

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

In the Matter of the Accusation Against:

7-Eleven, Inc. and Gytari, Inc.
Dba 7-Eleven #2365-27912D
2000 Lakeville Highway
Petaluma, CA 94954-6710

File: 20-538155

Reg: 17085497

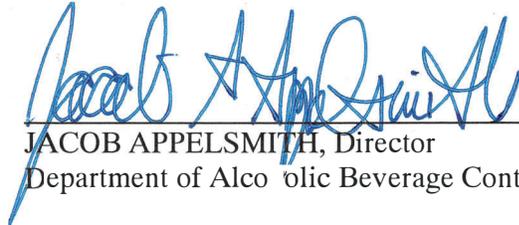
**PRECEDENTIAL DECISION
No. 19-02-E**

Licensee(s).

DESIGNATION AS PRECEDENTIAL DECISION

Pursuant to Government Code Section 11425.60, the Department of Alcoholic Beverage Control hereby designates as precedential its decision, dated April 18, 2018, in the above-referenced action.

This decision is designated precedential effective April 12, 2019.



JACOB APPELSMITH, Director
Department of Alcoholic Beverage Control

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

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

7-Eleven, Inc. and Gytari, Inc.
Dba 7-Eleven #2365-27912D
2000 Lakeville Highway
Petaluma, CA 94954-6710

Licensee(s).

File No.: 20-538155

Reg. No.: 17085497

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department on April 18, 2018, for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held on September 21, 2017, before Administrative Law Judge David W. Sakamoto, and the written arguments of the parties, and good cause appearing, the following decision is hereby adopted:

The Department seeks to discipline Respondent's license on the grounds that, on or about December 16, 2016, Respondent, through its agent or employee, Navneet Sangar, sold, furnished, or gave away, or caused to be sold, furnished, or given away, an alcoholic beverage to Nicholas Mueller., a person under the age of 21, in violation of California Business and Professions Code section 25658(a).¹ (Exhibit 1-pre-hearing pleadings)

After oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing, the matter was argued by the parties and initially submitted for decision on September 21, 2017. However, it was thereafter discovered by the ALJ that the copy of Respondent's video exhibit, copied to a computer "thumb-drive," was not fully re-playable and/or did not contain the same video clips as that shown at the hearing. The ALJ and the parties had a conference call and a replacement copy of the video was received by the ALJ on October 24, 2017.² The matter was deemed submitted for decision as of that date.

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

² The replacement thumb-drive recording will be substituted for the thumb-drive recording submitted at the hearing as Respondent's Exhibit G.

FINDINGS OF FACT

1. The Department filed the accusation on April 18, 2017. On May 5, 2017, the Department received a Notice of Defense requesting a hearing on the accusation. Except as noted above, the hearing was heard to completion on September 21, 2017.
2. The Department issued 7-Eleven, Inc. and Gytari, Inc., as co-licensees, a Type 20 Off-Sale Beer and Wine license on November 12, 2013.³
3. Since these co-licensees have been licensed, they suffered one prior disciplinary action for a violation of section 25658(a) under registration 16083794. The matter was resolved by way of a Stipulation and Waiver for a penalty of a 10 day suspension, with all 10 days stayed from imposition so long as Respondent did not suffer any added disciplinary action within 12 months of the decision becoming final. (Exhibit 2-prior discipline pleadings)
4. On December 16, 2016, 18 year old Nicholas Mueller (hereafter, “the decoy”) acted as a decoy for the Department of Alcoholic Beverage Control for the purpose of determining if he could purchase an alcoholic beverage at Respondent’s premises at 2000 Lakeview Highway, Petaluma, California. The licensed premises operated as a 7-Eleven convenience store. This investigative activity is commonly referred to as a “decoy” operation. As described below, the decoy was able to purchase beer at Respondent’s licensed premises that day.
5. The decoy was born on August 12, 1998 and was 18 years old as of December 16, 2016, the date he visited Respondent’s licensed premises.
6. When the decoy was at Respondent’s premises on December 16, 2016, he was 6’ 4” tall and weighed 235 pounds. He was wearing a white t-shirt, blue jeans, dark colored boots, and a light brown jacket. His hair was approximately a half-inch long. He appeared as depicted in photos taken of him that night and reflected in Exhibits 5, 6a, and 6b. Store video surveillance and still shots taken from such video showed high angles of the decoy in the premises (Exhibits E, F, and G).
7. Prior to entering Respondent’s premises, the ABC Agents with the decoy instructed him to present his true identification to the sales clerk if he asked to inspect it and to disclose his true age if the clerk asked for that. The decoy possessed his valid California driver license on him when he entered the store. (Exhibit 4, copy of the decoy’s driver license)

³ A Type 20 license permits the licensee to retail in beer and wine for consumption off the licensed premises.

