

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

AB-9900

File: 21-449736; Reg: 19089463

LUCKY STORES, INC.,
dba Lucky's #756
1750 Fulton Street
San Francisco, CA 94117,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: June 11, 2021
Telephonic

ISSUED JUNE 11, 2021

Appearances: *Appellant:* Gillian Garrett, of Hinman & Carmichael, LLP, as counsel
for Lucky Stores, Inc.,

Respondent: Sean Klein, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

Lucky Stores, Inc., doing business as Lucky's #756 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 25 days, because its agent or employee sold an alcoholic beverage to a minor, in violation of Business and Professions Code² section 25658(a).

¹The decision of the Department, dated January 13, 2021, is set forth in the appendix.

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

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on March 6, 2007. There are two prior records of departmental discipline against the license, with one occurring within 36 months of the present violation.

On November 4, 2019, the Department filed an accusation against appellant charging that, on September 13, 2019, appellant's employee Maria Low (the cashier) sold an alcoholic beverage to 18-year-old Kay Silveria (the minor).

At the two-day administrative hearing held on February 13, 2020 and October 8, 2020, documentary evidence was received, and testimony concerning the sale was presented by the minor and Department Agent Daniel Louie. Michael Jerry Lee, store manager at the licensed premises, testified on appellant's behalf.

Testimony established that on September 13, 2019, at approximately 9:30 p.m., the minor went to the licensed premises with her roommate, Maggie Marlow (Marlow), to obtain some wine and Fireball whiskey. She went to the wine section of the licensed premises and selected three 750 ml bottles of Smoking Loon chardonnay wine. She also located Fireball whiskey in a locked display cabinet and asked one of appellant's employees to get it for her. The employee obtained the Fireball whiskey and carried it to the front of the store. Marlow went to a different check stand to purchase other non-alcoholic beverage items/goods and played no role in the minor's purchase.

At the check stand, the minor told the cashier she had a bottle of Fireball whiskey up front. Another employee brought the whiskey to the check stand and the cashier began to ring up the sale. The minor had four bottles of alcoholic beverages total: three bottles of chardonnay wine and one bottle of whiskey.

The cashier asked the minor for her identification and the minor showed her a false California Driver's License. The minor did not take the identification out of her wallet, but rather, held it out for the cashier to see. The cashier looked at the identification in the wallet for one to two seconds but did not touch or handle it. Likewise, the cashier did not ask the minor any questions about the identification or otherwise confirm or ascertain the minor's age. The cashier then proceeded to ring up the sale. The minor paid for her items and she left the check stand area to rejoin Marlow. Both the minor and Marlow then exited the licensed premises.

Outside the licensed premises, Agent Louie and another agent detained the minor as she was putting the alcoholic beverages into a backpack. Agent Louie observed the minor while she was in the store and witnessed her select and purchase the alcoholic beverages. To him, the minor and Marlow appeared youthful and he thought they could be under 21 years of age. The minor was 5'4" tall and weighed approximately 140 pounds. She had black hair and brown eyes and was wearing a dark Patagonia jacket and blue jean style skirt. Agent Louie asked the minor her age and she told him she was 23 years old and handed Agent Louie a false California Driver's License. Agent Louie told the minor that her identification was false based on the poor quality of the photo. The minor confessed she was not 21 years old and presented her authentic identification, showing her to be 18 years old.

Agent Louie also interviewed the cashier, who confirmed she did not hold or touch the minor's identification. She also did not look at the descriptors on it or look at the expiration date. The cashier also told Agent Louie that she did not receive any special training from appellant regarding alcoholic beverage sales procedures. Agent

Louie cited the cashier for selling/furnishing an alcoholic beverage to a minor and she was released at the scene.

