

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

AB-9613

File: 21-479712 Reg: 15083162

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #9109
6265 El Cajon Boulevard, San Diego, CA 92115-3917,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: October 5, 2017
Los Angeles, CA

ISSUED OCTOBER 19, 2017

Appearances: *Appellants:* Donna J. Hooper, of Solomon Saltsman & Jamieson, as counsel for Garfield Beach CVS, LLC and Longs Drug Stores California, LLC.
Respondent: Kerry K. Winters 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 #9109 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 20 days because their clerk sold an alcoholic beverage to a non-decoy minor, a violation of Business and Professions Code section 25658.

FACTS AND PROCEDURAL HISTORY

1. The decision of the Department, dated September 20, 2016, is set forth in the appendix.

Appellants' off-sale general license was issued on September 14, 2009. On October 21, 2015, the Department instituted an accusation against appellants charging that, on August 22, 2015, appellants' clerk, Larry Bent, sold an alcoholic beverage to 19-year-old Claudia Corzan.

At the administrative hearing held on May 18, 2016, documentary evidence was received and testimony concerning the violation charged was presented by Corzan; by Agents Jennifer Hill and Dean Maier of the Department of Alcoholic Beverage Control; and by Ralph Baez, a district manager for co-appellant Garfield Beach CVS.

Testimony established that on the date of the operation, Corzan entered the licensed premises and selected two 30-packs of Coors Light beer cans and a 1.75 milliliter bottle of Smirnoff vodka. A clerk carried one of the 30-packs of beer for Corzan, while Corzan carried the other 30-pack and the Smirnoff bottle to the front sales counter for purchase. At the counter, Corzan and the clerk set the alcoholic beverages down in front of clerk Bent. Clerk Bent asked Corzan for identification (ID). Corzan handed clerk Bent a fake Florida driver's license.

Clerk Bent took the Florida ID from Corzan. Clerk Bent looked at the Florida ID briefly, then used it on two different machines to verify whether it was a valid ID. Clerk Bent first scanned the Florida ID's magnetic strip on the IDVisor Z22CounterTop machine. The IDVisor Z22 machine was not working. Clerk Bent then placed the Florida ID in the Fraud Fighter machine under an ultraviolet (UV) light, and awaited either a UV hologram or a UV image to appear, indicating a valid ID; neither appeared. Clerk Bent handed the Florida ID back to Corzan. Clerk Bent continued with the transaction. Corzan paid for the alcoholic beverages and exited the store, with clerk Bent carrying

one of the 30-packs of Coors Light beer and Corzan carrying the other 30-pack and the Smirnoff vodka bottle.

There is no evidence that clerk Bent compared the described date of birth on the Florida ID with Corzan, who stood before him. Clerk Bent did not ask Corzan any age-related questions or any questions based on the Florida ID. There is no evidence clerk Bent took the time to examine the Florida ID for any discrepancy that would suggest it was a fake ID.

The Florida ID contained Corzan's correct first and last name, actual photograph, correct height of 5'2", a made-up Fort Lauderdale address, and a date of birth of January 31, 1992, which made Corzan 23 years old on August 22, 2015. The Florida ID indicated it was issued on February 6, 2013.

Agent Maier observed Corzan and clerk Bent exiting the licensed premises with the alcoholic beverages. Maier noticed right away that Corzan looked youthful, about 18, and not old enough to purchase alcoholic beverages. Maier followed Corzan to the vehicle she had approached and made contact with her. Maier identified himself as a police officer and asked Corzan how old she was. She replied that she was 21. Maier asked for her ID. Corzan handed Maier the Florida ID, which Maier examined. Maier immediately noticed the ID was from Florida, a popular state for fake IDs; that the picture looked photoshopped, with a white-lined silhouette over the head; that it had a blurry background ocean landscape; that the lamination was off-center and peeling up at the left corner; that there were three obvious perforated lines, one vertical and two horizontal, which appeared to be air bubbles; and that the smaller inset picture was not an exact replica of the larger photograph, but had a blue hue over it. Maier confirmed

with Corzan she understood he was a police officer, after which she acknowledged she knew the ID was fake.