8. On December 16, 2016, the decoy entered Respondent's store and selected a pre-packaged three-pack of 25 ounce Budweiser beer cans from Respondent's coolers. He took the beer to the sales counter. The clerk, Mr. Navneet Sanger, sold the beer to the decoy. (hereafter "Sangar") Sangar neither asked to inspect the decoy's identification nor did Sangar ask the decoy for his age as part of the sales transaction. After the decoy paid for the beer, he exited the store with the three-pack of beer.

9. Once outside the store, the decoy met with ABC Agents Stefan Carlson and Derek Clark. The decoy told the agents he bought beer in the store and that, at the time of the sale, the clerk neither asked to inspect his identification nor asked his age.

10. The decoy and the two agents reentered the store. Agent Carlson, who witnessed the sale from outside the store, detained the clerk. After Agent Carlson identified himself to the clerk as an ABC Agent, he told the clerk he just sold beer to an 18 year old. After the decoy, agents, and Sangar moved to a rear area of the store, Agent Carlson asked the decoy who sold beer to him. The decoy pointed at Sangar with his finger and told Agent Carlson that Sangar was the seller. At that point, the decoy and Sangar were about three feet apart and had a clear view of one another. Sangar told Agent Carlson he made a mistake due to being in a hurry and that he usually checks identifications. Sangar told Agent Carlson that he was to enter a birthdate in the cash register if an age restricted item was being sold. Sangar said he typed in a random birthdate when he sold beer to the decoy. Next, Agent Carlson issued Sangar a citation for selling an alcoholic beverage to a minor. Sangar signed the citation and was given a copy of it.⁴

11. That day, the decoy attempted to purchase alcoholic beverages at 7 locations. Of those, 5 asked for his identification and 2 asked for his age. Two of the 7 businesses sold an alcoholic beverage to the decoy.

12. Respondent herein, Ms. Surinder Singh, has been the 7-Eleven franchisee at this store since 1993. In 2013, she self-incorporated at this location as Gytari, Inc. and continued to be the franchisee to the present under that entity. She is a 7-Eleven franchisee at five added stores in northern California.

She regularly trains her employees to follow all applicable rules and regulations and does not desire profit from the improper sale of age-restricted products, such as alcoholic beverages and cigarettes. She gives her employees computer based training provided by 7-Eleven and also trains her employees in proper sales practices. The sales clerk in this instance, Sangar, no longer works for her.

⁴ Sangar did not testify at the hearing regarding this transaction. He no longer works for Respondent.

LEGAL BASIS OF DECISION

1. Article XX, section 22 of the California Constitution and Business and Professions 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. Business and Professions Code 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. Business and Professions Code Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.
4. Business and Professions Code Section 25658(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. Under California Code of Regulations, Title 4, Division 1, Article 22, section 141, commonly referred to as Rule 141,
 - (a) A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.
 - (b) The following minimum standards shall apply to actions filed pursuant to Business and Professions Code Section 25658 in which it is alleged that a minor decoy has purchased an alcoholic beverage:
 - (1) At the time of the operation, the decoy shall be less than 20 years of age;
 - (2) The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense;
 - (3) A decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages;

(4) A decoy shall answer truthfully any questions about his or her age;

(5) 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.

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

DETERMINATION OF ISSUES

1. Cause for suspension or revocation of Respondent's license does exist under Article XX, section 22 of the California State Constitution and Business and Professions Code section 24200, subdivisions (a) and (b), because on December 16, 2016, Respondent's employee, Navneet Sangar, inside the licensed premises, sold an alcoholic beverage to Nicholas Mueller, a person under the age of 21, in violation of Business and Professions Code section 25658, subdivision (a).

2. In defense to the accusation, Respondent argued that the decoy did not meet the appearance standard set out in Rule 141(b)(2), which states: "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." Respondent focused on the physical aspects of the decoy's appearance, asserting that the decoy did not have the appearance that would be expected of an 18-year old because his height and weight were much greater than "average", and that the jacket he was wearing made him appear even larger.

