

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

AB-9648

File: 21-477508 Reg: 16084611

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #9558
320 South Twin Oaks Valley Road,
San Marcos, CA, CA 92078,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: May 3, 2018
Los Angeles, CA

ISSUED MAY 30, 2018

Appearances: *Appellants:* Donna J. Hooper, of Solomon, Saltsman & Jamieson, as counsel for Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #9558.
Respondent: John P. Newton as counsel for the Department of Alcoholic Beverage Control.

OPINION

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #9558 (appellant), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 10 days because their clerk sold an alcoholic beverage to a non-decoy minor, a violation of Business and Professions Code section 25658, subdivision (a).

1. The decision of the Department, dated May 11, 2017, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On August 19, 2016, the Department filed an accusation charging that appellants' clerk, Omar Renteria, sold an alcoholic beverage to 20-year-old Alessandra N. Cordero on July 7, 2016.

At the administrative hearing held on January 31, 2017, documentary evidence was received and testimony concerning the sale was presented by Cordero, by Agent Brett McIntire of the Department of Alcoholic Beverage Control, and by Chris Bietz, appellants' store manager.

Testimony established that on the date of the violation, Department Agents McIntire, Lee, and Mathos entered the licensed premises in a plainclothes capacity. At 8:10 p.m., Cordero entered the licensed premises and drew Agent McIntire's attention because she looked to him to be 18 to 20 years old. Agent McIntire observed Cordero walk straight to the section of the store that contained alcoholic wine. While out of Agent McIntire's view, Cordero selected a 1.5 liter bottle of Livingston Moscato wine and a 1.5 liter bottle of Livingston Cabernet Sauvignon. Agent McIntire then observed Cordero take the two bottles of wine to the front sales area for purchase and stand in line behind a customer. The three Department agents then stood in line behind her. Cordero approached the cash register closest to the exit door. Once at the counter, clerk Renteria said "hello" to Cordero, who did not reply. Cordero set the two bottles of wine down on the counter. Clerk Renteria scanned the two bottles of wine and manually entered a date of birth of 02/03/86 to override the age-restricted transaction prompt and permit the sale of alcohol to Cordero. Cordero paid clerk Renteria for the wine and

received change. Renteria did not ask Cordero for identification (ID) and did not ask any age-related questions. Cordero took the two bottles of wine and exited the store.

Agents McIntire and Mathos also exited the store just before Cordero. Agent McIntire made contact with Cordero right outside the threshold of the exit door and asked how old she was. At first, Cordero said she was over 21, and later admitted to her true age of 20. Agent McIntire asked Cordero if she had any ID on her person. She initially said she did not, but later produced a fake ID after Agent McIntire informed her she would be searched. Cordero handed Agent McIntire a Pennsylvania ID. Agent McIntire contacted the California Highway Patrol to determine the validity of the Pennsylvania ID, and was informed that it was not a valid ID. Agent McIntire asked Cordero if she had ever used a fake ID to purchase alcohol at the licensed premises in the past, to which she replied she had not. She admitted she had a second copy of the fake Pennsylvania ID, but that it had been taken away from her by a bouncer at a bar prior to July 7, 2016.

The fake Pennsylvania ID contained Cordero's correct first and last name, an actual—albeit youthful—photograph, correct eye color of brown, correct height of 5' 4", a fake Pennsylvania address, and a date of birth of January 4, 1994, which made Cordero 22 years old on July 7, 2016. The Pennsylvania ID indicated it was issued on January 9, 2015 and expires on January 5, 2019.

Agent McIntire re-entered the licensed premises and made contact with clerk Renteria. Renteria recalled the sale transaction with Cordero, and confirmed he did not ask for her ID. Agent McIntire asked him why he did not ask for ID, and Renteria replied that he "thought" she came in and presented him with an out-of-state ID showing she

was 21 in the past. Renteria did not say which state the ID was from and did not say when in the past it was that the minor had shown the ID to him. Renteria said he often saw youthful-looking persons come into the store with out-of-state IDs to buy alcohol. He admitted that he entered a date of birth of 02/03/86 during the transaction because it was his habit to use that birthdate to override an age-restricted transaction and permit the sale of alcohol when he believed someone was old enough to purchase alcohol.

There is no evidence in the record that Cordero did in fact show the same fake Pennsylvania ID to clerk Renteria before the date of the violation. She did not know or recognize Renteria on the day of the transaction. There was no evidence as to whether she was successful in purchasing age-restricted items when she produced the fake Pennsylvania ID in the past at the licensed premises. There was no evidence as to what the minor used the fake ID to purchase in the past at the licensed premises, whether it was alcohol or tobacco. Cordero testified that when she had visited the licensed premises in the past, she had purchased non-alcoholic merchandise.