Agent Maier reentered the licensed premises, approached clerk Bent, identified himself as an officer and explained the violation. Standing next to clerk Bent was assistant manager Roberto Alvarado. Clerk Bent told Maier that the licensed premises had not given him any training related to detecting fraudulent IDs or the sale of alcoholic beverages to minors, which Alvarado confirmed, adding that "CVS does not provide training." Maier asked clerk Bent a series of questions about the sales transaction and the Florida ID.

Clerk Bent explained to Agent Maier how, during the sales transaction, he used both the IDVisor Z22 and Fraud Fighter machines, and explained how they operate. The IDVisor machine is supposed to indicate the customer's age and whether the ID is valid or not. Maier had clerk Bent scan Bent's own ID into the IDVisor Z22 machine. Clerk Bent admitted that the IDVisor Z22 machine was not working. When clerk Bent scanned his ID the machine did not indicate clerk Bent's age or whether his ID was valid. Both clerk Bent and manager Alvarado acknowledged the IDVisor Z22 machine "does not always work." Clerk Bent then explained the operation of the Fraud Fighter machine and that either a UV hologram or a UV image will appear if the ID is valid. Maier placed the fake Florida ID under the UV light of the machine. Clerk Bent admitted he did not see a UV hologram or image on the Fraud Fighter machine when Maier placed the Florida ID under the machine. Maier asked clerk Bent to look at the Florida ID for discrepancies, which he did. After examining the Florida ID, clerk Bent acknowledged that during the sales transaction he did not notice the blurred ocean background landscape or the three

perforated lines on the front of the Florida ID, but that he did notice the discrepancies "now."

On August 25, 2015, Agent Maier returned to the licensed premises. Maier had logged the fake Florida ID out of evidence and brought it with him to the licensed premises. While at the licensed premises, Maier spoke with Assistant Managers Jesus Meza and Holly Maher. Assistant Manager Maher showed Agent Maier how the IDVisor Z22 machine worked by swiping the Florida ID into the machine. The screen was supposed to reveal the age of the customer and whether the ID is valid. A screen popped up which read, "Please Re-Scan/Swipe." Assistant Manager Maher then showed Agent Maier how the Fraud Fighter machine worked by placing the fake Florida ID under the UV light. She explained that if the ID is valid either a UV hologram or UV image was supposed to appear, but neither did. Both assistant managers confirmed they do not receive any type of training regarding ID cards.

At the hearing, Corzan testified that she was successful in purchasing alcoholic beverages at the licensed premises with the same fake Florida ID two times prior to August 22, 2015. Corzan admitted she went to the licensed premises to purchase alcoholic beverages because her friends told her it was "easy for minors to buy alcohol at that location."

The licensed premises is approximately one mile from California State University, San Diego.

After the hearing, the Department issued a proposed decision determining that the charge was proven and no defense was established.

On June 10, 2016, following submission of the proposed decision, the Department's Administrative Hearing Office sent a letter to appellants and to Department counsel offering both parties the opportunity to comment on the proposed decision. That letter stated:

Administrative Records Secretary and Concerned Parties:

Enclosed is the Proposed Decision resulting from the hearing before Department of Alcoholic Beverage Control, Administrative Hearing Office in the above entitled matter.

All concerned parties and their attorneys of record are being sent a copy of this Proposed Decision. All concerned parties and attorneys of record are hereby informed that you may submit comments regarding this Proposed Decision to the Director for consideration prior to any action being taken by the Director. Comments to the Director regarding this Proposed Decision shall be mailed to the Administrative Records Secretary. Additional comments submitted for review by the Director, if any, must also be submitted to all parties and their attorneys. For the convenience of all concerned, a list of those parties and their addresses is attached.

Pursuant to General Order 2016-02, the Administrative Records Secretary will hold this Proposed Decision until 14 days after the date of this letter. After that the Administrative Records Secretary will submit this Proposed Decision along with any comments received from concerned parties to the Director for consideration.

(Letter from John W. Lewis, Chief Admin. Law Judge, Dept. of Alcoholic Bev. Control, Jun. 10, 2016 [hereinafter "Comment Letter"].) As suggested in the final paragraph, the Comment Letter reflected a comment procedure adopted by the Department pursuant to its General Order 2016-02. (Dept. of Alcoholic Bev. Control, "GO-Ex Parte and Decision Review," Gen. Order 2016-02, at § 3, ¶¶ 5-6 (eff. Mar. 1, 2016) [hereinafter "General Order"].)