3. The Department argued the decoy met the appearance standard. In support of this, the Department noted that the clerk never made any comment about the decoy's appearance to the ABC Agents at the time of the violation.

4. The selling clerk, Sangar, did not testify at the hearing, and no direct evidence was presented about how the decoy presented himself to, or interacted with, clerk Sangar. In contrast, the Department Agent testified that clerk Sangar stated that he had entered a random date of birth into the register to complete the sale, that he made a mistake, and that he was in a hurry.

5. Following rejection of the Administrative Law Judge's ("ALJ") proposed decision, Respondent argued that the ABC Appeals Board has consistently held that ALJs should not focus their analysis solely on the physical characteristics of the decoy, but should also consider non-physical attributes, such as poise, demeanor, maturity, and mannerisms, as the ALJ here did. Respondent contends the ALJ had a unique perspective of the decoy's poise, mannerisms, and maturity, because the ALJ had the opportunity to observe the decoy on the stand during both direct and cross examination. In addition, because the decoy was wearing the same clothing on the night of the operation, Respondent further contends the ALJ was also able to observe the decoy testify much as he appeared when the alleged violation occurred.

6. Respondent further argued that the Department should defer to the ALJ's judgment as to the appearance of the decoy. In support of this, Respondent cites Government Code section 11425.50, which provides, "if the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it." It thus follows, Respondent asserts, that since the ALJ was the only finder of fact to observe the decoy testify, deference should be given to his determination that the decoy did not meet the required characteristics.

7. Respondent is mistaken in its arguments, both at hearing and on review. The two key provisions of Rule 141(b)(2) are: first, the decoy's appearance *could generally be expected* of a person under the age of 21 (not "average" or "usual"); and second, that the decoy's appearance is determined based upon *the actual circumstances* presented to the seller *at the time* of the alleged offense. Since there is no over-arching principle of "fairness" beyond the five specific criteria listed in subdivision (b) (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (Garfield Beach CVS)* (2017) 7 Cal.App.5th 628, 638), a licensee seeking to meet its burden of establishing the affirmative defense under subdivision (c) may only rest on the language of Rule 141(b)(2). In doing so, if a decoy is actually under 20 years old at the time of the offense (as required by Rule 141(b)(1)), there is a rebuttable presumption that he or she had an appearance that could *generally* be expected of a person under the age of 21. Therefore, the licensee must provide actual, substantial evidence of indicia of appearing over the age of 21, under the *actual circumstances* presented to the seller at the time of the violation, to overcome such a presumption.

The Decoy's Physical Appearance

8. With respect to the decoy's physical appearance, while he was 6'4" tall and weighed 235 pounds, he had, at the time of the sale in this case, a very youthful-appearing face (what is commonly referred to as "a baby face"). While objective evidence (such as graying hair, wrinkled skin, etc.) may be apparent based upon photographs taken at the time of a decoy operation, even those must be viewed in context. This case is a good example in which photographs taken at different times and from different angles on the same day, even within close temporal proximity to each other, can present different opinions about the person's "appearance." As the court noted in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (Southland Corporation)* (2002) 103 Cal.App.4th 1084, 1094, while "one could reasonably look at the photograph [of the decoy] and reasonably conclude that the decoy appeared to be older than 21 years of age, we cannot say that, as a matter of law, a trier of fact could not reasonably conclude otherwise." In the instant case, several of the photos in evidence clearly show a youthful-appearing individual. The other photos (of the decoy and clerk together, and the still shots taken from the video surveillance system), Respondent argues, show that the decoy appeared older than 21. The video surveillance photos show the decoy from a high angle, rather than from eye-view level during the sales transaction, and thus have limited evidentiary value. Moreover, Respondent presented no testimony in support of its contention that these photos accurately reflect how the minor appeared in front of the clerk at the time of the sale of alcohol. Further, Respondent did not even have the selling clerk testify regarding how the decoy appeared to him. In contrast, the Department Agent who actually observed the decoy at the time of the minor decoy operation gave undisputed and un rebutted testimony that the Department's photos in evidence truly and accurately reflect the decoy's appearance on the night of the operation. As such, the Department's photographs are accorded greater weight in the Rule 141 analysis.

9. In addition, many minors are tall and heavy-set, and being so does not lead to the conclusion that the minor's appearance disqualifies the minor in having the appearance generally expected of a person under the age of 21. Minors come in all shapes and sizes, and a minor decoy of large stature does not automatically violate the rule.