On October 18, 2020, the administrative law judge (ALJ) issued a proposed decision recommending that the accusation be sustained, and that appellant's license be suspended for a period of 25 days. The Department adopted the proposed decision on December 29, 2020 and issued a certificate of decision on January 13, 2021. Appellant filed a timely appeal contending: 1) substantial evidence does not support that the Department's findings that appellant failed to establish a defense under section 25660; 2) substantial evidence does not support the Department's findings that the appellant knew or should have known the minor was underage or her identification was false, and; 3) the Department's requirement that the cashier "touch" the minor's false identification constitutes an underground regulation in violation of the Administrative Procedures Act ("APA").

DISCUSSION

I

SUBSTANTIAL EVIDENCE

Appellant contends the Department erred in rejecting their section 25660 defense. (AOB, at pp. 8-10.) Specifically, appellant argued that the cashier reasonably relied on the minor's fake identification. (*Id.* at p. 9.) Further, appellant maintains that there is no substantial evidence that appellant knew or should have known that the minor's identification was fake. (*Id.* at pp. 10-12.)

Section 25660(c) provides:

Proof that the defendant-licensee, or his or her employee or agent, demanded, was shown, and acted in reliance upon [a government-issued

identification or identification purporting to be government-issued³] shall be a defense to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon.

(Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.

(2004) 118 Cal.App.4th 1429, 1444-1445 [13 Cal.Rptr.3d 826, 837] (Masani).)

However, section 25660 must be narrowly construed and the licensee has the burden of establishing the defense. *(Lacabanne Properties, Inc. v. Alcoholic Beverage etc.*

Appeals Board (1968) 261 Cal.App.2d 181, 189-190 [67 Cal.Rptr. 734] (Lacabanne).)

One of the requirements of section 25660 is that a licensee must show that reliance on the false identification was *reasonable*. *(Lacabanne, supra, at p. 189; 5501 Hollywood v. Dept. of Alcoholic Bev. Control (1957) 155 Cal.App.2d 748, 753-754 [318 P.2d 820] (5501 Hollywood).)* In other words, a licensee (or employee) must exercise the caution that a reasonable and prudent person would show in the same or similar circumstances. *(Lacabanne, supra, at p. 189; Farah v. Alcoholic Bev. Control Appeals Bd. (1958) 159 Cal.App.2d 335, 339 [324 P.2d 98]; 5501 Hollywood, supra, at p. 753.)* Further, reasonable reliance cannot be established if the appearance of the person

³ It is immaterial whether the identification used was actually government-issued.

In *Masani*, the court said:

The licensee should not be penalized for accepting a credible fake that has been reasonably examined for authenticity and compared with the person depicted. A brilliant forgery should not ipso facto lead to licensee sanctions. In other words, fake government ID's cannot be categorically excluded from the purview of section 25660. The real issue when a seemingly bona fide ID is presented is the same as when actual governmental ID's are presented: reasonable reliance that includes careful scrutiny by the licensee.

(Masani, supra at p. 1445.)

presenting the identification is “too young in appearance to be 21.” (*5501 Hollywood, supra*, at p. 754.)

Finally, the Department’s findings regarding a section 25660 defense will be upheld so long as those findings are supported by substantial evidence. (*Masani, supra*, at p. 1437; *Kirby v. Alcoholic Beverage Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628] [“In considering the sufficiency of the evidence issue the court is governed by the substantial evidence rule[;] any conflict in the evidence is resolved in favor of the decision; and every reasonably deducible inference in support thereof will be indulged. [Citations.]”.) 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.)

In the instant case, the Department rejected appellant’s section 25660 defense because “Agent Louie, a 9-year veteran ABC Agent who had training and extensive experience examining/assessing false identifications testified the photo of [the minor] on her false identification was not as clear as it should have been compared to an authentic identification.” (Determination of Issues, ¶ 8.) Agent Louie “indicated as soon as he saw her photo, he knew it was a false identification [and appellant] presented no witness that offered evidence to the contrary.” (*Ibid.*) Further, since the actual fake identification at issue was never admitted into evidence by appellant,⁴ the Department found that appellant did not meet its burden of proof to establish a defense under section 25660. (*Id.* at ¶ 9.)

⁴ A photograph of the fake identification (exh. 6b) was admitted into evidence, but not the actual false identification presented to the cashier.

