

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

AB-9859

File: 21-331696; Reg: 19088715

SAVE MART SUPERMARKETS,
Save Mart #334
3215 Pacific Avenue
Stockton, CA 95204-3641,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: July 2, 2020
Telephonic

ISSUED JULY 6, 2020

Appearances: *Appellant:* Gillian Garrett, of Hinman & Carmichael, LLP, as
counsel for Save Mart Supermarkets,

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

OPINION

Save Mart Supermarkets, doing business as Save Mart #334 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 10 days, with all 10 days stayed provided that no further cause for disciplinary action occurs within one year, because its clerk sold an alcoholic beverage to a minor in violation of Business and Professions Code² section 25658(a).

FACTS AND PROCEDURAL HISTORY

¹ The decision of the Department, dated January 7, 2020, is set forth in the appendix.

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

Appellant's off-sale general license was issued on July 31, 1997. There is no prior record of departmental discipline against appellant's license.

On April 10, 2019, the Department filed a single-count accusation against appellant charging that, on December 7, 2018, appellant's clerk, Michelle Tindell (the clerk), sold an alcoholic beverage to Michael Sherwin Wang (the minor), a person under the age of 21.

At the administrative hearing held on October 17, 2019, documentary evidence was received and testimony concerning the sale was presented by: the minor; Department Agent Justin Griffin; the clerk; Steven Harden, appellant's store manager, and; Susan Dworak, an expert on fake identifications³.

Evidence established that on December 7, 2018, the minor entered appellant's licensed premises and selected a six-pack of Corona beer to purchase. When the minor presented the beer, the clerk asked for identification. The minor presented her with a counterfeit New Jersey driver's license. (Exh. 3.) The clerk did not recognize the minor as a prior or regular customer at the licensed premises.

The clerk held and viewed the license for approximately five seconds; it did not appear suspicious to her. She examined the photo on the identification, and it matched the minor's appearance before her. She also looked at the height, birthdate, and expiration date as reflected on the license, but did not look at the other side of the license. The clerk proceeded with the transaction by manually entering the birthdate on the identification into her computer terminal. When the terminal indicated the birthdate was

³ For purposes of this decision, "ID", "identification", "driver license", and "driver's license" will be used interchangeably.

that of someone at least 21 years old, the clerk completed the sale. The minor paid for the alcohol and then exited the premises without incident.

The clerk did not ask the minor any questions about the New Jersey identification or questions to confirm the minor's exact age. She did not ask any other employee present to help confirm the authenticity of the identification. She also did not consult nearby resources, such as the identification guidebook kept at the licensed premises.

After witnessing the transaction, Agents Griffin and Thalken detained the minor. When asked about his age, the minor presented the same counterfeit New Jersey identification he had presented to the clerk. As the agents confirmed the authenticity of this license with the California Highway Patrol, the minor admitted his true age was 18. The minor then presented the agents with his real Arizona driver's license confirming his age to be 18. (Exh. 5A.) The agents cited and released the minor.

The agents next entered the licensed premises and spoke with Harden, the manager. The agents informed Harden that the clerk had just sold beer to a minor. After Harden notified the clerk, the agents informed the clerk of the same. She did not make any substantive statements regarding the transaction.

The administrative law judge (ALJ) issued a proposed decision on November 12, 2019, sustaining the accusation and recommending an all-stayed 10-day penalty. The Department adopted the proposed decision in its entirety on December 23, 2019, and issued a certificate of decision on January 7, 2020. Appellant filed a timely appeal contending that: 1) the Department erred by imposing additional conditions not required by section 25660, and; 2) the Department's decision is not supported by substantial evidence.

DISCUSSION

I

LEGAL ERROR

Appellant first contends that it established a complete defense pursuant to Business and Professions Code section 25660. (Appellant's Opening Brief, p. 8 (AOB).) In this regard, appellant raises three arguments: (1) the clerk reasonably relied on the identification; (2) the Department's treatment of the New Jersey identification conflicts with the plain language of section 25660, and; (3) imposing additional requirements under section 25660 is an underground regulation in violation of the Administrative Procedure Act (APA). (AOB, pp. 8-10, 11-13.)