Christ Bietz, appellants' store manager, had worked for appellants for approximately one year as of the date of the administrative hearing. Bietz testified that appellants' policy regarding sales of age-restricted products required that its clerks ask for ID if a customer looks 27 years old or younger. Upon hire, appellants' employees attend an eight-hour orientation, online class, and on-the-job training covering policy and how to make responsible sales of age-restricted products. Bietz spoke with clerk Renteria regarding the violation. Bietz was not aware the clerk was in the habit of entering a false birthdate to avoid asking for ID prior to the sale of alcohol. Clerk Renteria admitted to not asking for ID from Cordero despite the fact that she looked

younger than 27. Renteria claimed he made the said sale because he knew Cordero, she had been in the store before, he had "carded" her in the past and knew her license was out of state. Bietz suspended the clerk pending an investigation. After appellants conducted an investigation, clerk Renteria was discharged.

After the violation, appellants added an annual training covering all policies and required its employees attend LEAD training through the Department. Each register had a note to check ID expiration dates, along with a new policy attached to each register which required an out-of-state ID be verified by management prior to the sale of alcohol, and required all managers to ask for a second form of ID to verify the signature of the out-of-state ID. Each employee acknowledged and signed off on this policy, except one. Magnifying glasses were also posted at each register for clerk to examine out-of-state IDs for smudging, and if found, employees were instructed to refuse the sale of alcohol. Appellants' cash registers still require employees to enter the customer's date of birth when the transaction involves alcohol, but there is nothing to prevent the clerks from entering a false birthdate to override the age-restricted transaction prompt and permit the sale of alcohol to a minor.

After the hearing, the Department issued a decision determining that the violation charged was proved and no defense was established.

Appellants then filed this appeal contending (1) the ALJ abused her discretion by rejecting appellants' section 25600 defense based on flawed credibility findings, and (2) the ALJ improperly excluded relevant evidence when she disallowed questions about the minor's employment.

DISCUSSION

I

Appellants contend the ALJ abused her discretion by rejecting their section 25660 defense. (App.Br., at pp. 5-10.) They argue the ALJ improperly credited the testimony of the minor, Cordero, and dismissed clerk Renteria's statements. (*Id.* at pp. 6-7.) Appellants direct the Board to testimony suggesting Renteria "was a good and diligent employee" and that he had checked Cordero's ID on previous occasions. (*Id.* at p. 6.) Appellants also object that the ALJ "drew a nonsensical conclusion regarding [the clerk's] veracity" when she stated that clerk Renteria "admitted to being untruthful" when he explained how he used the birthdate 02/03/86 to override the age-restricted transaction prompt. (*Id.* at p. 7, quoting Conclusions of Law, ¶ 7.) They claim the practice of entering a false birthdate "allows the clerks to serve customers efficiently and avoids aggravating regular and older customers" and "is not indicative of an untruthful character." (App.Br., at pp. 7-8.) They also object to the ALJ's conclusion that Renteria was being untruthful in order to protect his job. (App.Br., at p. 7.) They argue "there was no evidence presented that he would have kept his job if that was the case." (*Ibid.*)

Appellants further contend that Cordero's testimony was not credible. (*Id.* at pp. 8-9.) They claim Cordero "failed to remember almost everything about the incident" as well as "any circumstances surrounding her receipt of and use of the fake identification." (*Id.* at p. 8.) They argue that Cordero was a "grossly dishonest person" who "obtained two fake identifications and regularly presented herself as over 21 to purchase alcohol and to get into bars" and lied to law enforcement when caught. (*Id.* at

p. 9.) Appellants claim the ALJ failed to consider Cordero's "extremely dishonest" nature when she made her credibility assessment. (*Ibid.*)

The Department responds that appellants failed to carry their burden of proof for a section 25660 defense. (Dept.Br., at pp. 5-12.) It argues appellants failed to show that Cordero had successfully purchase age-restricted products at the premises in the past, or that the clerk had previously made a diligent inspection of Cordero's ID. (*Id.* at p. 7.)

Appellants maintain that a defense to the charge of the accusation was established under Business and Professions Code section 25660, which provides:

(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.

