

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

AB-9932

File: 21-508036; Reg: 21090788

GARFIELD BEACH CVS, LLC and
LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store #4675
377 32nd Avenue
San Francisco, CA 94121,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: January 14, 2022
Telephonic

ISSUED JANUARY 19, 2022

Appearances: *Appellants:* Jade Quintero, as counsel for Garfield Beach CVS, LLC, and Longs Drug Stores California, LLC, dba CVS Pharmacy Store #4675,

Respondent: Patrice Huber, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store #4675 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 15 days

¹ The decision of the Department, dated August 3, 2021, is set forth in the appendix.

because their clerk sold alcoholic beverages to a minor, in violation of Business and Professions Code² section 25658(a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general retail license was issued on March 3, 2017. There is no prior instance of departmental discipline against the licensee.

On January 27, 2021, the Department filed a single-count accusation against appellants charging that, on October 31, 2020, appellants' clerk, Jack Dietz (the clerk), sold alcohol to 17-year-old O.D. (the minor).³

At the administrative hearing held on May 18, 2021, documentary evidence was received, and testimony concerning the sale was presented by Department Agent Daniel Louie (Louie). Although the minor took the stand, she did so in order to invoke her Fifth Amendment right against self-incrimination as she still had criminal prosecution pending against her. The administrative law judge (ALJ) excused the minor from the rest of the hearing, and the hearing proceeded with just the testimony of Louie. Appellants did not present any witnesses.

Testimony established that on October 31, 2020, the minor, then 17 years old, was at the licensed premises. She was wearing a white face mask on account of the COVID-19 pandemic. She was also wearing a white sweater, a skirt, and tennis shoes. The minor had a youthful appearance that day.

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

³ The minor shall be referred to as O.D. to preserve her privacy as she was a juvenile at the time of the incident in question.

The minor placed two vodka bottles on a sales counter at the licensed premises. She provided a false identification to the clerk while the two stood a foot or two away from each other. The hearing below did not establish whether the clerk asked for the ID or whether the minor provided it unprompted. The minor held the fake ID while showing it to the clerk, but the clerk never physically inspected the ID. He only looked in its direction briefly before completing the sale to the minor. The minor then left the store with the alcohol.

During this time, Agents Louie and Ott with the Department, as well as Lieutenant Sawyer and Sergeant Sainez with the San Francisco Police Department, happened to be at the licensed premises. They were there to inspect whether the appellants were operating the premises in compliance with the law. When Louie entered the licensed premises, he noticed the minor placing the vodka into a bag. He followed her outside the premises and detained her for further investigation.

Louie asked for the minor's age, and she replied she was 21 years old. She produced an ID in support of her claim. After physically inspecting the minor's ID, Louie determined, based on his training and experience, that it was a fake ID. Specifically, he observed that the back side of the ID was too smooth and lacked the discernable ridges as part of the magnetic strip. Louie informed the minor of his assessment that it was a fake ID and asked if she was at least 18. She admitted she was 17 years old, and stated that the clerk had not physically inspected her ID.

The minor re-entered the licensed premises with Ott and Sainez and identified the clerk as the one who had sold her the vodka. Louie subsequently issued the minor a citation for violating section 25658(b) and released her at the scene. Louie then contacted the clerk, who also confirmed that he had sold the vodka to the minor. He

was a manager-in-training who had worked at the premises for about 18 months. The clerk admitted he never looked at the physical descriptors of the person on the fake ID, and that he did not physically inspect the ID either.

The ALJ issued a proposed decision on June 7, 2021. He sustained the accusation and recommended a 15-day suspension of appellants' license. The Department adopted the proposed decision in its entirety. Appellants then filed a timely appeal raising the following issues: 1) the ALJ erred in concluding that the Department met its burden under section 25666 to produce the minor at the hearing, and; 2) the ALJ erred in concluding that appellants failed to establish a defense under section 25660.

DISCUSSION

I

FIFTH AMENDMENT

Appellants argue the Department failed to meet its burden under section 25666 to produce the minor for examination. (Appellants' Opening Brief, p. 7 (AOB).) They maintain the Department failed to meet this burden when the minor cut short her testimony by invoking her Fifth Amendment privilege against self-incrimination. (AOB, p. 11.) As a result, appellants contend they were not afforded "fairness in the administration of justice by allowing all witnesses to be heard." (*Ibid.*)

Section 25666 states, in pertinent part:

(a) In any hearing on an accusation charging a licensee with a violation of Sections 25658, 25663, and 25665, the department shall produce the alleged minor for examination at the hearing unless he or she is unavailable as a witness because he or she is dead or unable to attend the hearing because of a then-existing physical or mental illness or infirmity, or unless the licensee has waived, in writing, the appearance of the minor. When a minor is absent because of a then-existing physical or

mental illness or infirmity, a reasonable continuance shall be granted to allow for the appearance of the minor if the administrative law judge finds that it is reasonably likely that the minor can be produced within a reasonable amount of time.

(b)(1) Nothing in this section shall prevent the department from taking testimony of the minor as provided in Section 11511 of the Government Code.

