

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

AB-9707

File: 21-475217; Reg: 17086008

TRADER JOES COMPANY,
dba Trader Joes #236
265 Winston Drive,
San Francisco, CA 94132-1921,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: March 1, 2019
Sacramento, CA

ISSUED MARCH 5, 2019

Appearances: *Appellant:* Gillian Garrett, of Hinman & Carmichael LLP, as counsel
for Trader Joes Company,

 Respondent: Colleen R. Villarreal, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

Trader Joes Company, doing business as Trader Joes #236, appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 10 days because its clerk sold an alcoholic beverage to an individual under the age of 21, in violation of Business and Professions Code section 25658, subdivision (a).

¹The decision of the Department, dated April 23, 2018, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on August 12, 2009. There is no record of departmental discipline against the license.

On October 11, 2017, the Department instituted a single-count accusation against appellant charging that on May 4, 2017 appellant's clerk, Riley Michael Boulger (the clerk), sold an alcoholic beverage to Julia Francis Stafford, an individual under the age of 21 (hereinafter, the minor).

At the administrative hearing held on February 15, 2018, documentary evidence was received and testimony concerning the violation charged was presented by the minor, by Department Agent Michelle Ott, by the clerk, and by Susan Dworak, CEO of Real Identities, a company focused on helping people and businesses detect fake government IDs.

Testimony established that on May 4, 2017, the minor entered the licensed premises with two to three friends. They selected two six-packs of beer and walked towards the counter. As they were walking, the minor asked her friends "Do you think he'll check?" One friend replied, "No, I think you're fine." Department Agent Ott overheard these comments.

The minor went to the counter alone with the beer. The clerk rang it up and asked for her identification. The minor opened her tri-fold style wallet and showed the clerk what appeared to be a South Carolina Driver's License — later found to be a false identification. (Exh. 2.) The clerk looked at the license from a distance of approximately two feet but did not ask the minor to remove it from her wallet, nor did he ask her any age-related questions. The clerk entered the birthdate on the identification into the register, which cleared the item for sale, and completed the transaction. Agent

Ott witnessed the sale and promptly detained the minor in the store after she left the register with the beer.

Agent Ott asked the minor how old she was and the minor replied that she was 21. Ott asked her for identification and the minor showed her the South Carolina Driver's License. Agent Ott determined that the identification was false because of its orange-peel texture and because the photo on the license showed blonde hair, while the minor was a brunette. A photo of the minor was taken (exh. 6) and she was issued a citation for being in possession of an alcoholic beverage and possession of a false identification — both of which were seized as evidence.

Agent Ott contacted the clerk and told him he had sold alcohol to a minor. When shown a photo of the minor, the clerk acknowledged that he knew her as "Julia" and that he had checked her identification. The clerk was issued a citation. At the hearing, the clerk testified that he had been introduced to the minor a few months earlier by a mutual friend. He believed she was a student at San Francisco State University and that she was 22 or 23 years old.

On March 5, 2018, the administrative law judge (ALJ) submitted a proposed decision, sustaining the accusation and recommending a 10-day suspension of the license. The proposed decision was adopted in its entirety by the Department on April 4, 2018, and a Certificate of Decision was issued on April 23, 2018.

Appellant then filed a timely appeal raising the following issues: (1) the decision is not supported by substantial evidence because appellant reasonably relied on the fake ID — thereby establishing a complete defense under section 25660, and (2) the decision is invalid because it is based on underground regulations rather than proper rulemaking procedures under the Administrative Procedures Act (APA).

DISCUSSION

I

Appellant contends the decision is not supported by substantial evidence because appellant reasonably relied on false identification — thereby establishing a complete defense under section 25660. (AOB at pp. 9-11.)

Section 25660 provides:

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

[¶] . . . [¶]

(c) 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 burden in such a case is on the party asserting the defense.

In *Masani*, the court said:

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

(Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.

(2004) 118 Cal.App.4th 1429, 1445 [13 Cal.Rptr.3d 826] (*Masani*).

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings.²

Reasonable reliance on a fake ID cannot be established unless the appearance of the person presenting identification indicates that he or she could be 21 years of age and the seller makes a reasonable inspection of the identification offered. (5501 *Hollywood v. Dept. of Alcoholic Bev. Control* (1957) 155 Cal.App.2d 748, 753-754 [318 P.2d 820] (5501 *Hollywood*).