On June 24, 2016, counsel for appellants responded by submitting a comment letter offering to forego appeal in exchange for a reduced penalty of 15 days'

suspension. (Letter from Melissa H. Gelbart, counsel for appellants, to Ramona Prieto, Acting Director, Dept. of Alcoholic Bev. Control, Jun. 24, 2016.) Additionally, appellants appended "Comments to the Director re Proposed Decision," which challenged the legality of the comment procedure itself. The Department submitted no comments.

Ultimately, the Department adopted the proposed decision without changes.

Appellants then filed this appeal contending (1) the Administrative Law Judge erred in holding that appellants failed to establish a defense under Business and Profession Code section 25660, and (2) the Department's comment procedure violates the Administrative Procedure Act and the Administrative Adjudication Bill of Rights, and constitutes an underground regulation.

DISCUSSION

I

Appellants contend the ALJ erred when she found that clerk Bent should have challenged the Florida ID Corzan presented to him based on Corzan's youthful appearance. (App.Br., at p. 5.) Appellants argue this is contrary to the law, which they claim allows clerks to "rely on identification rather than their own assessment of a person's age." (App.Br., at p. 6.) According to appellants, "[t]he statute does not state that reliance on bona fide evidence of majority is a defense, unless the person looks under 21," and that such an interpretation "obliterates the defense." (*Ibid.*) Appellants claim section 25660 "only requires that the clerk rely on an identification that has the name, picture, date of birth and description of the person." (*Ibid.*) Appellants insist Corzan's fake ID contained those elements, and moreover, that "the clerk was not in the

position of trained law enforcement personnel" and therefore could not know the identification was fake. (App.Br., at pp. 6-7.)

Finally, appellants' position depends on their conclusion that the fake identification "was an exact duplicate of a Florida driver's license." (App.Br., at p. 6.)

While Business and Professions Code section 25658(a) prohibits the sale of alcohol to a minor, section 25660(b) provides a defense where the licensee demanded and relied upon bona fide documentary evidence of majority and identity issued by a government agency. (Bus. & Prof. Code, §§ 25658(a) and 25660(b); see also *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1438 [13 Cal.Rptr.3d 826].) The statute defines "[b]ona fide evidence of majority and identity of the person" as

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.

(Bus. & Prof. Code, § 25660(a)(1).) Even 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:

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

(*Masani, supra*, at p. 1445.)

There is, however, more to establishing a section 25660 defense than simply comparing the person with the picture. Section 25660, as an exception to the general prohibition against sales to minors, must be narrowly construed. (*Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 189 [67 Cal.Rptr. 734].) The licensee or his agent must act in good faith and with due diligence in relying on an apparently valid but actually fraudulent identification:

The defense must be asserted in good faith, that is, the licensee or the agent of the licensee must act as a reasonable and prudent [person] would have acted under the circumstances. Obviously, the appearance of the one producing the card, or the description on the card, or its nature, may well indicate that the person in possession of it is not the person described on such card.

(*Keane v. Reilly* (1955) 130 Cal.App.2d 407, 409-410 [279 P.2d 152].) Moreover, reasonable reliance under section 25660 requires that the "evidence of majority be presented by one whose appearance indicates that he or she could be 21 years of age, *and* a reasonable inspection of the document must be made by the licensee or his agent." (*5501 Hollywood, Inc. v. Dept. of Alcoholic Bev. Control* (1957) 155 Cal.App.2d 748, 753 [318 P.2d 820], emphasis added.) Thus, if the physical appearance of the individual presenting the identification is such that he could not be 21 years of age, then the defense fails, regardless of any subsequent inspection of the fake ID.

The burden of establishing such a defense rests with the licensee raising it. "The licensee has the burden of proving . . . that evidence of majority and identity was demanded, shown and acted on as prescribed by . . . section 25660." (*Lacabanne Properties, supra*, at p. 189.)