(b)(2) This section is not intended to preclude the continuance of a hearing because of the unavailability of a minor for any other reason pursuant to Section 11524 of the Government Code.

The evidence in the record shows that the Department issued a subpoena to the minor, the minor's counsel accepted the subpoena on her behalf, and the minor appeared at the hearing below. (Reporter's Transcript, 10:24-11:9 (RT).) After being sworn in, however, the minor invoked her Fifth Amendment right not to testify. (RT 12:2-20.) Based on the above, the ALJ concluded the Department had satisfied section 25666:

The Department's obligation to produce the minor at the hearing for examination as required under section 25666 was fulfilled because it produced [the minor] for examination at the hearing. However, section 25666 was not grounds for and did not authorize the ALJ piercing the self-incrimination privilege timely asserted by [the minor] to compel her to testify about what occurred at the licensed premises. Based on what evidence was presented at the hearing about her activities there, including the testimony of Agent Louie and the store video, [the minor's] claim of privilege seemed well founded and not merely speculative or made in bad faith. Neither party asked for a continuance of the hearing to a time when [the minor] would be out of jeopardy and available to testify about what occurred that October 31, 2020 at the licensed premises. Under these circumstances, section 25666's provisions were complied with and did not form a basis to dismiss the accusation.

(Determination of Issues, ¶ 9.)

Appellants cite to *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429 [13 Cal.Rptr.3d 826] (*Masani*) for the proposition that section 25666 should not be altered given its clear

wording and legislative history. (AOB, p. 8.) Appellants state that “the nature, purpose, and mandate of section 25666 are obvious from its face[.]” (AOB, p. 7.) Section 25666’s purpose is that the Department is “obligated” to produce the minor at the disciplinary hearing unless specific extenuating circumstances (death, physical or mental illness or infirmity) exist. (AOB, pp. 7-8.) Since none of the extenuating circumstances applied to the instant case, the Department had a duty to produce the minor at the hearing. However, as discussed below, the Department fulfilled its duty when it issued a subpoena to the minor, and the minor appeared at the administrative hearing.

Appellants quote from legislative history for the proposition that section 25666 “guarantee[s] fairness in the administration of justice by allowing all witnesses to be heard.” (AOB, p. 10.) However, there was no miscarriage of justice here; the minor appeared at the hearing and was heard from by the ALJ and the parties when she invoked her Fifth Amendment rights.

Appellants claim that the ALJ improperly expanded the scope of section 25666 “with no authority to do so.” (AOB, p. 10.) The irony is that the opposite is true; it is appellants who seek to improperly alter the scope or meaning of section 25666. Under *their* interpretation, not only must the minor be physically present, but the minor must also be compelled to offer “critical testimony.” (*Ibid.*) The problem, however, is that nowhere in its text does section 25666 ever mandate whether or to what extent testimony shall take place. Appellants are effectively seeking to alter the scope of the statute with no authority to do so. Appellants also provide no evidence as to why section 25666 ought to take precedence over the minor’s constitutional rights under the Fifth Amendment. Finally, despite having the opportunity to do so, appellants did not

seek a continuance of the administrative hearing to a time and date when the minor would be out of criminal jeopardy and available to testify about the events of October 31, 2020. (Findings of Fact, ¶ 4.)

In a recent decision involving the same issue here, this Board reached the following conclusion:

We agree with the Department that it satisfied its requirement under section 25666. Section 25666 only requires the Department to produce the minor for examination; it does not guarantee any type of qualitative examination by a licensee. Further, the fact that the minor exercised her privilege against self-incrimination was not the fault of the Department. In fact, the minor's privilege left both parties in the same position as being equally unable to examine her. The Board sees no error.

(*The Local Cider Bar, Inc.* (2021) AB-9927.) We reach the same conclusion in the instant case. There is no reversible error.

II

SECTION 25660

Appellants also maintain that they established a defense under section 25660. (AOB, p. 12.) Section 25660 provides that evidence of the majority and identity of an individual includes:

(a)(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.

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

(a)(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.

It also provides a licensee with an affirmative defense:

(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.

Section 25660 applies to identifications actually issued by government agencies as well as fake identifications purporting to be issued by a government agency.

(*Masani, supra*, 118 Cal.App.4th at pp. 1444-45.) A fake identification can support a defense under this section if the apparent authenticity of the identification is such that reliance upon it could be found to be reasonable. (*Ibid.*) However, as an exception to the general prohibition against sales to minors, section 25660 must be narrowly construed. (*Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control* (1968) 261 Cal.App.2d 181, 189 [67 Cal.Rptr. 734] (*Lacabanne*).)