Section 25660, as an exception to the general prohibition against sales to minors, must be narrowly construed. (*Lacabanne Properties, Inc. v. Alcoholic Beverage etc. Appeals Board* (1968) 261 Cal.App.2d 181, 189 [67 Cal.Rptr. 734] (*Lacabanne*)). The statute provides an affirmative defense, and "[t]he licensee has the burden of proving . . . that evidence of majority and identity was demanded, shown and acted on as prescribed by . . . section 25660." (*Ibid.*)

The case law regarding section 25660 makes clear that to provide a defense, reliance on the document must be reasonable, that is, the result of an exercise of due diligence. (See, e.g., *Lacabanne, supra*; 5501 *Hollywood, supra*.) A licensee, or a

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

licensee's agent or employee, must exercise the caution that would be shown by a reasonable and prudent person in the same or similar circumstances. (*Lacabanne, supra; Farah v. Alcoholic Bev. Control Appeals Bd.* (1958) 159 Cal.App.2d 335, 339 [324 P.2d 98]; *5501 Hollywood, supra.*) Reasonable reliance cannot be established unless the appearance of the person presenting identification indicates that he or she could be 21 years of age and the seller makes a reasonable inspection of the identification offered. (*5501 Hollywood, supra*, at pp. 753-754.)

Whether or not a licensee has made a reasonable inspection of an ID to determine that it is bona fide is a question of fact (*Masani, supra*, at p. 1445; *5501 Hollywood, supra*, at pp. 753-754), and this Board may not go behind that factual finding. The the standard of review is as follows:

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 page 1437.)

In the instant case, the clerk testified that he looked at the ID long enough for him to read the date of birth and to enter it into the cash register. He noticed that the expiration date was correct — ten years after the date of issue— and that the ID was from South Carolina. He saw nothing unusual about the ID that would cause him to doubt its authenticity. Furthermore, he noticed that the minor's hair color was currently different than that on the ID, but he did not question that because he had seen her with

blonde hair in the past and knew that she dyed her hair.

Appellant presented expert testimony about the fake ID. Testimony was presented that this was a “very, very good” fake ID — and “as good as it gets.” (RT at pp. 132-172.) The expert also testified that the texture of the ID was consistent with those intentionally manufactured by some states, and that the texture could have been caused by routine wear and tear. (*Ibid.*) The minor testified that she had used the fake ID to successfully purchase alcohol ten to fifteen times in the past few months, and that no one had challenged the ID as fake on those occasions. (RT at pp. 8-9.)

The ID contained the minor’s actual photograph, her correct height and weight, and the correct month and day of her birthdate — but with the year changed to make her over 21. (Finding of Fact, ¶ 12.) In addition, evidence established that the false identification was consistent with the outward features of a true South Carolina driver’s license, such as its size, coloring, formatting, printing, date of expiration, the absence of background color on the photo, and the presence of a hologram. (Det. of Issues, ¶ 7.)

The ALJ determined that the clerk did not make a reasonable inspection of the ID primarily because the clerk failed to ask the minor to take her identification out of her wallet — even though this was not the policy of the store, nor is it required by statute or regulation. The ALJ concluded that if the ID been examined more closely, the clerk would have detected the orange peel texture and minor imperfections in the ID. (Det. of Issues, ¶ 10.) Furthermore, the ALJ opined that the inspection was not reasonable because the clerk knew the minor was a student at San Francisco State University and therefore could be underage. The ALJ did not believe a reasonable inspection was made in this case. (*Ibid.*) We disagree.

In the instant case, the clerk was familiar enough with this customer, whom he

knew through a mutual friend, to know that the photo on the fake ID matched the person in front of him, even though her hair color was different. He knew she was a student at San Francisco State University, and that the store policy was to check identification if a person looked under 40 — accordingly, he checked her ID, even though, according to his testimony, he believed she appeared to him to be 22 or 23. He checked that the birthdate made her at least 21, that the expiration date was ten years after the issue date, and that the photo matched the person in front of him. There was nothing about the ID that would lead him to believe the ID was fake. He had encountered identification in the past that appeared to be fake, and in those cases he called his manager. (See RT at pp. 90-112.)