"Reasonable Reliance" under Section 25660

While Business and Professions Code section 25658(a) prohibits the sale of alcohol to a minor, section 25660 provides a complete defense where the licensee demanded and relied upon bona fide documentary evidence of majority and identity issued by a government agency. (See also *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1438 [13 Cal.Rptr.3d 826] (*Masani*).) 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 identification can support a defense under this section if the apparent authenticity of the identification is such that reliance

upon it could be found 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, emphasis added.)

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

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] (*Keane*)).)

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. Department of Alcoholic Beverage Control* (1957) 155

Cal.App.2d 748, 753 [318 P.2d 820], emphasis added (*5501 Hollywood*)).) Thus, if the

appearance of the individual presenting the identification is such that they could not be 21 years of age, then the defense fails regardless of any subsequent inspection of the fake identification.

A licensee, or their agent or employee, must exercise the caution which would be shown by a reasonable and prudent person in the same or similar circumstances. (*5501 Hollywood, supra*, at p. 753; *Farah v. Alcoholic Beverage Control Appeals Bd.* (1958) 159 Cal.App.2d 335, 339 [324 P.2d 98] (*Farah*).) The burden of establishing the defense rests with the licensee. “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, supra*, at p. 189.) Whether a licensee or its agent has made a reasonable inspection of an identification to determine if it is bona fide is a question of fact. (*Masani, supra*, at p. 1445; *5501 Hollywood, supra*, at p. 754.)

In the instant case, the Department acknowledged that the fake license resembled an authentic New Jersey license. (Determination of Issues, ¶¶ 9-10.) However, the presence of a credible fake, by itself, does not establish a section 25660 defense. Appellant must still establish that the minor’s appearance indicates they could be 21 years old. Moreover, reasonable reliance requires a careful inspection of an identification.

As an initial matter, appellant arguably failed to establish that the minor’s appearance was that of someone who could be 21. Agent Griffin testified he perceived the minor as “youthful” and as someone who appeared to be under the age of 21. (RT 57-58.) The Department similarly found that the minor appeared youthful and as someone who could be under the age of 21. (Determination of Issues, ¶ 3.) Indeed, the minor’s actual Arizona driver’s license showed that he was only 18 on the day of the

incident. (Findings of Fact, ¶ 4; Exh. 5A.) As referenced earlier, if the appearance of the individual presenting the identification is such that they could not be 21 years of age, then the defense fails regardless of any subsequent inspection of the fake identification.

Even if we assume that the appellant cleared this first threshold, its defense nevertheless fails because its clerk did not perform a reasonable inspection of the minor's false New Jersey identification. The Department found that the clerk examined the face of the fake identification. (Findings of Fact, ¶ 8.) However, reasonable reliance requires more than a cursory comparison between the identification and the individual who presented it. As outlined above, reasonable reliance includes careful scrutiny, and it is to be measured against the reasonable and prudent person standard.

Here, appellant has failed to establish that the clerk reasonably relied on the fake identification. The circumstances should have put her on notice. The “[licensed premise] is located approximately two blocks from the University of the Pacific (‘UOP’) and students regularly patronize the store.” (AOB, p. 1.) As such, the clerk was aware the licensed premises had many “youthful UOP student customers.” (Findings of Fact, ¶ 9.) The clerk further testified “she was accustomed to seeing out-of-state licenses due to the nearby student population.” (AOB, p. 2.) She also testified that, in her 17 years of experience, she never “recalled a customer ever presenting her a New Jersey driver license as proof of age.” (Findings of Fact, ¶ 9.) The clerk acknowledged that she had been trained to refer to an identification guidebook when handling out-of-state IDs, and that a copy of the guidebook was kept at the licensed premises. (RT 150.) Altogether, the risk of minors attempting to purchase alcohol using false, out-of-state IDs should have been at the forefront of the clerk's mind.

Despite these circumstances, the clerk completed the sale without a second thought. As the Department noted, the clerk: (1) did not ask the minor any questions about the New Jersey identification or questions to confirm the minor's exact age; (2) did not ask any other employee to help confirm the authenticity of the license, and; (3) did not consult any resources, such as the identification guidebook, kept at the licensed premises. (Findings of Fact, ¶ 8.) Not only did the clerk consciously disregard the risks before her, but she failed to follow the training she received for precisely these situations. In short, these are not the actions of a reasonable and prudent person.