The burden of establishing a defense under section 25660 is on the party asserting the defense: the appellants. In *Masani*, the court wrote:

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, emphasis added.) The case law regarding section 25660 makes clear that to provide a defense, reliance on the document must be reasonable, that is, the result of an exercise of due diligence. (See, e.g., *Lacabanne, supra*; *5501 Hollywood v. Department of Alcoholic Beverage Control* (1957) 155 Cal.App.2d 748, 753-754 [318 P.2d 820] (*5501 Hollywood*).) A licensee, or a licensee's agent or employee, must exercise the caution that would be shown by a reasonable and prudent person in the same or similar circumstances. (*Lacabanne, supra*; *Farah v. Alcoholic*

Beverage Control Appeals Bd. (1958) 159 Cal.App.2d 335, 339 [324 P.2d 98]; *5501 Hollywood, supra.*)

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. (*5501 Hollywood, supra* at pp. 753-754.) Thus, if the appearance of the individual presenting the identification is such that they could not be 21 years of age, then the defense fails regardless of any subsequent inspection of the fake identification.

Whether or not a licensee, or their agent or employee, has made a reasonable inspection of an ID to determine that it is bona fide is a question of fact (*Masani, supra* at p. 1445; *5501 Hollywood, supra* at pp. 753-754), and this Board is obligated to defer to the ALJ's factual determinations. The findings regarding the appellants' section 25660 defense will be upheld as long as they are supported by substantial evidence.

In determining whether a decision of the Department is supported by substantial evidence, this Board's review is limited to determining, in light of the entire administrative record, whether substantial evidence exists—even if contradicted—to reasonably support the Department's factual findings, and whether the decision is supported by those findings. (*Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113] (*Boreta*).) The Board is bound by the factual findings of the Department. (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1963) 212 Cal.App.2d 106, 113 [28 Cal.Rptr. 74] (*Harris*).) A factual finding of the Department may not be overturned or disregarded merely because a contrary finding would have been equally or more reasonable. (*Boreta, supra* at p. 94.) The Board may not exercise independent judgment regarding the weight of the

evidence; it must resolve any evidentiary conflicts in favor of the Department's decision. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].) The Board must also accept all reasonable inferences from the evidence which support the Department's decision. (*Harris, supra* at p. 113.)

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. N.L.R.B.* (1951) 340 U.S. 474, 477 [71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) Moreover, it is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Department of Alcoholic Beverage Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].).

As a preliminary matter, based on Agent Louie's testimony, the ALJ found that the minor was 17 years old on the date of the incident. (Findings of Fact, ¶ 11.) Appellants did not present any evidence to the contrary. In sum, there is substantial evidence to establish that appellants' clerk sold alcoholic beverages to an individual under the age of 21. Appellants, therefore, had the burden of establishing a defense under section 25660.

Here, the ALJ found there was insufficient evidence to support appellants' defense:

Section 25660 . . . must be reasonably proven by evidence and not based on speculating [the clerk] actually reviewed and considered [the minor's] identification, its quality, its merits, and its contents when the evidence indicated he glanced at it for only a few seconds, he could not have compared the photo on it with [her] masked face, he stated he did not

confirm the physical descriptors on it to [the minor], and he stated he did not touch/feel it in any way. There was insufficient evidence establishing what he actually considered when he looked at [the minor's] identification. On the state of the evidence, [the clerk's] actions were equally consistent with him feigning checking [her] identification assuming no real examination was necessary because no minor would offer an identification showing they were not yet 21 years old when displaying it to purchase an alcoholic beverage. Therefore, the evidence did not establish and it cannot be concluded [the clerk] actually and reasonably relied on [the minor's] false identification as proof of her age in making his decision to sell her alcoholic beverages. Therefore, a defense under section 25660 was not established.

(Determination of Issues, ¶ 17.)

First, the ALJ found that the minor had a “youthful appearance.” (Findings of Fact, ¶ 5.) His findings are supported by Louie’s testimony, as well as a photograph of the minor (without the mask) from the day of the incident (Exh. 6.) Although the ALJ did not go so far as to conclude that the minor’s appearance could not be that of someone 21 years old, photographs of a minor from the day of the incident are “arguably the most important piece of evidence” in determining how old the minor appeared. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652].) Given the evidence, it would be reasonable to infer that the minor’s appearance was that of someone who *could* be under 21 and that this should have put the clerk on notice.

Second, substantial evidence supports finding there was no reasonable reliance by the clerk. Here, the clerk only looked at the ID for approximately two seconds. (Findings of Fact, ¶ 16; RT 35:1-3.) The clerk admitted he never looked at the physical descriptors, such as height and weight, on the ID. (Findings of Fact, ¶ 15.) The clerk also never touched, held, or felt the minor’s fake ID to check for, for example, signs of forgery. (*Id.* at ¶ 6.) Although a fake identification can support a defense under

section 25660, the analysis does not turn on the quality of the fake ID. Rather, the analysis turns on whether the fake ID is accepted *following* a reasonable examination for authenticity and comparison with the person depicted. (*Masani, supra* at p. 1445.) In the instant case, we cannot say the clerk reasonably examined the minor's ID. The quality of the minor's fake ID does not excuse the clerk's conduct.

Appellants emphasize that section 25660 does not require "extraordinary measures" or "perfection" in inspecting and relying on an identification. (AOB, p. 13.) We agree. The law holds the clerk to the standard of a reasonable and prudent person under the same or similar circumstances, and here the clerk fell short of that standard. The instant case involved the minor, with a youthful appearance, buying alcohol on Halloween weekend when more people—including underage individuals—would be drinking and partying than usual. The increased risk of minors attempting to purchase alcohol using fake IDs on such an occasion was clearly present, yet the clerk did not ask the minor to disclose her age or otherwise ask any questions about her ID.