The ALJ's assessment, that the inspection of the identification was not reasonable because the clerk failed to examine the ID out of the wallet is simply not supported by the law, past cases, store policy, or any type of industry standard. There is no "take-it-out-of-your-wallet rule" if the licensed premises is near a university. Nor is there a requirement that the clerk possess the expertise of an individual with specialized training in the detection of fake IDs. Finally, even if the clerk had noted the orange-peel texture, testimony established that this is not necessarily indicia of a fraudulent ID.

The law, outlined above, requires three things to establish a defense under section 25660: (1) that a clerk exercise the caution that would be shown by a reasonable and prudent person in the same or similar circumstances, (2) that the person presenting the ID look like they could be 21, and (3) that the clerk make a reasonable inspection of the identification offered. We believe all three tests are met here. As the court in *Masani* said, "[t]he licensee should not be penalized for accepting a credible fake that has been reasonably examined for authenticity and compared with

the person depicted.” (*Masani, supra* at 1445.)

The clerk’s good faith reliance on what appeared to be a genuine ID, showing the minor to be 21, is a complete defense in this case under section 25660. The ALJ’s decision is simply not supported by substantial evidence. Instead, it relies on the ALJ’s erroneous application of a “take-it-out-of-your-wallet rule” which does not exist, and his assumption that if the ID had been taken out of the wallet the clerk would have noticed a texture which does not necessarily indicate falsity. This is an abuse of discretion.

II

Appellant contends the decision is invalid because it is based on underground regulations rather than proper rulemaking procedures under the APA. (AOB at pp. 13-16.)

The APA defines the term “regulation” broadly: “‘Regulation’ means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.” (Gov. Code, § 11342.600.) “[I]f it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it.” (*State Water Resources Control Bd. v. Office of Admin. Law* (1993) 12 Cal.App.4th 697, 702 [16 Cal.Rptr.2d 25].)

The APA requires that all regulations be adopted through the formal rulemaking process.

No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation, as defined in Section

11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

(Gov. Code, § 11340.5(a).) All regulations are subject to the APA rulemaking process unless expressly exempted by statute. (Gov. Code, § 11346; *Engelmann v. State Bd. of Education* (1991) 2 Cal.App.4th 47, 59 [3 Cal.Rptr.2d 264].) Compliance with the rulemaking process is mandatory; where a regulation was not properly adopted, it has no legal effect. (*Armistead v. State Personnel Bd.* (1978) 22 Cal.3d 198, 204-205 [149 Cal.Rptr. 1].)

In *Tidewater*, the California Supreme Court outlined a two-part test:

A regulation subject to the APA thus has two principal identifying characteristics. [Citation.] First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. [Citation.] Second, the rule must “implement, interpret, or make specific the law enforced or administered by [the agency], or . . . govern [the agency’s] procedure.” (Gov. Code, §11342, subd. (g).)

(*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571 [59 Cal.Rptr.2d 186].)

Appellant contends the Department issued two invalid regulations. One, when a Department agent orally instructed Trader Joes to commence removing IDs from wallets when selling alcohol³ — not just in a specific case, but all cases — and two, when the decision in this matter was issued, finding that when a licensed premises is located near a university, greater scrutiny of identification than usual is required. Both regulations,

³It should be noted that testimony established that the clerk in this matter had not yet been informed of this instruction at the time of this incident.

appellant argues, interpret section 25660 and make it narrower. This is the definition of an underground regulation under *Tidewater*.

The conclusion that something is an underground regulation, standing alone however, does not necessarily merit reversal. As the Court observed in *Tidewater*,

If, when we agreed with an agency's application of a controlling law, we nevertheless rejected that application simply because the agency failed to comply with the APA [rulemaking procedures], then we would undermine the legal force of the controlling law. Under such a rule, an agency could effectively repeal a controlling law simply by reiterating all its substantive provisions in improperly adopted regulations.

(*Tidewater, supra*, at p. 577.)

We agree with appellant that these two rules were unquestionably adopted without regard to the APA rulemaking procedures and that they constitute unenforceable underground regulations. The APA requires that before a rule can be implemented, licensees must be provided with notice and an opportunity to comment. No such procedure was followed here. As such, the rules violate appellant's APA due process rights.

The Department's use of underground regulations provides a second ground for reversal in this matter, in addition to appellant's 25660 defense. Until and unless the proper rulemaking procedures are followed by the Department, there is simply no "take-it-out-of-your-wallet rule" which negates the establishment of a 25660 defense by an appellant.

