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

AB-9780
File: 20-558798; Reg: 18086995

APRO, LLC,
dba United Oil #5250
190 West San Marcos Boulevard
San Marcos, CA 92069-2933,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: October 3, 2019
Los Angeles, CA

ISSUED OCTOBER 15, 2019

Appearances: *Appellant:* Ralph Barat Saltsman, of Solomon, Saltsman & Jamieson, as counsel for Apro, LLC,

Respondent: Alanna K. Ormiston, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Apro, LLC, doing business as United Oil #5250, appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for 15 days because its employee sold an alcoholic beverage to an individual under the age of 21, in violation of Business and Professions Code section 25658, subdivision (a).

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[1]The decision of the Department, dated December 6, 2018, is set forth in t he appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on January 27, 2016. There is no record of prior departmental discipline against the license.

On May 29, 2018, the Department instituted a single-count accusation against appellant charging that on February 2, 2018, appellant's employee, Ross Daniel Bentley (the clerk), sold an alcoholic beverage to an individual under the age of 21, namely Michael Christopher Jonah Rucker (the minor), in violation of Business and Professions Code section 25658(a).

At the administrative hearing held on September 13, 2018, documentary evidence was received and testimony concerning the violation charged was presented by the minor; Department Agent Brett McIntire; and Forrest Iwaszewski, the individual in charge of training employees at the licensed premises.

Testimony established that on February 2, 2018, the minor went to the licensed premises with his cousin. The minor went to the coolers and selected a three-pack of 24-ounce cans of Coors Banquet beer. He took the beer to the sales counter where the clerk rang up the beer without asking for identification and without asking any age-related questions. The minor and his cousin exited the premises with the beer.

Agent McIntire was in the parking lot, and observed two youthful-looking males exiting the licensed premises with beer and getting into a car. Agents McIntire and Perry approached the vehicle, knocked on the window, and identified themselves as police officers. McIntire asked the minor — the individual who carried the beer out of the store — if he had purchased the beer and he said that he had. The agent asked him how old he was and the minor said that he was 19. McIntire asked the minor if he

used a fake ID for the purchase, but the minor said he did not. McIntire then asked the minor if the clerk has asked him his age or for any identification and the minor said "no." McIntire seized the beer. (Exh. 3.)

The agents spoke to the clerk and showed him a photo of the minor. The clerk confirmed that he had sold the three-pack of beer to the minor, and that he had failed to ask for identification. Agent McIntire asked the clerk if the minor had ever shown him identification in the past and the clerk said he had not. The clerk did not indicate to the agents that he knew the minor or that he believed he was over the age of 21. The clerk did not testify.

The minor testified that he and the clerk had both worked previously at the Old Spaghetti Factory. The minor worked there for less than a year, and last saw the clerk when he quit in early January of 2017. The two did not interact socially and the minor never served alcohol while employed at the Old Spaghetti Factory.

The administrative law judge (ALJ) issued her proposed decision on October 10, 2018, sustaining the accusation and recommending a 15-day suspension. The Department adopted the proposed decision in its entirety on November 30, 2018 and issued its Certificate of Decision on December 6, 2018.

Appellant then filed a timely appeal arguing that the ALJ improperly excluded relevant evidence.

DISCUSSION

Appellant contends the ALJ failed to proceed in the manner required by law, and violated due process, by preventing appellant from cross-examining the minor regarding his history with the clerk, thereby excluding relevant evidence. (AOB at pp.

7-12.)

The Board is authorized to review a decision of the Department to determine "[w]hether there is relevant evidence ... which was improperly excluded at the hearing before the department." (Bus. & Prof. Code, § 23084; see also Cal. Const, art. XX, § 22 [providing remand as remedy in such cases].)

Generally, evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Relevance cannot be established by speculative inferences. (See, e.g., *People v. Babbitt* (1988) 45 Cal.3d 660, 681 [248 Cal.Rptr. 69]; *People v. Brady* (2006) 129 Cal.App.4th 1314, 1337-1338 [29 Cal.Rptr.3d 286].)

Relevant evidence may nonetheless be excluded "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) Stated another way, relevant evidence may be excluded "where, though material, it would have been merely cumulative or corroborative of evidence properly in the record." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 431, at pp 486-487, citing *Silvey v. Harm* (1932) 120 Cal.App. 561, 573 [8 P.2d 570] [excluding cross-examination regarding witness' sobriety, while error, was not prejudicial, since witness' testimony was corroborated by other witnesses whose sobriety was unquestioned].)