Appellants also cannot avail themselves of a defense under section 25660 because their clerk never testified. While appellants tried to introduce the actual manager of the licensed premises (from the day of the incident) as a witness, they did not explain why the clerk was unavailable or not called to testify at the hearing. (Findings of Fact, ¶ 20.) Other than the quality of the fake ID, appellants offered little evidence that would indicate the clerk's inspection was reasonable. We cannot know what went through the clerk's mind during the transaction, or whether he believed the minor appeared to be over 21 years of age at the time of the sale. We do not know if he even relied on the fake ID as a basis for his decision to only look at it for two seconds and not ask any age-related questions. As the ALJ wrote, the clerk's actions

were equally consistent with him “feigning checking [the minor’s] identification assuming no real examination was necessary.” (Determination of Issues, ¶ 17.) Without some type of evidence regarding the circumstances of the clerk’s inspection (e.g. his basis for believing the license was authentic), appellants cannot establish a defense under section 25660.

Based on the above, rejecting appellants’ section 25660 defense was proper and supported by substantial evidence. The ALJ’s findings were based upon video evidence of the sale, photographs of the minor and her fake ID from the day of the incident, as well as the testimony of Agent Louie. Since appellants did not call the clerk as a witness, they cannot establish that the inspection was reasonable. In this regard, the court has held that a clerk’s absence from the administrative hearing constitutes “a material failure of proof of the defense of reasonable reliance” under section 25660. (*Masani, supra*, 118 Cal.App.4th at p. 1446.)

The Board notes that the evidence shows the minor’s identification was noticeably sophisticated. (RT 30:13-25.) The Board also acknowledges that Agent Louie possessed significant training and experience in instantly identifying the excessive smoothness of the minor’s fake ID, and that such expertise is not typically found in the average employee. Finally, in light of the pandemic, the Board understands the clerk’s reluctance to touch personal items belonging to others, such as an ID. Nevertheless, this Board cannot simply overturn the findings below, even if a contrary conclusion would have been equally or more reasonable.

ORDER

The decision of the Department is affirmed.⁴

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

⁴ This final order is filed in accordance with Business and Professions Code section 23088 and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7.

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

APPENDIX

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

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

GARFIELD BEACH CVS, LLC &
LONGS DRUG STORES CALIFORNIA, LLC
CVS PHARMACY 4675
377 32ND AVENUE
SAN FRANCISCO, CA 94121

OFF-SALE GENERAL - LICENSE

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

CONCORD DISTRICT OFFICE

File: 21-508036

Reg: 21090788

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 July 22, 2021. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

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

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. The appeal must be filed within 40 calendar days from the date of the decision, unless the decision states it is to be "effective immediately" in which case an appeal must be filed within 10 calendar days after the date of the decision. Mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814. For further information, and detailed instructions on filing an appeal with the Alcoholic Beverage Control Appeals Board, see: <https://abcab.ca.gov> or call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

On or after September 13, 2021, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: August 3, 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:

| | | |
|--|---|--------------------------------|
| Garfield Beach CVS, LLC & | } | File: 21-508036 |
| Longs Drug Stores California, LLC | } | |
| Dbas: CVS Pharmacy 4675 | } | Reg: 21090788 |
| 377 32 nd Avenue | } | |
| San Francisco, CA 94121 | } | License Type: 21 |
| | } | |
| Respondent | } | |
| | } | Reporter: John Farhenwald, CSR |
| | } | Word Count Est: 21,130 |
| | } | |
| | } | Hearing Date: 5-18-2021 |
| | } | |
| | } | |
| Regarding Their Type-21 Off-Sale General License | } | |
| Under the State Constitution and the Alcoholic | } | |
| <u>Beverage Control Act</u> | } | PROPOSED DECISION |

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control (hereafter the ALJ) heard this matter via video conference on May 18, 2021.

Patrice Huber, Attorney III, Office of Legal Services, Department of Alcoholic Beverage Control, represented the Department of Alcoholic Beverage (hereafter the Department).

Jade Quintero, attorney-at-law, of Solomon, Saltsman and Jamieson, represented co- licensee/co-respondents Garfield Beach, CVS, LLC and Longs Drug Stores California, LLC (collectively hereafter respondent).

The Department seeks to discipline respondent's license on the grounds that on or about October 31, 2020, respondent, through its agent or employee, Jack Dietz, sold, furnished, or gave away, or caused to be sold, furnished, or given away, an alcoholic beverage to O.D.¹, 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)

¹ Because O.D. was a juvenile at the time of the incident, she was referred to in the pleadings and at the hearing as O.D. to help preserve her privacy.

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

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 May 18, 2021.