The statute provides an affirmative defense, and the burden of proof is on the party asserting it. (See, e.g., *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 189 [67 Cal.Rptr. 734] ["The licensee has the burden of proving the defense that evidence of majority and identity was demanded, shown and acted on as prescribed by the provisions of section 25660."]; *Farah v. Alcoholic Bev.*

Control Appeals Bd. (1958) 159 Cal.App.2d 335, 338 [234 P.2d 98].) Section 25660, as an exception to the general prohibition against sales to minors, must be narrowly construed. (*Lacabanne Properties, supra*, at p. 189.)

The law is clear that a fake or spurious identification can support a defense under this section if the apparent authenticity of the identification is such that reliance upon it can be said to be reasonable. (See *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* 118 Cal.App.4th 1429, 1445 [13 Cal.Rptr.3d 826] ["The licensee should not be penalized for accepting a credible fake that has been reasonably examined for authenticity and compared with the person depicted."]; see also *Lacabanne Properties, Inc., supra*, at p. 189 ["[T]he 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."]; *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1968) 267 Cal.App.2d 895, 897 [73 Cal.Rptr. 352] ["It is well established that reliance in good faith upon a document issued by one of the governmental entities enumerated in section 25660 constitutes a defense to a license suspension proceeding even though the document is altered, forged or otherwise spurious."].)

Whether a licensee or its employee has made a reasonable inspection of an ID to determine that it is bona fide is a question of fact. (*Masani, supra*, at p. 1445; *5501 Hollywood v. Dept. of Alcoholic Bev. Control* (1957) 155 Cal.App.2d 748, 753-754 [318 P.2d 820].) The Board's review of factual findings is strictly limited:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the

evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citation.] 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.)

Moreover, it is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640].)

The ALJ made factual findings regarding Cordero's testimony at the administrative hearing (Findings of Fact, ¶ 10) as well as her statements, both truthful and untruthful, to officers immediately following the sale (Findings of Fact, ¶ 6). The ALJ also made findings regarding the clerk Renteria's hearsay remarks to officers after the violation. (Findings of Fact, ¶¶ 8-9). The ALJ weighed the clerk's hearsay statements against Cordero's testimony and made the following credibility determinations:

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

The Respondents' contention that clerk Renteria made the said sale because he knew minor Cordero, she had been in the store before, he had "carded" her in the past and knew her license was out of state making her 21 or older is disbelieved for the following reasons. Clerk Renteria was facing sure discipline for failing to follow store policy. His self-serving statements to store manager Bietz exhibited his motive and interest to protect his employment and avoid termination. This was also clear from the inconsistent self-serving statement he told agent McIntire on July 7, 2016, that he "thought" minor Cordero came in and presented him with an out of state ID showing she was 21 in the past. Clerk Renteria added a little more fabrication to his story to store manager Bietz claiming he "knew" the minor. Clerk Renteria admitted to being untruthful and avoiding following store policy in that he would regularly enter into the cash register a false birthdate of 02/03/86 to override age-restricted transactions to

permit the sale of alcohol without actually checking the customer IDs; even of persons, like minor Cordero, who looked under 27. Clerk Renteria's claim that he did not ask for minor Cordero's ID because she produced an out of state ID in the past is inconsistent with his admission that it is his experience that youthful looking persons use out of state IDs to purchase alcohol. If this was his experience, then clerk Renteria should have asked minor Cordero for ID since she looked her age and definitely did not look 27 per Respondents' policy. Clerk Renteria was not present to testify.

On the other hand, minor Cordero had no motive or interest to lie during the giving of her testimony. She had already resolved the citation relating to the violation at hand. While minor Cordero could not recall what she was wearing on July 7, 2016, or the number of times she had been in the Licensed Premises, not many people could recall that. Minor Cordero provided otherwise consistent, credible testimony. She credibly testified that she did not know clerk Renteria. She was adamant that she did not show her fake ID to clerk Renteria and that she did not recognize clerk Renteria on July 6, 2016. She admitted to using her fake ID at locations other than the Licensed Premises, including getting admission into bars; something she would not have to admit to but she did, further showing the credibility of her testimony.

(Conclusions of Law, ¶ 7.)