The Government Code substantially relaxes the rules of evidence for purposes of administrative proceedings:

> The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. *Any relevant evidence shall be admitted* if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

(Gov. Code, § 11513(c), emphasis added.) Nevertheless, the trier of fact in an administrative hearing "is vested with wide discretion in deciding relevancy, and its determination will not be disturbed on appeal unless there is a clear showing of abuse." (*McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1054 [228 Cal.Rptr. 567].)

Finally, the California Constitution provides:

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

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

Appellant maintains the ALJ erred when she sustained the Department's objections to questions about the history between the clerk and the minor. The Department argued that the line of questioning was irrelevant because it did not matter whether the clerk believed the minor to be over the age of 21. The parties argued, in part:

> [COUNSEL FOR APPELLANT]: It goes to mitigation and the prior relationship and whether or not Mr. Bentley had a good faith belief that Mr. Rucker was over the age of 21.
>
> [COUNSEL FOR THE DEPARTMENT]: Again, good faith is not a defense to this crime, and it doesn't go to mitigation. As a server or seller of alcohol, he has an obligation to not sell alcohol to anyone under 21. He had an obligation to card this individual, and he did not do that. The only defense to this is that he was shown a bona fide ID. He was not shown a bona fide ID, and it's not mitigation that he thought that Mr. Rucker was older.

(RT at p. 17.)

In the decision, the ALJ addresses appellant's argument on this point:

> 8. The Respondent argued clerk Bentley mistakenly believed Rucker was 21 years of age, because they had a prior history having worked together at the Old Spaghetti Factory, citing *In Re Jennings,* 34 Cal.4th 254, with the Respondent claiming that court allowed for a new defense of mistake-of-fact, "if the offender had an honest, reasonable, good faith belief the minor was over the age of 21."
>
> 9. This argument is rejected. First of all, clerk Bentley did not testify at the hearing. There was no direct evidence that clerk Bentley believed Rucker was 21 years old or older. Additionally, there was no evidence that Rucker and clerk Bentley had a prior history or relationship, other than the fact they both worked at the same Old Spaghetti Factory restaurant. In fact, Rucker credibly testified that Rucker and Ross Daniel Bentley never interacted together in a social environment. . . .
>
> 10. Secondly, *In Re Jennings* does not create a new mistake-of-fact defense. It holds that section 25660 also applies to criminal cases against non-licensees. That court also points out that a mistake-of-fact

> defense is incorporated within section 25660, which is the only affirmative defense available to licensees in non-decoy sale to minor cases. . . .

(Decision, at ¶¶ 8-10.)

As the ALJ goes on to explain, Business and Professions Code section 25658(a) is a strict liability offense. The only defense to selling alcohol to a minor is found in section 25660, which allows the seller to rely on what appears to be bona fide evidence of majority and identity — i.e., a fake ID — if the reliance is reasonable. In the instant case, however, there is no evidence that a fake ID was shown on the evening in question or that the clerk believed he had been shown evidence of majority in the past by this minor. In fact, Agent McIntire testified that the clerk did not indicate to him that he knew the minor or that he believed the minor was over the age of 21.

In its brief, appellant declares:

> The court also held that a defense of good faith belief that the minor was 21 or over was a valid affirmative defense to Business and Professions] Code section 25658 subdivision (c). (*Jennings, supra,* at 280.) The reasoning in *Jennings* arguably extends to 25658 subdivision (a) and nothing in *Jennings* precludes such an argument.

(AOB at p. 9.) This assertion is entirely unsupported and simply wrong. Section 25658(c) addresses an entirely different issue than the one at hand, and the reasoning in *Jennings* does not arguably extend to 25658(a) — at least not without some explanation from appellant as to how the reasoning should be extended. As the ALJ correctly explains in the decision, the good faith belief that an individual is over 21 is *only* a defense in conjunction with a section 25660 fake ID defense, and that defense is not being raised here.

Even if the Board found that the ALJ erred by excluding this line of questioning and sustaining the relevance objection, appellant has not shown how it was prejudiced by the ruling. The burden is on the party seeking reversal of an administrative agency's decision to affirmatively show that the alleged error was prejudicial, i.e., that it is reasonably probable he or she would have received a more favorable result at trial had the error not occurred. (*Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 308 [140 Cal.Rptr.3d 459].) We see no such showing of prejudice.

