy Devenney's hotel room, knocked on the door, and she answered. After decoy Devenney opened the door, West handed her the plastic bag containing the beer and left the area. West did not verify if decoy Devenney was at least 21 years of age. He did not ask to view her identification, did not ask her age, or otherwise took any step to determine she was at least 21 years old.

10. When decoy Devenney took delivery of the six pack of beer from West, one ABC agent and decoy Kucsak were in decoy Devenney's guest room. The agent was behind an interior door and decoy Kucsak was sitting on a bed in the room. There was no evidence West was aware of the presence of either the ABC agent or decoy Kucsak.

11. Before West left the hotel facility, Agent Elvander and Agent Rak detained West. They identified themselves to him as peace officers and informed him he delivered alcoholic beverages to an underage decoy. They escorted him back to the decoy Devenney's hotel room. West indicated to the agents he had not checked decoy Devenney's identification. He indicated he worked for Uber Eats and picked up the beer at respondent's licensed premises. He indicated he was not aware of any Uber Eats' policy about alcoholic beverage deliveries. Agent Elvander took a photo, Exhibit 4, that depicted West and decoy Devenney, who was holding the plastic bag containing the beer.

12. Agent Elvander then went to respondent's licensed premises and met with store manager Ashly Black (hereafter Black). She provided a sales receipt for the beer delivered to decoy Devenney. Elvander took a photo of the receipt. (Exhibit 7: photo of receipt) The receipt documented the sale of the six-pack of Bud Light beer for \$9.11.

13. Agent Elvander also asked Black a series of questions from a pre-printed Department questionnaire sheet, Exhibit 8, used in connection with remote delivery decoy investigations.

14. The completed questionnaire reflected that, among other things, respondent received the order for beer; that it was to be delivered via third party vendor Uber Eats; that respondent's bag had a red tag on it indicating the bag contained alcohol; that the beer was bagged and tagged in the driver's presence; that respondent understood it would be responsible if the delivery driver delivered alcoholic beverages to a minor; that its bag had a tag stating "Proof of Age and Identity must be shown prior to delivery"; and that it canceled a previous delivery driver because he was under 21 years old.

15. Devenney's appearance was consistent with that of a person who was 19 years old, her actual age. 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 at the hotel when acting as a decoy, Devenney displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to West when he delivered the six pack of beer to her.

DETERMINATION OF ISSUES

1. California Constitution, article XX, section 22 and Business and Professions Code section 24200, subdivision (a), provide 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, subdivision (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, subdivision (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. Section 25658, subdivision (f), permits law enforcement officials to use persons under 21 years old to apprehend licensees, employees or agents or other persons who sell or furnish alcoholic beverages to minors.

5. The Department's rule that applies to the off premises delivery of alcoholic beverages to decoys is at California Code of Regulations, title 4, section 141.1 (hereafter rule 141.1). It states:

(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 the 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.

(f) Failure to comply with this rule shall be a defense to any action brought pursuant to Business and Professions Code Section 25658.

6. Based on the evidence presented at the hearing, cause for suspension or revocation of respondent's license exists under California Constitution, article XX, section 22 and Business and Professions Code section 24200, subdivision (a) and (b), because on May 19, 2022, Jamil West, one of respondent's agents, delivered or furnished an alcoholic beverage, to-wit: a six pack of Bud Light beer, to Cassandra Devenney, a person who was under the age of 21, in violation of Business and Professions Code section 25658, subdivision (a). (Findings of Fact ¶¶ 4-10)

7. The evidence established that pursuant to a phone order placed to respondent's business, West delivered a six pack of beer to 19 year old decoy Devenney at the hotel. West neither asked her age nor asked to inspect her identification to determine if she was at least 21 years of age.

8. Respondent argued it did all within its direct control to adhere to the law and not sell or deliver beer to minors. It indicated that in delivery driver West's presence, it red tagged the bag holding the beer to remind West to check the recipient customer's identification. It also contended it canceled a previous delivery driver because he was under 21 years of age. However, even if respondent took the aforementioned steps, that did not excuse it from responsibility if West, as in this instance, delivered the alcoholic beverage to the minor decoy without actually asking her age or checking her identification to confirm she was at least 21 years of age. Even in the pre-printed questionnaire, Exhibit 8, box 12, respondent acknowledged it was aware it would be held responsible if the delivery driver furnished

alcoholic beverages to a minor. What efforts respondent took in this instance to prevent the actual delivery of beer to decoy Devenney did not constitute a defense to the accusation.