Appellants defend clerk Renteria's credibility. They argue he was a "good and diligent employee who took the responsibility to card people seriously." (App.Br., at p. 6.) As the ALJ noted, however, clerk Renteria admitted to Agent McIntire that he routinely entered a false birthdate in order to override the register's age restrictions, in defiance of appellants' store policy.² (Findings of Fact, ¶ 8; see also RT at p. 94-95, 97 [store manager Bietz testifies clerk Renteria was told not to enter "anything other than the true birth date on the ID" and that any employee who did so would "definitely" face

2. At oral argument, counsel for appellants argued that entering a fraudulent birthdate in order to override age-restricted sales was good customer service and a legitimate means of avoiding conflict with regular or older customers. Fortunately, counsel's position does not reflect appellants' store policies, either before or after the instant sale. (See RT at pp. 79, 83-97.) We are deeply troubled that any licensee might prioritize the convenience of customers over compliance with this state's alcoholic beverage laws.

discipline].) That alone belies any claim that clerk Renteria took age verification seriously. Moreover, appellants terminated clerk Renteria following their investigation of this transaction, undermining their argument that he was a responsible employee. (See RT at pp. 82-83.) If Renteria was truly a responsible, diligent employee, appellants would not have fired him.

Appellants further argue there is no evidence to support the ALJ's conclusion that clerk Renteria lied to keep his job, since there was no evidence he would have kept his job either way. As appellants' store manager testified, however, clerk Renteria was "in tears" as he described the transaction. (RT at p. 82.) Clerk Renteria was clearly distraught at the prospect of discipline. Whether there was any real chance of retaining his job or not, clerk Renteria had a clear incentive to describe the transaction in a manner that made him appear innocent of any wrongdoing.

That incentive is highlighted by the differences between clerk Renteria's statement to Agent McIntire and his purported comments to store manager Bietz. According to Bietz,

The reason [clerk Renteria] told me he made the sale was because the customer had been in previously and he had carded the customer previously. He knew the customer's license was out of state, which is why he told me it sort of stood out to him and he knew her. So that's why he told me he made the sale.

(RT at p. 82.) According to Agent McIntire, clerk Renteria "stated that he *thought* she had come in and presented him with an out-of-state ID showing that she was 21 previously." (RT at p. 48, emphasis added.) Renteria's level of certainty varied depending on the audience.

Finally, all of appellants' analysis overlooks a pivotal fact: Renteria did not testify. His statements are hearsay. Whether they are admissible hearsay or not, they are less

valuable than Cordero's direct testimony, which was offered under oath and subjected to thorough cross-examination. The ALJ was justified in discounting Renteria's hearsay statements in favor of Cordero's direct testimony.

However, even if the ALJ had credited clerk Renteria's hearsay statements, they would not be sufficient to prove a section 25660 defense. As the ALJ observed, "[t]here is no evidence in the record that minor Cordero did in fact show the same fake PA ID to clerk Renteria prior to July 7, 2016." (Findings of Fact, ¶ 9.) Although Cordero "recalled producing her fake PA ID at the Licensed Premises at least twice" before the transaction at issue, "[t]here was no evidence in the record as to whom in the Licensed Premises she showed the fake ID prior to July 7, 2016," and "[s]he did not know or recognize clerk Renteria on July 7, 2016, when the said transaction was made." (Findings of Fact, ¶ 10.) Under these facts—countered only by clerk Renteria's oblique and discredited hearsay statements—it is impossible for appellants to establish that "evidence of majority and identity was demanded, shown, and acted on as prescribed," let alone that clerk Renteria conducted a "diligent inspection" of the ID on a previous occasion. (See *Lacabanne Properties, supra*, at pp. 189.) Appellants' section 25660 defense therefore fails.

II

Appellants contend the ALJ improperly sustained the Department's objection to appellants' line of questioning regarding Cordero's employment. (App.Br., at pp. 10-12.) Appellants argue Cordero's employment was relevant to their section 25660 defense for several reasons. First, if Cordero worked in a job that required her to be 21 and her employer relied on the fake identification, it would lead to evidence of dishonest

character, and, according to appellants, would "bolster the element of Appellant's [*sic*] defense that the identification was reasonably relied on." (App.Br., at p. 11.) Second, appellants contend that "questions about her schedule and habits before and after work could have refreshed her memory" about how often she visited the licensed premises. (*Ibid.*) Appellants argue that "the more often [Cordero] visited the store the more credible [clerk] Renteria's claims were." (App.Br., at p. 12.) Finally, appellants claim that "[b]ecause Cordero had difficulty with her memory, inquiring about aspects of her life that may jog her memory was a valid and relevant line of questioning." (*Ibid.*) Appellants insist that excluding this line of questioning denied them due process and violated the Administrative Procedure Act. (*Ibid.*, citing Gov. Code, § 11513(b).)

Section 11513 of the Government Code provides, in relevant part:

Each party shall have these rights: to call and examine witnesses, to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called him or her to testify; and to rebut the evidence against him or her.