Appellant argues that it and its clerk should not be held to a heightened standard of care that even the Department does not expect out of itself. (AOB, p. 15.) We agree: the law only holds the clerk to the standard of a reasonable and prudent person under the same or similar circumstances. But appellant fails to show how asking for assistance from a co-worker, referring to a guidebook, or being careful about handling an out-of-state ID for the first time holds the clerk to a specialized standard of care. A reasonable and prudent clerk would not have been so casual and uncritical about accepting an identification they had never seen or handled before.

Appellant attempts to alter or shift the burden of proof under section 25660, but its arguments do not hold water. Appellant contends the decision is invalid because the Department did not show appellant, or the clerk, had actual or constructive knowledge about the falsity of the identification. (AOB, p. 14.) There are two issues with appellant's contention. First, it seeks to impermissibly shift the burden required under section 25660 over to the Department. Second, it misstates the inquiry under section 25660. The key

question is not about knowledge, but whether the clerk's reliance was based on a reasonable and careful scrutiny of the fake identification.

Appellant next alleges "the Department penalized Save Mart for violating a nonexistent rule it would have performed in vain, because no reasonable clerk would have suspected the ID." (AOB, p. 15.) In support, the appellant emphasizes the testimonies of Harden, the store's manager, and Susan Dworak, its expert witness.

Harden testified that the clerk "conscientiously" followed protocol and, were he in the clerk's place, he "probably would have relied upon [the license] and sold [minor] the beer" as well. (AOB, p. 4.) However, Harden also admitted that he had not "had to look at too many ID's" during the prior 12 to 13 months. (RT 180.) He further testified that: (1) he would have used the guidebook if the person attempting to purchase alcohol "was someone [he] hadn't seen before"; (2) he would have to "look at [out-of-state IDs] carefully" when presented by individuals who appear young, and; (3) when looking at out-of-state IDs, he would turn them over or ask the individuals about information on the identification such as zip codes. (RT 177-179.) The clerk did none of the above. Thus, even by her manager's standards, the clerk's inspection of the license fell short.

Appellant also relies on testimony from Dworak, who described herself as a "fake ID expert." (RT 190.) Appellant emphasizes Dworak's testimony that "the ID was a very good fake, and that [the clerk] could not reasonably have been expected to identify it as false." (AOB, p. 12.) Dworak also provided detailed testimony regarding what to look for when examining identifications, such as high gloss sheens, peeling, lighting, holograms, as well as the efficacy of identification guidebooks. (See, e.g., RT 224-226; 229-233; 246-251.) The problem is that her expertise is with respect to false identifications, not

what constitutes reasonable conduct by a clerk in inspecting identifications. However, Dworak did testify as to her own approach in examining IDs. She testified that—despite being an expert—even she consults with identification guidebooks because there is “no way I can remember what is on every ID.” (RT 212:3-11.) She also testified that when inspecting an identification, one could “flip the ID over onto the back” and read what is on the back or ask the individual for another form of identification. (RT 253:1-11, 21-22.) The clerk did none of the above.

Altogether, appellant’s emphasis on the quality of the false New Jersey license is a red herring. To permit a section 25660 defense on that basis would allow appellant to take “unfair advantage” of the fact that the fake ID happened to resemble an actual New Jersey license. (Determination of Issues, ¶ 10.) Again, the key question here is whether the clerk acted as a reasonable and prudent person would have in her place. To that end, the Department focused on assessing “this specific clerk’s ... attempt to verify the authenticity of the New Jersey license theretofore completely unknown and unfamiliar to her before she relied on it as bona fide proof of the minor’s age.” (*Ibid.*) In short, the Department’s conclusion is the same as ours. Given the clerk’s lack of familiarity with New Jersey licenses and due diligence in inspecting the same, appellant did not have a reasonable basis for relying on the minor’s identification as required by section 25660.

Plain Language of Section 25660

The appellant next argues the Department’s application of section 25660 is at odds with the plain language of the statute. Specifically, appellant contends the plain language makes no distinction between California and out-of-state licenses, and that the statute treats both types equally. (AOB, p. 13.)