ORDER

The decision of the Department is reversed.⁴

⁴This 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.

BAXTER RICE, CHAIRMAN
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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:**

TRADER JOES COMPANY
TRADER JOES #236
265 WINSTON DRIVE
SAN FRANCISCO, CA 94132-1921

OFF SALE GENERAL - LICENSE

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

CONCORD DISTRICT OFFICE

File: 21-475217

Reg: 17086008

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 4, 2018. 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, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after June 4, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: April 23, 2018



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Trader Joes Company	}	File: 21-475217
Dbas: Trader Joes #236	}	
265 Winston Drive	}	Reg.: 17086008
San Francisco, CA 94132-1921	}	
	}	License Type: 21
Respondent	}	Word Count Estimate: 49,392
	}	Rptr: Christy Curry, CSR
	}	Emerick and Finch Court Reporters
<u>Regarding Its Type-21 Off-Sale General License Under</u>	}	
<u>the State Constitution and the Alcoholic Beverage</u>	}	
<u>Control Act.</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter in San Francisco, California, on February 15, 2018.

Colleen R. Villarreal, Attorney III, Office of Legal Services, Department of Alcoholic Beverage Control, appeared for and represented the Department of Alcoholic Beverage Control. (Hereafter, "the Department")

John Edwards, Esq. of Hinman and Carmichael, appeared for and represented the licensee, Trader Joes Company. (Hereafter, "Respondent")

The Department seeks to discipline Respondent's license on the grounds that, on or about May 4, 2017, Respondent, through its agent or employee, Riley Michael Boulger, sold, furnished, or gave away, or caused to be sold, furnished, or given away, an alcoholic beverage to Julia Francis Stafford., a person under the age of 21, in violation of California Business and Professions Code section 25658(a).¹ (Exhibit 1:pre-hearing pleadings)

At the hearing, Respondent contended that because its clerk reasonably relied upon a South Carolina Driver's License the minor presented to establish she was at least 21 years old, which was only later determined to be fraudulent, a defense to the accusation was established under section 25660.

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

After oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing, the matter was argued by the parties and submitted for decision on February 15, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on October 11, 2017. On October 16, 2017, the Department received a Notice of Defense from Respondent requesting a hearing on the accusation. The matter was heard on February 15, 2018 and submitted for decision.
2. On August 12, 2009, the Department issued Respondent a Type-21 Off-Sale General license for its premises at 265 Winston Drive, San Francisco, California.²
3. Since Respondent has been licensed there, it has had no history of disciplinary action.
4. Julia Francis Stafford was born on August 5, 1997. On May 4, 2017, when she was at Respondent's store, she was 19 years old. (Hereafter, "the minor")
5. On May 4, 2017, the minor went to Respondent's store with two or three friends to buy beer for their own consumption. Respondent's licensed business is a Trader Joes market located in the Stonestown Shopping Center near San Francisco State University. (Hereafter, "SFSU") The minor and her friends selected two six packs of beer from the alcoholic beverage section of the store and approached the check stands. En route to the check stands, the minor asked her friends "Do you think he'll check?". One friend replied "No...I think you're fine."
6. The minor stood alone at one of the check stands. The clerk, Riley Michael Boulger, rang up the minor's two six-packs of beer and asked for her identification. (Hereafter, "the clerk") The minor opened up her tri-fold style wallet where her false South Carolina Driver's License was set behind a clear window in the wallet.³ (Exhibit 2: False South Carolina Driver's License). The clerk leaned in towards the wallet to view the identification. The clerk was within approximately two feet of it when he viewed it for a few seconds. The clerk did not ask the minor to remove it from her wallet for a closer inspection. The clerk neither asked the minor any questions about her identification nor asked her any further questions to verify her age. The clerk entered the minor's birthdate into the cash register which cleared the item for sale. The minor refolded up her wallet and put it away. The minor paid for her beer and left the check stand area.

² A Type 21 license permits the holder to retail in beer, wine, and distilled spirits for off-premises consumption,

³ It was undisputed the minor used a false South Carolina Driver's license in making the purchase. (Exhibit 2)

7. Alcoholic Beverage Control Agent Ott (Hereafter, Agent Ott) and her partner, Agent Daniel Louie, were on undercover patrol at Respondent's store looking for potential violations. Agent Ott overheard the minor's comments to her friends about whether the clerk might check her identification. Agent Ott also saw the youthful minor in possession of beer. Agent Ott ultimately witnessed the minor purchase beer using what she suspected was a false identification. After the minor left the check stand with her beer, Agent Ott promptly detained her in the store.