Based on the above, the Department's findings that the cashier did not reasonably rely on the minor's false identification, and should have known that the identification was false, are supported by substantial evidence. These findings were based upon Agent Louie's testimony that the picture on the false identification was so unclear that it indicated the identification was fake. Further, it was appellant's burden to establish the section 25660 defense. Yet it did not produce any evidence at the hearing, either the false identification at issue or testimony from the cashier, to show that the clerk reasonably relied on the minor's fake identification. The Board cannot simply second guess the Department and reach a different conclusion based upon its own observations of the evidence. Therefore, the Department's findings must stand.

II

UNDERGROUND REGULATION

Appellant argues the decision below is "invalid" because it amounts to an underground regulation in violation of the APA. (AOB, at pp. 12-15.) The APA defines "regulation" broadly. Government Code section 11342.600 defines "regulation" as "every rule, regulation, order, or standard of general application ... adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." The APA also requires regulations to be adopted through the formal rulemaking process. Government Code section 11340.5, subdivision (a) provides:

No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation[.]

All regulations are subject to the APA rulemaking process unless expressly exempted by statute. (Gov. Code, § 11346; *Engelmann v. State Bd. of Education* (1991) 2 Cal.App.4th 47, 59 [3 Cal.Rptr.2d 264].) If a regulation is not properly adopted, it has no legal effect. (*Armistead v. State Personnel Bd.* (1978) 22 Cal.3d 198, 204-205 [149 Cal.Rptr. 1].)

There are two key traits that identify a regulation: (1) the agency must intend its rule to apply generally, rather than in a specific case, and; (2) the rule must implement, interpret, or make specific the law either enforced by the agency or which governs the agency's procedure. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571 [59 Cal.Rptr.2d 186] (*Tidewater*).)

However, *Tidewater* listed several instances that do not constitute a regulation and are thus exempt from the rulemaking requirement. Most relevant here, "interpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as precedents in similar subsequent cases." (*Tidewater, supra*, at p. 571; accord *Capen v. Shewry* (2007) 155 Cal.App.4th 378, 387 [65 Cal.Rptr.3d 890] ["If the interpretation arises in the course of an enforcement proceeding involving the adjudication of a specific case it is not a regulation subject to the APA."].)

Here, appellant complains there is no formal rule or regulation in place about "touching the ID" during sales of alcoholic beverages where an identification is shown. (AOB, p. 12.) Specifically, the appellant claims that such a requirement "... amounts to a general rule narrowing protections for licensees and subjecting them to a new and higher standard of due diligence." (*Ibid.*) As such, appellant argues the Department's decision violates statutory requirements and is void. (*Ibid.*)

However, in its brief, appellant fails to articulate how the decision created a rule of general applicability. Nowhere in the decision did the Department order that its interpretation of section 25660 be generally applied; e.g., that a clerk must physically touch an identification for an examination to be reasonable. The Department merely notes that the cashier did not physically touch or inspect the minor's identification in this matter.

Further, the decision makes it clear that the Department did not focus on the fact that the cashier failed to touch the minor's ID, but rather, that the clarity of the picture on the false ID indicated that it was fake. A reasonable examination of an identification is already required under section 25660. The cashier's failure to notice that the minor's picture on the false identification was "not as clear as it should have been compared to an authentic identification" is specific to the facts and circumstances of *this* appeal. (Determination of Issues, ¶ 8.) In short, rules are mandatory, and the Department's analysis of the clerk's examination was explanatory. This Board cannot say that the Department's decision was the product of an underground regulation.

ORDER

The decision of the Department is affirmed.⁵

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

⁵ This final order is filed in accordance with Business and Professions Code section 23088 and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7.

