

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

AB-9701

File: 47-548753 Reg: 17085860

TK MANAGEMENT, INC.,
dba Tilted Kilt Pub & Eatery
12409 Mariposa Road,
Victorville, CA 92395-6017,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: D. Huebel

Appeals Board Hearing: November 1, 2018
Ontario, CA

ISSUED JANUARY 29, 2019

Appearances: *Appellant.* Matt McLaughlin as counsel for TK Management, Inc.,
doing business as Tilted Kilt Pub & Eatery.
Respondent. Jonathan Nguyen as counsel for the Department of
Alcoholic Beverage Control.

OPINION

TK Management, Inc., doing business as Tilted Kilt Pub & Eatery (appellant),
appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending
its license for 15 days because its bartender sold an alcoholic beverage to a minor, a
violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on December 22,
2014. On August 24, 2017, the Department filed an accusation charging that appellant's

1. The decision of the Department, dated March 28, 2018, is set forth in the appendix.

bartender, Brock Zareh Markarian, sold an alcoholic beverage to 20-year-old O.C.E on January 19, 2017.

At the administrative hearing held on December 14, 2017, documentary evidence was received and testimony concerning the sale was presented by O.C.E, the minor; by Markarian, the bartender; by Agents Mehul Patel and Gilbert Castillo of the Department of Alcoholic Beverage Control; and by Mina Matta, appellant's manager.

Testimony established that on January 19, 2017, at approximately 9:50 p.m., Agents Mehul Patel and Gilbert Castillo arrived in a plainclothes capacity at the licensed premises. They were conducting Departmental enforcement spot checks in the Victorville high desert area. At the front entrance of the licensed premises a security guard checked the agents' identification and gave them blue Bud Light wrist bands to indicate they were 21 years or older. The agents proceeded to the center of the licensed premises near fixed tables by the fixed bar. Agent Patel ordered an 805 beer from a waitress who happened to walk by them. The agents remained in that position for a few minutes and began surveying the crowd for anyone who looked under 21 years of age consuming alcoholic beverages.

The agents then proceeded to the southwest corner of the fixed bar and began observing the patrons. The agents immediately noticed a group of three patrons, two females seated at the southwest side of the fixed bar and a male patron standing behind the females. The agents noticed that one of the females wore a blue wristband, as did the male patron standing behind the females. The agents both noticed the second female, who appeared youthful to them, did not have a wristband. The youthful-

appearing female was later identified as O.C.E. The agents continued to observe O.C.E to determine whether she would consume alcoholic beverages.

The agents then observed a bartender performing bartending duties behind the bar. The bartender was later identified as Markarian. The agents saw Markarian make two alcoholic beverages using distilled spirits from the well in front of O.C.E and her friend. Markarian made both distilled spirit beverages, later identified as a Sex on the Beach cocktail, which is an alcoholic beverage. Markarian mixed the Sex on the Beach cocktails and placed them on the bar counter directly in front of O.C.E. O.C.E slid the first Sex on the Beach drink to her female friend seated directly next to her. O.C.E grabbed the second distilled spirit beverage placed in front of her and took a sip from the glass, consuming the alcoholic beverage. Markarian appeared to be facing O.C.E while she took the sip. Markarian did not check to see whether O.C.E was wearing a blue Bud Light wristband or not, and he did not ask O.C.E for her identification.

Markarian collected payment for the two Sex on the Beach cocktails from O.C.E female friend, who had ordered the two cocktails from the bartender while seated at the same location at which she paid for the drinks with a credit card. At no time during the evening did Markarian ask for O.C.E identification.

Agents Patel and Castillo then approached the three patrons and identified themselves as police officers. Agent Castillo asked to see the identification of O.C.E two companions. Agent Castillo determined both companions were over the age of 21. Agent Patel made contact with O.C.E and asked for her identification. O.C.E provided her California driver's license. O.C.E's California driver's license has a vertical orientation and shows her correct date of birth. Agent Patel asked O.C.E what drink she

was drinking, to which she replied, "Sex on the Beach." Agent Patel asked her if she knew what kind of alcohol the drink contained. O.C.E said she believed the drink contained vodka and some juice. The drink tasted like it had alcohol in it to O.C.E.

Once Agent Patel had confirmed O.C.E to be under 21 years of age, he requested that Agent Castillo secure the alcoholic beverage from which O.C.E had taken a sip. Agent Castillo took possession of O.C.E's cocktail, placed a small portion of the liquid drink into a sample bottle, sealed the bottle with a cap, and provided the bottled liquid to Agent Patel.

The agents escorted O.C.E to the vestibule of the main entrance inside the licensed premises, where the agents continued their investigation. Agent Castillo took a photograph of O.C.E in the vestibule of the main entrance of the licensed premises. Agent Patel issued a citation to O.C.E.

Agent Patel then went to the fixed bar and made contact with bartender Markarian. Agent Patel identified himself as a police officer to Markarian and explained the violation to him. Agent Patel asked Markarian if he saw the young girl with black hair that he served two drinks to on the other side of the bar. Markarian replied, "Yeah I did. I just missed it. Sorry man. I should have checked to see if she had a [wrist] band on or not. I must have not have [*sic*] been paying attention," and added that he should have checked O.C.E's identification. Agent Patel asked Markarian if he remembered what alcoholic beverage he had served to O.C.E. Markarian replied, "Honestly I don't know. I think it was a mixed drink. Am I going to get fired?"