Whether a licensee or its agent has made a reasonable inspection of an ID to determine if it is bona fide is a question of fact. (*Masani, supra*, at p. 1445; *5501*

Hollywood, Inc., supra, at p. 754.) This Board is bound by the Department's factual findings, provided they are supported by substantial evidence. (*Masani, supra*, at p. 1437.) The Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Ibid.*)

The ALJ made clear factual findings on both Corzan's apparent age and clerk Bent's examination of the fake ID. Regarding Corzan's appearance, she found:

13. At the hearing, Claudia Corzan was 5'2", 113 pounds, wore her hair up and wore no make-up. She wore blue jeans, a black blouse with white pockets, a white sweater and the same white Vans tennis shoes as she wore on August 22, 2015. Claudia Corzan has an extremely youthful appearance in-person. She appeared 18 years old to agent Maier at the time of the sales transaction on August 22, 2015, and to the undersigned at the hearing, despite the fact she was 19 years old on August 22, 2015, and 20 years old at the hearing. On August 22, 2015, the minor did not appear to be the age of 23 as the date of birth described on the Florida ID.

(Findings of Fact, ¶ 13.) Regarding clerk Bent's inspection of the ID, as well as the ID inspection standards of the licensed premises generally, the ALJ found:

6. Clerk Bent took the Florida ID from Claudia Corzan. Clerk Bent looked at the Florida ID briefly, then used it on two different machines to verify whether it was a valid ID. Clerk Bent first scanned the FL ID's magnetic strip on the IDVisor Z22CounterTop machine. (Exhibit 6.) The IDVisor Z22 machine was not working. Clerk Bent then placed the Florida ID in the Fraud Fighter machine under an Ultra Violet (UV) light, and awaited either a UV hologram or UV image to appear, indicating a valid ID; neither appeared. Clerk Bent handed the Florida ID back to Claudia Corzan. Clerk Bent continued with the sales transaction of alcoholic beverages to Claudia Corzan. Claudia Corzan paid for the said alcoholic beverages and exited the store, with clerk Bent carrying for her one of the 30-packs of Coors Light beer and Claudia Corzan carrying the other 30-pack Coors Light beer and Smirnoff Vodka bottle.

7. There is no evidence clerk Bent compared the described date of birth on the Florida ID with Claudia Corzan, who stood before him. Clerk Bent did not ask Claudia Corzan any age-related questions or any questions

based on the Florida ID. There is no evidence clerk Bent took the time to examine the Florida ID for any discrepancy which would cause suspicion that it was a fake ID.

8. The Florida ID contained Claudia Corzan's correct first and last name, actual photograph, correct height of 5'2", a made-up Fort Lauderdale address, and a date of birth of January 31, 1992, which made Claudia Corzan 23 years old on August 22, 2015. The Florida ID indicated it was issued on February 6, 2013. (Exhibit 3.)

[¶ . . . ¶]

10. Agent Maier re-entered the Licensed Premises, approached clerk Bent, identified himself as an officer and explained the violation to clerk Bent. Standing next to clerk Bent was assistant manager Robert Alvarado (manager Alvarado). Clerk Bent replied to agent Maier that the Licensed Premises had not given him any training relating to detecting fraudulent IDs or the sale of alcoholic beverages to minors, which manager Alvarado confirmed adding that "CVS does not provide training." Agent Maier asked clerk Bent a series of questions about the said sales transaction and Florida ID.

11. Clerk Bent explained to agent Maier how, during the said sales transaction, he used both the IDVisor Z22 and Fraud Fighter machines, and explained how they operate. The IDVisor Z22 machine is supposed to indicate the customer's age and whether the ID is valid or not. (Exhibit 6.) Agent Maier had clerk Bent scan clerk Bent's own ID into the IDVisor machine. Clerk Bent admitted that the IDVisor Z22 machine was not working. When clerk Bent scanned his ID the machine did not indicate clerk Bent's age or whether his ID was valid. Both clerk Bent and manager Alvarado acknowledged the IDVisor Z22 machine "does not always work." Clerk Bent then explained the operation of the Fraud Fighter machine and that either a UV hologram or UV image will appear if the ID is valid. Agent Maier placed the fake Florida ID under the UV light of the machine. Clerk Bent admitted he did not see a UV hologram/image on the Fraud Fighter machine when agent Maier placed the Florida ID under the machine. Agent Maier asked clerk Bent to look at the Florida ID for discrepancies, which he did. After examining the Florida ID, clerk Bent acknowledged that during the said sales transaction he did not notice the blurred ocean background landscape or the three perforated lines on the front of the Florida ID, but that he did notice the discrepancies "now."