8. Agent Ott asked the minor how old she was. The minor stated she was 21. Agent Ott asked the minor for identification and the minor presented her false South Carolina Driver's License. Agent Ott noticed the identification had an "orange-peel" appearance below the clear laminate over-lay as opposed to a clear appearance. Also, the minor's hair color in the identification was blonde as opposed to her then dark brown/black hair. Agent Ott asked the minor to present her true identification as it appeared the one given was false. The minor produced her valid California Identification Card. The minor mentioned that she was acquainted with the clerk by way of a mutual friend, but did not know the clerk's name. Agent Ott took a photo of the minor. (Exhibit 6: photo of minor at store) She also issued a citation to the minor for being in possession of an alcoholic beverage and possession of a false identification. Agent Ott seized both the beer and the false identification from the minor as evidence.⁴

9. Just after Agent Ott cited and released the minor, she contacted the sales clerk and notified him he had just sold beer to a minor. After Agent Ott showed the clerk a picture of the minor, the clerk acknowledged he knew that patron as "Julia" and he had checked her identification in selling her beer moments before. Agent Ott mentioned to him that the minor had not taken her identification but of her wallet for him to handle when he viewed it. He did not reply to that comment. Agent Ott issued the clerk a citation for selling beer to the minor. Agent Ott later completed an investigative report about the incident.⁵ (Exhibit B)

10. Respondent's store policy was that its clerks must ask customers who are purchasing alcoholic beverages to present their identifications if they do not appear at least 40 years old. If a clerk suspected an identification was false, he/she was to contact the store manager who would make a final decision on its authenticity and the propriety of the sale. The clerk herein had taken such steps in the past regarding identifications he suspected of being false. The clerk herein suspected an identification might be false if the person's photo was of poor quality. He would also look to verify the presenter's date of birth and expiration date of the

⁴ Exhibit 2 was the false identification. Exhibit 3 was a photo of the two six-pack of beer purchased by the minor.

⁵ To help preserve the privacy of those involved, the ALJ redacted home addresses, phone numbers, and driver license or identification card numbers that appeared in Exhibit B and its attachments.

identification. Respondent also used “secret-shoppers” to help ensure that its clerks were following store policies in verifying a patron’s age when required.⁶

11. At the time of the sale, the clerk recognized the minor.⁷ They had been introduced a few months earlier by a mutual friend. At that time, the minor’s hair was blonde in color. He had seen the minor approximately three times since in purely social circumstances and believed she was a student at SFSU. The clerk recognized the minor even though when he had first met her she had blonde hair, and her hair was dark brown/black when he sold her the beer. He did not then know her actual age and so asked for her identification when she wanted to buy the beer. He could see the face/front of her false identification when she displayed it to him in her wallet. He read her birthdate and entered that into the cash register that permitted him to continue on with the sale. While he was not that familiar with South Carolina identifications, from what he could see of the minor’s false identification, the photograph of her on it, and its printing, it appeared of reasonable quality. He did not ask the minor to remove it from her wallet for further inspection. He never held or touched the license. He did not call for a manager’s assistance to evaluate its authenticity. As of that time, while Respondent had a policy of checking the identifications of those patrons who did not appear at least 40 years old, it did not have a policy or practice of asking patrons to hand over their identifications to the sales clerks for a closer visual and physical inspection. To the clerk, the minor appeared to be about 22-23 years old when she was at his check stand.

12. As to the false identification, Exhibit 2, the minor testified it was false and obtained by way of an internet web-site offering false identifications. It cost her \$50.00. She obtained it within a few months prior to her May 4, 2017 visit to Respondent’s premises. She originally received two false South Carolina identifications, but had since destroyed the duplicate as directed by Agent Ott. Exhibit 2, the one used at Trader Joes, contained an actual photograph of the minor that she provided to the false identification manufacturer. In that photo, she has straight long blonde hair. The day and month of her birthdate are correct, but the birth year was made 1995 to make her over 21 years old. It contained her true height and weight as of when she ordered the card. The signature under her photo is not hers, but made up. She did not order a particular state to use for the false identification, it just came to her as a South Carolina driver’s license. She had presented it at other locations to prove she was at least 21 years old. Some who have asked for and inspected her false identification also asked her follow up questions about the identification. If asked, she would just make up an answer. At some locations, she was able to obtain alcoholic beverages. She had memorized the home address and birthdate reflected on the false identification. She kept the false identification in different wallets as needed. In the wallet

⁶ “Secret shoppers” were persons intentionally sent in by Respondent to pose as customers and to purchase items to ascertain if its employees were actually following store rules and policies when dealing with customers, especially verifying the age of patrons purchasing alcoholic beverages.