Agent Patel then spoke with Mina Matta, the on-site manager at the licensed premises. Both agents and Matta walked to an office and viewed the video surveillance

of the incident. The video surveillance confirmed Agent Patel's observations of the violation.

After the hearing, the Department issued a decision determining the violation charged was proved and no defense was established. The decision imposed a penalty of 15 days' suspension.

Appellant then filed this appeal contending (1) the video evidence negates the ALJ's findings and conclusions of law, and (2) evidence of witness bias was improperly excluded.

DISCUSSION

I

Appellant contends that video surveillance evidence from the night in question shows that the Department's decision is erroneous. (App.Br., at p. 1, citing Exh. A.) Appellant claims the ALJ "fail[ed] to adopt as factual findings exactly what was depicted in these recordings." (*Ibid.*) Appellant argues the video clearly shows it was O.C.E's male companion who ordered the second cocktail, and not O.C.E. Appellant contends the Department agents only began observing after the order had been placed and "would not have presumed the guilt of the bartender had they been present to see the order being taken from the [two] over-age patrons." (App.Br., at p. 3.) Appellant argues that because the agents only watched the drinks being set down, and not being ordered, they misunderstood who the drink was for:

[T]hey incorrectly assumed that the bartender had intended to give the second drink to the underage female O.C.E. A minute later their incorrect assumption seemed confirmed when they spied O.C.E take a sip of that beverage. By mentally connecting O.C.E's sip with the bartender's placing of the drink on the bar caused the agents to draw the false inference that the drink had been given *to her*. But it clearly had not been. The bartender

gave them to the over 21 female for herself and the over 21 male standing behind her.

(App.Br., at p. 5, emphasis in original.)

Appellant has also appended a number of annotated still shots from the surveillance video to its brief. (See generally App.Br.)

As an initial matter, neither the still shots nor appellant's annotations are part of the administrative record. (See generally exhs.; see also Bus. & Prof. Code, § 23083 ["The Board shall determine the appeal upon the record of the department."] Moreover, appellant has not explained why these still shots could not have been produced at the administrative hearing—a necessary showing before this Board may remand a case for the review of additional evidence. (See Bus. & Prof. Code, § 23084(e); Code Regs., tit. 4, § 198.) Finally, the annotations are not supported by the testimony of any percipient witness. (See generally RT.) We therefore strike the still shots and accompanying annotations and decline to consider them in reaching our decision.

This Board is bound by the factual findings in the Department's decision as long as they 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.]

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

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

The trier of fact . . . is the sole arbiter of all conflicts in the evidence, conflicting interpretations thereof, and conflicting inferences which reasonably may be drawn therefrom; it is the sole judge of the credibility of the witnesses; may disbelieve them even though they are uncontradicted

if there is any rational ground for doing so, one such reason for disbelief being the interest of the witnesses in the case; and, in the exercise of sound legal discretion, may draw or may refuse to draw inferences reasonably deducible from the evidence.

(*Pescosolido v. Smith* (1983) 142 Cal.App.3d 964, 970-971 [191 Cal.Rptr. 415].) When findings are attacked as 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, that will support the findings. When two or more competing inferences of equal persuasiveness can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; see also 6 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 376, pp. 434-435.)

Section 25658(a) provides, in relevant part, "Except as otherwise provided . . . every person who sells, furnishes, gives, or causes to be sold, furnished, or given away any alcoholic beverage to any person under 21 years of age is guilty of a misdemeanor." (Bus. & Prof. Code, § 25658(a).)

In the common parlance, the word "furnish" means to "supply" or "give." (Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/furnish> [as of October 9, 2018].) Case law gives the word a broad meaning:

We shall make no effort to state definitively the meaning of the word "furnishes" used in section 25658(a). As used in a similar context the word "furnish" has been said to mean: "To supply; to offer for use, to give, to hand." [Citation.] It has also been said the word "furnish" is synonymous with the words "supply" or "provide." [Citation.] In relation to a physical object or substance, the word "furnish" connotes possession or control over the thing furnished by the one who furnishes it. [Citation.]

(*Bennett v. Letterly* (1977) 74 Cal.App.3d 901, 904-605 [141 Cal.Rptr. 682].) "As used in liquor laws, 'furnish' means to provide in any way, and includes giving as well as

selling." (*Fiorini v. City Brewing Co., LLC* (2014) 231 Cal.App.4th 306, 309 [179 Cal.Rptr.3d 827], citing Black's Law Dict. (4th rev. ed. 1968) at p. 804.)

The relevant question, then, is to whom bartender Markarian furnished—that is, "gave," "supplied," or "provided"—the alcoholic beverage in question. Despite appellant's insistence, the question of who placed the order, or for whom the alcoholic beverage was supposedly intended, is irrelevant if the evidence shows the alcoholic beverage was in fact furnished to O.C.E.

At appellant's insistence, we have reviewed the video surveillance. The video, however, is low-resolution and blurry. The angle of the camera prevents the viewer from determining the bartender's actions, or where on the bar the drinks were placed. Although a woman at the bar appears to take a sip of a beverage, it is unclear whether the drink was set in front of her or in front of the woman seated to her right.

The video, then, is unhelpful without supporting testimony to indicate what events are taking place. The percipient witnesses included Agents Patel and Castillo, minor O.C.E, and bartender Markarian.