FINDINGS OF FACT

1. The Department filed the accusation on January 27, 2021. The respondent filed a Notice of Defense and Special Notice of Defense with the Department requesting a hearing on the accusation. The matter was heard to conclusion on May 18, 2021.³
2. On March 3, 2017, the Department issued respondent a type-21 off-sale general retail license for its premises known as CVS Pharmacy #4675 located at 377 32nd Avenue, San Francisco, California.⁴ (hereafter the licensed premises)
3. Respondent has not suffered any prior disciplinary action.
4. At the hearing, James Bustamante, attorney-at-law, appeared with minor O.D. The Department called O.D. as a witness to testify and she was sworn in. However, she, on advice of her counsel, Mr. Bustamante, asserted her 5th Amendment right not to testify as such might incriminate herself. In on-the-record discussions with her counsel, it was asserted O.D. was still in jeopardy of criminal prosecution as she was issued a criminal citation based on this incident. The matter was before the juvenile court, but there had been no final trial, dismissal with prejudice, or other final resolution such as to remove that criminal jeopardy exposure. The administrative hearing was being heard within the one-year statute of limitations for criminal misdemeanors. Based upon those circumstances, the ALJ excused O.D. from testifying any further at the hearing. The Department requested the hearing proceed without O.D. Neither the Department nor respondent sought a continuance of the hearing to a time when O.D. would be out of criminal jeopardy and could testify about what occurred at the licensed premises. The hearing proceeded on with the testimony of Alcoholic Beverage Control Agent Louie (hereafter Agent Louie).

³ After submission of the matter, the ALJ noted that a copy of the Notice of Hearing was not included within Exhibit 1 and Exhibit 2, the pre-hearing pleadings. A copy of the Notice of Hearing was marked as Exhibit 9 to complete the pre-hearing pleadings.

⁴ A type-21 license permits the holder to retail in beer, wine, and distilled spirits for consumption off the licensed premises.

5. On October 31, 2020, 17 year old O.D. was at the licensed premises. She was wearing a white long sleeve sweater, a skirt, and tennis shoes. She was approximately 5'4" tall and weighed approximately 130 pounds. She had long straight brown hair and was wearing a white face mask similar to those worn by persons during the COVID-19 pandemic. She had a youthful appearance.

6. O.D. placed two bottles of vodka on a sales counter in the licensed premises. O.D. displayed her false identification to respondent's sales clerk, Jack Dietz (hereafter Dietz), while she was within approximately one to two feet from him.⁵ O.D. held her false identification while showing it to Dietz. He never touched, held, or felt O.D.'s false identification. He looked in its direction for a few seconds, sold O.D. her two bottles of vodka, and O.D. left the store with her vodka.

7. Coincidentally, on October 31, 2020, Agent Louie, Alcoholic Beverage Control Agent Ott (hereafter Agent Ott), San Francisco Police Lieutenant Sawyer (hereafter Lt. Sawyer), and San Francisco Police Sergeant Sainez (hereafter Sgt. Sainez) were at the licensed premises checking if respondent was operating in compliance with the law.

8. Just as O.D. was completing her purchase of vodka, Agent Louie had just entered the licensed premises and noticed O.D. at the sales counter placing her bottles of vodka in a bag. Agent Louie immediately followed O.D. outside the licensed premises and detained her near her car for further investigation.

9. Once detained, Agent Louie asked O.D. her age. She claimed she was 21 years old and gave him an identification. (Exhibit 6: false identification) Agent Louie had been an ABC Agent for about ten years and had received classroom and field training in detecting false identifications. He had inspected hundreds to thousands of identifications as an ABC agent. In feeling O.D.'s identification, he determined it was a false identification because the back side of the identification felt too smooth or slick in that it had no discernable ridges as part of the magnetic strip on the back side of the identification.

10. O.D.'s actual false identification was not made an exhibit by any party at the hearing so the ALJ could not examine it, especially as to the texture of the backside of the identification. A color copy of the front side of the false identification was admitted as Exhibit 4. It was in the form of a California Driver License in the horizontal format used for those at least 21. It contained O.D.'s photo, name, and physical descriptors.

⁵ It was not established whether Dietz asked O.D. for her identification or O.D. merely volunteered it without any request.

11. Upon Agent Louie's assessment of the identification, he told O.D. she gave him a false identification and he asked her if she was at least 18 years old. She admitted she was 17 years old.

12. O.D. told Agent Louie the sales clerk had not held her identification when he sold her the vodka.

13. Ultimately, O.D. gave Agent Louie her authentic identification.

14. O.D. returned to the licensed premises with Agent Ott and Sgt. Sainez. O.D. identified 20-year old Dietz as the person who sold her the vodka. Agent Louie issued O.D. a citation for violating section 25658, subdivision (b), i.e. a minor purchasing alcoholic beverages and for violating section 25661, i.e. possession/use of a false identification. O.D. was released at the scene.

15. Agent Louie contacted Dietz who indicated he had sold the vodka to O.D. He indicated he was a manager-in-training and worked at the licensed premises about 18 months. He told Agent Louie he had not looked at the physical descriptors on the false identification and he did not touch it either. While Dietz never said so, Agent Louie's impression was that Dietz's statement about not touching O.D.'s identification was based on Dietz's concern over potential COVID-19 exposure.