⁷ Respondent's clerk, Riley Boulger, testified at the hearing.

used at Respondent's premises, she believed most all of the face of the false identification was visible from behind a clear display window in one section of that tri-fold wallet.

13. May 4, 2017, when at Respondent's store, the minor was 5'3" tall and weighed approximately 130 lbs. She was wearing a white shirt that had a white grid pattern and black buttons. She wore cream colored pants. She had jet-black hair, worn straight, and approximately 12 to 16 inches long. She wore dark eyebrow product, eye-shadow, lipstick, and face make-up. She had on dark nail polish, a necklace, a gold hoop earring in each ear, and the lower portion of a tattoo on her left arm above her elbow was visible. (Exhibit 6: photo of minor)

14. When assessing the minor's false identification, Agent Ott came to the ultimate conclusion that it was a false identification primarily based on two factors. First, the face of the identification, which contained the minor's photo and identifying data, appeared to have an "orange peel" texture beneath the clear laminate over lay covering. This was contrasted to the back side of the identification that had no sign of the "orange peel" appearing texture. Through her training, Agent Ott learned that the "orange peel" appearance was a sign of a false identification. Further, prior to the hearing, Agent Ott confirmed with the State of South Carolina that none of their driver licenses or identification cards had an "orange-peel" textured appearance.

15. Agent Ott also saw the false identification had a section running from top to bottom on the face of the identification at its mid-point where it the laminate finish was raised above the surface, resembling a crease in the identification. However, the rear of the license shows no sign of any corresponding crease and is completely smooth/slick to the touch. To the left of this raised section is another portion where a section of laminate has raised into a smaller cross shaped pattern. Both of these raised portions are visually discernable and easily detectable by touch of the hand and were both present when Agent Ott seized the false identification from the minor. Agent Ott opined that based primarily upon these two types of irregularities, the "orange peel" and raised portions, the clerk should not have relied upon Exhibit 2 as a bona-fide identification and proof of her age. Agent Ott also noted that, to her, the minor did not appear at least 21 years old, and that the minor had blonde hair in the false identification, but that it was a very dark brown or black when she was at Respondent's store.

16. Respondent presented the testimony of Susan Dworak, the chief executive officer of a company known as Real Identities, a four-year old company focused on aiding people and businesses detect false government identifications.⁸ She indicated the 56 states and territorial jurisdictions in the United States issue approximately 280-300 different types of driver licenses and identification cards. She also testified that false identifications vary in

⁸ Ms. Dworak was retained and paid a fee by Respondent to examine the false identification in this matter and to determine its quality and apparent authenticity as compared to authentic South Carolina Driver's Licenses.

quality. She testified the South Carolina Driver's License presented by the minor in this instance was of very high quality. It had the appropriate outward features and characteristics such as its size, construction, coloring, formatting, printing, date of expiration, absence of background color on the minor's photo, and the types of personal information printed on it that were all consistent with an authentic South Carolina Driver's license. It also had some visible security features, such as appropriate holograms.

17. She also testified that sometimes an "orange peel" effect can intentionally be a feature of a document's composition, but might also inadvertently be created during the manufacturing process or even after the finished document has been the subject of normal wear and tear, such as having accidentally gone through a clothes washer and dryer. As to the raised defects on the face of the identification, she also opined that could be caused by normal wear and tear. She testified that there is no industry standard calling for retail alcoholic beverage merchants to compel customers to hand their identifications to employees for inspection. The Real Identities Company plans to release a software program that will give specific detailed directions to subscribers about exactly what to look for when trying to assess the authenticity of identifications presented for inspection.

LEGAL BASIS OF DECISION

1. Article XX, section 22 of the California Constitution and Business and Professions 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. Business and Professions Code 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. Business and Professions Code 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. 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.

