

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

AB-9966

File: 20-582148; Reg: 21091266

7-ELEVEN, INC. & MOHAMMAD IQBAL LODHI,
dba 7-Eleven #14179C
633 Moraga Road
Moraga, CA 94556,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: August 4, 2023
Sacramento, CA/Telephonic

ISSUED AUGUST 7, 2023

Appearances: *Appellants:* Dean R. Lueders, of ACTlegally, as counsel for 7-Eleven, Inc. and Mohammad Iqbal Lodhi, dba 7-Eleven #14179C;

Respondent: Jason T. Liu, as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Mohammad Iqbal Lodhi, doing business as 7-Eleven #14179C (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 25 days because their clerk sold an alcoholic beverage to a minor in violation of Business and Professions Code² section 25658(a).

¹ The decision of the Department under Government Code section 11517(c), dated March 21, 2023, is set forth in the appendix.

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

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale retail beer and wine license was issued on October 9, 2017. There is one prior instance of departmental discipline against the license for violating section 25658(a), which occurred approximately eight months before the violation at issue in this appeal.

On June 16, 2021, the Department filed a single-count accusation against appellants charging that, on February 26, 2021, appellants' clerk, Shishpal Kumar (the clerk), sold an alcoholic beverage to 19-year-old Dylan Pelkey (the minor).

This matter was originally argued and submitted for decision on September 29, 2021. At the September 29th hearing, the minor, Department Agent Jimisa Brown, the clerk, and appellant Mohammad Iqbal Lodhi (Lodhi) testified. An initial proposed decision was issued on October 25, 2021 but was rejected by the Department on December 14, 2021. On May 9, 2022, the Department issued an order striking the testimony of the clerk and remanding the matter to the Administrative Law Judge (ALJ) for further proceedings to take additional evidence. The clerk's testimony was stricken after the Department contended that the ALJ improperly allowed the clerk to testify while in the same room as Lodhi.³ The Department contended that the testimony was tainted, as the clerk repeatedly looked sideways where Lodhi was sitting off camera while giving testimony.

A second administrative hearing was held on August 17, 2022, and the clerk, Lodhi, and Agent Brown testified. A second proposed decision was issued on September 14, 2022, but was again rejected by the Department on November 1, 2022.

³ The hearing took place over video conference, so the clerk and Lodhi appeared on video in a different physical location than other participants.

On March 21, 2023, the Department issued a decision under Government Code section 11517(c) sustaining the allegation and imposing a 25-day suspension of appellants' license.

The evidence in the record reflects that the minor entered the licensed premises on February 26, 2021, and went to one of the coolers inside. The minor selected a 12-can pack of White Claw Hard seltzer, an alcoholic beverage, and took it to the sales counter. The clerk sold that item to the minor. The minor wore a black protective facemask throughout the transaction and was never asked to remove it. The clerk did not ask the minor to present any identification to determine if he was at least 21 years old. The minor exited the premises after the sale was completed.

When the minor made his alcoholic beverage purchase, Department supervising agent Jason Stockbridge and Agent Brown were observing the licensed premises from their car that was parked about 15-20 feet from the sales counter. As the minor exited the licensed premises, the agents approached and detained him for further investigation.

The agents asked the minor his age and he told them he was 21 years old and presented a false, horizontally formatted, California driver's license (exhibit A). Agent Brown asked the minor whether the identification would come back as valid if she ran it through her database. The minor then admitted he was only 19 years old and presented his true identification, a vertically formatted and authentic California driver's license that indicated he was only 19 years old (exh. 5).

The minor told the agents that the clerk did not ask for his identification at the time of the sale. The minor testified at the hearing that he presented his false identification to a clerk at the licensed premises on another occasion prior to the sale

that led to the violation and was 95 percent sure that clerk was clerk Kumar. The minor testified that the clerk was the only clerk the minor ever saw at the licensed premises.

At the scene, the minor filled out an affidavit regarding his activity at the licensed premises (exh. C). In that document, he indicated he was not asked for any identification and did not show any identification in connection with his purchase of the White Claw seltzer. He indicated he had been to the licensed premises in the past but had not purchased alcoholic beverages there. However, his statement also indicated that he showed his false identification at the licensed premises in the past but did not specify who he had shown it to or for what purpose it was displayed.

The agents issued the minor a citation for possession of a false identification and purchasing alcoholic beverages at the licensed premises. The agents then contacted the clerk, who told them he primarily spoke Hindi, so the agents interviewed him using an interpreting service via a phone link. The clerk told the agents that he had worked at the licensed premises for two to three months to help his uncle. He told the agents that he asked the minor for his identification, but the minor refused to present one. The clerk said the minor had been a customer at the store before, but he had never sold him alcoholic beverages.

During the first hearing, on September 29, 2021, the clerk testified through a Punjabi (not Hindi) interpreter. The clerk testified that he did not request any identification from the minor, nor did he review or examine any identification in connection with the sale. He testified that he recognized the minor as a regular customer, and that the minor had purchased alcoholic beverages at the store earlier that same day and presented a false identification to show he was at least 21 years old.

The clerk testified that he had examined the false identification on three to four occasions prior to February 26, 2021, and looked at the minor's photo, his height, his weight, and those were consistent with the physical appearances of the minor.⁴ The clerk also testified that he had scanned the identification and that the computer reader indicated that it was "OK" to sell the minor alcoholic beverages. The clerk stated that he told the agents' Hindi interpreter that he had viewed the minor's identification on a prior occasion or occasions.

At the second hearing, the clerk testified that he was 20 years old and had worked at the licensed premises for about one year prior to the date of the violation. The clerk stated that he was trained by a store manager for about one week and then worked under a manager's supervision. When presented an identification, the clerk was trained to check the date of birth, hair color, eye color, photograph, expiration date, and then run the identification through the sales register.

The clerk testified that when the sales register scanned an alcoholic beverage, it prompted the salesclerk to verify the customer's age. Appellants' policy was to examine the identifications of those customers who did not appear at least 35 years old and to scan the identification into the register. If the person was at least 21 years old, the register would process the sale. The register had an override function so that a clerk could manually enter a birthdate.