Although appellant's manager, Matta, attempted to narrate the video, he acknowledged on cross-examination that he had not personally observed any of the events:

[BY MR. NGUYEN:] You weren't at the bar when this drink was served to somebody; correct?

[MR. MATTA:] I probably was not at the bar at the moment. But I have four bartenders on that day behind the bar.

Q Right. Some of the things that you were kind of narrating in the video, you were not present when they were occurring; correct? Some of the things—

A Correct. I was on the floor somewhere. If you look at all the videos, I'd probably be on the other side of the bar at one moment. You know, if you look within ten minutes, I'm always around the bar, especially on the service area on the other side.

Q But the video that we had watched previously—

A For the three minutes? No, I was not there.

(RT at pp. 106-107.) The ALJ therefore properly discredited Matta's narration of the events on the video. (Findings of Fact, ¶ 20.)

The ALJ also discredited Markarian's testimony and provided detailed reasoning for so doing:

The contentions and claims made by bartender Markarian are disbelieved because bartender Markarian could not recall material matters about which he testified, presented conflicting, self-serving testimony, and exhibited a bias in the presentation of his testimony as an employee to protect his employment. Agents Patel and Castillo have no bias or motive in the presentation of their testimony. Bartender Markarian admitted that he did *not recall* what happened on January 19, 2017, including how drinks were served and to whom he served drinks. Bartender Markarian did *not recall* the minor O.C.E, or that she was seated at the bar. He did *not recall* if minor O.C.E was seated next to her friend when her friend ordered the drinks. He did *not recall* whether he made two of the same kind of drink. He did *not recall* if he served both drinks at the same time. Then he claimed he served both drinks at the same time to the friend who ordered the drinks. He could *not recall* where the friend was when he served the two drinks. When asked whether he apologized to Agent Patel, bartender Markarian claimed, he "*may have* apologized," claiming it was "for the inconvenience," for Agent Patel taking time out of his day, but *did not recall* apologizing for serving an alcoholic beverage to a minor. He did *not recall* saying, "Yeah, I did. I just missed it. Sorry man. I should have checked to see if she had a [wrist] band on or not. I must have not been paying attention." His self-serving statement that he asked the female, when she ordered the drinks, for whom the second drink was, conflicts with the agents' credible testimony that bartender Markarian placed both drinks in front of minor O.C.E. If, in fact, bartender Markarian had asked the female for whom the second drink was and the female stated it was for the male behind her, then why did not bartender Markarian hand the first drink to the female and the second drink to the male, who stood behind the female instead of minor O.C.E. Bartender Markarian made another inconsistent statement that he "assumed the two drinks [he] was making were for the people, for her and *whoever* she ordered for." Bartender

Markarian claimed that after he served both drinks at the same time to the female who ordered the drinks he did not see what happened to the drinks after that because he "turned around to help the next guest." Immediately thereafter, bartender Markarian admitted that he did not then help the next guest, but collected payment from the female who ordered the drinks in the form of a credit card, then turned to the register to process the sale/payment, and admitted that when she signed the credit card receipt he did not *recall* if the two drinks were still in front of the female, the person he claimed to have placed the drinks before.

(Conclusions of Law, ¶ 9, emphasis in original.) The ALJ provided exceptionally thorough, sound reasoning in support of her determination that Markarian was not credible, and this Board is bound by that conclusion.

The ALJ instead credited testimony from O.C.E and from Agents Patel and Castillo. On direct examination, O.C.E testified that one drink was placed in front of her, and one in front of her female companion:

[BY MR. NGUYEN:] Was [the drink] for you and your friend, the female friend, or herself and the male, if you recall? Who were the drinks for?

[MS. O.C.E:] Well, it was just her and I sitting there. So she ordered them, and then they were put in front of us. But my friend was behind us, and he had another friend with him.

Q When you say the drinks were placed in front of you, were they placed—well, "in front of us," were they placed in front of you or your friend, if you recall?

A It was—there was one drink in front of each. It was one in front of my friend and then one in front of me.

(RT at p. 60.) She repeated this testimony on cross-examination. (RT at p. 66.)

The agents' testimony differed slightly from O.C.E's regarding the placement of the drinks. On direct examination, Agent Patel testified:

[BY MR. NGUYEN:] After Mr. Markarian finished making the first drink, what did he do with that drink, if anything?

[AGENT PATEL:] He placed them on the fixed bar countertop in front of the individuals.

Q Did he place it in front of a specific person or just generally in front of them?

A In front of O.C.E.

Q Did you see Ms. O.C.E do anything with that drink?

A She moved the drink—one of the drinks over to her friend.

Q Where was her friend sitting in relation to her?

A Directly next to her.

(RT at pp. 18-19.) On cross-examination, Agent Patel confirmed this testimony. (RT at p. 28.)

Agent Castillo testified similarly on direct examination:

[BY MR NGUYEN:] Did you see him make any drinks for Ms. O.C.E's group?

[AGENT CASTILLO:] Yes. He poured two drinks, which I observed him place directly in front of Ms. O.C.E.

Q Both at the same time or one by one?

A One by one.

Q So when Ms. O.C.E was—when the drink was first placed in front of Ms. O.C.E, what happened next?

A She slid one of the drinks over to the other female.

Q And when the second drink was served, who was that served to?

A To Ms. O.C.E.

Q Placed directly in front of her?

A Yes.

(RT at pp. 43-44.) Agent Castillo confirmed his testimony during cross-examination. (RT at p. 54.)