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

APPENDIX

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

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

LUCKY STORES INC.
LUCKY'S #756
1750 FULTON ST
SAN FRANCISCO, CA 94117

OFF-SALE GENERAL - LICENSE

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

CONCORD DISTRICT OFFICE

File: 21-449736

Reg: 19089463

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 December 29, 2020. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

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

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

On or after February 23, 2021, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: January 13, 2021



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Lucky Stores Inc.	}	File: 21-449736
Dbas: Luckys #756	}	
1750 Fulton St.	}	Reg.: 19089463
San Francisco, CA 94117	}	
	}	License Type: 21
Respondent	}	
	}	First Hearing Date: 2/13/2020
	}	Reporter: Christy Curry, CSR 13982
	}	Word Count Est: 10,427
	}	
	}	Second Hearing Date: 10/8/2020
	}	Reporter: Sharon Cahn, CSR 6210
	}	Word Count Est: 8,214
Regarding Its Type-21 Off-Sale General License Under	}	
the State Constitution and the Alcoholic Beverage	}	PROPOSED DECISION
<u>Control Act</u>	}	

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard part of this matter in person in San Francisco, California on February 13, 2020. By stipulation of the parties, the balance of the hearing was heard by way of a video-conference on October 8, 2020.¹

Sean Klein, Attorney III, Office of Legal Services, Department of Alcoholic Beverage Control, represented the Department of Alcoholic Beverage Control on February 13, 2020. (hereafter the Department)

Patrice Huber, Attorney, Office of Legal Services, Department of Alcoholic Beverage Control, represented the Department of Alcoholic Beverage Control on October 8, 2020.

Gillian Garrett, attorney-at-law, of Hinman and Carmichael, represented respondent-licensee, Lucky Stores, Inc. (hereafter respondent)

¹ At the video-hearing, the parties also waived personal appearance of the minor, Kay Silveria, otherwise required under Business and Professions Code 25666. She appeared in-person and testified at the February 13, 2020 hearing.

The Department seeks to discipline respondent's license on the grounds that on or about September 13, 2019, respondent, through its agent or employee, Maria Low, sold, furnished, or gave away, or caused to be sold, furnished, or given away, an alcoholic beverage to Kay Silveria, a person under the age of 21, in violation of California Business and Professions Code section 25658, subdivision (a).² (Exhibit 1:pre-hearing pleadings)

Respondent primarily contended that because Low, its clerk, reasonably relied on a counterfeit/false California driver license the minor presented to establish she was at least 21 years old a defense under section 25660 to the accusation was proven.

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 submitted for decision on October 8, 2020.

FINDINGS OF FACT

1. The Department filed the accusation on November 4, 2019. On November 12, 2019, the Department received a Notice of Defense from Respondent requesting a hearing on the accusation. The matter was heard on February 13, 2020 and October 8, 2020.
2. On March 6, 2007, the Department issued respondent a type-21 Off-Sale General license for its premises known as Luckys #756 located at 1750 Fulton Street, San Francisco, California.³ (Hereafter the licensed premises)
3. Since being licensed, respondent suffered the following disciplinary action:

Date of Violation	Section Violated	Registration Date	Registration Number	Penalty Imposed
03/08/2018	Bus. & Prof. Code §§24200, subd.(a) and (b), 25658, subd.(a).	04/06/2018	18086759	25-day license suspension;§23095 POIC paid
04/10/2015	Bus. & Prof. Code §§24200, subd.(a) and (b), 25658 subd.(a).	06/04/2015	15082557	10-day license suspension with all 10 days stayed

² All further section references are to the California Business and Professions Code unless otherwise noted.

³ A type-21 license permits the holder to retail in beer, wine, and distilled spirits for off-premises consumption.