12. On August 25, 2015, agent Maier returned to the Licensed Premises. Agent Maier had logged the fake Florida ID out of evidence and brought it with him to the Licensed Premises. While at the Licensed Premises agent Maier spoke with assistant managers Jesus Meza and Holly Maher. Assistant manager Maher showed agent Maier how the IDVisor Z22

machine worked by swiping the Florida ID into the machine. The screen was supposed to reveal the age of the customer and whether the ID is valid. A screen popped up which read, "Please Re-Scan/Swipe." (Exhibit 7.) Assistant manager Maher then showed agent Maier how the Fraud Fighter machine worked by placing the fake Florida ID under the UV light. (Exhibit 8.) She explained that if the ID is valid either a UV hologram or UV image was supposed to appear, but neither did. Both assistant managers confirmed they do not receive any type of training regarding ID cards.

(Findings of Fact, ¶¶ 6-8, 10-12.)

Based on these factual findings, the ALJ concluded both that Corzan did not appear to be 21 years of age *and* that clerk Bent failed to conduct a diligent inspection of the identification Corzan presented. First, she correctly outlined the law, as provided by section 25660 and the cases interpreting it:

5. Section 25660 provides a defense to any person who was shown and acted in reliance upon bona fide evidence of majority . . . in making a sale forbidden by section 25658(a)

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.^[fn.] 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.^[fn.] 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.^[fn.] The defense offered by section 25660 is not established if the appearance of the minor does not match the description on the identification.^[fn.] 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.

(Conclusions of Law, ¶ 5; see also Bus. & Prof. Code, § 25660; *Masani, supra*, at p. 1445 [reasonable reliance includes careful scrutiny by the licensee]; *Keane, supra*, at pp. 409-410 [description on ID must match person presenting it]; *5501 Hollywood*,

supra, at p. 753 [defense applies only if ID is presented by "one whose appearance indicates that he or she could be 21 years of age"].)

Regarding Corzan's appearance, the ALJ concluded—based on her own observations and Agent Maier's firsthand testimony—that Corzan did not appear to be 21, let alone 23 as purported by the fake ID:

6. In the present case, the Respondents failed to meet their burden. Claudia Corzan did not appear to be 21 years old; rather, she appeared to be 18 years old, although her true age was 19 at the time of the sales transaction on August 22, 2015, and her appearance most certainly did not match the date of birth described on the Florida ID. In other words, she could not pass for 21, let alone 23 according to the date of birth on the Florida ID. While Claudia Corzan wore make-up she still appeared youthful. In fact, sworn, direct testimony by agent Maier confirmed Claudia Corzan had a youthful appearance, looking to him to be about 18 years old on August 22, 2015. Agent Maier further testified that Claudia Corzan looked so young it caused agent Maier to become suspicious she was under 21.

The evidence failed to establish that clerk Bent exercised due diligence or the caution of a reasonable and prudent person in the same or similar circumstances. There is no evidence clerk Bent made his own appraisal of the physical appearance of the minor prior to the sale and in comparison to the date of birth described on the Florida ID. Had he done so, a reasonable conclusion would have been that the minor appeared to look 18 years of age and not much older, and that she did not match the age as described on the Florida ID. Claudia Corzan could not reasonably have been thought to be the owner of the Florida ID. (Findings of Fact, ¶¶ 6, 7, 8 & 13.)

(Conclusions of Law, ¶ 6.) The ALJ further concluded that clerk Bent did not conduct a reasonable inspection of the identification for indicia of authenticity:

There is no evidence clerk Bent made a reasonable inspection of the Florida ID, having only looked at it briefly before attempting to verify its validity with the IDVisor Z22, a machine he knew "does not always work," and the Fraud Fighter machine. Had he made a reasonable inspection of the Florida ID he would have noticed the obvious perforation lines, and peeling of the off-centered lamination. When he did examine the Florida ID in agent Maier's presence he acknowledged "now" seeing certain discrepancies, including the perforated lines. He asked no age-related questions or anything about the Florida ID. What the evidence does reveal

is that clerk Bent grabbed the ID, looked at it briefly before scanning it on the IDVisor Z22, which was not working, and then placed the Florida ID under the Fraud Fighter machine, which revealed no UV hologram or image whatsoever. When no UV hologram or image appeared on the Fraud Fighter machine, which was an indication the ID was not valid, in conjunction with the minor appearing 18, and not the age of 23 as per the Florida ID, clerk Bent should have refused the sale. A reasonable, prudent person under similar circumstances would have refused the sale. The Respondents' own district manager Baez acknowledged he would have refused the sale for the sole reason that no UV hologram appeared on the Fraud Fighter machine. (Findings of Fact ¶¶ 6, 7, 9, 13 & 19.) Accordingly, clerk Bent's reliance on the Florida ID was not reasonable. Respondents failed to establish a defense under section 25660.