(Gov. Code, § 11513(b).) Notably, the statute limits admissibility to *relevant* evidence.

(See Gov. Code, § 11513(c).) "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Moreover, "[t]he presiding officer has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time." (Gov. Code, § 11513(f).)

At the administrative hearing, appellants' counsel asked four questions to which the Department objected on grounds of relevance, and the ALJ sustained the

objections. Those questions were, in order: "Were you employed during July 7, 2016?" (RT at p. 19); "[D]id you work near the CVS where you purchased those two bottles of wine on July 7, 2016?" (RT at p. 22); [D]id you visit the shopping center about once a week, would you say, prior to July 7, 2017?" (RT at p. 23); and "Were you employed in the general vicinity of the CVS on July 7, 2016?" (RT at p. 32).

Following each objection, the ALJ asked counsel for appellants to explain the relevance. At no point did appellants argue, as they do before this Board, that Cordero might have fraudulently obtained employment using the fake identification. (See RT at pp. 19-32.) The relevance, according to appellants, centered on Cordero's appearance and on how often she frequented the shopping center in which the licensed premises is located. Appellants argued, for example, that the first question—whether Cordero was employed on the date of the violation—was relevant to "deciphering the minor's appearance" and "may establish a pattern of purchasing at the CVS." (RT at p. 20.) Later, in support of the third question—that is, whether Cordero visited the shopping center "about once a week"—appellants argued that the number of times Cordero visited the shopping center was "incredibly relevant" to the "crucial evidence" of whether Cordero had previously purchased alcohol at the licensed premises using the fake ID. (RT at pp. 23-24.) With regard to the fourth question, appellants again argued that the location of Cordero's employment was relevant in determining how often she frequented the licensed premises:

[COUNSEL FOR APPELLANTS]: Your Honor, I—I see no good reason why we should not be able to discuss whether and why the minor was frequently—whether she was regularly employed at the location next to or in close proximity to the CVS location in order to further establish how often sales were made or how often she was in that store as a customer.

(RT at p. 32.)

The problem with this position is that the information appellants purportedly sought—how often Cordero visited the licensed premises, whether she purchased alcohol during those visits, and what her physical appearance might have been—cannot be established based on the questions appellants asked. Whether Cordero was employed in the shopping center in which the licensed premises was located reveals nothing about how often she visited the licensed premises, and even less about whether she purchased alcohol there. Indeed, reaching the conclusion appellants seem to advocate—that frequenting the shopping center necessarily means she *also* frequented the licensed premises and purchased alcohol there—requires an unsupportable inferential leap.

Moreover, other testimony and evidence answers appellants' questions directly. Counsel for appellants questioned Cordero about how often she frequented the licensed premises and used the fake ID:

BY MS. GELBART:

Q. Had you purchased alcohol at the CVS prior to July 7, 2016?

A. Yes.

Q. Had you produced your Pennsylvania—fake Pennsylvania identification at CVS prior to July 7, 2016?

A. Yes.

Q. Do you recall how many times you produced your Pennsylvania—fake Pennsylvania identification at this CVS prior to July 7, 2016?

A. No.

Q. More than once?

A. Yes.

Q. More than twice?

A. Yes, but I'm not sure how many times.

Q. Are you able to estimate?

A. No.

Q. Would you say more than ten times?

A. I don't believe so, but I don't know.

Q. Would you say more than five times?

A. I can't give you a number. I don't know.

(RT at pp. 24-25.) Although Cordero's recollection was admittedly imprecise, the location of her employment tells us even less; it is unreasonable to infer, from the location of someone's employment alone, how often they frequent adjacent businesses. Additionally, a photograph of Cordero was admitted in evidence, establishing her physical appearance far more concretely than a question about her employment could. (See exh. A; see also RT at pp. 31-32 [cross-examining Cordero regarding her physical appearance].)

In sum, the questions, as asked, were irrelevant, and the ALJ was justified sustaining the Department's objections.

ORDER

The decision of the Department is affirmed.³

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
JUAN PEDRO GAFFNEY RIVERA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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

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

APPENDIX

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

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

**GARFIELD BEACH CVS, LLC
LONGS DRUG STORES CALIFORNIA, LLC
CVS PHARMACY #9558
320 SOUTH TWIN OAKS VALLEY RD
SAN MARCOS, CA 92078-4333**

OFF-SALE GENERAL - LICENSE

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

SAN MARCOS DISTRICT OFFICE

AB-9648
File: 21-477508

Reg: 16084611

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 April 17, 2017. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

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

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 300 Capitol Mall, Suite 1245, Sacramento, CA 95814.