4. On September 13, 2019 at approximately 9:30 p.m., 18-year old Kay Silveria (hereafter Silveria) went to the licensed premises to obtain some wine and "Fireball" whiskey.⁴ She went with her roommate, Maggie Marlow. (hereafter Marlow)
5. When Silveria entered the store, she was 5'4" tall, weighed approximately 140 pounds and had black hair and brown eyes. (Exhibit 5: ABC report) She was wearing a dark Patagonia jacket and blue jean style skirt. Silveria had an overall youthful appearance.
6. Silveria went to the wine section of the licensed premises and selected three 750 ml. bottles of Smoking Loon chardonnay wine. She located the "Fireball" whiskey in a locked display cabinet. She asked one of respondent's employees to get the whiskey for her. The employee obtained a 750 ml. Fireball whiskey from the cabinet and took it to the check stand for Silveria. Silveria carried her three bottles of wine to the check stand. Marlow went to a different check stand to purchase other non-alcoholic beverage items/goods. Marlow played no role in Silveria's purchase.
7. At the check stand, Silveria told respondent's cashier, Maria Low (hereafter Low), she had a bottle of Fireball whiskey up front. Another employee brought over the bottle of whiskey to Low's check stand and Low began to ring up the sale. Silveria only purchased the three bottles of wine and one bottle of whiskey, all alcoholic beverages. Low asked for Silveria's identification. Silveria took out her wallet that contained a false California Driver license. Silveria did not take the identification from her wallet. Rather, she held out her wallet and Low looked at the identification as displayed/stored within Silveria's wallet. Low neither touched nor handled the false identification. Low looked and pointed at the identification as displayed in the wallet for 1-2 seconds, then continued ringing up the sale. Low did not ask Silveria any questions about her identification or to otherwise confirm or ascertain Silveria's age. Silveria paid for her items and all were put into a shopping bag. Silveria left the check stand area, re-joined Marlow, and both exited the licensed premises.
8. Once outside the licensed premises, as Silveria was putting the shopping bag holding her wine and whiskey into her backpack, she was detained by ABC Agent Louie and Agent Ott. Agent Louie had Silveria under observation when she was in the store and witnessed her select and purchase her wine and whiskey.

⁴ Silveria testified she was born on April 27, 2001.

9. When Silveria was inside the licensed premises, Alcoholic Beverage Control Agents Louie and Ott were also inside the licensed premises to detect any violations there. Respondent's premises is about one block from the University of San Francisco campus. Agent Louie was aware that the licensed premises personnel had been cited in the past for selling or furnishing alcoholic beverages to minors. Agent Louie had previously issued citations to minors there for illegal possession of alcoholic beverages.

10. At approximately 9:23 p.m., Agent Louie noticed Silveria and Marlow in the licensed premises. To him they appeared youthful and as though they could be under 21 years of age. He saw Silveria select three bottles of wine then proceed to the check stands. He observed Low check Silveria's identification that was displayed within Silveria's wallet. Low pointed at the identification, almost touching it, for about one second then punched/entered something on her register keypad. The sale was completed. Louie did not hear Low ask Silveria any questions about her identification or concerning her age. Once the sale was completed the wine and whiskey were put in a bag and Silveria rejoined Marlow and both exited the licensed premises. Once they were outside, Agent Louie detained Silveria as she was putting the shopping bag holding the wine and whiskey into her backpack.

11. Agents Louie and Ott identified themselves to Silveria as a police officers and asked her age. Silveria told them she was 23 years old and gave Agent Louie a false California driver license. Due to the poor quality of the photo on the false identification, Agent Louie or Agent Ott told her that was a false identification. Silveria confessed she was not 21 years old and presented her authentic identification. Agent Louie confirmed the facts of the sales transaction with Silveria. Silveria told him the clerk looked at her false identification in her wallet for about one second. He also confirmed that her false identification was not taken out of her wallet at the time of sale and the clerk did not ask her any questions regarding her age.

12. Agent Louie also interviewed Low. She confirmed she did not hold or touch Silveria's identification. She indicated she did not look at the descriptors on it of Silveria and did not look at the expiration date. She indicated she looked at it 1-2 seconds. She told Agent Louie she did not receive any special training from respondent regarding alcoholic beverage sales procedures. Another nearby unidentified clerk also told Agent Louie she, the unidentified clerk, had also not received any specific training on selling alcoholic beverages. Agent Louie advised Low that when inspecting identifications, she can hold the identification itself, compare the photo on the identification with the person who offered it, compare the physical descriptors on the identification to the person offering the identification, and check its expiration date to make sure it is current. Agent Louie issued Low a citation for selling/furnishing an alcoholic beverage to a minor and she was released at the scene.