⁴ Other than a false birthdate and a false address, there was no evidence presented that there were any apparent or observable faults, deficiencies, imperfections, or imprecisions in the false identification that would have or should have caused a reasonable person to reject it as a bona fide identification. Similarly, there was no evidence presented that the false identification was sufficiently similar to a legitimate identification that a reasonable prudent person would accept it after careful examination. Although a full color copy of the false identification was offered as evidence, neither party sought to introduce the actual false identification as an exhibit.

The clerk considered the minor a regular customer and testified that he had waited on the minor three or four times at the licensed premises. However, the clerk only checked the minor's identification one time prior to the violation and the transaction on February 26, 2021 was the first time that the minor purchased alcohol.

About one month prior to the transaction at issue, the clerk examined the minor's false identification in connection with a cigarette purchase. The clerk examined the minor's false identification for his age, name, and if the photo on it matched the minor. The clerk noted the photo on the identification was of the minor. The eye color, weight, and height on the identification also matched the minor. The clerk looked at the front and back of the identification and noted it was not expired. The clerk also testified that he scanned the identification through the cash register.

Based upon his examination of the minor's false identification, he determined it appeared authentic and established the minor was at least 21 years old. During the alcoholic beverage sale to the minor on February 26, 2021, the clerk relied upon his earlier check of the minor's identification and did not ask to inspect the identification again. The clerk manually entered a birthdate into the sales register such that the register calculated the minor was at least 21 years old and cleared the alcoholic beverage for sale.

Lodhi testified that appellants established a training program for new employees where they receive instructions on how to check identifications and how to detect false identifications. Thereafter, a manager or trainer works alongside the new employee for a week to ten days to provide on-site training. At the time of the transaction with the minor, an override feature existed on the cash register system, allowing a clerk to complete the sale of alcohol without the clerk inspecting the customer's identification.

After the sale in question, appellants removed this option, so that now any customer purchasing alcohol must provide an identification to the clerk, who must run it through the register. Lodhi testified that Kumar was dismissed from employment based upon the violation at issue in this appeal.

Based on the evidence offered, the Department sustained the allegation and determined that appellants failed to establish reasonable reliance on a false identification as required by section 25660. Appellants filed a timely appeal contending that the Department erred: 1) by striking the testimony of the clerk during the first hearing due to the Department's failure to timely object and because there was no evidence of undue influence or witness tampering, and; 2) for rejecting appellants' affirmative defense under section 25660 because the false identification was not used in the violation at issue.

DISCUSSION

I.

STRIKING CLERK KUMAR'S TESTIMONY

Appellants contend that the Department improperly struck the clerk's testimony after the September 29, 2021 hearing because Department counsel failed to timely object and failed to offer any evidence to support the assertion of undue influence or witness tampering. (Appellants' Opening Brief at pp. 3-6.)

The Board is authorized to review a decision of the Department to determine "[w]hether there is relevant evidence ... which was improperly excluded at the hearing before the department." (Bus. & Prof. Code, § 23084; see also Cal. Const, art. XX, § 22 [providing remand as remedy in such cases].) Appellants are generally correct that "[a]n appellate court will ordinarily not consider procedural defects or erroneous rulings,

in connection with relief sought or defenses asserted, where an objection could have been but was not presented to the lower court by some appropriate method" (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal. 3d 180, 184, [588 P.2d 1261, 1263].) However, appellants have not cited any legal authority to support their position that the Department was required to provide evidence of actual undue influence or tampering in order to strike the clerk's testimony. The Department argues in its Reply Brief that it did, in fact, object twice to Lodhi and the clerk being in the same room while the clerk was testifying. (Department's Reply Brief at pp. 13-14.)

The California Constitution provides:

No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

(Cal. Const., art. VI, § 13, emphasis added.) Thus "even where a trial court improperly excludes evidence, the error does not require reversal of the judgment unless such error resulted in a miscarriage of justice." (*Poniktera v. Seiler* (2010) 181 Cal.App.4th 121, 142 [104 Cal.Rptr.3d 291].) The burden falls on the complaining party "to demonstrate it is reasonably probable a more favorable result would have been reached absent the error." (*Ibid.*, citing *Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431–1432 [77 Cal.Rptr.2d 574]; see also *Estate of Thottham* (2008) 165 Cal.App.4th 1331, 1341-1342 [81 Cal.Rptr.3d 856] ["Error in excluding evidence is a ground for reversing a judgment only if the error resulted in a miscarriage of justice, and that a different result would have been probable if the error had not occurred."].)

Here, appellants have not met their burden of demonstrating that a more favorable result would have been reached had the clerk's testimony been admitted.⁵ The record reflects that the clerk gave three different statements involving the transaction at issue and his familiarity with the minor and the false identification; one statement at the licensed premises on the day of the violation and oral testimony on September 29, 2021 and August 17, 2022. In the Board's view, the Department unnecessarily went through the process of striking the clerk's testimony from September 29, 2021, when it could have easily (and probably more appropriately) considered it and rejected it as not credible, which is its right as the ultimate trier of fact. (See *Pescosolido v. Smith* (1983) 142 Cal.App.3d 964, 970-971 [191 Cal.Rptr. 415] ["The trier of fact . . . is the sole judge of the credibility of the witnesses [and] may disbelieve them even though they are uncontradicted if there is any rational ground for doing so . . .".])

Appellants erroneously believe that admitting the clerk's September 29th testimony requires the Department to give it weight. Yet, a reasonable inference from the record is that the Department simply did not believe the clerk's testimony. The Board has no power to say otherwise. (See *Kirby v. Alcoholic Bev. etc. Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815] ["When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the department."].) For these reasons, the Board finds that, even if the Department erred by striking the testimony of the clerk, appellants have

⁵ Since the Board holds that appellants have not shown that a more favorable result would have been reached absent the error, it abstains from determining whether the Department actually objected to the clerk testifying in the same room as Lodhi.

failed to show that it was probable they would have achieved a more favorable result, had the testimony been admitted.

II.

SECTION 25660

Appellants also contend the Department erred in rejecting their section 25660 defense. (AOB, at pp. 7-11.) Specifically, appellants argue that the Department erred by finding that the clerk could not reasonably rely on his prior inspection of the minor's false identification when he sold the minor the seltzer. (*Ibid.*)

Section 25660(c) provides:

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.

(*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1444-1445 [13 Cal.Rptr.3d 826, 837] (*Masani*).)