16. A video recording was made of respondent's store surveillance video that recorded the sales transaction between Dietz and O.D. That video clip, Exhibit 7, showed O.D. waiting to make her purchase, approach the sales counter, appear to display her identification to Dietz for a few seconds, complete her purchase, and leave the store. It also showed Agent Louie just after entering the licensed premises and as he commenced to follow O.D. out of the licensed premises. The video seemed to play at a slightly accelerated speed and slowed just as it shows O.D. finishing displaying her identification to Dietz. It then resumes to a slightly faster replay speed. The recording did not appear to record any audio component of the actual sales transaction, especially as to any words that O.D. and Dietz may have said during the brief sales transaction.⁶

⁶ The surveillance video clip was shown during the hearing. The ALJ advised the parties that after the hearing the ALJ would make a CD or DVD recording of the video clip from the Department's electronic exhibit folder provided by the court reporting service and that copy would be the exhibit. After the hearing, the ALJ made such a copy on a CD-R disc and marked it as Exhibit 7 which was received in evidence and was the same clip shown during the hearing.

17. At the hearing, respondent offered Brittney Price as a witness. The Department objected to her testifying because respondent had only disclosed her as a witness the day prior to the hearing. Respondent indicated in an offer-of-proof Ms. Price was the licensed premises manager on October 31, 2020 and would testify regarding employee training and respondent's COVID-19 procedures. Respondent indicated at some time after October 31, 2020, Ms. Price was transferred to one of respondent's other stores and was just recently located and disclosed to the Department the day prior to the hearing as a witness.

18. The ALJ disallowed presentation of Ms. Price as a witness due to respondent's extremely late disclosure of her to the Department as a hearing witness. Pre-hearing discovery for this matter was governed under California Government Code section 11507.5 and 11507.6. Exhibits 1 and 2, the pleadings for this matter, indicated the Department's request for discovery, including, in part, a request for the names and addresses of hearing witnesses, was served on respondent on or about January 27, 2021. The hearing was held on May 18, 2021, nearly four months after the Department's discovery request was made. Ms. Price remained one of respondent's employees since October 31, 2020. The information she was to testify about was known to respondent well prior to the hearing date. Respondent's discovery response should have included Ms. Price as one of its hearing witnesses. To allow Ms. Price to testify under these circumstances would reward respondent's incomplete and untimely compliance with the discovery provisions of the Administrative Procedure Act.

19. Additionally, permitting Ms. Price to testify would have been unfair to the Department. As Ms. Price remained one of respondent's employees since October 31, 2020, her identity and work location were certainly known to respondent well prior to the hearing date. This was not an instance where respondent had to track down a former employee causing a delay in disclosing the person as a witness. Respondent's offer of proof indicated she would testify regarding employee training and COVID-19 procedures. It seems those areas of inquiry could have likely been covered by another properly disclosed and available witness(s) if Ms. Price was not somehow locatable. The late disclosure of Ms. Price was a surprise to the Department and deprived it of a reasonable opportunity to prepare for her testimony. To compel the Department to request a continuance to prepare for her testimony or respond at a continued hearing to what testimony she would give if permitted to testify at the May 18, 2021 hearing would cause an unjustified delay in the proceedings, just what respondent would likely argue if the roles were reversed and the day before the hearing the Department declared one of its own employees a witness to testify about information long known to the Department. Fair presentation of witnesses and evidence at the hearing should be a goal not to be undermined in this case by the extremely late disclosure of a witness without good cause.

20. Dietz did not testify at the hearing.⁷

LEGAL BASIS OF DECISION

1. Article XX, section 22, of the California Constitution and Business and Professions section 24200, subdivision (a), provides 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. Under Business and Professions Code section 24300, subdivision (a), hearings on accusations, except as provided for in section 24203 and in that section, shall be conducted in accordance with Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code. Chapter 5 consist of Government Code sections 11500 through 11529. Those sections are within what is known as the Administrative Procedure Act.
4. Government Code section 11513, subdivision (e), states: "The rules of privilege shall be effective to the extent they are otherwise required by statute to be recognized at the hearing."
5. Evidence Code section 940 states: "To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him."
6. 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.
7. Business and Professions Code section 25660 generally provides a defense to a licensee or person accused of selling an alcoholic beverage to a minor, i.e., a person under 21 years of age, if the person asked for and reasonably relied on bona-fide evidence of majority and identity provided by the minor.

⁷ There was no indication why Dietz was unavailable or not called to testify at the hearing.

8. Business and Professions Code section 25661 makes a minor's possession or use of a false identification a crime. It states: "(a) Any person under the age of 21 years who presents or offers to any licensee, his or her agent or employee, any written, printed, or photostatic evidence of age and identity which is false, fraudulent or not actually his or her own for the purpose of ordering, purchasing, attempting to purchase or otherwise procuring or attempting to procure, the serving of any alcoholic beverage, or who has in his or her possession any false or fraudulent written, printed, or photostatic evidence of age and identity, is guilty of a misdemeanor..."

