

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on August 25, 2017. There is one prior instance of departmental discipline against the license for the sale of alcohol to a minor in 2018.

On August 5, 2021, the Department instituted a single-count accusation against appellant charging that on January 22, 2021, appellant's clerk, Chien Chung (the clerk), sold an alcoholic beverage to 19-year-old Taylor Ignacio (the minor).

At the administrative hearing held on October 21, 2021, documentary evidence was received and testimony concerning the violation charged was presented by the minor, Department Agent Eric Silva, and the clerk. Mohammad Rashid, corporate officer and sole shareholder of Trojan 1970, Inc. testified on appellant's behalf.

Testimony established that on January 22, 2021, the minor entered the licensed premises. He was wearing a mask, as required by COVID-19 health regulations at that time. Agent Silva was on general enforcement assignment of the area's licensed premises which are in close proximity to the University of Southern California (USC). Agent Silva believed the minor looked young, so he followed him into the premises and observed as he selected a six-pack of Stella Artois hard cider.

When it was his turn, the minor presented the six-pack to the clerk for purchase. The clerk asked the minor for his identification (ID), and the minor handed him a purported California driver's license (exh. D-4) which contained his actual photograph and correct height, weight, and eye color information. The birth date on the license, if correct, would have made him 24 years of age. The clerk looked at the ID but did not pick it up. The clerk completed the sale without asking any age-related questions and without asking the minor to remove his mask.

The minor was detained by Department agents as he exited the premises. Upon questioning, the minor admitted that he was 19 years old and that he had used one of two fake IDs in his possession, which were confiscated by the agents. (Exh. 4.) Agent Silva noted that the photograph on the fake ID used by the minor showed more of the torso than a genuine ID, as well as discrepancies in the texture and signature that confirmed that the ID was a fake. The minor was photographed (exh. D-3), cited, and released from custody.

The agents questioned the clerk, who acknowledged selling alcohol to the minor. He stated that he believed the minor to be over the age of 21 because he had checked the minor's ID and believed it to be genuine. Although a scanner was available to the clerk to check IDs, he did not use it on this occasion.

The administrative law judge (ALJ) issued a proposed decision on November 8, 2021, sustaining the accusation and recommending a 20-day suspension. The Department adopted the proposed decision in its entirety on December 20, 2021, and a certificate of decision was issued eight days later.

Appellant then filed a timely appeal contending: (1) the decision misapplies the reasonable person standard under section 25660, and (2) the actual ID shown to the clerk was improperly excluded from evidence.

DISCUSSION

I

SECTION 25660

Appellant contends the Department's decision misapplies the reasonable person standard under Business and Professions Code section 25660. (AOB at pp. 7-9.)

Business and Professions Code section 25660 provides an affirmative defense to the unlawful sale of an alcoholic beverage to a person under the age of 21. The defense is available if the licensee proves that the seller "demanded, was shown, and acted in reliance upon" "bona fide evidence of majority and identity of the person" purchasing alcoholic beverages:

(a) Bona fide evidence of majority and identity of the person is a document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a motor vehicle operator's license, an identification card issued to a member of the Armed Forces that contains the name, date of birth, description, and picture of the person, or a valid passport issued by the United States or by a foreign government.

[¶] . . . [¶]

© 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.

(Bus. & Prof. Code, § 25660.)

To establish a defense under section 25660, a licensee must establish that an identification document, purported to be issued by a government agency, was displayed and examined and that the clerk's reliance on that identification was reasonable. (*Dept.*

of Alcoholic Bev. Control v. Alcoholic Beverage Control Appeals Bd. (2004) 118 Cal.App.4th 1429, 1445 [13 Cal.Rptr.3d 826] (*Masani*.) The burden in such a case is on the party asserting the defense. (*Farah v. Alcoholic Beverage Control Appeals Board* (1959) 159 Cal.App.2d 335, 338-339 [324 P.2d 98].)

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.)