However, section 25660 must be narrowly construed and the licensee has the burden of establishing the defense. (*Lacabanne Properties, Inc. v. Alcoholic Beverage etc. Appeals Board* (1968) 261 Cal.App.2d 181, 189-190 [67 Cal.Rptr. 734] (*Lacabanne*).)

One of the requirements of section 25660 is that a licensee must show that reliance on the false identification was *reasonable*. (*Lacabanne, supra*, at p. 189; *5501 Hollywood v. Dept. of Alcoholic Bev. Control* (1957) 155 Cal.App.2d 748, 753-754 [318 P.2d 820] (*5501 Hollywood*).) In other words, a licensee (or employee) must exercise the caution that a reasonable and prudent person would show in the same or similar

circumstances. (*Lacabanne, supra*, at p. 189; *Farah v. Alcoholic Bev. Control Appeals Bd.* (1958) 159 Cal.App.2d 335, 339 [324 P.2d 98]; *5501 Hollywood, supra*, at p. 753.)

Finally, the Department's findings regarding a section 25660 defense will be upheld so long as those findings are supported by substantial evidence. (*Masani, supra*, at p. 1437; *Kirby v. Alcoholic Beverage Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628] ["In considering the sufficiency of the evidence issue the court is governed by the substantial evidence rule[;] any conflict in the evidence is resolved in favor of the decision; and every reasonably deducible inference in support thereof will be indulged. [Citations.]".) Substantial evidence is "evidence of ponderable legal significance, which is 'reasonable in nature, credible and of solid value.'" (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 814 [38 Cal.Rptr.2d 304, 307–308], internal citations omitted.)

In the instant case, the Department made the following findings regarding appellants' section 25660 defense:

15. [...] Here, Kumar testified that Pelkey had not purchased alcoholic beverages at the store previously. He further testified that the one time he had viewed Pelkey's identification was approximately one month prior and in connection with a sale of tobacco products. Based upon Kumar's testimony, two things are clear: (1) there was no temporal nexus between the checking of identification and the alcohol sales transaction (i.e., checking the identification one month before the transaction in question is not "at or about the time" of the sale); and (2) the prior showing of identification was not in connection with a transaction forbidden by section 25658. [...] Since the prior showing of identification here was not in connection with a transaction prohibited by section 25658 and the action to suspend or revoke the license is not based upon a transaction in which identification was demanded or shown, the defense must fail.

16. [...] When considering the totality of circumstances under the facts of the instant case, Respondent has failed to meet its burden of establishing the affirmative defense. While Kumar testified that Pelkey was a "regular customer," he then testified that Pelkey had only been in the store "three or four times." Kumar also testified that Pelkey had never purchased

alcoholic beverages at the store previously and that he had checked his identification on only one prior occasion in connection with the purchase of tobacco. Taken together, there is scant evidence that minor Pelkey was "memorable and well-known" to Kumar or that Kumar "reasonably relied on the false identification on multiple prior occasions.

(Determination of Issues, ¶¶ 15-16.)

Based on the above and after a review of the record, the Department's findings regarding appellants section 25660 defense are supported by substantial evidence. It is reasonable for the Department to find that the minor was not a "regular customer" based upon three or four visits to the licensed premises. Further, the Department is reasonable in finding that a single inspection of an identification over a month before the sale at issue (and not related to the sale of alcohol) was insufficient to establish a defense under section 25660.⁶ The Department rejected the contradictory testimony of the clerk and the minor that the minor had previously sold the minor alcohol (even earlier that same day) and inspected the minor's false identification on "three to four occasions." The Board cannot simply second guess the Department and reach a different conclusion based upon its own observations of the evidence. The Department's decision is supported by substantial evidence and, therefore, the Department's findings must stand.

⁶ Tobacco products are not covered by sections 25658, 25663, or 25665. Thus, a clerk cannot rely on an inspection of a false identification during a sale for tobacco to establish a defense under section 25660.

ORDER

The decision of the Department is affirmed.⁷

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

⁷ 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. 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:

7 Eleven, Inc., and	}	File: 20-582148
Mohammad Iqbal Lodhi	}	
Dbas: 7-Eleven #14179C	}	Reg.: 21091266
633 Moraga Road	}	
Moraga, CA 94556	}	License Type: 20
Respondents,	}	
	}	
	}	
	}	
	}	

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter was originally argued and submitted for decision on September 29, 2021. The initial proposed decision was issued on October 25, 2021, and was rejected on December 14, 2021, by the Director pursuant to Government Code Section 11517(c)(2)(E)(i). Following review of the record and the written arguments of the parties, the Department issued an order striking the testimony of Shishpal Kumar and remanding the matter to the Administrative Law Judge for further proceedings to take additional evidence.

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control (hereafter the ALJ) heard this matter via video conference on September 29, 2021, and in-person on August 17, 2022. A second proposed decision was issued on September 14, 2022. The proposed decision was rejected by the Director by Notice dated November 1, 2022. The matter having regularly come before the Department for decision under Government Code Section 11517(c), and the Department having considered its entire record, including the transcript of the hearings held on September 29, 2021, and August 17, 2022, before Administrative Law Judge David W. Sakamoto, and the written arguments of the parties, adopts the following decision.

Jason Liu, attorney, Office of Legal Services, Department of Alcoholic Beverage Control, represented the Department of Alcoholic Beverage Control (hereafter the Department).

Dean Lueders, attorney, represented co-licensee-respondent Mohammad Iqbal Lodhi (hereafter respondent).

Co-licensee-respondent 7-Eleven, Inc. did not appear at the hearing.

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 August 17, 2022.

As specified in the Department's accusation, it seeks to discipline respondent's license on the following grounds:

Count 1: "On or about February 26, 2021, respondent-licensee's agent or employee, Shishpal Kumar, at said premises, sold, furnished, gave, or caused to be sold, furnished, or given, an alcoholic beverage, to wit: beer, to Dylan Pelkey, a person under the age of 21 years, in violation of Business and Professions Code Section 25658(a)."¹ (Exhibit 1: Pre-hearing pleadings)

FINDINGS OF FACT

1. The Department filed the accusation on June 16, 2021. On June 25, 2021, the Department received Respondent's Notice of Defense and set the matter for a hearing.
2. On October 9, 2017, the Department issued respondent a type-20 off-sale retail beer and wine license for its premises at 633 Moraga Road, Moraga, California (hereafter the licensed premises). That license permitted respondent to retail in beer and wine to the public for consumption off the licensed premises.
3. Respondent suffered one prior disciplinary action under its license as follows:

Date of Violation	Section Violated	Registration Date	Registration Number	Penalty Imposed
06-19-2020	Bus. & Prof. Code §25658(a)	08/10/20	20090360	15 day license suspension

4. Dylan Pelkey (hereafter Pelkey) was born on April 20, 2001.²

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

² Pelkey testified at the hearing about his activities at the licensed premises on February 26, 2021.