As a preliminary matter, it was appellant's duty to establish that an error occurred. When appellant fails to meet this duty, this Board may treat unsupported and unasserted contentions as waived or forfeited. (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 [199 Cal.Rptr. 72] ["Where a point is merely asserted by appellant's counsel without any argument of or authority for the proposition, it is deemed to be without foundation and requires no discussion by the reviewing court."]; *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 [183 Cal.Rptr.3d 654] ["It is the responsibility of the appellant ... to support claims of error with meaningful argument and citation to authority. [Citations.] When legal argument with citation to authority is not furnished on a particular point, we may treat the point as forfeited and pass it without consideration. [Citations.] In addition, citing cases [or statutes] without any discussion of their application to the present case results in forfeiture."].)

Here, appellant's argument is heavy on assertions, but light on analysis. Its opening brief makes no case as to why its interpretation of section 25660 should prevail. The only support it offers is *Masani*, in which the court found the Department's "distinction" between fake and real IDs was "untenable because it is illogical and imparts an unfair meaning to section 25660 that does not provide for strict liability for nongovernmental documents." (*Masani, supra*, at p. 1445.) Yet, appellant does not establish how the holding in *Masani*, relating to fake versus real IDs, applies to the instant case involving in-state versus out-of-state licenses. Appellant merely asserts its position, summarizes *Masani*, and repeats its assertion. There is no discussion that bridges the gap between appellant's assertion and *Masani*. There is no explanation how the

Department's reading imparts an unfair meaning to section 25660. In the absence of such discussion, we may treat appellant's argument as waived and forfeited.

At any rate, appellant's reading of section 25660 would not only lead to absurd results, but such results would be at odds with the Department's mission. When engaging in statutory interpretation, the language must be interpreted to "make [it] workable and reasonable ... and to avoid an absurd result." (*Soil v. Superior Court* (1997) 55 Cal.App.4th 872, 876 [64 Cal.Rptr.2d 319].) Appellant argues section 25660 should not require additional steps just because a license is an out-of-state one. This reading, however, would make no distinction between an in-state license that a clerk handles regularly versus an out-of-state license that a clerk has never seen before. To ignore surrounding circumstances, however, would conflict with court rulings that "a licensee, or their agent or employee, must exercise the caution which would be shown by a *reasonable and prudent person in the same or similar circumstances.*" (5501 Hollywood, *supra*, at p. 753; *Keane, supra*, at pp. 409-410; *Farah, supra*, at p. 339, emphasis added.) In essence, appellant's position is that licensees, rather than the Department or courts, should define what reasonable reliance requires. This is the type of absurd outcome we are to avoid.

Appellant's reading of section 25660 would also conflict with the Department's mission. If a plain-language analysis leaves any doubt, or if there is more than one reasonable interpretation of the statute, then a reviewing body must "refer to the legislative history" or "other aids, such as the statute's purpose ... and public policy." (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1162-1163 [72 Cal.Rptr.3D 624]; *Coal. of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34

Cal.4th 733, 737 [21 Cal.Rptr.3d 676].) Article XX, section 22 of the California Constitution and Business and Professions Code 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. Appellant's reading of section 25660 would allow irresponsible licensees to rely on the negligence of its employees as a shield against enforcement and discipline. Lowering the standard of duty expected of employees, such as the clerk, would clearly be contrary to public welfare. Appellant fails to argue otherwise.

“Regulations” under the Administrative Procedure Act

Finally, appellant argues the Department's decision is an underground—and thus invalid—regulation in violation of the APA. The APA defines “regulation” broadly. Government Code section 11342.600 defines “regulation” as “every rule, regulation, order, or standard of general application ... adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.” The APA also requires regulations to be adopted through the formal rulemaking process. Government Code section 11340.5, subdivision (a) provides:

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[.]

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].) If a regulation is not properly adopted, it has no legal effect. (*Armistead v. State Personnel Bd.* (1978) 22 Cal.3d 198, 204-205 [149 Cal.Rptr. 1].)

There are two key traits that identify a regulation: (1) the agency must intend its rule to apply generally, rather than in a specific case, and; (2) the rule must implement, interpret or make specific the law either enforced by the agency or which governs the agency's procedure. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571 [59 Cal.Rptr.2d 186] (*Tidewater*).) However, *Tidewater* listed several instances that do not constitute a regulation and are thus exempt from the rulemaking requirement. Most relevant here, "interpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as precedents in similar subsequent cases." (*Ibid*; accord *Capen v. Shewry* (2007) 155 Cal.App.4th 378, 387 [65 Cal.Rptr.3d 890] ["If the interpretation arises in the course of an enforcement proceeding involving the adjudication of a specific case it is not a regulation subject to the APA."].)