9. Business and Professions Code section 25666, subdivision (a), states: "In any hearing on an accusation charging a licensee with a violation of Sections 25658, 25663, and 25665, the department shall produce the alleged minor for examination at the hearing unless he or she is unavailable as a witness because he or she is dead or unable to attend the hearing because of a then-existing physical or mental illness or infirmity, or unless the licensee has waived, in writing, the appearance of the minor. When a minor is absent because of a then-existing physical or mental illness or infirmity, a reasonable continuance shall be granted to allow for the appearance of the minor if the administrative law judge finds that it is reasonably likely that the minor can be produced within a reasonable amount of time.

"(b)(1) Nothing in this section shall prevent the department from taking testimony of the minor as provided in Section 11511 of the Government Code .

"(2) This section is not intended to preclude the continuance of a hearing because of the unavailability of a minor for any other reason pursuant to Section 11524 of the Government Code."

DETERMINATION OF ISSUES

1. Cause for suspension or revocation of respondent's license does exist under Article XX, section 22, of the California Constitution and Business and Professions Code section 24200, subdivisions (a) and (b), because on October 31, 2020, respondent's employee, Jack Dietz, inside the licensed premises, sold alcoholic beverages to O.D., a person under the age of 21, in violation of Business and Professions Code section 25658, subdivision (a).

2. The evidence established respondent's employee, Jack Dietz, while on the licensed premises, sold alcoholic beverages, to-wit: vodka, to 17 year old O.D., a person under 21 years of age, in violation of section 25658, subdivision (a).

3. Respondent contended the accusation should be dismissed because the Department did not comply with section 25666 which generally obligates the Department to produce the minor at the hearing for examination when the accusation has charged a violation of section 25658, i.e. giving, selling, or furnishing an alcoholic beverage to a minor. Respondent

asserted the minor in this instance, O.D., could not be examined because she asserted her right not to give testimony that would or tend to incriminate her.

4. Under Business and Professions Code section 24300, subdivision (a), the accusation hearing in this matter was to be conducted in accordance with Government Code sections 11500 through 11529.

5. Government Code section 11513, subdivision (e), states: "The rules of privilege shall be effective to the extent they are otherwise required by statute to be recognized at the hearing."

6. The Fifth Amendment to the United States Constitution states, in part: "(n)o person ... shall be compelled in any criminal case to be a witness against himself." The California Constitution, article 1, section 15, states, in part: "[p]ersons may not...be compelled in a criminal cause to be a witness against themselves..." Evidence Code section 940 states: "To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him." However, the incrimination involved is limited to incrimination in the commission of a punishable crime. [Citation.] (*People v. Whelchel* (1967) 255 Cal.App.2d 455, 460 [63 Cal.Rptr. 258].) The privilege has been extended so that it is available to a person appearing only as a witness in any kind of proceeding where testimony can be compelled. (*Gonzales v. Superior Court* (1980) 117 Cal.App.3d 57, 62 [178 Cal.Rptr. 358].) In *Kastagar v. United States* (1972) 406 U.S. 441, 444, the United States Supreme Court indicated the privilege against self-incrimination extends to "...any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory..."

7. In accordance with section 25666, the Department called O.D. to the stand at the hearing and she was sworn-in to testify. However, under advice of her personal counsel, who was also present at the hearing, she declined to answer questions regarding what occurred at the licensed premises so as not to incriminate herself. O.D.'s counsel indicated O.D. was issued a criminal citation for being a minor in possession of an alcoholic beverage and possessing/using a false identification. He indicated she was still in jeopardy, i.e. subject to possible criminal prosecution, especially as to illegal use or illegal possession of a false identification when she was at the licensed premises. He added her case was before the juvenile court and while it had been initially dismissed, that was not done with prejudice so a case against her could be refiled there.

8. Section 25661 states it is a misdemeanor for a person under 21 to use a false identification to obtain, purchase or procure, or attempt to obtain, purchase or procure an alcoholic beverage or to possess a false identification. Section 25658, subdivision (b), makes it a misdemeanor for a minor to purchase an alcoholic beverage. The violation herein occurred on October 31, 2020 and this hearing before the Department was held on

May 18, 2021. Therefore, the criminal one-year statute of limitations under Penal Code section 802, subdivision (a), had not run as to these two criminal misdemeanor offenses. O.D. could still potentially be criminally prosecuted for them. Therefore, she timely invoked her right not to testify as to matters that may have criminally incriminated her regarding what she did or possessed at the licensed premises on October 31, 2020.

9. The Department's obligation to produce the minor at the hearing for examination as required under section 25666 was fulfilled because it produced O.D. for examination at the hearing. However, section 25666 was not grounds for and did not authorize the ALJ piercing the self-incrimination privilege timely asserted by O.D. to compel her to testify about what occurred at the licensed premises. Based on what evidence was presented at the hearing about her activities there, including the testimony of Agent Louie and the store video, O.D.'s claim of privilege seemed well founded and not merely speculative or made in bad faith. Neither party asked for a continuance of the hearing to a time when O.D. would be out of jeopardy and available to testify about what occurred that October 31, 2020 at the licensed premises. Under these circumstances, section 25666's provisions were complied with and did not form a basis to dismiss the accusation.