(Conclusions of Law, ¶ 6.)

Thus, according to the ALJ, appellants failed to establish *either* factor of a bona-fide ID defense under section 25660: first, the ALJ found that Corzan did not appear over the age of 21 (let alone 23, as the Florida ID stated), and second, that clerk Bent failed to conduct a reasonable inspection of the ID—particularly after the Fraud Fighter machine failed to reveal a UV hologram or image—and did not notice tell-tale signs of a fraudulent identification, such as offset lamination or air-bubble perforations.

Based solely on the photographs of Corzan in evidence, reasonable minds might differ as to whether she could appear over 21. This Board, however, is bound by the factual findings made below, assuming they are reasonable and supported by the evidence. We cannot say the ALJ's finding was unreasonable. Moreover, in this case, the ALJ saw Corzan firsthand as she testified at the administrative hearing, and was therefore in a better position than this Board to make judgments about Corzan's appearance.

Far more problematic for appellants is clerk Bent's failure to conduct a reasonable inspection of the Florida ID. Clerk Bent told Agent Maier that he placed the

ID under the Fraud Fighter machine, and no hologram or image appeared.² This alone should have signaled to Bent that the ID was fake. Nevertheless, clerk Bent proceeded with the sale, never asking any questions about the ID or the information on it, and apparently never noticing obvious physical indicia of fraud such as offset lamination or perforations.

This case is particularly troubling because *three separate managers*³ at the licensed premises told Agent Maier that they do not receive training regarding ID cards. (Findings of Fact, ¶¶ 10, 12.) Clerk Bent's actions are consistent with an employee who has not been adequately trained in using fraud-detection equipment or in visually inspecting identification for evidence of fraud.

To allow appellants to evade discipline in this case is to absolve licensees of the responsibility of training their employees. Such a result is unconscionable, as it allows the most irresponsible licensees to rely on their own negligence as a shield against enforcement.

2. It is true that clerk Bent's comments are hearsay. However, in administrative hearings, hearsay is admissible where offered to supplement or explain other evidence. (Gov. Code, § 11513(d).) Agent Maier returned to the premises and tested the Florida ID under the Fraud Fighter machine, with the same result. (Findings of Fact, ¶ 12.) Clerk Bent's hearsay remarks supplement Agent Maier's independent test of the identification and explain how the Fraud Fighter machine functioned during the actual transaction. Clerk Bent's hearsay remarks are therefore admissible.

3. These hearsay remarks are admissible because they explain why clerk Bent ignored the absence of a holographic image when the Florida ID was placed under the Fraud Fighter machine and why he failed to conduct a further examination of the ID or notice other indicia of fraudulence. (See Findings of Fact, ¶ 11.)

II

Appellants contend the Department's comment procedure, implemented pursuant to its General Order 2016-02, violates the hearing and review procedures set forth in the APA, constitutes an underground regulation prohibited by the APA, and encourages illegal ex parte communications. (App.Br., at pp. 7-16.)

We recently addressed an identical argument in *7-Eleven, Inc./Gupta* (2017) AB-9583. In that case, we concluded the Department's comment procedure, as outlined in the General Order, constitutes an unenforceable underground regulation. The comment procedure was identical in this case. We therefore reach the same legal conclusion here, and refer the parties to *Gupta* for our complete reasoning. (*Id.* at pp. 12-25.)

Furthermore, the sole comment, submitted by appellant, had no effect on the outcome of the case, and therefore, the comment procedure did not materially affect appellant's due process rights. (See *id.* at pp. 26-29.)

As we have noted elsewhere, however, the Department's comment procedure creates a minefield of potential due process issues. (See *id.* at p. 29 ["The Department's decision to bypass the rulemaking process deprived it of the opportunity to review public comments that might have alerted it to potential pitfalls in the comment procedure."].) We remind the parties that "we shall remain particularly vigilant in future cases, and will not hesitate to reverse where the Department's improperly adopted comment procedure materially infringes on an appellant's due process rights." (*Ibid.*)

ORDER

The decision of the Department is affirmed.⁴

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

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

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