DETERMINATION OF ISSUES

1. Cause for suspension or revocation of Respondent's license does exist under Article XX, section 22 of the California State Constitution and Business and Professions Code sections 24200(a) and (b) because on May 4, 2017, Respondent's employee, Riley Michael Boulger, inside the Licensed Premises, sold an alcoholic beverage to Julia Francis Stafford, a person under the age of 21, in violation of Business and Professions Code section 25658(a).

2. The evidence established Respondent's clerk sold an alcoholic beverage to the minor during the normal course of Respondent's business. Further, the evidence established that the clerk made the sale after asking for and viewing the decoy's false South Carolina Driver's License, Exhibit 2.

3. The evidence established the minor appeared youthful and as someone who just might or might not be 21 years old.

4. Respondent asserted that under section 25660, a defense to the accusation was proven because the clerk asked for, inspected, and reasonably relied on the minor's false identification at the time he sold her the beer.

5. Generally, section 25660 provides a defense to a licensee or person accused of selling an alcoholic beverage to a minor if the person asked for and reasonably relied on the identification provided by the minor-customer.

6. However, section 25660 is an affirmative defense, so a licensee has the burden of establishing all of its elements, namely, that evidence of majority and identity was demanded by the seller, shown by the buyer, and reasonably relied on by the seller.⁹ To provide a defense, reliance on the document must be reasonable, that is, it was based on due

⁹ *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).

diligence of the seller. This section applies to identifications actually issued by government agencies and identifications that are false replicas of government identifications.¹⁰

A licensee or his or her employee is not entitled to rely upon an identification if it does not appear to be a bona fide government-issued identification or replica thereof if the appearance of the presenter of the identification demonstrates above mere suspicion that the holder is not the legal owner of the identification.¹¹ The defense is also inapplicable if the appearance of the presenter does not match the description on the identification.¹² 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 false identification.

7. In this instance, the minor's false identification was not issued by any governmental agency, but was a false replica of a South Carolina's Driver's License. The evidence established the false identification had appropriate outward features consistent with an authentic South Carolina Driver's License such as its size, coloring, formatting, printing, date of expiration, and the absence of background color on the minor's photo. It contained the appropriate types of personal information of the driver along with having some visible security features, such as holograms. The minor's actual photo was used in the false identification.

8. The Department contended that the "orange-peel" appearance on the false identification was also a sign that it was not authentic and would have been visible to the clerk had he more closely examined the false identification. Agent Ott recently confirmed with the State of South Carolina that the "orange-peel" characteristic was not any part of any of its valid identifications and that was consistent with her earlier training. However, upon the ALJ's own examination of the false identification, that characteristic, while discernable upon close visual examination, is very subtle and could easily be missed by one not focused on looking for that specific feature. The "orange-peel" appearance describes a texture that appears to occur below the surface of the laminate that covers the face of the identification. The front and back surfaces of the false identification were smooth/slick to the touch but for the crease and star-shaped irregularities described above. As the "orange-peel" feature was so subtle, even if the clerk had noticed it, it was not shown that it was such a commonly

¹⁰ *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).

¹¹ *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).

¹² *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.

known, obvious, or distinctive trait of a false identification that the clerk should have reasonably rejected it on that basis.¹³

9. However, in this instance, the clerk merely inspected the license for a few seconds as the minor displayed it from behind a window in her wallet held approximately two feet from the clerk.¹⁴ The clerk did an exclusively visual inspection to see if the photo on the identification appeared to be that of the minor, that the identification was not expired, that it showed a birthdate making the minor at least 21 years old, and that it otherwise generally appeared authentic. The clerk did not ask the minor to remove the identification so that he could have a closer view of it or hold, touch, and feel the identification as part of his overall examination of it. The clerk also understood the minor presenting the identification was a San Francisco State University student at that time. Further, the minor had a generally youthful appearance. She appeared as someone who could either be just under or just over 21 years of age. Lastly, he was not particularly familiar with South Carolina Driver's licenses.