5. On February 26, 2021, Pelkey, then 19 years old, entered the licensed premises and went to one of the coolers inside. He was wearing a white t-shirt and a long sleeve shirt over that. He wore black pants and tennis shoes. He also wore a black face-mask.³

6. Pelkey selected a 12-can carton of White Claw Hard Seltzer, an alcoholic beverage, and took it to the sales counter. Respondent's sales clerk, Shishpal Kumar (hereafter Kumar) sold that item to Pelkey. Pelkey used a credit card or debit card to make payment. Kumar did not ask Pelkey to present any identification to determine if he was at least 21 years old. Pelkey exited the licensed premises.

7. When Pelkey made his purchase, Alcoholic Beverage Control (hereafter ABC) supervising agent Stockbridge and ABC Agent Brown (hereafter Agent Brown) had the licensed premises under observation from their car that was parked about 15-20 feet from the sales counter. As Pelkey exited the licensed premises carrying his seltzer, the agents approached and detained him for further investigation.

8. Once the agents detained Pelkey outside the licensed premises, they asked him his age. He told them he was 21 years old and presented Exhibit A, a false, horizontally formatted, California driver license. Agent Brown asked Pelkey that if she ran that identification would it come back as valid. Pelkey then confessed he was only 19 years old and presented his true identification, Exhibit 5, a vertically formatted authentic California driver license that indicated his birthdate was "04/20/2001" making him only 19 years old. Pelkey told the agents Kumar did not ask for his identification at the time of sale. Pelkey testified at the hearing that within the prior few weeks before that purchase he had presented his false identification to a clerk at the licensed premises to purchase alcoholic beverages. He testified he was 95% sure the clerk was Kumar as he was the only clerk Pelkey ever saw at the licensed premises. The agents issued Pelkey a citation for possession of a false identification and purchasing alcoholic beverages at the licensed premises.

9. At the scene, Pelkey filled out Exhibit C, a minor affidavit, regarding his activity at the licensed premises. In that document, he indicated he was not asked for any identification and did not show any identification in connection with his purchase of the White Claw seltzer. He indicated he had been to the licensed premises in the past but had not purchased alcoholic beverages there. However, his statement also indicated he had shown false identification at the licensed premises in the past but did not specify who he had shown it to or for what purpose it was displayed.

³ Although not expressly stated, it was presumed Pelkey wore his face mask as a common public health practice to prevent the spread of COVID-19. There was no evidence Pelkey was hiding or obscuring his facial appearance to facilitate his purchase of an alcoholic beverage or to steal from or rob the licensed premises.

10. The agents took a color photo of Pelkey's true identification, Exhibit 5. It was a California Driver License. It was in a vertical format used for minors, with his actual photo in the upper left corner. His signature was below his photograph. It stated his correct birthdate as "04/20/2001". It listed his sex as male, his hair color as brown, his eye color as brown, his height as 5'09", and his weight as 150 lbs. It indicated he would be "AGE 21 IN 2022".

11. At the hearing, a slightly enlarged color copy of Pelkey's false identification was admitted as Exhibit A.⁴ It was in the form of a California driver license. It was in the horizontal format used for those over 21 years of age with Pelkey's actual photo on the left side of the card. Pelkey's signature was under the photo. It listed Pelkey's birthdate as "04/20/1999" that would indicate he was two years older than his true age. It listed Pelkey's true and full name, his sex as male, his height as 5'8", his hair color as brown, his eye color as brown, and his weight as 150 lbs. Pelkey testified his false identification used a prior residential address he had. But for the informational inaccuracies in the false identification, no evidence was presented there were any apparent or observable faults, deficiencies, imperfections, or imprecisions in the false identification, e.g. it had/used the wrong format, wrong card dimensions, wrong color scheme, wrong font, wrong construction of card, wrong texture or had any other deficient feature or faulty characteristic that would have or should have caused a reasonable person to reject it as a bona fide identification and satisfactory proof of Pelkey's age. Similarly, however, beyond the color copy introduced, no evidence was presented that the false identification was sufficiently similar to a legitimate identification that a reasonably prudent person would accept it after careful examination.

12. After the agents cited and released Pelkey, they contacted Kumar. In attempting to question him about his sale to Pelkey, Kumar indicated he primarily spoke Hindi so the agents had to interview him using an interpreting service via a phone link. Kumar told the agents he had worked at the licensed premises for two or three months to help his uncle. He said he asked Pelkey for his identification but Pelkey refused to present one and just affirmed he was 22 years old. He said Pelkey had been a customer at the store before, but he had never sold him alcoholic beverages. Kumar indicated he understood a person had to be at least 21 to purchase alcoholic beverages.

13. During the first hearing, Kumar testified through the use of a Punjabi, not Hindi, interpreter⁵. He testified that he did make the sale to Pelkey on February 26, 2021, and did not request any identification from Pelkey, and did not review or examine any

⁴ The actual false identification was seized by the agents but neither party marked nor sought to admit it as evidence.

⁵ Issues regarding clerk Kumar's prior testimony at the first hearing will be addressed below.

identification, in connection with that sale. He testified that he recognized Pelkey as a regular customer. He testified that earlier that same day, Pelkey had purchased alcoholic beverages at the store and presented his false identification to show he was at least 21 years old. Kumar testified he had examined that false identification on three to four occasions prior to February 26, 2021. He looked at Pelkey's photo, his height, his weight and those were consistent with Pelkey. He previously scanned the false identification in the licensed premises' computer reader that indicated it was OK to sell him alcoholic beverages. Kumar testified he believed Pelkey was at least 21 years old. Kumar denied he ever told the agents Pelkey had never purchased alcoholic beverages there before. Kumar testified he told the agent's Hindi interpreter he had viewed Pelkey's identification on a prior occasion or occasions. Pursuant to the remand order, Kumar's testimony during the first hearing was stricken.