On or after June 21, 2017, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: May 11, 2017.



Matthew D. Botting
General Counsel

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ABC APPEALS BOARD

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Garfield Beach CVS LLC, and Longs Drug	}	File: 21-477508
Stores California LLC	}	
Dbas, CVS Pharmacy #9558	}	Reg.: 16084611
320 South Twin Oaks Valley Road	}	
San Marcos, California 92078-4333	}	License Type: 21
	}	
Respondents	}	Word Count: 20,937
	}	
	}	Reporter:
	}	Ruth Valdivia
	}	California Reporting
	}	
<u>Off-Sale General License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at San Marcos, California, on January 31, 2017.

Jennifer Casey, Attorney, represented the Department of Alcoholic Beverage Control.

Melissa Gelbart, Attorney, represented Respondents, Garfield Beach CVS LLC, and Longs Drug Stores California LLC.

The Department seeks to discipline the Respondents' license on the grounds that, on or about July 7, 2016, the Respondents, through their agent or employee, sold, furnished, or gave alcoholic beverages to minor Cordero, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on January 31, 2017.

FINDINGS OF FACT

1. The Department filed the accusation on August 19, 2016.

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

2. The Department issued a type 21, off-sale general license to the Respondents for the above-described location on June 22, 2009 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Alessandra N. Cordero was born on January 4, 1996. On July 7, 2016, she was 20 years old. On that date minor Cordero was 5'4". She wore a black, zippered sweatshirt with sorority letters, "AXO," down the left front of the sweatshirt. She wore make-up, a silver ring on the middle finger of each hand (one ring contained a small diamond, the other a gemstone), and she wore her black, straight hair down past her shoulders. She had manicured finger nails and her left nostril pierced. (Exhibit A.)
5. On July 7, 2016, at 7:50 p.m. Department agents Brett McIntire (agent McIntire), Lee and Mathos entered the Licensed Premises in a plain clothes capacity. At 8:10 p.m., minor Cordero entered the Licensed Premises and drew agent McIntire's attention because she looked to him to be 18 to 20 years old. Agent McIntire observed minor Cordero walk straight to the section of the store that contained the alcoholic wine. While out of agent McIntire's view, minor Cordero selected a 1.5 liter bottle of Livingston Moscato wine and a 1.5 liter bottle of Livingston Cabernet Sauvignon. (Exhibits 2 & 3.) Agent McIntire then observed minor Cordero take the two bottles of wine to the front sales area for purchase and stand in line behind a customer. The three Department agents then stood in line behind her. Minor Cordero approached the cash register closest to the exit door. Once at the counter, the clerk, Omar Renteria, said "hello" to minor Cordero, who did not reply. Minor Cordero set the two bottles of wine down on the counter. Clerk Renteria scanned the two bottles of wine, and manually entered the date of birth of 02/03/86, to override the age-restricted transaction to permit the sale of alcohol to minor Cordero. Minor Cordero paid clerk Renteria for the wine and received change. Clerk Renteria did not ask minor Cordero for identification (ID) or any age-related questions. Minor Cordero took the two bottles of wine and exited the store.
6. Agents McIntire and Mathos also exited the store just before minor Cordero. Agent McIntire made contact with minor Cordero right outside the threshold of the exit door, and asked how old she was. At first, she said she was over the age of 21, and later admitted to her true age of 20. Agent McIntire asked minor Cordero if she had any ID on her person. She initially said she did not, and later produced a fake ID after agent McIntire informed her she would be searched for ID. Minor Cordero handed agent McIntire a Pennsylvania (PA) ID. Agent McIntire contacted the California Highway Patrol to determine the validity of the PA ID and was informed that it was not a valid ID. Agent McIntire asked minor Cordero if she had ever used a fake ID to purchase alcohol at the Licensed Premises in the past, to which she replied she had not. She admitted she had a second copy of the fake PA ID but that it had been taken away from her by a

bouncer at a bar prior to July 7, 2016. Agent McIntire seized the wine bottles from minor Cordero, he maintained custody of them, and after he left the scene he booked the wine bottles in the evidence room at the San Marcos district office. (Agent McIntire produced the same two bottles of wine at the hearing. Those wine bottles were remanded back to the Department at the end of the hearing.)