Here, appellant contends the Department's decision is an invalid regulation under the APA. Specifically, they allege the decision "interprets Section 25660 and makes it narrower, more specific and with conditions and requirements not found in the statute" and that it "imposes extra procedures for inspection of out-of-state IDs." (AOB, p. 10.)

Appellant's argument does not withstand scrutiny. While it is true the Department interpreted section 25660 in more specific terms, appellant fails to articulate how the Department created a rule of general applicability. In its decision, the Department characterizes its list of additional procedures as "reasonable alternate paths" the clerk *could* have taken. (Determination of Issues, ¶ 11.) The Department further explained, "[t]he aforementioned options are not meant to be an exclusive list of alternative actions

the clerk could have taken, but merely examples of how the clerk could have acted more prudently and exercised due diligence under the circumstances presented to her in this instance.” (*Ibid.*) Rules are mandatory; the Department’s discussion was purely explanatory.

Moreover, the scope of the Department’s discussion was confined to the instant case. Nowhere did the Department order that its interpretation be generally applied to all cases involving a section 25660 defense. Rather, the Department engaged in a case-specific interpretation of section 25660 to determine whether the clerk exercised due diligence in inspecting a New Jersey license under all the circumstances. As its interpretation arose during the course of a case-specific adjudication, the Department’s decision falls under the *Tidewater* exception and thus retains its legal effect.

Ironically, appellant is guilty of what it accuses. Appellant alleges section 25660 makes no distinctions between in-state and out-of-state licenses as a general matter. Appellant argues the Department had the burden of proof under section 25660 of establishing that appellant’s clerk had actual or constructive knowledge about the falsity of the identification. Appellant also contends it should be allowed to avail itself of a section 25660 defense because no reasonable clerk would have suspected the minor’s false New Jersey license. In redefining section 25660 for the instant case and beyond, appellant has done precisely what it accused the Department of doing: creating an underground regulation.

In sum, appellant offers no proof that the list of additional actions referenced in the Department’s decision are to be applied to all cases. Appellant also offers no argument as to why the “case-specific adjudication” exception outlined in *Tidewater* should not

apply here. This Board cannot say that the Department's decision was the product of an underground regulation. Accordingly, we affirm.

II

SUBSTANTIAL EVIDENCE

Appellant's final contention is that the Department's decision "is not supported by substantial evidence in light of the whole record." (AOB, p. 8.) In determining whether a decision of the Department is supported by substantial evidence, this Board's review is limited to determining, in light of the entire administrative record, whether substantial evidence exists—even if contradicted—to reasonably support the Department's factual findings, and whether the decision is supported by those findings. (*Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113] (*Boreta*)). The Board is bound by the factual findings of the Department. (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1963) 212 Cal.App.2d 106, 113 [28 Cal.Rptr. 74] (*Harris*)). A factual finding of the Department may not be overturned or disregarded merely because a contrary finding would have been equally or more reasonable. (*Boreta*, at p. 94.) The Board may not exercise independent judgment regarding the weight of the evidence; it must resolve any evidentiary conflicts in favor of the Department's decision. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].) The Board must also accept all reasonable inferences from the evidence which support the Department's decision. (*Harris*, at p. 113.)

Here, there is no evidentiary conflict to resolve. Appellant concedes its clerk sold an alcoholic beverage to the minor, who was under 21 at the time of the incident. (AOB,

p. 3.) The record establishes that the clerk asked for and examined the minor's identification (Findings of Fact, ¶ 8); the clerk sold the minor a six-pack of Corona beer (Findings of Fact, ¶¶ 6-8), and; the minor was actually 18 years old at the time of the incident (Findings of Fact, ¶ 10; Exh. 5A.).

The record also establishes that in her 17 years of experience (AOB, p. 2), the clerk never recalled ever being presented with a New Jersey license or a false identification. (Findings of Fact, ¶ 9.) She also did not recognize the minor as a prior or regular customer of the licensed premises. (Findings of Fact, ¶ 8.) The record reflects that, despite these circumstances, the clerk looked at only one side of the false New Jersey license; did not ask the minor questions about the license or other questions to confirm his age, and; neither asked for assistance from another employee nor consulted nearby resources, such as the identification guidebook, to verify the authenticity of the New Jersey license. (Findings of Fact, ¶ 8.)