13. Silveria's false identification was a horizontally formatted California driver license. (Exhibit 6-B: color copy of false identification). It had an image of her, her address, and signature. Silveria obtained it through a friend of a friend about two weeks before she went to the licensed premises. She had never displayed it at the licensed premises on any prior occasion. Silveria did not recognize Low from any prior visit to the licensed premises. Silveria never purchased alcoholic beverages from the licensed premises on any prior occasion and felt a little nervous when she made her purchase of wine and whiskey on this occasion.

14. Although no witness testified the ABC agents seized Silveria's false identification, their report, Exhibit 5, mentioned it was seized. While Exhibit 6B, a color copy of the false identification, was admitted by stipulation as evidence, the false identification itself was not presented by either party at the hearing for examination by the ALJ or any witness. Neither party otherwise marked nor sought admission of the actual false identification as a hearing exhibit nor sought its admission as evidence. There was neither mention nor comment from either party that since its seizure by the ABC agents, Silveria's false identification was lost, misplaced, mutilated, destroyed, contaminated, or otherwise did not exist such that it could not have been presented for examination at the hearing.

15. Low worked at the licensed premises since at least 2007 and continues to be one of respondent's employees.⁵ However, she is currently off work due a worker's compensation related medical leave that commenced prior to the February 13, 2020 hearing on this matter and based on a work-related incident unrelated to her transaction with Silveria.

16. In 2015, Low signed an affidavit acknowledging being advised of certain laws and rules regarding the sales of alcoholic beverages. (Exhibit A: Clerk's Affidavit) At about that same time, respondent also provided some two days of supervised training to its employees regarding working as a store cashier, which was to include the proper retailing of alcoholic beverages.

⁵ Low did not testify at the hearing. Just prior to the February 2020 hearing, Low was unavailable to testify due to a recent worker's compensation related incident unrelated to this matter. While the testimony of Silveria and Agent Louie was heard at the February session, the hearing was continued to take Low's testimony at a later date. However, at the October 8, 2020 video hearing, respondent's counsel indicated Low remained off work due to the worker's compensation matter and would not be testifying that day. Respondent did not make any motion to the undersigned ALJ to continue the hearing. Respondent called only Michael Lee, respondent's store manager, as a witness at the April 8, 2020 hearing.

17. Respondent's policy is to require patrons who appear under 30 year of age to present their identification when purchasing alcoholic beverages. Employees are instructed to examine the name, date of birth, photo, physical description, and expiration date on those identifications presented to them. Cashiers also key in on their sales register the date of birth to proceed with the sale. If a customer presents an out-of-state identification, the cashier is to obtain review and approval of the identification by their supervisor or manager prior to proceeding with the sale. Respondent's store also has an identification guide booklet for reference as needed. Respondent's store has seized some false identifications in the past. Respondent also utilizes a "secret-shopper" program i.e. youthful appearing adults are sent into the licensed premises in an undercover capacity to see if respondent's employees are following store policies, including proper retailing of alcoholic beverages. If proper polices were followed, the tested employee is given a green colored card. If a policy was not followed, the employee is given a red card. Low received green cards in the past. Store manager Lee generally considered Low a reliable and consistent employee. After respondent's own investigation of this incident, Low was not disciplined as respondent's human resources department determined Low followed respondent's sales policies.

18. Respondent's manager, Lee, also testified this licensed premises site is especially sensitive about selling alcoholic beverages to minors at it is within one block of the University of San Francisco campus. This adds to the volume of youthful appearing shoppers, some of whom seek to purchase alcoholic beverages.