9. Respondent also contended the decoy operation was faulty because decoy Kucsak and an ABC agent were in decoy Devenney's hotel room when West delivered the beer to her. However, there was no evidence West was aware the ABC agent and decoy Kucsak were in the guest room at that time. West did not testify at the hearing and there was no other evidence presented he knew about the presence of the ABC agent and decoy Kucsak in decoy Devenney's hotel room. There was no evidence of any statement he made to the agents that the presence of the ABC agent and decoy Kucsak played any role in his delivery of beer to decoy Devenney. It was also not shown their presence in decoy Devenney's guest room made decoy Devenney appear any older than her 19 years of age. Thus, it was not shown the presence of decoy Kucsak and the ABC agent played any role in West's delivery of beer to decoy Devenney and so did not establish any defense to the accusation.

10. Based upon the evidence presented, there was sufficient evidence to sustain Count 1 in the accusation. No defense to count 1 was established under rule 141.1 or under any other statute, regulation, or other grounds.

11. Except as set forth in this decision, all other allegations in the accusation and all other contentions made by the parties in the pleadings or at the hearing regarding those allegations lacked merit.

PENALTY

1. In assessing a penalty for this matter, the Department's penalty guidelines are in California Code of Regulations, title 4, section 144 (hereafter 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.

2. Rule 144 also indicates aggravating and mitigating factors can be considered when assessing a penalty. Aggravating factors include, but are not limited to, such things as prior disciplinary history, warning letters, licensee involvement, premises located in high crime area, lack of licensee cooperation in the investigation, appearance and age of minor, and a continuing course of conduct. Mitigating factors include, but are not limited to, such things as the duration of discipline free licensure, action taken to correct the problem, licensee training, and licensee cooperation in the investigation.

3. As this would be respondent's first violation of section 25658, rule 144 indicates a 15 day license suspension is appropriate. The Department recommended a mitigated 10 day license suspension. It contended the evidence established respondent's agent, West, delivered beer to 19 year old decoy Devenney without first confirming if she was at least 21 years of age. Further, it contended the decoy Devenney clearly had a youthful appearance and the appearance and age of the minor are specified in rule 144 as a factor in aggravation.

4. The respondent contended it took what steps it could to prevent delivery of alcoholic beverages to a minor. It put a red tag on the bag holding the beer in the presence of West so as to remind him to verify the age of the patron before he handed over the beer. Further it noted it canceled a prior delivery driver because he was under 21 years of age. Respondent also contended, although not established by the evidence, West may have been confused due to the presence of decoy Kucsak and an ABC agent in decoy Devenney's hotel room. Respondent asserted that if the accusation were sustained, a five day suspension or a term of license suspension, with all suspension days stayed, would be appropriate.

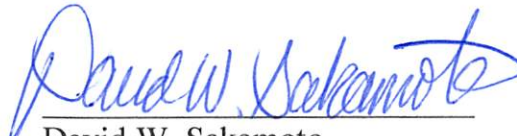
5. In assessing the appropriate penalty in this instance, some degree of mitigation from the 15 day penalty specified under rule 144 is warranted. Respondent red tagged the bag in front of West so as to remind him to verify the customer's age upon delivery of the beer, although West did not ultimately do so in this instance. Further, respondent refused delivery of the beer using a prior delivery driver who was not yet 21 years of age. Additionally in mitigation, respondent was licensed a little over six years with no prior disciplinary history.

6. The penalty set forth in the order below reflects a weighing of the relevant facts and circumstances of this matter in accordance with rule 144's penalty considerations.

ORDER

1. Count 1 of the accusation is sustained.
2. As to Count 1, respondent's license is suspended for 10 days.

Dated: March 12, 2023



David W. Sakamoto
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____

By: _____
Date: _____ 04/28/23