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings.³

The question before the Board in this matter is whether the ALJ abused his discretion in determining that the clerk did not reasonably rely on the fake ID. Reasonable reliance on a fake ID cannot be established unless the appearance of the person presenting identification indicates that he or she could be 21 years of age and

³The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

the seller makes a reasonable inspection of the identification offered. (*5501 Hollywood v. Dept. of Alcoholic Bev. Control* (1957) 155 Cal.App.2d 748, 753-754 [318 P.2d 820] (*5501 Hollywood*)).) Section 25660, as an exception to the general prohibition against sales to minors, must be narrowly construed. (*Lacabanne Properties, Inc. v. Alcoholic Beverage Control Appeals Board* (1968) 261 Cal.App.2d 181, 189 [67 Cal.Rptr. 734] (*Lacabanne*)).)

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, supra*.) 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, supra*; *5501 Hollywood, supra*.)

Whether or not a licensee 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 may not go behind that factual finding. The court in *Masani*, summarized the standard of review:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends, Inc. v. Alcoholic Beverage Control Appeals Bd.* (2002) 100 Cal.App.4th [1250,] 1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; §§ 23090.2, 23090.3.) We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*)).) The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the

credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Masani, supra*, at p. 1437.)

In the instant case, the ALJ made a factual finding that the clerk's reliance on the fake ID was not reasonable and that a 25660 defense was not established:

10. Chung requested and was shown the identification from Ignacio. Chung briefly looked at it in making his inquiry as to whether Ignacio was older than 21. Part of the analysis required under the law requires Chung to determine the bona fides of the identification itself. Chung credibly testified that he subjectively concluded that Ignacio was over 21. His conclusion was based on his brief review of the identification and a conclusion that it was Ignacio's bona fide California driver's license that he looked at. (Findings of Fact ¶¶ 5-16) The remaining question is whether his reliance on the genuineness of the identification presented by Ignacio was objectively reasonable such that a defense is established.

11. If Chung had examined Ignacio and the purported identification with the level of care required under the law, he would have seen a number of discrepancies that would have led him to the conclusion that Ignacio was underage, and the identification was fraudulent. Chung should have had Ignacio remove his mask. Had he done so, he would have been able to observe that Ignacio appeared consistent with his chronological age of 19 years old. This would have been at odds with the identification stating he was 24 years old. In terms of the identification itself, the picture image of Ignacio was not properly zoomed in on Ignacio's face and the raised signature was the wrong texture. Most importantly, Chung had the scanner that would have assisted him in identifying the presented identification as fake. Chung did not use it. His assertion that there was a health reason for not physically interacting with the license is rejected as not legitimate given that he interacted physically with other items that also came into contact with Ignacio's hands.

12. As noted above, the purported license was somewhat sophisticated. Chung clearly subjectively relied on the identification as real. Though Chung was negligent, he did not recklessly disregard his obligation to check for identification. The purported license looked genuine to him. However, had he looked at Ignacio's face, examined the identification more closely, and then taken the basic step of running it through the scanner, he would have determined that it was not genuine. His failure to

take these necessary actions precludes the availability of the defense under section 25660.

(Conclusions of Law, ¶¶ 10-12.)

Whether the identification appeared genuine, and whether reliance on it was reasonable, is a factual determination for the ALJ, and this Board may not overturn a finding of fact by reweighing the evidence to reach a contrary result. In *Masani*, the court reversed a decision of the Appeals Board which had, in turn, reversed a decision of the Department which had held that the seller of alcoholic beverages did not reasonably rely on false identification presented by a 19-year-old minor.

[T]he Department ALJ found, as a question of fact, there was no reasonable reliance on the particular ID in this case. In reaching the contrary conclusion the Board impermissibly reweighed the evidence and substituted its independent judgment for the Department's.

(*Masani, supra*, at p. 1437.)

Appellant now asks the Board to do what the *Masani* court said it should not. We must decline to reweigh the evidence before us.

II

EVIDENCE IMPROPERLY EXCLUDED

Appellant contends that relevant evidence was improperly excluded at the administrative hearing when the Department failed to enter the fake ID into evidence. Accordingly appellant argues, under section 23085, the matter should be remanded for consideration of that evidence. (AOB at pp. 9-10.)

Our governing statutes provide:

The board shall determine the appeal upon the record of the department and upon any briefs which may be filed by the parties. . . . The board shall not receive any evidence other than that contained in the record of the proceedings of the department.