7. The fake PA ID contained minor Cordero's correct first and last name, actual photograph, albeit she looks extremely youthful in the photo, correct eye color of brown, correct height of 5'4", a made-up Pennsylvania address, and a date of birth of January 4, 1994, which made minor Cordero 22 years old on July 7, 2016. The PA ID indicated it was issued on January 9, 2015 and expires on January 5, 2019. (Exhibit 4.)

8. Agent McIntire re-entered the Licensed Premises and made contact with clerk Renteria. Clerk Renteria recalled the sales transaction with minor Cordero, and confirmed he did not ask her for her ID. Agent McIntire asked him why he did not ask for ID and clerk Renteria replied that he "thought" she came in and presented him with an out of state ID showing she was 21 in the past. Clerk Renteria did not say which state the ID was from and did not say when in the past it was that the minor had shown the ID to him. Clerk Renteria said it was his experience that he often saw youthful looking persons come in the store with out of state IDs to buy alcohol. He admitted that he entered the date of birth of 02/03/86 during the said transaction because it was his habit to use that birthdate to override the age-restricted transaction to permit the sale of alcohol when he believed someone was old enough to purchase alcohol. Clerk Renteria was hired by the Respondents on March 11, 2016. A photograph of clerk Renteria was taken (Exhibit 5.)

9. There is no evidence in the record that minor Cordero did in fact show the same fake PA ID to clerk Renteria prior to July 7, 2016. Clerk Renteria did not appear and did not testify at the hearing.

10. Minor Cordero appeared and testified at the hearing. She appeared her age. She recalled producing her fake PA ID at the Licensed Premises at least twice prior to July 7, 2016. There was no evidence in the record as to whom in the Licensed Premises she showed the fake PA ID prior to July 7, 2016. She did not know or recognize clerk Renteria on July 7, 2016, when the said transaction was made. There was no evidence as to whether she was successful in purchasing age-restricted items when she produced the fake PA ID in the past in the Licensed Premises. There was no evidence as to what the minor used the fake ID to purchase in the past at the Licensed Premises, whether it was alcohol or tobacco. She testified when she was in the Licensed Premises in the past she had purchased non-alcoholic merchandise.

11. Chris Bietz, the store manager (store manager Bietz) for the Licensed Premises appeared and testified at the hearing. Store manager Bietz worked for the Respondents for approximately one year, as of the date of the hearing. The Respondents' policy regarding sales of age-restricted products requires that its clerks ask for ID if a customer looks 27 years old or younger. Upon hire Respondents' employees attend an eight hour orientation, on-line class and on-the-job training covering policy and how to make responsible sales of age-restricted products. Store manager Bietz spoke with clerk Renteria regarding the said sales transaction of July 7, 2016. Store manager Bietz was not aware clerk Renteria was in the habit of entering a pseudo birthdate to avoid asking for ID prior to the sale of alcohol. Clerk Renteria admitted to not asking for ID from minor Cordero despite the fact she looked younger than 27. Clerk Renteria claimed he made the said sale because he knew minor Cordero, she had been in the store before, he had "carded" her in the past and knew her license was out of state. Store manager Bietz suspended clerk Renteria pending an investigation. After the Respondents conducted an investigation clerk Renteria was discharged. After the said violation the Respondents added an annual training covering all policies and require its employees attend Lead Training through the Department of Alcoholic Beverage Control. Each cash register has a note to check ID expiration dates and a new policy attached to each register which requires an out-of-state ID be verified by management prior to the sale of alcohol and all managers to ask for a second form of ID to verify the signature on the out-of-state ID. (Exhibit C.) Each employee acknowledged and signed off on this policy, except one employee, Augustin. (Exhibit B.) Magnifying glasses are also posted at each register (Exhibit D) for clerks to examine out-of-state IDs for smudging, and if found employees are instructed to refuse the sale of alcohol. The Respondents' cash registers still require its employees to enter the date of birth of the customer when the transaction involves alcohol, but there is nothing to prevent the clerks from entering a pseudo birthdate as clerk Renteria did to override the age-restricted transaction and permit the sale of alcohol to a minor.

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

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. Cause for suspension or revocation of the Respondents' license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on July 7, 2016, clerk Renteria, inside the Licensed Premises, sold an alcoholic beverage to Alessandra N. Cordero, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-10.)

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

The defense offered by this section is an affirmative defense. As such, the licensee has the burden of establishing all of its elements, namely, that evidence of majority and identity was demanded, shown, and acted on as prescribed.² To provide a defense, reliance on the document must be reasonable, that is, the result of an exercise of due diligence. This section applies to identifications actually issued by government agencies as well as those which purport to be.³ 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.⁴ The defense offered by section 25660 is not established if the appearance of the minor does not match the description on the identification.⁵ Thus, reasonable reliance cannot be established unless the appearance of the person presenting identification indicates that he or she could be 21 years of age and the seller makes a reasonable inspection of the identification offered.