10. Furthermore, the clerk did not make any comment to the Department's Agent at the time of the incident about the decoy's size (or any other aspect of his appearance, physical or otherwise) as giving the appearance of a person over the age of 21, or otherwise having any influence whatsoever on his decision to sell alcoholic beverages to him. Rather, when given the opportunity to explain why he sold alcohol to the decoy, the clerk stated that he made a mistake and was in a hurry. Contrary to Respondent's assertions otherwise, these statements indicate that the clerk was not in any way misled by the minor's appearance.

11. Finally, the argument that a decoy's clothing makes the decoy look like he is engaged in certain work is not particularly helpful in establishing whether the decoy has the general appearance of a person over the age of 21. Respondent argued that the decoy's attire made him look like a construction worker. It is lawful to work in construction as young as 16 years old (see, Lab. Code § 1294.1, subdiv. (a)(2); 29 C.F.R. § 570.33), and many young people are engaged in the construction trade. Thus, wearing "construction" style clothing⁵ really has little, if any, relevance.

12. It is found that the minor decoy had the physical 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.

Non-Physical Aspects of Decoy's Appearance

13. As for the non-physical aspects of a decoy's "appearance," Respondent argues that the Department must defer to the ALJ's evaluation. In contrast, the Department argues that considerations of non-physical aspects of a decoy's appearance are too subjective and are beyond the scope of the plain language of Rule 141(b)(2).

14. First, the Government Code provision Respondent cites in support of its position has nothing to do with whether any special or particular deference must be given to the ALJ's findings in this regard. Government Code section 11425.50 applies, by its own terms, to factual determinations "based substantially on the credibility of a witness." The appearance of a minor decoy is not a credibility determination and the ALJ here did not make any finding with respect to credibility on this issue. As such, this section does not apply and the Department is not obligated to accord "great weight," or any other particular deference, to the ALJ's factual findings in this regard.

15. Second, even if deference may (or even should) be generally accorded to the ALJ's findings regarding non-physical aspects of a decoy's appearance, to the extent that such findings rely upon an incorrect analysis of Rule 141(b)(2), or are not supported by substantial evidence in the record, no deference or weight should be given to them. Here, the ALJ found that the decoy had a "mature persona as he testified at the hearing" and "based on the decoy's overall appearance, i.e., his physical appearance, dress, poise, demeanor, conduct, maturity, and mannerisms shown at the hearing, and his over-all

⁵ Whether a tan Carhartt jacket, white t-shirt, blue jeans, and black boots even actually constitutes "construction" style clothing is somewhat subjective. These are common articles of clothing worn by people in all walks of life, and are certainly not limited to the construction industry. Moreover, this was Respondent's unsubstantiated opinion, not supported by any evidence in the record.

appearance and conduct in front of the sales clerk, the decoy displayed the appearance which was not generally to be expected of a person under 21 years of age under the actual circumstances presented to the clerk.” (Proposed Decision, Determination of Issues 3.⁶) Given that minors typically grow and mature over time, how a decoy acts at a hearing conducted long after the sale of alcohol occurred is at best circumstantial evidence from which a conclusion may be drawn as to the decoy’s poise, demeanor, conduct, maturity, and mannerisms during the transaction in question. In the absence of any direct evidence in the record of how the decoy presented himself or herself before the seller of the alcohol, there is little, if any, nexus between the non-physical aspects of the decoy’s appearance at hearing and how such factors manifested themselves under the actual circumstances presented to the seller.

16. In the instant case, the hearing occurred some nine months after the minor decoy operation occurred. As an affirmative defense, Respondent was required to present substantial evidence in support of any contention that aspects of the decoy’s poise, demeanor, conduct, maturity, and mannerisms made him “appear” older than 21 before the selling clerk at the time of the actual sale. Only limited circumstantial evidence was presented. As such, the ALJ’s findings about the decoy’s non-physical appearance at the time of the actual sale are based solely upon how the ALJ perceived the decoy’s appearance at the hearing and are not based upon any direct evidence in the record. Further, the ALJ fails to provide any analysis or explanation as to how his observations of the decoy’s “mature persona as he testified at the hearing” and his “poise, demeanor, conduct, maturity, and mannerisms shown at the hearing” can be extrapolated to a determination that these aspects of his appearance were even present under the actual circumstances presented to the selling clerk. Based upon the evidence presented by Respondent (or lack thereof), it is not reasonable to conclude that there was non-compliance with Rule 141(b)(2) based upon any non-physical aspects of the decoy’s appearance.