14. At the second hearing, Kumar again testified. On February 26, 2021, Kumar was 20 years old and had worked at the licensed premises for about one year prior to that date. Respondent's store manager trained Kumar for about one week and then he worked under the supervision a manager. As to checking identifications of customers, respondent instructed Kumar to check the date of birth, hair color, eye color, photograph, expiration date, and then run the identification through the sales register.

15. Kumar testified when the sales register scanned an alcoholic beverage as an item to be purchased, it prompted the salesclerk to verify the customer's age. The respondent's policy was to examine the identifications of those customers who did not appear at least 35 years old. As a part of the clerk's examination of an identification, Kumar testified he was to also scan the identification into the register. It would read the identification to see if it indicated the person was at least 21 years old. If it indicated the person was at least 21 years old, the register would process the sale. If it indicated the person was not yet 21 years old, the register would not process the sale. The register had an over-ride function so that a clerk could manually enter a birthdate and depending on the whether that birthdate indicated the person was or was not 21 years of age, it would, respectively, either process or not process the sale.⁶

16. Kumar testified he would generally check 30-40 identifications per day related to sales he made while working at the licensed premises.

⁶ While the evidence indicated the electronic cash register could read a date of birth or age programmed on the identification card, it was not established the register could or did read other data from the identification card or make an assessment whether the identification was authentic or false.

17. Kumar considered Pelkey a regular customer of the licensed premises. Kumar had waited on Pelkey on three or four prior occasions at the licensed premises. However, Kumar further testified that he checked Pelkey's identification only one time previously and that the subject transaction on February 26, 2021, was the first time that Pelkey purchased alcohol.

18. Kumar testified that approximately one month prior to February 26, 2021, he examined Pelkey's false identification in connection with his purchase of cigarettes. Cigarette purchasers must also be at least 21 years of age. Kumar examined Pelkey's false identification for his age, name, and if the photo on it matched Pelkey. He noted the photo on the identification was of Pelkey. The eye color, weight, and height on the identification also matched Pelkey. He looked at the front and back of the identification and noted it was not expired. He also scanned it through the cash register. Based upon his examination of Pelkey's false identification, he determined it appeared authentic and established Pelkey was at least 21 years old.

19. As to the February 26, 2021, sale of an alcoholic beverage to Pelkey, Kumar testified he did not check Pelkey's identification on that date. He did not ask Pelkey to remove his mask, but recognized Pelkey, primarily by his voice, as a regular customer at the licensed premises.⁷ He recalled he previously inspected Pelkey's identification to see if he was at least 21 years old when Pelkey purchased cigarettes. On February 26, 2021, when Pelkey wanted to purchase an alcoholic beverage, Kumar relied on his earlier check of Pelkey's identification and did not ask to inspect it again. Kumar manually entered a birthdate into the sales register such that the register calculated Pelkey was at least 21 years old and cleared the alcoholic beverage seltzer for sale. Kumar then completed the sale to Pelkey.

20. Respondent fired/dismissed Kumar because he did not inspect Pelkey's identification with respect to the February 26, 2021, sales transaction. Respondent's policy was that identifications had to be checked for sales involving alcoholic beverages to all customers who did not appear at least 35 years old.

21. Mohamad Iqbal Lodhi (hereafter Lodhi), the co-licensee/respondent and 7-Eleven franchisee for the licensed premises, testified at the hearing that he first began working at a 7-Eleven store in 1983 as a sales associate. He subsequently worked as an assistant manager and later as a store manager. In 1997, he became a 7-Eleven franchisee for the first time. Currently, including this licensed premises, he is the 7-Eleven franchisee at five locations, primarily in Sonoma County.

⁷ Presumably, Pelkey was wearing his mask due to the Covid-19 pandemic. There was no evidence presented he was wearing it for any other purpose.

22. Other than the prior violation at this licensed premises and the current accusation matter, he has no prior violations at any of his other four licensed 7-Eleven stores.

23. Lodhi has an established training program for his new employees. It consists of computer based training, where a trainer employee sits with a new employee and goes through the training material with the new employee. The training includes how to check identifications and how to detect false identifications. Thereafter, the manager or a trainer then works alongside the new employee for a week to ten days to provide on-site training. The new employee would then be able to work at the store.

24. Lodhi testified Kumar was not related to him in any way and suggested Kumar's mention to the agents that Lodhi was his "uncle" was merely a culturally based custom of showing deference to an elder. Lodhi testified Kumar told him Pelkey was a regular customer so that was why he did not check Pelkey's identification for the sale of the hard seltzer.

25. Lodhi testified that as of February 26, 2021, there was an override feature on the respondent's cash register system such that the clerk could complete the sale of an alcoholic beverage without the clerk actually seeing the customer's identification and running it through the sales register. However, he has removed that option from the electronic register. Now, any customer purchasing an alcoholic beverage must provide an identification to the clerk who will inspect it and run it through the register to confirm the purchaser is at least 21 years old before the register will allow the sale to be processed. The clerk must obtain an identification from the customer regardless of how young or old the customer appears.

26. Since becoming the co-licensee/franchisee of this licensed premises in 2017, Lodhi has used a secret shopper program at the licensed premises. The service sends in undercover shoppers monthly to determine if store employees are following required procedures such as checking the identifications of those purchasing alcoholic beverages. The service gives out green cards to those employees who followed required procedures and red cards to those who did not. 7 Eleven Inc. and store management are informed of the results of the secret shopper operations. Lodhi will retrain those employees issued red cards. If an employee receives three red cards they are subject to termination of employment. Lodhi testified he never received any red cards for Kumar for not following proper sales procedures.

27. Lodhi testified after this violation involving Kumar, he dismissed Kumar because he did not follow his policy of inspecting the identification of each customer every time they purchased alcoholic beverages even if Kumar believed he had checked Pelkey's identification in the past. Lodhi also retrained all the remaining employees again stressing the checking of identifications when selling alcoholic beverages.

28. During the hearing on August 17, 2022, Department counsel sought to impeach Kumar with the use of his prior inconsistent testimony during the September 29, 2021, hearing. The ALJ sustained an objection from Respondent's counsel, ruling that because Kumar's testimony was ordered stricken it was as if "those statements were never uttered." The proposed decision issued September 14, 2022, by the ALJ recommended dismissal of the accusation. It found that although Kumar sold an alcoholic beverage to 19-year-old Pelkey in violation of section 25658, subdivision(a), a defense under section 25660 was established. The ALJ found Kumar reasonably relied on a prior inspection of Pelkey's identification, which was of sufficient quality to qualify as a bona fide identification under section 25660.