We find that the minor's history with the clerk was entirely irrelevant and that the relevance objection was properly sustained by the ALJ.

ORDER

The decision of the Department is affirmed.[2]

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

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[2]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:

APRO, LLC
UNITED OIL #5250
190 WEST SAN MARCOS BLVD
SAN MARCOS, CA 92069-2933

OFF-SALE BEER AND WINE - LICENSE

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

SAN MARCOS DISTRICT OFFICE

File: 20-558798

Reg: 18086995

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 November 30, 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 January 16, 2019, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: December 6, 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:

APRO, LLC Dba: United Oil #5250 190 West San Marcos Boulevard San Marcos, California 92069-2933 Respondent	File: 20-558798 Reg.: 18086995 License Type: 20 Word Count: 10,157 Reporter: Matthew Kennedy Kennedy Court Reporters
Off-Sale Beer And Wine License	**PROPOSED DECISION**

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at San Marcos, California, on September 13, 2018.

Kerry Winters, Attorney, represented the Department of Alcoholic Beverage Control.

Brian Washburn, Attorney, represented Respondent, APRO, LLC.

The Department seeks to discipline the Respondent's license on the grounds that, on or about February 2, 2018, the Respondent, through its agent or employee, Ross Daniel Bentley, at said premises, sold, furnished, gave or caused to be sold, furnished or given, alcoholic beverages, to-wit: beer, to Michael Christopher Jonah Rucker, 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 September 13, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on May 29, 2018.

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

2. The Department issued a type 20, off-sale beer and wine license to the Respondent for the above-described location on January 27, 2016 (the Licensed Premises). The premises has a gas station in addition to its Licensed Premises.

3. There is no record of prior departmental discipline against the Respondent's license.

4. Michael Christopher Jonah Rucker (hereinafter referred to as Rucker) was born on December 5, 1998. On February 2, 2018, he was 19 years old.

5. On February 2, 2018, at approximately 10:30 p.m., Rucker drove to the Licensed Premises to purchase beer, and parked in the Licensed Premises' parking lot. Rucker and his cousin exited the vehicle and entered the Licensed Premises. Rucker walked to the refrigerated coolers and selected a three-pack of 24 fluid ounce cans of Coors Banquet beer, which has an alcohol content of five percent alcohol by volume. (Exhibit 3.) Rucker took the three-pack of beer to the sales counter for purchase.

6. At the counter, the Respondent's clerk, Ross Daniel Bentley (hereinafter clerk Bentley), rang up the three-pack of Coors Banquet beer for Rucker, who paid clerk Bentley for the said beer. Clerk Bentley did not ask Rucker for his ID, date of birth or any age-related questions. Rucker exited the Licensed Premises with the three-pack of Coors Banquet beer.

7. Department Agents Brett McIntire (Agent McIntire) and Perry arrived in a plain clothes capacity at the Licensed Premises for the purpose of conducting general enforcement to observe any potential violations of law. As Agent McIntire parked his vehicle in front of the Licensed Premises' store, he observed two youthful appearing males exiting the Licensed Premises, one of whom Agent McIntire later learned was Rucker carrying the three-pack of Coors Banquet beer. Rucker and his cousin entered their vehicle, with Rucker entering the driver's side. Agents McIntire and Perry exited their vehicle and approached Rucker's vehicle. Agent McIntire knocked on the driver's side window, which Rucker rolled down. Agent McIntire identified himself as a police officer to both occupants of the vehicle with his Department issued badge displayed on his chest. Agent McIntire believed Rucker appeared youthful, between 17 and 19 years of age. Agent McIntire asked Rucker if he had just purchased the Coors Banquet beer, to which Rucker admitted he had. Agent McIntire told Rucker he appeared youthful to the agent and asked his age. Rucker replied that he was 19 years old. Agent McIntire asked Rucker how he obtained the beer from the Licensed Premises. Rucker explained he bought it from the on-duty clerk. Agent McIntire asked Rucker if he used fake ID to purchase the beer and Rucker replied that he did not. Agent McIntire searched Rucker and found no fake ID on Rucker. Agent McIntire asked Rucker if the on-duty clerk had asked his age or viewed any form of ID prior to Rucker's purchase of the Coors Banquet beer, to which Rucker replied, "No." Agent McIntire seized from Rucker the three-pack

of Coors Banquet beer, which was later transported to the district office where a photo of the beer was taken. (Exhibit 3.)