(Bus. & Prof. Code, § 23083(a).) The only exception to this rule is when evidence is offered which either could not be produced, or should have been admitted, at the administrative hearing:

The review by the board of a decision of the department shall be limited to the questions . . . [w]hether there is relevant evidence, which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department.

(Bus. & Prof. Code, § 23084(e).) In such a case:

In appeals where the board finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department, it may enter an order remanding the matter to the department for reconsideration in the light of such evidence.

(Bus. & Prof. Code, § 23085.) As a general rule, evidence is relevant if it has any tendency in reason to prove or disprove a disputed fact that is of consequence to the determination of the action. (Evid. Code, § 210.)

The ALJ raised the issue of whether the fake ID should be physically examined by him before issuing his proposed decision. The Department offered to deliver the actual fake ID to the Office of Administrative Law for the ALJ's inspection, but the ALJ ultimately rendered his proposed decision without the benefit of this examination because neither the Department nor appellant requested that the fake ID be entered into evidence, and both parties agreed to rest their cases on the photographic and

testimonial evidence presented at the administrative hearing. (RT at pp. 100-107.) As pointed out in the Department's Reply Brief at pp. 16-17, the burden was on appellant to make this request as part of its burden to establish a defense under section 25660. Since appellant did not raise an objection at the administrative hearing to the fake ID not being entered into evidence, it cannot do so now.

Numerous cases have held that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; *Hooks v. California Personnel Board* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564,576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].) The Board is entitled to consider this issue waived.

In sum, this is not a situation where evidence either could not have been produced or was improperly excluded. Both parties had an opportunity to ask that the fake ID be introduced into evidence, but neither did. We find no error.

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 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 *et seq.* Service on the Board pursuant to California Rules of Court (Rule 8.25) should be directed to: 400 R Street, Ste. 320, Sacramento, CA 95811 and/or electronically to: abcboard@abcappeals.ca.gov

APPENDIX

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

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

TROJAN 1970, INC.
TROJAN LIQUOR
3000 S. VERMONT AVENUE
LOS ANGELES, CA 90007-3032

OFF-SALE GENERAL - LICENSE

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

CERRITOS ENFORCEMENT OFFICE

File: 21-582111

Reg: 21091339

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 28, 2021. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

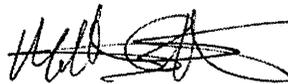
Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date 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 February 7, 2022, a representative will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: December 28, 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:

Trojan 1970, Inc.	}	File: 21-582111
DBA: Trojan Liquor	}	
3000 S. Vermont Avenue	}	Registration: 21091339
Los Angeles, California 90007-3032	}	
	}	License Type: 21
Respondent	}	
	}	Word Count: 21,114
	}	
	}	Reporter:
	}	Sharon Cahn-CSR #6210
	}	iDepo Reporters
	}	
<u>Off-Sale General License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter, via videoconference, on October 21, 2021.

Patrice Huber, Attorney, represented the Department of Alcoholic Beverage Control (Department).

Jade Quintero, Attorney, represented the respondent, Trojan 1970, Inc. (Respondent).

The Department seeks to discipline the Respondent's license on the grounds that, on or about January 22, 2021 the Respondent, through their agent or employee, Chien Chung, sold, furnished, gave, or caused to be sold, furnished, or given, an alcoholic beverage, to wit: hard cider, to Taylor Ignacio, an individual under the age of 21 years in violation of Business and Professions Code section 25658(a)¹ (Exhibit D-1).

The Department further alleged that there is cause for suspension or revocation of the license of the Respondent in accordance with section 24200 and sections 24200(a) and (b). The Department further alleged that the continuance of the license of the Respondent would be contrary to public welfare and/or morals as set forth in Article XX, Section 22 of the California State Constitution, and sections 24200(a) and (b). (Exhibit D-1)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on October 21, 2021.