29. On November 1, 2022, the Director rejected the proposed decision pursuant to Government Code Section 11517(c)(2)(E)(i) and sent notice to the involved parties. On December 13, 2022, the Director invited the parties to submit written argument addressing the following issues:

- 1) Did the ALJ err in not allowing the Department to use the testimony of a witness in the prior hearing held in this action for the purpose of seeking to impeach that witness in this proceeding?
- 2) If the ALJ did commit error, what is the remedy? May the Director review and rely upon the prior testimony of the witness or must the matter be remanded again to the ALJ for further proceedings?
- 3) Did the showing of identification on a prior occasion in this matter satisfy the licensee's burden of proving reasonable reliance upon bona fide identification? The parties should address in particular the cases cited in the proposed decision and whether showing identification on a prior occasion satisfies the requirement that reliance on bona fide evidence of age and identity shall be "in any transaction" as provided in Business and Professions Code section 25660, subdiv. (b).

LEGAL BASIS OF DECISION

1. Article XX, section 22, of the California Constitution and Business and Professions section 24200, subdivision (a), provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.
2. Business and Professions Code section 24200, subdivision (b), provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Business and Professions Code section 25658, subdivision (a), provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.

4. Business and Professions Code section 25660 provides that:

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

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

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

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

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

5. The right to cross-examine witnesses is a fundamental part of the adversarial legal process. "This right is not only guaranteed as a matter of constitutional law, it is specifically guaranteed by the Administrative Procedure Act in subdivision (b) of the Government Code section 11513." (*Ogden Entertainment Services v. Workers' Comp. Appeals Bd.* (2014) 233 Cal.App.4th 970, 982.)

6. Evidence Code section 1235 provides that:

Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.

7. Evidence Code section 770 provides that:

Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:

- (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or
- (b) The witness has not been excused from giving further testimony in the action.

DETERMINATION OF ISSUES

I. Use of Prior Stricken Testimony:

1. In its written arguments, with respect to Kumar's prior testimony, Respondent asserts, without citation to any legal authority, simply that, "Testimony that is stricken can not be used for any purpose, it is not evidence. Moreover, fundamental fairness and due process prevent ABC from having it both ways by picking and choosing the testimony."
2. In its written argument, the Department argued that Kumar's prior testimony, although stricken from the record, may nonetheless be used for purposes of impeachment. Although the prior testimony may be excluded and cannot be relied upon for a determination of the issues, it does not mean that the statements uttered did not occur. As such, it is asserted, Kumar's prior testimony may be used for impeachment purposes when his testimony at the subsequent hearing differs, as it did here in several material respects.
3. The Department has the better argument here. The reason for allowing a witness to explain or deny an alleged prior inconsistent statement is to assist the trier of fact in assessing the witness's credibility. (*Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1151.) Respondent claims that the Department is seeking to "pick[] and choos[e]" Kumar's testimony. Yet it is actually Respondent that seeks to ignore Kumar's prior version of what happened. Most significantly, during the first hearing Kumar stated that Pelkey had visited the store earlier the same day to purchase alcoholic beverages and that he (Kumar) had inspected Pelkey's identification in connection with that transaction. He further stated that he had checked Pelkey's false identification on about four or five prior occasions. Yet at the second hearing, Kumar's story changed and he testified that Pelkey had not previously purchased alcoholic beverages at the store and that he had only inspected Pelkey's identification on a single prior occasion in connection with the sale of tobacco approximately one month previously.
4. A witness may be impeached with prior stricken testimony that is inconsistent with their testimony at trial. "Striking [the witness's] testimony does not mean the words were not

spoken. They were. [The defendant] had the right to present the words to the jury for its consideration of [the witness's] earlier words. [The witness] gave two versions of the events. By not admitting [the witness's stricken] statement, the jury only heard the version proffered by the prosecution." (*People v. Corella* (2004) 122 Cal.App.4th 461, 471.)

5. "The witness who has told one story aforesaid and another today has opened the gates to all the vistas of truth which the common law practice of cross-examination and re-examination was invested to explore. The reasons for the change of face, whether forgetfulness, carelessness, pity, terror, or greed, may be explored by the two questioners in the presence of the trier of fact, under oath, casting light on which is the true story and which is false." (*People v. Zapien* (1993) Cal.4th 929, 953.) Just as in *Corella*, although Kumar's prior testimony was stricken, the words were still spoken. The Department should have been afforded the opportunity to present the full version of events and not just the version proffered by Respondent. It was error for the ALJ to prevent the Department from seeking to impeach Kumar using his prior inconsistent statements made during the first hearing.

6. The Department then argues that the Director may review the record of both hearings and rule on Kumar's credibility without remanding the matter once again to the ALJ for further proceedings. Respondent offered no thoughts on this, reasserting simply that the stricken testimony cannot be considered for any purpose. While it is true that the Director is the ultimate trier of fact in this proceeding, acting without affording Respondent the opportunity for Kumar to attempt to respond to and explain the inconsistencies in his testimony would be improper. Indeed, the prior inconsistent statements would not be eligible for the exception to hearsay provided by Evidence Code section 1235 since there would not be compliance with Evidence Code section 770 (and there is no indication that the interests of justice would require otherwise). As such, a remand to the ALJ on this issue would be appropriate except that, for the reasons discussed below, it is ultimately unnecessary in this case.

II. The Section 25660 Defense:

7. For purposes of assessing whether Respondent met its burden of establishing the affirmative defense afforded by Business and Professions Code section 25660, Kumar's testimony during the second hearing is considered without regard to his prior inconsistent statements made during the first hearing. Based on Kumar's testimony during the August 17, 2022, hearing, Respondent has failed to establish by substantial evidence that there was reasonable reliance on bona fide evidence of majority and identity as required by section 25660.