8. Agents McIntire and Perry later made contact with clerk Bentley. Agent Perry showed clerk Bentley a photo of Rucker, which had been taken moments earlier, and Agent McIntire asked clerk Bentley if he sold alcohol to the person depicted in the photograph. Clerk Bentley acknowledged he had sold the three-pack of Coors Banquet beer to Rucker. Clerk Bentley admitted he did not ask Rucker for his age or any form of ID prior to selling the alcohol to Rucker. Agent McIntire asked clerk Bentley if Rucker had ever shown the clerk an ID in the past, to which clerk Bentley said he had not. At no time did clerk Bentley tell the agents that he knew Rucker prior to February 2, 2018. Clerk Bentley never gave any indication to Agent McIntire that he believed Rucker was over the age of 21.

9. At some point, Agent Vega read to Rucker the questions from an ABC-312 Minor Affidavit. Rucker answered the questions truthfully and Agent Vega marked the answers on the form. When Agent Vega read question number 22, whether Rucker had been or not been inside the business before to purchase or consume alcoholic beverages, Rucker replied that he had not, prior to February 2, 2018, purchased alcoholic beverages at the Licensed Premises but had in the past purchased at the Licensed Premises Swishers, which are cigar wraps, a tobacco product. Agent Vega circled the two "have" options on question 22. Rucker signed the form at line 26. (Exhibit 2.)

10. Rucker appeared and testified at the hearing, at which time he was 19 years old. He appeared his age. He admitted the reason he went to the Licensed Premises on February 2, 2018, was to "buy beer." He acknowledged that on February 2, 2018, he purchased, at the Licensed Premises, a three-pack of 24 ounce cans of Coors Banquet beer. (Exhibit 3.) Rucker further testified that clerk Bentley did not ask for his ID, date of birth or any age-related questions. Rucker said he has never owned a fake ID and has never shown a fake ID at the Licensed Premises.

11. Rucker met Ross Daniel Bentley while both worked at the Old Spaghetti Factory, having worked there at the same time for less than a year. Prior to February 2, 2018, the last time Rucker saw Ross Daniel Bentley was when Rucker quit his employment with Old Spaghetti Factory in early January of 2017. Rucker and Ross Daniel Bentley never interacted together in a social environment. The Old Spaghetti Factory at which Rucker worked sold alcoholic beverages, but Rucker never served alcohol while working at the Old Spaghetti Factory.

12. Clerk Bentley did not appear and did not testify at the hearing.

13. Forrest Iwaszewski appeared and testified at the hearing. Mr. Iwaszewski has worked for the Respondent for five years as the district manager for the Licensed Premises. He used to train employees four to five years prior to the hearing date but no longer trains employees. As the district manager, Mr. Iwaszewski makes sure trainers conduct the training of employees and provide Mr. Iwaszewski with acknowledgments signed by employees that they received such training. On February 8, 2018, Respondent's employees were re-trained in the Respondent's age-restricted sales policies and procedures. Mr. Iwaszewski was provided with seven "Age-Restricted Products Remedial Training Acknowledgments" signed by each of the employees who underwent the re-training. (Exhibit B.)

14. When employees are hired they are given an "Age-Restricted Sales Handbook" (Exhibit A) and attend a training class which reviews the handbook and the Respondent's policies and procedures. Employees undergo a refresher training every six months, as well as after any violation. The Respondent's policy guidelines require its clerks to ask for the ID of anyone appearing 30 years of age and under, physically take hold of the ID, examine the ID to ensure the ID is not expired or altered in any way, and ensure the customer is the same person as depicted and described on the ID and is of legal age to purchase age-restricted merchandise. The clerks are required to scan the ID and if the ID does not scan they are required to input the customer's date of birth into the point of sale (POS) system. If the customer is over the age of 30 the clerk may manually enter a pseudo birthdate made up of the month and day of the transaction and the year 1970. The handbook contains tips on spotting California IDs, fake IDs, and the differences in minor IDs relating to the vertical format, and ensuring an ID is not expired. If any of Respondent's clerks sells age-restricted merchandise to a minor they are terminated. Clerk Bentley was terminated for the said violation.

15. The Respondent's store managers are responsible for randomly checking the POS system for age-restricted sales transactions performed by Respondent's clerks, finding the date and time thereof and using that information to review the closed circuit video to ensure the clerks are actually holding, examining and scanning the customer IDs; and if they do not scan the ID that the clerk manually enters a date of birth into the POS system. When a minor's ID is scanned or a minor's birth date is manually entered into the cash register, the POS system will automatically stop the sales transaction if the customer is a minor and prevent the age-restricted sale to the minor.