Testimony from all three witnesses the ALJ found credible indicates that at least one drink was set on the bar in front of O.C.E. As the ALJ pointed out, the inconsistency

as to whether both or only one of the two alcoholic beverages was set in front of O.C.E is immaterial:

The Respondent referenced conflicting testimony between the agents and minor O.C.E relating to whether bartender Markarian made the two drinks separately or at the same time, and whether he served them both at once, or separately, to the minor, or to the minor and her friend. First of all, the difference is without material consequence. The testimony of either minor O.C.E or the agents, by themselves, is sufficient to establish that a violation occurred. Either way, bartender Markarian, without checking for minor O.C.E's wristband or ID, served a distilled spirit to O.C.E, who was a minor.^[fn.]

(Conclusions of Law, ¶ 10.) The ALJ correctly applied the law. It does not matter whether Markarian placed one or two alcoholic beverages in front of O.C.E. In either case, he furnished alcohol to a minor.

Nor does the video surveillance evidence undermine this conclusion. As noted, the video is blurry; the two alcoholic beverages are not visible, even as the woman to the left leans over to take a sip. Accordingly, the best evidence available is not the surveillance video, but the testimony offered by Agents Patel and Castillo and by O.C.E.

II

Appellant contends the ALJ improperly excluded evidence of O.C.E's criminal plea agreement. (App.Br., at p. 6.) According to appellant, it was "entitled to inquire about how her testimony was tainted by the motivation to please the Department so that she could obtain a plea deal regarding her pending criminal charges." (*Id.*, at p. 7.)

Appellant also points out that the ALJ "assur[ed] Miss O.C.E that no 'adverse inference' would apply if she were to refuse to testify." (App.Br., at p. 6.) According to appellant, this indicates witness manipulation on the part of the ALJ—that the "Department's judge was reminding the witness of her criminal charges and of a threat

of 'adverse inferences' that the Department could still use against [her] if something wrong was said." (*Ibid.*)

The Department counters that "[t]he status of [O.C.E's] criminal case was irrelevant to the issue of whether Mr. Markarian furnished an alcoholic beverage to [O.C.E]." (Dept. Reply Br., at p. 8.)

Appellant has appended to its brief a series of documents it claims indicate the disposition of O.C.E's criminal matter.

As in Part I, *supra*, the documents appellant has appended to its brief are not part of the administrative record. (See generally exhs.; see also Bus. & Prof. Code, § 23083 ["The Board shall determine the appeal upon the record of the department."] This Board may not consider them.

This Board may, however, remand if there is evidence which, despite the exercise of reasonable diligence, could not have been produced at the time of the administrative hearing, or was improperly excluded. (Bus. & Prof. Code, § 23084(e).)

Appellant argues evidence of witness bias, in the form of certain lines of questioning, was improperly excluded. Appellant writes, "Inquiry into the criminal charges pending against the witness was relevant to the witness' bias, yet it was unfairly excluded, and therefore the decision must be reversed." (App.Br., at p. 6.)

The ALJ did sustain objections, on grounds of relevance, to two questions related to O.C.E's criminal citation. Upon the Department's objection, however, appellant did not argue why these lines of questioning were relevant, and made no mention whatsoever of witness bias.

On cross-examination of O.C.E, for example, Matta, acting as appellant's representative, asked only about O.C.E's citation and court date:

[BY MR. MATTA:] So you were issued a citation outside?

[MS. O.C.E:] Uh-huh.

Q Did you go to the court?

MR. NGUYEN: I'm going to object, your Honor, as to relevance.

THE COURT: Sustained.

BY MR. MATTA:

Q How did your friend feel about the citation?

MR. NGUYEN: Your Honor, I'm going to object as to relevance as well.

THE COURT: Sustained.

(RT at pp. 68-69.) The ALJ sustained objections to two questions, neither of which implicated a plea deal or supported appellant's claim, before this Board, that O.C.E's testimony was somehow "tainted." The first question asked only whether O.C.E went to court—a fact that is indeed irrelevant to whether appellant's bartender furnished an alcoholic beverage to her, and which implies nothing regarding bias or motive to testify. The second question—regarding how O.C.E's friend felt about the citation—is even less relevant. Both objections were properly sustained.

Moreover, during closing argument appellant made no mention of witness bias. Appellant argued only that "[w]e do not know what happened to Ms. O.C.E, but she never showed up to court as far as we investigate and knew to her court date." (RT at p. 114.) Appellant offered no evidence in support of that contention and did not argue why O.C.E's appearance or absence at her criminal court date was relevant to her testimony or to the disciplinary action at hand.

In short, appellant did not raise the argument of a purported plea agreement or witness bias at the administrative hearing. It is therefore waived.

Additionally, the ALJ's comment to O.C.E at the beginning of her testimony was not, as appellant argues, an attempt to manipulate a witness or induce testimony unfavorable to appellant. It was, in fact, a reminder of her Fifth Amendment rights:

THE COURT: Okay. I'm going to give you an instruction. I understand that there may be some criminal charges being filed or already filed against you. You have a privilege against self-incrimination that gives you the right not to testify in this case. I will not draw an adverse inference against you if you exercise that right.

If you chose to waive your right against self-incrimination, anything you say may be used against you in a criminal case.

However, I want to make it clear to you that I'm not compelling you to testify here today. And I am not granting you immunity if you choose to waive your privilege and testify. Do you understand what I've said to you?