8. The defense afforded by section 25660 is an affirmative defense. As such, the licensee has the burden of establishing all of its elements, namely, that evidence of majority and

identity was demanded, shown, and acted on as prescribed. (*Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control* (1968) 261 Cal.App.2d 181, 189 .) This section applies to identifications actually issued by government agencies as well as those which purport to be. (*Dept. of Alcoholic Beverage Control v. Alcoholic Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1444-45.) A licensee or his or her employee is not entitled to rely upon an identification if it does not appear to be a bona fide government-issued identification or if the personal appearance of the holder of the identification demonstrates above mere suspicion that the holder is not the legal owner of the identification. (*Masani*, supra, 118 Cal.App.4th at 1445-46; *5501 Hollywood, Inc. v. Department of Alcoholic Beverage Control* (1957) 155 Cal.App.2d 748, 753.) The defense offered by section 25660 is not established if the appearance of the minor does not match the description on the identification. (*5501 Hollywood*, supra, 155 Cal.App.2d at 751-54.)

9. In 1959, section 25660 was amended to remove a requirement that the checking of the identification occur contemporaneously with or immediately prior to the unlawful sale at issue for a defense under section 25660 to apply. The California Attorney General, in its opinion at 36 Ops. Cal. Atty. Gen. 124 (1960), opined that section 25660 no longer required that the checking of a bona fide identification occur immediately prior to the selling or furnishing of the alcoholic beverage at issue for a defense under section 25660. That conclusion was based on the Legislature's amendment deleting that very time-based requirement, "immediately prior", from the statute's text. The Attorney General's opinion concluded by stating: "Thus, the evidence of majority and identity need no longer to be shown immediately prior to the alleged offense to constitute a valid defense." (*Id.* at p. 126; underlining in original.)

10. As to the weight or significance to be given a formal opinion of the Attorney General, in *Spring Valley Lake Assn. v. City of Victorville* (2016) 248 Cal. App. 4th 91,105, the Court stated:

While not binding, an opinion of the Attorney General is entitled to considerable weight. (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 716, fn. 14.) Absent controlling authority, an Attorney General opinion as to the construction of a statute ""is persuasive because we presume that the Legislature was cognizant of the Attorney General's construction of [the statute] and would have taken corrective action if it disagreed with that construction."" (*Ibid.*; see *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1013; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 103-104.)

11. The Attorney General Opinion was discussed by the Court of Appeal in *Lacabanne Properties, Inc. v. Dept. of Alcoholic Beverage Control* (1968) 261 Cal.App.2d 181. That case involved the sale of alcohol to a minor in an on-sale premises. The issue was whether the section 25660 defense applies when a bartender relies upon the demand and inspection

of identification by a doorperson at the time the customer enters the premises. In considering this issue, the Court stated (at pp. 189-190), “The cases interpreting section 25660, Business and Professions Code, have generally set forth three tests by which to measure the conduct of the licensee in determining whether there has been a compliance with the provisions of the section. [¶] First, the licensee who makes a diligent inspection of the documentary evidence of majority and identity offered by the customer **at or about the time of the sale** is entitled to rely upon its apparent genuineness. [Citations.] [¶] Second, a licensee must exercise the caution which would be shown by a reasonable and prudent person in the same or similar circumstances. [Citation.] [¶] Third, a licensee must make the inspection of the documentary evidence and his appraisal of the physical appearance of the customer 'immediately prior' to the sale. [Citation.]” (Quoting from *Farah v. Alcoholic Beverage etc. Appeals Board*, (1958) 59 Cal.App.2d 335, 339; emphasis added.) With respect to the Attorney General Opinion, the Court observed that, “The opinion does not discuss whether the use of the phrase ‘in any transaction etc.’ requires the licensee to prove that the evidence was demanded and shown in connection with the particular transaction which is the basis of the proceedings against him.” (*Lacabanne, supra*, 261 Cal.App.2d 181, 190.)

12. In considering what may constitute the “transaction” for purposes of section 25660, the Court held that, “The fact that permitting the entry and permitting the consumption may be separate offenses (see *Harris v. Alcoholic Beverage etc. Appeals Board, supra*, 197 Cal.App.2d 182, 187) does not necessarily mean that they are separate transactions when, as here, the entry is immediately followed by the sale, furnishing and consumption of the alcoholic beverage. If there is no duty to make a second demand before serving the minor, the fact that the second employee made an inadequate inquiry should not defeat the right of the licensee to rely on the original determination that the patron had shown the evidence required by law.” (*Id.*, at p. 191.)

13. While *Lacabanne* involved an on-sale transaction, similar principles may be readily applied to the application of section 25660 in connection with off-sale businesses. The Court essentially determined that “transaction” means more than an individual sale or service of alcohol and can encompass the totality of the time during which a minor may be inside the licensed premises and interacting with the licensee and employees or agents. This is a significant consideration here for two reasons. First, the Court considered that the “any transaction” language of the statute has continuing relevance and application notwithstanding the amendment removing the “immediately prior to” requirement. Second, it noted that when looking at what reasonably constitutes the “transaction,” there must be some rational temporal nexus to the evaluation of identification and the actual sale or service of alcohol (i.e., that it occurred “at or about the time” of the sale or furnishing of alcohol).

14. The ABC Appeals Board addressed a similar factual situation as that presented in the instant case in *7 Eleven, Inc. v. Department of Alcoholic Beverage Control* (2011) AB-9081, where the false identification was displayed by the minor on prior occasions at the involved licensed premises. It concluded a defense under section 25660 could be based upon an inspection of a false identification that was done on a date or dates prior to the date of the violation at issue. While Appeals Board opinions are not precedential, they can provide guidance in factually similar cases. In holding that the section 25660 defense was established, the Appeals Board concluded by observing that, “Having found that the clerk reasonably relied on the false identification on multiple prior occasions, and under the facts in this case, where the minor was memorable and well-known to appellants, and the actual fake ID was available for examination, we believe a defense was established.” It is the Department’s position that, while the end result in that case may have been appropriate, the conclusion that the affirmative defense had been established is contrary to the plain language of section 25660 and the rationale of the Court of Appeal in *Lacabanne* because it does not consider the relationship between a prior showing and the transaction at issue. If a prior showing of identification on any prior occasion is acceptable, then the statutory requirement that identification be demanded, shown, and relied upon in any transaction that is forbidden by section 25658 (among the other sections stated) has no relevance.