16. The Respondent has a BARS program for which it pays an organization to have a person, aged between 21 and 25 years old, visit its Licensed Premises and mystery shop for age-restricted products. The secret shopper will ask the Respondent's clerks either for pricing on age-restricted products or attempt to purchase age-restricted merchandise. If the clerk asks the secret shopper for an ID, the secret shopper will give the clerk a green card as an indication they passed the BARS test. If the clerk fails to ask for an ID

the secret shopper will give the clerk a red card, indicating they failed the BARS test. When a clerk receives a red card two things occur: (1) The store manager is required to review the remedial training with the offending clerk, and (2) Mr. Iwaszewski will issue the clerk a corrective action notice, not for violating the BARS program, but for violating Respondent's Age-Restricted Sales policy.

17. Mr. Iwaszewski testified that after reviewing Exhibit A, the "Age-Restricted Sales Handbook," which was revised on January 1, 2018, he "personally" did not "see any changes from the [handbook] I used years ago...when I was a manager -I was a trainer four to five years ago in Palm Springs. It looks very similar to be honest with you." Mr. Iwaszewski also said that "I haven't been able to locate any paperwork" documenting that clerk Bentley received any training, "but I was told 'yes he did receive the [new hire] training as part of the policy.'" Mr. Iwaszewski later reiterated, "but I never saw actual documents whether he did or didn't." When asked whether clerk Bentley received the refresher training each six months Mr. Iwaszewski said, "I wasn't running that particular area so I can't answer that question." Mr. Iwaszewski did not check to see what date of birth clerk Bentley entered during the said sales transaction between clerk Bentley and Rucker and did not review the closed circuit video surveillance thereof. Mr. Iwaszewski did not personally know why clerk Bentley did not ask Rucker for his ID.

18. 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 Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on February 2, 2018, Respondent's employee, clerk Ross Daniel Bentley, inside the Licensed Premises, sold alcoholic beverages, to-wit: beer, to Michael

Christopher Jonah Rucker, 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).

6. 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 he could be 21 years of age and the seller makes a reasonable inspection of the identification offered.

7. In the present case, the Respondent failed to meet its burden of proof in establishing all of the elements of the affirmative defense. Respondent did not show that evidence of majority and identity was demanded, shown, and acted on as prescribed. On the date of said violation, Clerk Bentley failed to request to see Rucker's ID. It would have been incumbent upon clerk Bentley to demand to see the minor's ID given that Rucker does not appear 21 years old, let alone 30 years old - pursuant to Respondent's policy requiring its clerks ask for the ID of anyone appearing 30 years old or under. At the hearing, Rucker appeared his age, 19. In fact, Agent McIntire's sworn, direct testimony indicated that on February 2, 2018, Rucker appeared to Agent McIntire to be between the

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[2] *Lacabanne Properties, Inc. v. Departinent 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).

ages of 17 and 19 and had a youthful appearance, so much so that it caused Agent McIntire to question Rucker about his age and purchase of the three-pack of Coors Banquet beer. (Findings of Fact ¶¶ 4-7.) Furthermore, Respondent presented no credible evidence that prior to February 2, 2018, majority and identity was demanded, shown, and acted on as prescribed.

8. The Respondent argued clerk Bentley mistakenly believed Rucker was 21 years of age, because they had a prior history having worked together at the Old Spaghetti Factory, citing *In Re Jennings,* 34 Cal. 4th 254, with the Respondent claiming that court allowed for a new defense of mistake-of-fact, "if the offender had an honest, reasonable, good faith belief the minor was over the age of 21."

9. This argument is rejected. First of all, clerk Bentley did not testify at the hearing. There was no direct evidence that clerk Bentley believed Rucker was 21 years old or older. Additionally, there was no evidence that Rucker and clerk Bentley had a prior history or relationship, other than the fact they both worked at the same Old Spaghetti Factory restaurant. In fact, Rucker credibly testified that Rucker and Ross Daniel Bentley never interacted together in a social environment. 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 Respondent did not produce clerk Bentley as a witness at the hearing, which would have been stronger, more satisfactory evidence and thus its offered evidence is viewed with distrust and disbelieved.