[MS. O.C.E:] Yes.

(RT at p. 57.) There is nothing nefarious whatsoever in this exchange; the ALJ was simply reminding O.C.E of the rights guaranteed to her by both the United States and California constitutions. (See U.S. Const., Amend. V ["No person . . . shall be compelled in any criminal case to be a witness against himself."]; Cal. Const., art. 1, § 15.) Appellant's position—that the ALJ was implicitly threatening O.C.E with criminal consequences should her testimony not align with the Department's interests—is wholly unsupported.

Finally, even if O.C.E had chosen not to testify, or if her testimony were discredited or excluded, cause for disciplinary action was established via testimony from Agents Patel and Castillo—two percipient witnesses whom the ALJ found credible.

In sum, appellant has shown no grounds for relief.

ORDER

The decision of the Department is affirmed.²

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
MEGAN MCGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

2. This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.

APPENDIX

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

IN THE MATTER OF THE ACCUSATION
AGAINST:

TK MANAGEMENT INC
TILTED KILT PUB & EATERY
12409 MARIPOSA RD
VICTORVILLE, CA 92395-6017

ON-SALE GENERAL EATING PLACE -
LICENSE

Respondent(s)/Licensee(s)
under the Alcoholic Beverage Control Act.

RIVERSIDE DISTRICT OFFICE

File: 47-548753

Reg: 17085860

AB: 9701

2018 JUN 11 PM 2:40
RECEIVED
ABC APPEALS BOARD

CERTIFICATION

I, Dominique Williams, do hereby certify that I am a Senior Legal Analyst for the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that annexed hereto is a true, correct and complete record (not including the Hearing Reporter's transcript) of the proceedings held under Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code concerning the petition, protest, or discipline of the above-listed license heretofore issued or applied for under the provisions of Division 9 of the Business and Professions Code.

IN WITNESS WHEREOF, I hereunto affix my signature on June 11, 2018, in the City of Sacramento, County of Sacramento, State of California.



Office of Legal Services

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

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

TK MANAGEMENT INC
TILTED KILT PUB & EATERY
12409 MARIPOSA ROAD
VICTORVILLE, CA 92395-6017

ON-SALE GENERAL EATING PLACE - LICENSE

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

RIVERSIDE DISTRICT OFFICE

File: 47-548753

Reg: 17085860

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 March 27, 2018. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

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

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

On or after May 8, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: March 28, 2018



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

TK Management Inc.	}	File: 47-548753
dba Tilted Kilt Pub & Eatery	}	
12409 Mariposa Road	}	Reg.: 17085860
Victorville, California 92395-6017	}	
	}	License Type: 47
Respondent	}	
	}	Word Count: 20,733
	}	
	}	Reporter:
	}	Brywn Whatford
	}	Kennedy Court Reporters
	}	
<u>On-Sale General Eating Place License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at San Bernardino, California, on December 14, 2017.

Jonathan Nguyen, Attorney, represented the Department of Alcoholic Beverage Control.

Mina M. Matta, represented Respondent, TK Management Inc., which was not represented by counsel.

The Department seeks to discipline the Respondent's license on the grounds that, on or about January 19, 2017, the Respondent, through its agent or employee, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to wit: distilled spirits, to O.C.E 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 December 14, 2017.

FINDINGS OF FACT

1. The Department filed the accusation on August 24, 2017.

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

2. The Department issued a type 47, On-sale general eating place license to the Respondent for the above-described location on December 22, 2014 (the Licensed Premises).

3. There is no record of prior departmental discipline against the Respondent's license.

4. At the start of the hearing, the parties stipulated that the drink alleged in count one of the accusation was distilled spirits.

5. O.C.E. was born on March 26, 1996. On January 19, 2017, she was 20 years old.

6. On January 19, 2017, at approximately 9:50 p.m., Department Agents Mehul Patel

(Agent Patel) and Gilbert Castillo (Agent Castillo) arrived in a plain clothes capacity at the Licensed Premises; conducting Departmental enforcement/spot checks in the Victorville, high desert area. At the front entrance of the Licensed Premises a security guard checked the agents' identification (ID) and gave them blue Bud Light wrist bands to indicate they were 21 years or older. The agents proceeded to the center of the Licensed Premises near fixed tables by the fixed bar. Agent Patel ordered a can of 805 beer from a waitress, who happened to walk by them. The agents remained in that position for a few minutes and began surveying the crowd for anyone who looked under 21 years of age consuming alcoholic beverages.

7. The agents then proceeded to the southwest corner of the fixed bar and began observing the patrons. The agents immediately noticed a group of three patrons, two females seated at the southwest side of the fixed bar and a male patron standing behind the females. The agents noticed that one of the females had on her wrist a blue wristband, as did the male patron standing behind the females. The agents both noticed the second female, who appeared youthful to them and who did not have a wristband. The youthful appearing female was later identified as O.C.E. (hereinafter referred to as minor O.C.E.). The agents continued to serve minor O.C.E. to determine whether she would consume alcoholic beverages.