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

FINDINGS OF FACT

1. The Department filed the accusation on August 5, 2021. On August 25, 2017 the Department issued the Respondent a type 21, off-sale general license for the above-described location (the Licensed Premises). (Exhibit D-1)

2. The following is the record of prior Department discipline against the Respondent's license as established by official records introduced by the Department (Exhibit D-6):

Violation Date	Violation	Registration Date	Registration Number	Penalty
1/25/2018	25658(a)	3/30/2018	18086721	15 day suspension

3. Taylor Ignacio (Ignacio) was born on March 17, 2001 and was 19 years old on January 22, 2021. On that date, Ignacio was detained by an agent of the Department after he purchased a six-pack of Stella Artois Hard Cider at the Licensed Premises. Prior to being detained, Ignacio had entered the Licensed Premises and purchased the alcoholic beverages using one of two fraudulent California driver's licenses he had obtained. (Exhibit D-4) Department Agent E. Silva (Silva) observed Ignacio prior to his entry into the Licensed Premises. Silva was on a general enforcement assignment of the area's licensed premises because of their close proximity to the University of Southern California (USC) campus. Ignacio was an undergraduate student at USC. Ignacio was not wearing a mask when he was observed by Silva. Ignacio appeared to be "very young" and potentially underage to Silva.

4. On January 22, 2021 Ignacio entered the Licensed Premises. The Licensed Premises was actively enforcing COVID-19 health regulations during the pandemic. The business had a transparent plastic barrier between the cashier area and the customers making purchases and it was also requiring the wearing of face masks by employees and patrons. Ignacio was wearing a face mask when he walked through the Licensed Premises, selected the six-pack for purchase and walked to the counter area to complete his purchase. Because of Silva's concerns about Ignacio's age, he followed him into the Licensed Premises and observed his actions.

5. Ignacio was called up to the counter by a cashier who was later identified as Chien Chung (Chung). Ignacio presented the six-pack for purchase. Chung asked Ignacio for identification to prove he was over 21 years of age. Ignacio produced the purported California driver's license by presenting it through the opening in the transparent barrier. (Exhibit D-4) Chung looked briefly at the identification but did not pick it up to examine it. The image on the identification was of Ignacio. The height and weight information corresponded to Ignacio. The purported California driver's license showed his date of birth as March 17, 1996 which would make him 24 if this was a genuine identification with accurate information. The purported license also had a fake address.

6. Though Chung primarily worked as a security guard for the Licensed Premises, he regularly relieved cashiers and assisted at the registers when it was busy. Chung was aware that the

Licensed Premises had scanners at the registers for checking the security features of purported licenses for genuineness. Chung was aware that USC was located nearby. Chung was aware the Licensed Premises encountered the use of fake identifications frequently. Chung had also personally encountered persons trying to use fake identifications to purchase alcoholic beverages at the Licensed Premises and in his previous employment in a licensed establishment in Virginia. Despite the presence of the scanner at the register, Chung did not use it to examine the genuineness of the identification presented by Ignacio. Chung, in his testimony at the hearing, testified that he did not handle the identification because of COVID-19 concerns and concerns about his health. During the transaction, Chung handled the six-pack, Ignacio's debit card, and the pen he handed Ignacio to sign the debit card receipt despite these items presenting the same issue of Ignacio having held them. (Exhibit D-7)

7. Chung concluded that the identification presented by Ignacio was genuine and he processed the purchase. Chung did not ask any age related questions of Ignacio at any time during their interaction. Chung did not have Ignacio remove his mask to look at his facial features. Ignacio paid for the purchase with his debit card, and he took the six-pack after the transaction was completed. Ignacio then walked out of the Licensed Premises. Silva preceded him out and joined another Department agent who was waiting. When Ignacio walked out, the Department agents detained him for questioning.

8. The agents identified themselves as law enforcement. Silva asked Ignacio his true age and Ignacio admitted he was 19 years old. Ignacio admitted to using one of the two fake identifications he had in his possession. Ignacio then produced the purported California driver's licenses and handed them to Silva. Silva photographed the identifications (Exhibit D-4) and later retained them as evidence. Silva looked at the fake identifications handed to him by Ignacio. Ignacio also provided Silva his real identification which Silva documented with a photograph. (Exhibit D-5)

9. While the identifications were good quality reproductions, Silva observed discrepancies in the identifications that allowed him to conclude they were not genuine, separate from Ignacio's admission that they were fakes. Notable to Silva was that the photo of Ignacio on the fake identifications captured a portion of Ignacio's upper torso and shoulders. Real identifications, like Ignacio's California genuine driver's license (Exhibit D-5), are significantly more zoomed in on the face. Silva also observed that the texture of the raised signature on the fake identification was too chunky. On a genuine identification, the raised signature is sharper and more refined. Silva took a photograph of Ignacio to document his appearance that day. (Exhibit D-3) Ignacio was then cited and released from custody.