10. Secondly, *In Re Jennings* does not create a new mistake-of-fact defense. It holds that section 25660 also applies to criminal cases against non-licensees. That court also points out that a mistake-of-fact defense is incorporated within section 25660, which is the only affirmative defense available to licensees in non-decoy sale to minor cases. "Although a violation of section 25658 can occur despite the seller's lack of knowledge that the purchaser is under the age of 21, the seller's liability is not absolute because 'the Legislature has furnished a procedure whereby he may protect himself, *namely,* ...section 25660 [allowing the seller to rely on bona fide evidence of majority and identity].'" *(Provigo Corp. v. Alcoholic Beverage Control Appeals Bd.* (1994) 7 Cal. 4th 561, 564-565, 28 Cal.Rptr.2d 638, 869 P.2d 1163.) (Italics and undersigning used for emphasis.) Therefore, as the Department attorney pointed out, sale to minor violations are strict liability offenses, which *In Re Jennings* also holds. To negate the strict liability under section 25658(a) the Respondent must prove its affirmative defense under section 25660. As discussed above, the Respondent failed to meet its burden of proof in establishing the elements of the affirmative defense available to it under Section 25660.

PENALTY

The Department requested the Respondent's license be suspended for a period of 15 days, arguing aggravating factors. The factors argued include, (1) the Respondent was only licensed since January of 2016, a little more than two years at the time of the said violation, (2) any offered mitigation is "wiped out" by the fact clerk Bentley failed to follow any procedures Respondent had in place, and there is no evidence clerk Bentley ever received any training because Respondent provided only hearsay statements that he had, and no documented proof thereof, with Exhibit B failing to include any training acknowledgments signed by Bentley as proof of his completing Respondent's training program, and (3) Rucker was only 19 years old.

The Respondent recommended a mitigated penalty was warranted based on the following: (1) the Respondent took positive action to correct the problem by terminating clerk Bentley for the said violation and re-training its employees to ensure proper procedures are followed to prevent sales to minors, as established through its existing handbook procedures, training program, BARS program, video surveillance monitoring, retraining of employees every six months and after violations, (2) the Respondent provided documented training of its employees after the violation of February 2, 2018 (Exhibit B), and (3) the Licensee cooperated in the investigation.

While the Respondent's preventative measures are commendable, they fail to fully address the problem arising out of clerk Bentley's actions, which continues to exist and raises grave concern. Mr. Iwaszewski testified that all employees are trained and required to request IDs of anyone appearing 30 years of age and under, and then are required to either scan the ID or manually enter the date of birth of the customer who appears 30 years of age or under. Rucker was only 19 years old and had a youthful appearance; he clearly did not appear 21 years old, let alone 30 years old. Despite the Respondent's claimed strict policy, procedures and training clerk Bentley failed to ask for Rucker's ID and proceeded with the sale of alcohol to a youthful appearing minor. From Mr. Iwaszewski's testimony it is most probable clerk Bentley simply entered some age-appropriate birthdate to override the cash register safety protocol and allow the sale of alcohol to Rucker. Mr, Iwaszewski said that for any customer appearing over 30 years of age employees are taught to input a pseudo date of birth, as "instructed in the training manual which is today's date" with the year "1970." This latter policy not only encourages its clerks to use false birthdates, it allows Respondent's clerks to override the POS safety protocol with a false birthdate. While clerk Bentley was fired and employees were re-trained on policy, the mitigating measures otherwise taken were trumped by the fact that Respondent's clerks remain able to do as clerk Bentley did - enter a pseudo date of birth to allow an age-restricted sale to proceed. As to the Respondent's handbook, revised January 1, 2018, Mr. Iwaszewski testified that he saw no changes thereto and that, in fact, it appeared the same as when he was a manager and trainer "four to five

years ago in Palm Springs." There was no direct evidence that clerk Bentley received the new hire training or even the re-training every six months. The BARS program only addresses whether clerks ask for IDs, it does not address clerks physically examining IDs and comparing the photograph and descriptors with the customer. While Respondent's store managers are required to view past age-restricted sales transactions, it was not clear whether the store manager could actually see what date of birth the clerks enter into the POS system. In the end, the aggravating and mitigating factors balance each other out. The penalty recommended herein complies with rule 144.[6]

ORDER

The Respondent's off-sale beer and wine license is hereby suspended for a period of 15 days.

Dated: October 10, 2018

D. Huebel
Administrative Law Judge

☒ Adopt

☐ Non-Adopt: _____

By: _____

Date: 11/30/18

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