8. The agents then observed a bartender performing bartending duties behind the bar. The bartender was later identified as Brock Zareh Markarian (hereinafter referred to as bartender Markarian). The agents saw bartender Markarian make two alcoholic beverages using distilled spirits from a bowl in front of minor O.C.E. and her friend. Bartender Markarian made both distilled spirit beverages, later identified as a Sex On The Beach cocktail, which is an alcoholic beverage. Bartender Markarian mixed the Sex On The Beach cocktails and placed them on the bar counter directly in front of minor O.C.E. Minor O.C.E. slid the first Sex On The Beach drink to her female friend seated directly next to her. Minor O.C.E. grabbed the second distilled spirit beverage placed in

front of her and took a sip from the glass, consuming the alcoholic beverage. Bartender Markarian appeared to be facing minor O.C.E while she took the said sip. Bartender Markarian did not check to see whether minor O.C.E was wearing a blue Bud Light wristband or not, and he did not ask minor O.C.E for her ID.

9. Bartender Markarian collected payment for the two Sex On The Beach cocktails from minor O.C.E's female friend, who had ordered the two said cocktail drinks from the bartender while seated at the same location at which she paid for the drinks with a credit card. At no time during the evening did bartender Markarian ask for minor O.C.E's ID.

10. Agents Patel and Castillo then approached the three said patrons and identified themselves as police officers. Agent Castillo asked to see the IDs of the female and male companion to minor O.C.E. Agent Castillo determined the male and female to be over the age of 21. Agent Patel made contact with minor O.C.E and asked her for her ID. Minor O.C.E provided her California Driver License to Agent Patel. Minor O.C.E's California Driver License has a vertical orientation, and shows her correct date of birth. (Exhibit 2A.) Agent Patel asked minor O.C.E what drink she was drinking, to which she replied, "Sex On The Beach." Agent Patel asked her if she knew what kind of alcohol that drink contained. Minor O.C.E said she believed the drink contained vodka and some juice. The drink tasted like it had alcohol in it to minor O.C.E.

11. Once Agent Patel confirmed minor O.C.E to be under 21 years of age he requested that Agent Castillo secure the alcoholic beverage from which minor O.C.E had taken a sip. Agent Castillo took possession of minor O.C.E's cocktail, placed a small portion of the liquid drink into a sample bottle, sealed the bottle with a cap, and provided the bottled liquid to Agent Patel.²

12. The agents escorted minor O.C.E to the vestibule of the main entrance inside the Licensed Premises where the agents continued their investigation. Agent Castillo took a photograph of minor O.C.E in the vestibule of the main entrance of the Licensed Premises. (Exhibit 2B.) Agent Patel issued a citation to minor O.C.E.

13. Agent Patel then went to the fixed bar and made contact with bartender Markarian. Agent Patel identified himself as a police officer to bartender Markarian and explained the violation to him. Agent Patel asked bartender Markarian if he saw the young girl with the black hair that he served two drinks to on the other side of the bar, to which he replied, "Yeah I did. I just missed it. Sorry man. I should have checked to see if she had a [wrist] band on or not. I must have not have been paying attention" and added that he should have checked minor O.C.E's ID. Agent Patel asked bartender Markarian if he remembered what alcoholic beverage he had served to minor O.C.E, to which bartender

² Agent Patel later transported the bottled liquid to the Riverside District Office, placed a tape on it to secure it, logged, booked and placed it into the evidence locker.

Markarian replied, "Honestly I don't know. I think it was a mixed drink. Am I going to get fired?"

14. Agent Patel then spoke with Mina Matta, the on-site manager at the Licensed Premises. Both agents and Mr. Matta walked to an office and viewed the video surveillance of the incident. The video surveillance confirmed Agent Patel's observations of the said violation and what he observed that evening. (Exhibit A.)

15. O.C.E. appeared and testified at the hearing. She appeared her age. O.C.E. testified that bartender Markarian did not ask for her ID and served her distilled spirits at the Licensed Premises on January 19, 2017.

16. Bartender Brock Zareh Markarian appeared and testified at the hearing. He could not recall material matters about which he testified. He did not recall what happened on January 19, 2017, including how drinks were served and to whom he served drinks. Bartender Markarian did not recall the minor O.C.E., or that she was seated at the bar. He recalled that after the violation the officer asked a lot of questions and he was not able to answer them "because I did not know the answers at the time."

17. Bartender Markarian acknowledged that Respondent's policy requires bartenders serve alcoholic drinks to patrons 21 years or older. January 19, 2017, was a Thursday night, normally the busiest night for Respondent, in that Respondent provides a Latin Caliente Night with a Spanish disc jockey, music and dance floor for patrons. Security checks patron identification at the door and places wristbands on patrons who are 21 years of age or older. Policy requires that bartenders still ask patrons for ID if they look 30 years of age or under, regardless if they are wearing a wristband or not. Bartender Markarian received an alcoholic beverage serving certificate, on-line from some third party entity, which he did not recall.

18. Bartender Markarian had to view the video surveillance to get an idea of what happened on January 19, 2017. From viewing that video he said minor O.C.E.'s friend ordered two drinks from bartender Markarian. Bartender Markarian claimed the friend pointed to a male patron behind her and bartender Markarian asked if the second drink order was for the male patron. He claimed he asked for the ID of the friend. He did not recall if minor O.C.E. was seated next to the friend when the friend ordered the drinks. He did not recall whether he made two of the same kind of drink. He did not recall if he served both drinks at the same time. Then he claimed he served both drinks at the same time to the friend who ordered the drinks. He could not recall where the friend was when he served the two drinks. He thought she might have been on the same side of the pillars when she ordered the drinks. He did not know what happened to the two drinks or where they were at the time he collected payment from the female friend to minor O.C.E.