LEGAL BASIS OF DECISION

1. Article XX, section 22 of the California Constitution and Business and Professions section 24200, subdivision (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, subdivision (b), provides a licensee's violation, or causing or permitting of a violation, of any rules of the department and 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, 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. Business and Professions Code Section 25660 provides that:

“(a) Bona fide evidence of majority and identity of the person is any of the following:

(1) A document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a valid motor vehicle operator’s license, that contains the name, date of birth, description, and picture of the person.

(2) A valid passport issued by the United States or by a foreign government.

(3) A valid identification card issued to a member of the Armed Forces that includes a date of birth and a picture of the person.

(b) Proof that the defendant-licensee, or his or her employee or agent, demanded, was shown, and acted in reliance upon bona fide evidence in any transaction, employment, use, or permission forbidden by Section 25658, 25663, or 25665 shall be a defense to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon.”

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 September 13, 2019, respondent’s employee, Maria Low, inside the licensed premises, sold alcoholic beverages to Kay Silveria, a person under the age of 21, in violation of Business and Professions Code section 25658, subdivision (a).

2. The evidence established respondent’s sales cashier, Maria Low, sold Kay Silveria, then only 18-years old, three bottles of wine and one bottle of Fireball whiskey, during the normal course of business at the licensed premises. Further, the evidence established that Low made the sale after asking for and only momentarily looking at Silveria’s false California Driver license. (Findings of Fact ¶¶ 4-8)

3. The evidence established Silveria appeared youthful and as someone who might not be 21 years of age.

4. Despite Low’s sale of alcoholic beverages to Silveria, respondent asserted under section 25660 it established a defense to the accusation because Low asked for, inspected, and reasonably relied on Silveria’s false identification at the time she sold her the three bottles of wine and bottle of whiskey.

5. Generally, section 25660 provides a defense to a licensee or person accused of selling an alcoholic beverage to a minor if the person asked for and reasonably relied on bona-fide evidence of majority and identity provided by the minor-customer. Bona-fide evidence is “(1) A document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a valid motor vehicle operator’s license, that contains the name, date of birth, description, and picture of the person. (2) A valid passport issued by the United States or by a foreign government. (3) A valid identification card issued to a member of the Armed Forces that includes a date of birth and a picture of the person.”

6. However, section 25660 is an affirmative defense, so a licensee has the burden of establishing all of its elements, namely, that evidence of majority and identity was demanded by the seller, shown by the buyer, and reasonably relied on by the seller.⁶ To provide a defense, reliance on the document must be reasonable, that is, it was based on due diligence of the seller. This section applies to identifications actually issued by government agencies and identifications that are quality false versions of government identifications.⁷

7. 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 replica thereof if the appearance of the presenter of the identification demonstrates above mere suspicion that the holder is not the legal owner of the identification.⁸ The defense is also inapplicable if the appearance of the presenter does not match the description on the identification.⁹ Reasonable reliance cannot be established unless the appearance of the person presenting identification indicates that he or he could be 21 years of age and the seller makes a reasonable inspection of the false identification.

⁶ *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).

⁷ *Dept. of Alcoholic Beverage Control v. Alcoholic Control Appeals Bd. (Masani)*, 118 Cal. App. 4th 1429, 1444-45, 13 Cal. Rptr. 3d 826, 837-38 (2004).

⁸ *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).

⁹ *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 155.

8. In this instance, respondent's burden of establishing a defense under 25660 was not adequately met. The actual false identification was not introduced as a piece of evidence at the hearing. Agent Louie, a 9-year veteran ABC Agent who had training and extensive experience in examining/assessing false identifications testified the photo of Silveria on her false identification was not as clear as it should have been compared to an authentic identification.¹⁰ He indicated as soon as he saw her photo, he knew it was a false identification. Respondent presented no witness that offered evidence to the contrary.