Based on the findings and evidence, the Department properly concluded that appellant's clerk sold an alcoholic beverage to the minor, an individual under the age of 21, in violation of section 25658(a). (Determination of Issues, ¶¶ 1-2.) The Department also determined that the minor appeared youthful and as someone who could be under the age of 21. (Determination of Issues, ¶ 3; Exh. 2A.) The Department further concluded that appellant failed to establish a defense under section 25660. Specifically, the Department spent considerable time outlining how appellant's clerk failed to exercise due diligence in inspecting the minor's fraudulent New Jersey license. (Determination of Issues, ¶¶ 8-12.)

Appellant asks this Board to ignore the evidence (or lack thereof) regarding its clerk's diligence in inspecting a New Jersey license, which she had never seen before. This self-serving request is not tethered to any supporting authority. As the Department wrote, "the fact the false New Jersey license she inspected turned out to resemble an actual ... license was merely fortuitous should certainly not be given controlling weight." (Determination of Issues, ¶ 10.) Appellant would have this Board minimize the fact that, despite all the circumstances, the clerk's inspection of the license was superficial. This would require re-weighing evidence regarding the steps the clerk took (or did not take) in inspecting the license. Legal authority makes it clear, however, that this Board is not to exercise independent judgment regarding the evidence. In sum, there was substantial evidence to support the Department's decision that appellant violated section 25658(a). We see no grounds to disturb the decision.

ORDER

The decision of the Department is affirmed.⁴

SUSAN BONILLA, CHAIR
MEGAN McGUINNESS, 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.

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:

SAVE MART SUPERMARKETS
DBA: SAVE MART 334
3215 PACIFIC AVE
STOCKTON, CA 95204-3641

STOCKTON DISTRICT OFFICE

File: 21-331696

Reg: 19088715

AB: 9859

*Rec'd
3/27*

OFF-SALE GENERAL - LICENSE

Respondent(s)/Licensee(s)
under the Alcoholic Beverage Control Act.

CERTIFICATION

I, Yuri Jafarinejad, do hereby certify that I am a Senior Legal Analyst for the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that annexed hereto is a true, correct and complete record (not including the Hearing Reporter's transcript) of the proceedings held under Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code concerning the petition, protest, or discipline of the above-listed license heretofore issued or applied for under the provisions of Division 9 of the Business and Professions Code.

IN WITNESS WHEREOF, I hereunto affix my signature on March 27, 2020, in the City of Sacramento, County of Sacramento, State of California.



Office of Legal Services

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

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

SAVE MART SUPERMARKETS
SAVE MART 334
3215 PACIFIC AVENUE
STOCKTON, CA 95204-3641

OFF-SALE GENERAL - LICENSE

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

STOCKTON DISTRICT OFFICE

File: 20-331696

Reg: 19088715

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 December 23, 2019. 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.

RECEIVED

JAN 07 2020

Alcoholic Beverage Control
Office of Legal Services

Sacramento, California

Dated: January 7, 2020



Matthew D. Botting
General Counsel

2/10

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Save Mart Supermarkets
Dbas: Save Mart 334
3215 Pacific Avenue
Stockton, CA 95204-3641

Respondent

Regarding Its Type-21 Off-Sale General License Under
the State Constitution and the Alcoholic Beverage
Control Act.

} File: 21-331696

} Reg.: 19088715

} License Type: 21

} Word Count Estimate: 48,784

} Rptr: Michelle Careyyette, CSR 7546
} Atkinson-Baker Reporters

PROPOSED DECISION

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter in Stockton, California, on October 17, 2019.

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

Gillian Garrett, Esq. of Hinman and Carmichael, represented the licensee, Save Mart Supermarkets. (Hereafter, "Respondent")

The Department seeks to discipline Respondent's license on the grounds that on or about December 7, 2018, Respondent, through its agent or employee, Michelle Tindell, sold, furnished, or gave away, or caused to be sold, furnished, or given away, an alcoholic beverage to Michael Sherwin Wang, a person under the age of 21, in violation of California Business and Professions Code section 25658, subdivision (a).¹ (Exhibit 1:pre-hearing pleadings)

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

At the hearing, Respondent contended because its clerk reasonably relied on a counterfeit New Jersey driver license the minor presented to establish he was 21 years old, a defense to the accusation was established under section 25660.