19. Bartender Markarian had never prior to January 19, 2017, seen minor O.C.E or here friends. During cross-examination the Department attorney read from the agent's report, that Agent Patel asked bartender Markarian if he saw the young girl with black hair hee served two drinks to on the other side of the bar, and that the report states bartendere Markarian replied, "Yeah, I did. I just missed it. Sorry man. I should have checked toe see if she had a [wrist] band on or not. I must have not been paying attention." Thee Department attorney queried bartender Markarian whether he recalled making thate statement, towhich bartender Markarian replied he did not recall. The Departmente attorney continued to read from the report, regarding Agent Patel's question as to whate drink was served to that person, and read bartender Markarian's reply, "Honestly I don'te know. I think it was a mixed drink. Am I going to get fired?" Bartender Markariane recalled making those statements.e

20. Mina M. Matta appeared and testified at the hearing. He said on January 19, 2017,e heewas working as the on-site manager at the Licensed Premises. He did not witness thee events to which the agents and minor O.C.E testified or the violation at hand. He recallede seeing the agents with minor O.C.E in the vestibule of the main entrance of thee establishment where he approached the agents to ensure everything was okay. Thee agents informed Mr.eMatta they would find him and talk to him when they were finished.e Mr. Matta recalled that he went to bartender Markarian and asked him what hade happened, to which bartender Markarian replied he did not know. Mr. Mattae acknowledged that, regarding his narration during the watching of the video at thee hearing, he was not present on January 19, 2017, when the events he narrated weere occurring. His narrations of the video were descriptions of what he believed he saw wase occurring on the video.e

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

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) providee that a license to sell alcoholic beverages may be suspended or revoked if continuation ofe the license would be contrary to public welfare or morals.e

2. Section 24200(b) provides that a licensee's violation, or causing or permitting of ae violation, of any penal provision of California law prohibiting or regulating the sale ofe alcoholic beverages is also a basis for the suspension or revocation of the license.e

3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes toe be sold, furnished, or given away, any alcoholic beverage to any person under the age ofe 21 years is guilty of a misdemeanor.e

4. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on January 19, 2017, Respondent-Licensee's employee, Brock Zareh Markarian, inside the Licensed Premises, furnished an alcoholic beverage, to wit: distilled spirits, too O.C.E, a person under the age of 21, in violation of Business and Professions Code Section 25658(a). (Findings of Fact ¶¶ 4-13.)

5. Section 25660 provides a defense to any person who was shown and acted in reliance upon bona fide evidence of majority in permitting a minor to enter and remain in a public premises in contravention of section 25665, in making a sale forbidden by section 25658(a), or in permitting a minor to consume in an on-sale premises in contravention of section 25658(b).

The defense offered by this section is an affirmative defense. As such, the licensee has the burden of establishing all of its elements, namely, that evidence of majority and identity was demanded, shown, and acted on as prescribed.³ To provide a defense, reliance on the document must be reasonable, that is, the result of an exercise of due diligence. This section applies to identifications actually issued by government agencies as well as those which purport to be.⁴ A licensee or his or her employee is not entitled to rely upon an identification if it does not appear to be a bona fide government-issued identification or if the personal appearance of the holder of the identification demonstrates above mere suspicion that the holder is not the legal owner of the identification.⁵ The defense offered by section 25660 is not established if the appearance of the minor does not match the description on the identification. Thus, reasonable reliance cannot be established unless the appearance of the person presenting identification indicates that he or she could be 21 years of age and the seller makes a reasonable inspection of the identification offered.

6. In the present case, the Respondent failed to meet their burden of proof in establishing any of the elements of the affirmative defense. They did not show that evidence of majority and identity was demanded, shown, and acted on as prescribed. Bartender Markarian failed to request to see O.C.R's ID and failed to even note that she was *not* wearing a blue Bud Light wrist band, which would have been a red flag too

³

Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control, 261 Cal. App. 2d 181, 189, 67 Cal. Rptr. 734, 739 (1968); 27 Ops. Atty. Gen. 233, 236 (1956).

⁴ *Dept. of Alcoholic Beverage Control v. Alcoholic Control Appeals Bd. (Masani)*, 118 Cal. App. 4th 1492, 1444-45, 13 Cal. Rptr. 3d 826, 837-38 (2004).

⁵ *Masani*, 118 Cal. App. 4th at 1445-46, 13 Cal. Rptr. 3d at 838; *5501 Hollywood, Inc. v. Department of Alcoholic Beverage Control*, 155 Cal. App. 2d 748, 753, 318 P.2d 820, 823-24 (1957); *Keane v. Reilly*, 130 Cal. App. 2d 407, 411-12, 279 P.2d 152, 155 (1955); *Conti v. State Board of Equalization*, 113 Cal. App. 2d 465, 466-67, 248 P.2d 31, 32 (1952).