10. If the clerk had taken a closer look at the identification or physically examined the false identification, he would have seen and felt the easily discernable crease that ran from top to bottom in the middle of the face of the horizontally formatted license.¹⁵ That crease is only on the face of the license while the reverse is completely smooth and shows no evidence of any crease or fold whatsoever. Therefore, it would not have appeared the crease was due to an obvious bending of the license along the crease. Further, he would have also noted a similar smaller raised cross shaped defect also on the face of the license where the laminate appears to be lifting off the surface of the identification, similar to how the larger crease appears. Those apparent physical irregularities or defects on the face of the identification should have made him suspicious as to the very construction and validity of the license. Further, the clerk specifically knew the minor attended San Francisco State University, which was near Respondent's store. Such an institution, like any other large university, would have a high percentage of students who were just under, at, or just over the age of 21. Careful scrutiny of any identifications presented by youthful appearing students, especially

¹³ The cleric did not testify he even saw this feature of the false identification or that even if he had seen it, it would have been a sign to him that it was a false identification. The Department did not present evidence that such a characteristic, if noticed by a clerk, would reasonably indicate to him/her that it was a false identification.

¹⁴ This was similar to the clerk in *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) who also missed deficiencies in the false identification because he only looked at it when positioned within the minor's wallet.

¹⁵ Licensee's witness Dworak testified that having sales clerks physically hold and inspect identifications is not an "industry standard". However, that assertion, whether true or not, is irrelevant. It is not uncommon for patrons to hand their identifications over for inspection. In this instance, the premises was near a major university filled with students at or near the age of majority. Also, careful scrutiny was also warranted especially as the clerk believed the minor was a SFSU student. Lastly, the defects noted herein were likely only apparent upon physical inspection, and probably not so obvious when viewed from a distance of two feet behind a wallet window. If Respondent did not, or would not, have its clerks make a physical inspection of the license, then a sale would be made at the risk of not knowing what such an inspection would reveal. In this instance, it appeared there was an obvious defect in the card's manufacture or construction. Reliance on an exclusively visual inspection of the identification in this case was insufficient

when they are purchasing alcoholic beverages, was clearly warranted. As such, in this case, the clerk should not have relied solely upon a cursory visual inspection of the false identification that remained inside of the minor's wallet. His reliance upon it to establish the age of the minor was not reasonable and therefore a defense under 25660 was not established.¹⁶

PENALTY

1. In assessing an appropriate measure of discipline, the Department's penalty guidelines are in California Code of Regulations, Title 4, Division 1, Article 22, section 144, commonly referred to as "Rule 144". Under Rule 144, the presumptive penalty for a first violation of selling or furnishing an alcoholic beverage to a minor in violation of section 25658 is a 15 day license suspension.
2. Rule 144 also permits imposition of a revised penalty based on the presence of aggravating or mitigating factors. The duration of licensure free of disciplinary action is specifically mentioned as a factor in mitigation.
3. The Department recommended a mitigated 10 day suspension. It acknowledged that Respondent has been licensed since 2009 with no record of any prior disciplinary action.
4. Respondent argued that a defense under section 25660 had been established. No specific penalty was recommended in the event the accusation was sustained.
5. Respondent has been licensed for approximately 9 years with no prior disciplinary action. Further, Respondent, in an effort to prevent selling alcoholic beverages to minors, had a policy of checking identifications of those patrons who did not appear at least 40 years old. Respondent's cash registers automatically prompt cashiers to verify the ages of customers purchasing alcoholic beverages. Respondent has also imposed a new procedure where clerks are to actually possess/handle the identification when they are checking them. The clerk in this case did ask for and, at least visually, inspected the identification of the youthful appearing minor who did not obviously appear under 21. Lastly, Respondent also used "secret shoppers" to help ensure its employees were complying with store policies, especially dealing with proper checking of identifications when required. Therefore mitigation of the standard penalty is warranted.
6. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties raised in the pleadings or at the hearing lack merit.

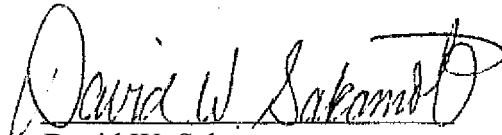
¹⁶ Up to that point, Respondent had not instructed its clerks to hold and feel identifications as part of checking their authenticity, which they have since been instructed to do.

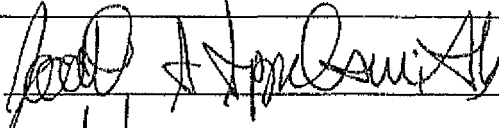
ORDER

Count 1 of the accusation is sustained.

Respondent's license is suspended for a period of 10 days.

Dated: March 5, 2018


David W. Sakamoto
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>4/4/18</u>