10. Silva entered the Licensed Premises and contacted Chung regarding the sale to Ignacio. Chung admitted that he had sold to Ignacio, but that Ignacio presented identification that showed him to be older than 21. Chung communicated to Silva that he believed the license to be genuine. Chung confirmed the Licensed Premises did have a scanner and he initially claimed to have used it. Chung did not use the available scanner when checking Ignacio's identification. (Exhibit D-7)

11. Chung cooperated with Silva during the investigation, and he contacted Mohammed Rashid (Rashid) about what had just occurred. Rashid is the owner and a corporate officer of the corporation holding the license. Rashid is actively involved in the running of the Licensed Premises. Rashid purchased identification scanners for the Licensed Premises four years prior to the incident and he invested in upgrading them three years ago. (Exhibit L-1) Rashid communicates weekly with employees of the Licensed Premises and reiterates the need to check identifications carefully. Rashid maintains signage in English and in Spanish that warns that the Licensed Premises enforces age requirements in the purchase of alcohol (Exhibits L-2 and L-3) and that the Licensed Premises uses a scanner to check age. (Exhibit L-4) After this incident, Rashid completed LEAD training on October 13, 2021 and intends to use the training to educate his employees regarding age restricted sales.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.
2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.
3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.
4. 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.

5. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on January 22, 2021 the Respondent's clerk, Chien Chung, inside the Licensed Premises, sold an alcoholic beverage to Taylor Ignacio, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 1-11)

6. The evidence established that on January 22, 2021 Ignacio was 19 years old and he purchased a six-pack of Stella Artois Hard Cider, an alcoholic Beverage, in the Licensed Premises, a location subject to the responsibilities of an establishment holding a type 21, off-sale, general license. Ignacio purchased the alcoholic beverage from the Respondent's employee, Chung after he produced a fraudulent California identification with a fake date of birth, rather than his own identification. After briefly looking at the identification and Ignacio, Chung subjectively concluded that Ignacio was 24 years old, as stated on the fake identification, even though Ignacio was actually 19 years old. Ignacio appeared consistent with his chronological age of 19 and had Chung actually had Ignacio remove his mask, this disparity would have been more apparent. (Findings of Fact ¶¶ 5-7)

7. The Respondent has offered testimony and evidence in support of the assertion that Chung reasonably relied on the purported California driver's license presented by Ignacio that showed him to be over 21 years of age and that the provisions of section 25660 should apply as a defense to the accusation. Section 25660 provides a defense to any person who was shown and acted in reliance upon bona fide evidence of majority in permitting a minor to enter and remain in a public premises in contravention of section 25665, a sale forbidden by section 25658(a), or in permitting a minor to consume in an on-sale premises in contravention of section 25658(b).

8. The defense offered by this section is an affirmative defense. As such, the Respondent, as the licensee, has the burden of establishing all of its elements, namely, that evidence of majority and identity was demanded, shown, and acted on as prescribed.² This section applies to identifications actually issued by government agencies as well as those which purport to be.³ A licensee or his or her employee is not entitled to rely upon identification if it does not appear to be a bona fide government-issued identification or if the personal appearance of the holder of the identification demonstrates, above mere suspicion, that the holder is not the legal owner of the identification.⁴

² *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).

³ *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).