⁶ *5501 Hollywood*, 155 Cal. App. 2d at 751-54, 318 P.2d at 822-24; *Keane*, 130 Cal. App. 2d at 411-12, 279 P.2d at 455 (construing section 61.2(b), the predecessor to section 25660).

him that she was under the age of 21 and should not have been served alcoholic beverages. It would have been incumbent upon bartender Markarian to demand to see her ID given that O.C.E appears her age, which was 20 at the time of said violation. Bartender Markarian testified that policy requires he ask for ID of patrons appearing under 30. Minor O.C.E certainly did not appear 30. At the hearing, O.C.E appeared her age, in-person, to the undersigned. In fact, sworn, direct testimony by Agents Patel and Castillo confirmed O.C.E had a youthful appearance on January 19, 2017, so much so that it caused both agents to become suspicious she was under 21 and to continue to observe her to determine whether she would consume alcoholic beverages. (Exhibit 2B). Bartender Markarian had never prior to January 19, 2017, seen minor O.C.E or her friends. (Findings of Fact ¶¶ 4 through 10, 12, 15, 17, and 19.)

7. In determining the credibility of a witness, as provided in section 780 of the Evidence Code, the administrative law judge may consider any matter that has any tendency in reason to prove or disprove the truthfulness of the testimony at the hearing, including the manner in which the witness testifies, the extent of the capacity of the witness to perceive, to recollect, or to communicate any matter about which the witness testifies, a statement by the witness that is inconsistent with any part of the witness's testimony at the hearing, the extent of the opportunity of the witness to perceive any matter about which the witness testifies, the existence or nonexistence of any fact testified to by the witness, and the existence or nonexistence of a bias, interest, or other motive.

8. If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust. (Evidence Code, section 412.)

9. Using the factors set forth in the Evidence Code sections above, and in balancing the conflicting testimony between the agents and bartender Markarian, the agents' testimony is deemed more credible. The agents had a better recollection of material matters. The contentions and claims made by bartender Markarian are disbelieved because bartender Markarian could not recall material matters about which he testified, presented conflicting, self-serving testimony, and exhibited a bias in the presentation of his testimony as an employee to protect his employment. Agents Patel and Castillo have no bias or motive in the presentation of their testimony. Bartender Markarian admitted that he did *not recall* what happened on January 19, 2017, including how drinks were served and to whom he served drinks. Bartender Markarian did *not recall* the minor O.C.E or that she was seated at the bar. He did *not recall* if minor O.C.E was seated next to her friend when her friend ordered the drinks. He did *not recall* whether he made two of the same kind of drink. He did *not recall* if he served both drinks at the same time. Then he claimed he served both drinks at the same time to the friend who ordered the drinks. He could *not recall* where the friend was when he served the two drinks. When asked

whether he apologized to Agent Patel, bartender Markarian claimed, he "*may have apologized,*" claiming it was "for the inconvenience," for Agent Patel taking time out of his day, but *did not recall* apologizing for serving an alcoholic beverage to a minor. He *did not recall* saying, "Yeah, I did. I just missed it. Sorry man. I should have checked to see if she had a [wrist] band on or not. I must have not been paying attention." His self-serving statement that he asked the female, when she ordered the drinks, for whom the second drink was, conflicts with the agents' credible testimony that bartender Markarian placed both drinks in front of minor O.C.E. If, in fact, bartender Markarian had asked the female for whom the second drink was and the female stated it was for the male behind her, then why did not bartender Markarian hand the first drink to the female and the second drink to the male, who stood behind the female instead of minor O.C.E. Bartender Markarian made another inconsistent statement that he "assumed the two drinks [he] was making were for the people, for her and *whoever* she ordered for." Bartender Markarian claimed that after he served both drinks at the same time to the female who ordered the drinks he did not see what happened to the drinks after that because he "turned around to help the next guest." Immediately thereafter, bartender Markarian admitted that he did not then help the next guest, but collected payment from the female who ordered the drinks in the form of a credit card, then turned to the register to process the sale/payment, and admitted that when she signed the credit card receipt he did not *recall* if the two drinks were still in front of the female, the person he claimed to have placed the drinks before.

10. The Respondent referenced conflicting testimony between the agents and minor O.C.E. relating to whether bartender Markarian made the two drinks separately or at the same time, and whether he served them both at once, or separately, to the minor, or to the minor and her friend. First of all, the difference is without material consequence. The testimony of either minor O.C.E. or the agents, by themselves, is sufficient to establish that a violation occurred. Either way, bartender Markarian, without checking for minor O.C.E.'s wristband or ID, served a distilled spirit to O.C.E., who was a minor.⁷

PENALTY

The Department requested the Respondent's license be suspended for a period of 15 days, given the short duration of licensure. The Respondent did not recommend a penalty in the event the accusation was sustained. The Respondent argued that dismissal of the accusation was appropriate. The Respondent argued that bartender Markarian simply made a mistake, "he never intentionally served alcohol to a minor." Section 25658(a) is not an intent-based statute—the seller's intent does not determine whether there is a

⁷ It should be noted that all three of the Department's witnesses testified credibly. People do not usually describe the same event in the same manner—word choice, and so forth will naturally vary from person to person. The minor differences in the testimony between the agents and minor O.C.E. do not call into question their credibility.

violation or not. Similarly, rule 144⁸ does not list lack of intent or mistake as mitigation factors. The penalty recommended herein complies with rule 144.

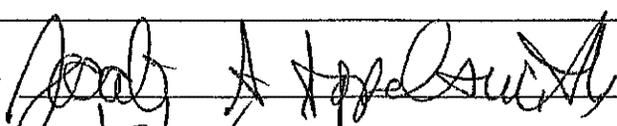
ORDER

The Respondent's on-sale general eating place license is hereby suspended for a period of 15 days.

Dated: January 16, 2018



D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By:  _____
Date: 3/27/18 _____

⁸ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.