10. Respondent also asserted it established a defense to the accusation under section 25660 because Dietz reasonably relied on O.D.'s false identification at the time he sold her the bottles of vodka.

11. 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."

12. 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.⁸ 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

⁸ *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).

government agencies and identifications that are high quality false versions of government identifications.⁹

13. 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.¹⁰ The defense is also inapplicable if the appearance of the presenter does not match the description on the identification.¹¹ 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 false identification.

14. As neither O.D. nor Dietz testified at the hearing, the primary evidence of their transaction was Exhibit 7, a brief video clip that recorded it. The recording did not have any audio component preserving what, if anything, they said to each other during the sales transaction. The video shows their whole transaction took approximately 20-30 seconds. During that time, it appeared Dietz looked in the direction of O.D.'s false identification for, at most, two to three seconds before he completed the sale of vodka to her. O.D. held her identification as Dietz looked toward it. Dietz never touched it.

15. As Dietz did not testify at the hearing about his transaction with O.D., other than telling Agent Louie that day he did not look at/consider the physical descriptors on O.D.'s identification and did not touch/feel it, it was not established what, if anything, Dietz actually considered when he ostensibly viewed/inspected O.D.'s identification at the sales counter. The video shows O.D. always held her identification. She never removed her mask so Dietz could not have compared her full facial appearance with her photo on the false identification. Further, there was no evidence Dietz: was familiar with or knew O.D. from any prior contact, assessed 17 year old O.D. as someone who could have been 21 years old; read the birthdate on the false identification and determined it made O.D. at least 21 years old; recognized the formatting and design of her identification as that used for those 21 and over;

⁹ *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).

¹⁰ *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).

¹¹ *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.

asked O.D. any questions about her age or about the identification; and/or indicated, for some other reason(s), he reasonably actually relied on her false identification as proof 17 year old O.D. was at least 21 years old.

16. Although Dietz told Agent Louie on the day of the investigation he was a manager-in-training and had worked for respondent about 18 months, there was no evidence what specific training or experience, if any, Dietz received or had regarding the proper/lawful sales of alcoholic beverages and what he should be looking for when examining/assessing identifications he is inspecting, especially when doing so in conjunction with selling alcoholic beverages.

17. Section 25660 is an affirmative defense for respondent to establish. It must be reasonably proven by evidence and not based on speculating Dietz actually reviewed and considered O.D.'s identification, its quality, its merits, and its contents when the evidence indicated he glanced at it for only a few seconds, he could not have compared the photo on it with O.D.s masked face, he stated he did not confirm the physical descriptors on it to O.D., and he stated he did not touch/feel it in any way. There was insufficient evidence establishing what he actually considered when he looked at O.D.s identification. On the state of the evidence, Dietz's actions were equally consistent with him feigning checking O.D.'s identification assuming no real examination was necessary because no minor would offer an identification showing they were not yet 21 years old when displaying it to purchase an alcoholic beverage.¹² Therefore, the evidence did not establish and it cannot be concluded Dietz actually and reasonably relied on O.D.'s false identification as proof of her age in making his decision to sell her alcoholic beverages. Therefore, a defense under section 25660 was not established.

18. Except as set forth in this decision, all other allegations in the accusation and all other contentions the parties raised in the pleadings or at the hearing lacked merit.

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 first violation for selling or furnishing an alcoholic beverage to a minor in violation of section 25658 is a 15-day license suspension.

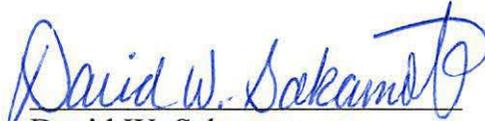
¹² However, California Code of Regulations, title 4, section 141 (known as rule 141), governs law enforcement operations wherein an underage decoy is sent into a licensed premises to determine if he/she can purchase an alcoholic beverage. A decoy who possesses his/her real identification must display it to the seller if requested and must also answer truthfully any question(s) put to him/her about their age. If the decoy does not do those things, a defense to the charge is established.

2. Rule 144 also permits imposition of a revised penalty based on the presence of aggravating or mitigating factors. Rule 144 contains a non-exhaustive list of some factors that can be considered.
3. The Department recommended the 15-day suspension set forth in rule 144.
4. Respondent did not establish any relevant factors in mitigation.
5. The evidence did not establish any noteworthy elements of mitigation or aggravation in this matter to warrant any deviation from the penalty set forth in rule 144. Therefore, the standard penalty set out therein of a 15-day license suspension is appropriate.

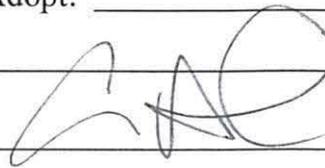
ORDER

1. Count 1 of the accusation is sustained.
2. Respondent's license is suspended for 15 days.

Dated: June 7, 2021



David W. Sakamoto
Administrative Law Judge

| | |
|-------------------------------------|---|
| <input checked="" type="checkbox"/> | Adopt |
| <input type="checkbox"/> | Non-Adopt: _____ |
| By: |  _____ |
| Date: | 07/22/21 _____ |