9. Exhibit 6B, a color photocopy of the false identification, was admitted as evidence by stipulation. However, Low did not view Exhibit 6B when she made the sale to Silveria, she viewed her actual false identification. Therefore, to properly assess the quality of Silveria's false identification, including its portrait photo of her, it was critical the ALJ view and examine the actual false identification as that was what Low viewed and what Agent Louie assessed. Section 25660 is an affirmative defense that respondent has the burden to establish. Respondent never sought to have the actual false identification made an exhibit or entered as evidence. As noted above, neither party indicated at the hearing that since the agents seized the false identification it had thereafter been lost, misplaced, mutilated, destroyed, contaminated, or otherwise did not exist such that it could not have been presented by respondent for review and inspection at the hearing. Exhibit 6B was clearly weaker secondary evidence of the false identification's quality than the actual false identification. Based on Exhibit 6b and what testimony Agent Louie provided as to the actual false identification's quality, there was insufficient evidence presented Silveria's false identification was good enough to support a defense under section 25660. Therefore, a defense under section 25660 was not established. The evidence otherwise supported sustaining Count 1.

10. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties raised in the pleadings or timely raised at the hearing lack merit.

¹⁰ Exhibit 6B had two portraits of Silveria, a larger one and a smaller one. It was not established which one, if not both, Agent Louie thought did not have the appropriate clarity or resolution.

PENALTY

1. In assessing an appropriate measure of discipline, 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 second violation of selling or furnishing an alcoholic beverage to a minor in violation of section 25658 within 36 months of a prior violation of that same section is a 25-day suspension.
2. Rule 144 permits imposition of a revised penalty based on the presence of aggravating or mitigating factors, some of which are specified therein.
3. The Department recommended a 25-day suspension. It argued respondent had two prior sale to minor violations, the most recent of which occurred less than 36 months prior to the matter at issue. It added, the first prior discipline from 2015 also named "Maria Low" as the clerk who provided an alcoholic beverage to a minor in that accusation. As to the pending matter, the Department pointed out Low only viewed the false identification for a few moments while it remained in the minor's wallet and Low did otherwise examine it or ask the minor questions about her age so she fell short of conducting a reasonable inspection of the false identification. It argued respondent's claim of thorough training of its cashiers, including Low, was overstated and this sale would not have occurred if respondent's own policies were followed. Further, the two prior disciplinary actions clearly gave "notice" to respondent regarding this kind of problem at this specific licensed premises.
4. Respondent argued a defense to the accusation under section 25660 was established. It contended Low viewed the minor's photo on her false identification, but had not verified her height and weight. Respondent contended it trained Low regarding proper retailing of alcoholic beverages and that included on-going annual re-training. Respondent contended neither rule nor regulation mandated Low should have had Silveria remove the identification from her wallet or otherwise compel Low to handle the identification when she reviewed it.
5. In assessing the penalty for this matter, while respondent has been licensed for over 12 years, it suffered two prior sales to minors incidents since 2015. The first violation also involved Maria Low. Respondent's manager acknowledged respondent is aware of and particularly cautious in trying not to sell alcoholic beverages to minors at the licensed premises as it sits only a block or two from the University of San Francisco campus that results in many youthful people patronizing this licensed premises, some of whom want to buy alcoholic beverages. Respondent made organized efforts to train and re-train its staff on proper retailing of alcoholic beverages. It also used a "secret-shopper" program to verify its employees' adherence to store policies. However, in this particular case, Low did not seem to be particularly mindful in selling the youthful appearing 18-year old minor three bottles of wine and one bottle of whiskey. While Low did ask for and examine the minor's

false identification, she viewed the identification for only 1-2 seconds while it remained in the minor's wallet which may have obscured her view of the quality of the minor's photo on the identification. Based upon the above, it appears what aggravating and mitigating factors were involved herein generally offset one another so the penalty set forth in rule 144 is appropriate in the case.

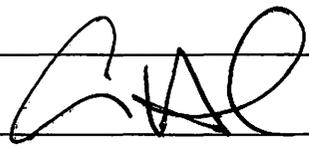
6. Except as set forth herein, all other arguments raised by the parties with respect to the appropriate penalty did not have merit.

ORDER

1. Count 1 of the accusation is sustained.
2. Respondent's license is suspended for 25 days.

Dated: October 18, 2020


David W. Sakamoto
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: 12/29/20