17. With respect to the Department’s argument that non-physical aspects of a decoy’s appearance are beyond the scope of the Rule 141(b)(2) defense, this is not correct. Although physical attributes of appearance are generally more objective and are often established by photographic evidence from the time of the violation, this does not mean that non-physical aspects of a person’s overall appearance cannot or should not be considered. How a decoy speaks, acts, or presents himself or herself to a seller of alcohol may be relevant in evaluating that person’s overall appearance. However, because these factors are inherently more subjective, they are generally of less evidentiary value. Non-physical attributes are particularly unhelpful to the trier of fact in cases such as this one that are

⁶ Although a proposed decision is a legal nullity unless adopted, it is relevant for purposes of discussion in this Decision due to the assertion that the Department essentially has no authority to find contrary to the ALJ’s findings and determination.

based solely on circumstantial evidence, given that the trier of fact must evaluate how such factors influence a minor's appearance at the actual time the sales transaction took place⁷.

18. Respondent here has not met its burden to establish that there was a failure to comply with Rule 141(b)(2).

PENALTY

This was Respondent's second violation for selling alcoholic beverages to a minor within a 36-month period. The Department's disciplinary guidelines (Rule 144) provide for a 25-day suspension of the license, absent either aggravation or mitigation. Here, the Department requested that Respondent's license be suspended for 30 days based upon what it contends are several aggravating factors. Respondent did not make any argument about the level of discipline, relying solely on its position that the accusation should be dismissed.

The factors cited in aggravation of the discipline are that this second violation of section 25658(a) occurred only approximately 11 months after the first violation⁸; that Respondent took few remedial steps following the first violation, and the limited actions taken were of minimal (if any) effectiveness⁹; the selling clerk in this instance was allowed to continue to work for several months following the incident without any additional training¹⁰ or disciplinary action; lack of due diligence on the part of the clerk (no identification was requested nor was the decoy asked his age, and when he was prompted to input a birth date into the register, he simply entered a random date). Overall, the Department argues, the record establishes that Respondent failed to take any meaningful precautionary measures to prevent the sale of alcoholic beverages to minors, especially following a recent prior violation of the same provision of law. It is further noted that the licensee had only been licensed here for some 37 months prior to this second violation.

⁷ Although it appears that any argument that the minor decoy's maturity, poise, demeanor, conduct, or mannerisms, alone or in combination with his physical appearance, gave the decoy 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, may have been waived here, since it was never raised at hearing, Respondent has nevertheless failed to meet its burden.

⁸ As indicated in Exhibit 2, the first violation occurred on January 15, 2016. The Department does note that it is not using the mere fact of the prior violation for purposes of aggravation, as that is already built in the "standard" discipline specified in Rule 144. (See, Department's Written Argument Regarding Issuance of Final Decision, 14:27-15:6.) Rather, it is the close proximity in time between the two violations that is an aggravating factor.

⁹ Although the frequency of training increased, the substance of the training was unchanged; Respondent testified that a sign would now be placed at the checkout register stating that everyone needed to show identification.

¹⁰ Although Respondent asserts that there was a desire to have the clerk attend the Department's LEAD training, he did not attend such training prior to leaving Respondent's employment.

7-Eleven, Inc. and Gytari, Inc.
Dba 7-Eleven #2365-27912D
20-538155; 17085497
Page 11 of 11

The Department has established aggravation. With respect to the cited aggravating factor of the selling clerk's continued employment, it should be noted that the Department is not requiring or even advocating for any particular level of discipline or termination of the involved employee. What the Department does expect from a licensee is that it take reasonable steps to insure that this type of violation does not occur again. This may include education and training (or re-education and re-training) of employees in responsible practices for the sale or service of alcoholic beverages, including the need to request and inspect appropriate identification from the purchaser. It may also include some appropriate discipline of the seller. Respondent has not shown any factors to be considered in mitigation. As such, an aggravated level of discipline is warranted in this case.

ORDER

Respondent's off-sale beer and wine license is suspended for a period of 30 days.

Sacramento, California

Dated: April 18, 2018

Jacob A. Appelsmith
Director

Pursuant to Government Code section 11521(a), any party may petition for reconsideration of this decision. The Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or on the effective date of the decision, whichever is earlier.

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9, of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.