15. The conclusion that the “any transaction” requirement of section 25660 applies to the sales transaction at issue is further compelled by the structure and grammar of the section. Section 25660 provides that if the licensee acted in good faith reliance upon bona fide evidence of majority and identity “in any transaction . . . forbidden by Section 25658 . . . [it] shall be a defense . . . to any proceedings for the suspension or revocation of any license based thereon.” Here, Kumar testified that Pelkey had not purchased alcoholic beverages at the store previously. He further testified that the one time he had viewed Pelkey’s identification was approximately one month prior and in connection with a sale of tobacco products. Based upon Kumar’s testimony, two things are clear: (1) there was no temporal nexus between the checking of identification and the alcohol sales transaction (i.e., checking the identification one month before the transaction in question is not “at or about the time” of the sale); and (2) the prior showing of identification was not in connection with a transaction forbidden by section 25658. The “based thereon” language of the statute means that the action to suspend or revoke the license is a consequence of the transaction forbidden by section 25658 in which identification was demanded and shown. Since the prior showing of identification here was not in connection with a transaction prohibited by section 25658 and the action to suspend or revoke the license is not based upon a transaction in which identification was demanded or shown, the defense must fail.

16. Moreover, notwithstanding any differences of opinion concerning the analysis, *7 Eleven* does not stand for the proposition that a prior showing of an otherwise compliant identification automatically means that a licensee has met its burden of establishing the affirmative defense. The Appeals Board engaged an analysis of the specific facts of that

case and considered the totality of the circumstances in concluding that the licensee had met its burden. Because the Appeals Board's opinion in *7 Eleven* is limited to the factual circumstances of that case, Respondent's contention here that the Department is compelled to accept the conclusion that a prior showing of identification compels a finding that Respondent here has met its section 25660 burden because it did not appeal that case further is misplaced. When considering the totality of circumstances under the facts of the instant case, Respondent has failed to meet its burden of establishing the affirmative defense. While Kumar testified that Pelkey was a "regular customer," he then testified that Pelkey had only been in the store "three or four times." Kumar also testified that Pelkey had never purchased alcoholic beverages at the store previously and that he had checked his identification on only one prior occasion in connection with the purchase of tobacco. Taken together, there is scant evidence that minor Pelkey was "memorable and well-known" to Kumar or that Kumar "reasonably relied on the false identification on multiple prior occasions."

17. Respondent further contends that it relied upon the Department's implied acceptance of the Appeals Board's opinion that a prior showing of identification at some undefined point of time in the past can satisfy the section 25660 defense, and that based upon that the Department is precluded from asserting a contrary position now. However, the record does not support this position. First, at no time prior to its written argument following rejection of the proposed decision, has Respondent asserted any reliance at all on this point. Second, the facts establish that Respondent's policy was that sales clerks must check identification in connection with every sale of alcohol, even if the clerk believed they had checked the customer's identification previously. Indeed, it was Kumar's failure to do so that resulted in his termination of employment. Claiming reliance now is simply without any foundation whatsoever.

18. In the proposed decision, the ALJ cited *Keane v. Reilly* (1955) 130 Cal.App.2d 407 for the proposition that a defense under section 25660 may be found even though the licensee relied upon a prior showing of identification that had occurred some three months before the sales transaction at issue. However, the court in that case was interpreting an earlier version of what became section 25660. The then-section 61.2, subdiv. (b), provided that a licensee had a defense against a violation if the "licensee or his agent or employee demanded and was shown, before furnishing any alcoholic beverage to a minor, a motor vehicle operator's license or a registration certificate issued under the Federal Selective Service Act or other bona fide documentary evidence of majority and identity of such person." As can be seen, there was no language that established any specific temporal relationship between the showing of identification and the sales transaction in question. The law simply required that identification be demanded and shown "before" furnishing alcohol to a minor. Therefore, the notion that this case established that prior showing of identification some three months prior to the sales transaction satisfies the requirements of the affirmative defense as the law is currently written is incorrect. Indeed, that case was not even about whether the showing of identification three months prior to the incident was sufficient to meet the elements of the

defense. Rather, it was about whether or not a licensee may reasonably rely on a fake identification and what diligence is required.

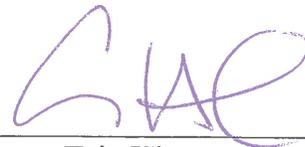
19. For all of the foregoing reasons, Respondent has failed to satisfy its burden of establishing an affirmative defense under section 25660.

20. During the transaction in question, the clerk made no demand for identification, nor did he inspect any identification from the minor. Notwithstanding Respondents' asserted reliance on a prior inspection of the minor's fake identification one month prior, the clerk failure to ask the minor to remove his mask during the transaction in question to confirm his identity. These are aggravating factors. In contrast, Respondents had an established training program at the premises for employees regarding the checking of identifications, the clerk in question received such training, and the Respondents terminated the clerk from employment. Subsequent to the violation, Respondents removed the override system that permitted the sale of alcohol without scanning an identification. However, this action should have been taken following the first sale of alcohol to a minor and thus serves as little, if any, mitigation in connection with this violation. Mitigation and aggravation balance each other and the discipline ordered herein reflects this.

ORDER

The accusation is sustained. Respondents' off-sale beer and wine license is suspended for a period of 25 days.

Dated: March 21, 2023



Eric Hirata
Director

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

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

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

7-ELEVEN, INC. & MOHAMMAD
IQBAL LODHI,
dba 7-Eleven #14179C
633 Moraga Road
Moraga, CA 94556,
Appellants/Licensees,

v.

DEPARTMENT OF ALCOHOLIC
BEVERAGE CONTROL,
Respondent.

) AB-9966
)
) File: 20-582148
) Reg: 21091266
)

**DECLARATION OF SERVICE
BY E-MAIL**

I, MARIA SEVILLA, declare that I am over the age of eighteen (18) years, and not a party to the within action; that my place of employment and business is 400 R Street, Suite 320, Sacramento, CA; that on the 7th day of August, 2023, I served a true copy of the attached **Decision** of the Alcoholic Beverage Control Appeals Board in the above-entitled proceeding on each of the persons named below:

BY E-MAIL or ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent to the person(s) at the e-mail address(es) listed below:

DEAN LUEDERS
ACTLegally
P. O. Box 1577
Carmichael, CA 95609
dean.lueders@actlegally.com

Department of ABC
Office of Legal Services
3927 Lennane Drive, Suite 100
Sacramento, CA 95834
yuri.jafarinejad@abc.ca.gov

I declare under penalty of perjury that the foregoing is true and correct.
Executed at Sacramento, California, on the 7th day of August 2023.

MARIA SEVILLA