⁴ *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. In this matter, it is undisputed that the identification presented by Ignacio depicted his image and that the age information on the identification depicted him as being over the age of 21. It is also undisputed that the identification was a fabrication and was not a “document issued by a federal, state, county, or municipal government.” The remaining question is whether the identification presented by Ignacio was something that Chung could have reasonably relied on because the identification *appeared* to be a bona fide government-issued identification. The Respondent has not met their burden regarding this prong of the defense offered by section 25660. (Findings of Fact ¶¶ 5-11)

10. Chung requested and was shown the identification from Ignacio. Chung briefly looked at it in making his inquiry as to whether Ignacio was older than 21. Part of the analysis required under the law requires Chung to determine the bona fides of the identification itself. Chung credibly testified that he subjectively concluded that Ignacio was over 21. His conclusion was based on his brief review of the identification and a conclusion that it was Ignacio’ bona fide California driver’s license that he looked at. (Findings of Fact ¶¶ 5-16) The remaining question is whether his reliance on the genuineness of the identification presented by Ignacio was objectively reasonable such that a defense is established.

11. If Chung had examined Ignacio and the purported identification with the level of care required under the law, he would have seen a number of discrepancies that would have led him to the conclusion that Ignacio was underage, and the identification was fraudulent. Chung should have had Ignacio remove his mask. Had he done so, he would have been able to observe that Ignacio appeared consistent with his chronological age of 19 years old. This would have been at odds with the identification stating he was 24 years old. In terms of the identification itself, the picture image of Ignacio was not properly zoomed in on Ignacio’s face and the raised signature was the wrong texture. Most importantly, Chung had the scanner that would have assisted him in identifying the presented identification as fake. Chung did not use it. His assertion that there was a health reason for not physically interacting with the license is rejected as not legitimate given that he interacted physically with other items that also came into contact with Ignacio’s hands.

12. As noted above, the purported license was somewhat sophisticated. Chung clearly *subjectively* relied on the identification as real. Though Chung was negligent, he did not recklessly disregard his obligation to check for identification. The purported license looked genuine to him. However, had he looked at Ignacio’s face, examined the identification more closely, and then taken the basic step of running it through the scanner, he would have determined that it was not genuine. His failure to take these necessary actions precludes the availability of the defense under section 25660.

13. The Department has met its burden of proof that there was a violation of section 25658(a) and the Respondent has failed to establish a defense under section 25660. Specifically, the Respondent failed to prove that Chung made a sufficient inquiry as to whether Ignacio’s identification was bona fide evidence of majority and identity such that Chung could reasonably have relied upon it. (Findings of Fact ¶¶ 4-11)

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

PENALTY

The Department established that the Respondent suffered a prior violation of section 25658(a) within 36 months. The standard penalty for a violation with one prior of this nature is 25 days. This is the penalty sought by the Department. The Respondent has been licensed since August 25, 2017. The prior occurred in January 2018, which is approximately two years prior to this incident. No factors in aggravation have been established by the Department beyond the close proximity of this prior.

The Respondent has established some factors in mitigation that justify a departure downward from the standard penalty. This violation, in comparison to other violations, appeared to be the product of an error on the part of the clerk while he was subjectively trying to enforce the requirement to show identification. He fell below the duty of care required, but he did not actively ignore his duty, as occurs in more serious violations. Ignacio presented a fairly sophisticated fake identification to Chung. It is also noted that this incident occurred during disrupted operations at the Licensed Premises during a pandemic and Chung was also having to juggle health and safety requirements such as social distancing and mask wearing with his ongoing duty to ensure that only persons 21 and older were sold alcoholic beverages.

The Respondent has maintained appropriate signage and uses scanners to assist in age restricted sales. The Respondent did take and complete LEAD training just prior to the hearing in this matter. It is noted the Respondent could have done this soon after the incident in January 2021 as part of an effort to improve age restricted sales protocols at the Licensed Premises. The delay in seeking the training diminishes its impact as a factor in mitigation.

There appear to be no other factors in mitigation applicable to this violation. It is worrisome that the Respondent has had two violations since its licensure in August 2017 given its proximity to a university. It is hoped that the Respondent will redouble its efforts to avoid future sales given the vulnerable student population that will undoubtedly continue to test the boundaries of this Licensed Premises. No other factors in aggravation have been shown. The penalty recommended herein complies with rule 144.

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ORDER

The Respondents' on-sale beer and wine license is hereby suspended for a period of 20 days.

Dated: November 8, 2021



Alberto Roldan
Administrative Law Judge

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

By:  _____
Date: <u>12/20/21</u> _____