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).

⁵ *5501 Hollywood*, 155 Cal. App. 2d at 751-54, 318 P.2d at 822-24; *Keane*, 130 Cal. App. 2d at 411-12, 279 P.2d at 155 (construing section 61.2(b), the predecessor to section 25660).

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

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

The Respondents' contention that clerk Renteria made the said sale because he knew minor Cordero, she had been in the store before, he had "carded" her in the past and knew her license was out of state making her 21 or older is disbelieved for the following reasons. Clerk Renteria was facing sure discipline for failing to follow store policy. His self-serving statements to store manager Bietz exhibited his motive and interest to protect his employment and avoid termination. This was also clear from the inconsistent self-serving statement he told agent McIntire on July 7, 2016, that he "thought" minor Cordero came in and presented him with an out of state ID showing she was 21 in the past. Clerk Renteria added a little more fabrication to his story to store manager Bietz claiming he "knew" the minor. Clerk Renteria admitted to being untruthful and avoiding following store policy in that he would regularly enter into the cash register a false birthdate of 02/03/86 to override age-restricted transactions to permit the sale of alcohol without actually checking the customer IDs; even of persons, like minor Cordero, who looked under 27. Clerk Renteria's claim that he did not ask for minor Cordero's ID because she produced an out of state ID in the past is inconsistent with his admission that it is his experience that youthful looking persons use out of state IDs to purchase alcohol. If this was his experience, then clerk Renteria should have asked minor Cordero for ID since she looked her age and definitely did not look 27 per Respondents' policy. Clerk Renteria was not present to testify.

On the other hand, minor Cordero had no motive or interest to lie during the giving of her testimony. She had already resolved the citation relating to the violation at hand. While minor Cordero could not recall what she was wearing on July 7, 2016, or the number of times she had been in the Licensed Premises, not many people could recall that. Minor Cordero provided otherwise consistent, credible testimony. She credibly testified that she did not know clerk Renteria. She was adamant she did not show her fake ID to clerk Renteria and that she did not recognize clerk Renteria on July 6, 2016. She admitted to using her fake ID at locations other than the Licensed Premises, including getting

admission into bars; something she would not have to admit to but she did, further showing the credibility of her testimony.

8. Based on this credibility determination, the Respondents failed to establish a defense under section 25660—i.e., the Respondents failed to prove that minor Cordero showed a bona fide ID in the past to clerk Renteria. There was insufficient evidence in the record to show that minor Cordero showed the same fake PA ID or any fake ID to this same clerk, Clerk Renteria, prior to July 7, 2016. While the minor said she showed her fake ID in the store before, there was no testimony elicited as to whom she showed the ID, or whether the minor was successful on the prior occasions in purchasing the age-restricted merchandise when she used her fake PA ID prior to July 7, 2016. She credibly testified she did not recognize clerk Renteria on July 7, 2016, and she did not know that she showed the ID to clerk Renteria before July 7, 2016. There was no evidence as to what the minor used the fake ID to purchase in the past at the Licensed Premises, whether it was alcohol or tobacco, the latter of which only requires she be 18. While the minor had been in the store before, she credibly testified she had bought non-alcoholic merchandise. Minor Cordero also had told agent McIntire on July 7, 2016, that she had never before shown her fake PA ID in the Licensed Premises to purchase alcohol. In light of this finding, and that Respondents failed to establish that evidence of majority and identity was demanded, shown, and acted on as prescribed, it is unnecessary to address the merits of the Pennsylvania ID.

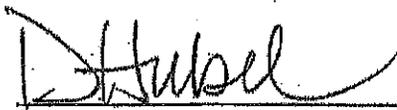
PENALTY

The Department requested the Respondents' license be suspended for a period of 15 days. The Respondents argued that, if the accusation were not dismissed, a 10 day suspension, with all 10 days stayed, was appropriate since the Respondents implemented some preventative measures after the said violation as testified to by store manager Bietz, and the length of licensure without prior discipline. The penalty recommended herein complies with rule 144.⁶

ORDER

The Respondents' off-sale general license is hereby suspended for a period of 10 days.

Dated: February 20, 2017



D. Huebel
Administrative Law Judge

⁶ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

Garfield Beach CVS LLC, and
Longs Drug Stores California LLC
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