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 October 17, 2019.

FINDINGS OF FACT

1. The Department filed the accusation on April 10, 2019. On April 26, 2019, the Department received a Notice of Defense from Respondent requesting a hearing on the accusation. The matter was heard on October 17, 2019 and submitted for decision.
2. On July 31, 1997, the Department issued Respondent a type-21 Off-Sale General license for its premises known as Save Mart #334 at 3215 Pacific Avenue, Stockton, California.² (Hereafter the licensed premises)
3. Since being licensed, Respondent has no history of disciplinary action.
4. Michael Sherwin Wang (Hereafter the minor) was born on December 13, 1999. On December 7, 2018, he was 18 years old when he went to the licensed premises to buy beer.³
5. Upon entering the store, the minor, a local college student, stood 5'-5" to 5'-6" tall and weighed approximately 105 pounds. He had black hair and was wearing clear lensed glasses. He wore a blue tie-dye appearing long sleeve shirt. He was clean shaven. (Exhibit 2A: photo of minor).
6. On December 7, 2018, at approximately 4:00 p.m., the minor and three companions, none of whom were at least 21 years old, went to the licensed premises. The minor intended to purchase some beer and other food items. Once inside the licensed premises, the minor went to the liquor section and selected one six-pack of Corona beer. He took the beer and other food items to one of the check stands and stood in line.

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

³ Michael Wang testified at the hearing regarding his activities at the Licensed Premises on December 7, 2018.

7. At that time, Alcoholic Beverage Control Agents Griffin and Thalken, both in plain clothes, were also inside the licensed premises to determine if they could detect any minors attempting to purchase alcoholic beverages.⁴ Agent Thalken observed the minor standing in line to purchase beer and signaled Agent Griffin to focus on the minor. Agent Griffin joined Agent Thalken and they stood in line behind the minor, separated by one other patron. While at the check stand, the minor was not accompanied by any of his three companions. From there, Agent Griffin witnessed the minor's exchange with the sales clerk, Michelle Tindell. (Hereafter Tindell)

8. When it was the minor's turn to make his purchase, Tindell, who had worked for Respondent 18 years, asked the minor for identification. The minor gave her a counterfeit New Jersey driver license that she held and viewed for approximately five seconds. (Exhibit 3: counterfeit license) The license did not appear suspicious to her. She noticed it was an out-of-state license and they saw those types of licenses at the licensed premises. She examined the photo on the driver license and it looked like the minor before her. She also looked at the height of the driver as reflected on the license, the birthdate on the license, and its expiration date. She did not recognize the minor as a prior or regular customer at the licensed premises. She only looked at one side of the identification. She did not swipe/scan it into any other electronic device. She manually entered the birthdate shown on the identification into her computer terminal and it indicated the birthdate was for someone at least 21 years old and permitted the sale to be rung up. Tindell did not ask the minor any questions about the New Jersey identification or any other questions to confirm or determine the minor's age. She neither asked anyone to help her assess the identification's authenticity nor did she consult any resource, such as an identification guidebook that was kept at the nearby service-center in the licensed premises. Tindell completed the sale of beer and some other food items to the minor who used a credit card to pay for his merchandise. The minor then exited the licensed premises.

9. Tindell also testified Respondent's policy was to require viewing identification from patrons seeking to purchase alcoholic beverages if they did not appear at least 30 years old. She had never been cited in the past for selling any alcoholic beverages to a minor. She was aware that the University of the Pacific (Hereafter UOP) was 2-3 blocks away and that the licensed premises has many youthful UOP student customers. She did not recall a customer ever presenting her a New Jersey driver license as proof of age. She has received training flyers from Respondent reminding employees about "carding" people in selling alcoholic beverages. She testified she never recalled being presented a false identification, but once refused to sell alcohol to a customer because the customer's height reflected on the identification was too different than his/her actual height.

⁴ Agent Griffin testified at the hearing regarding the investigation as did clerk Tindell.

With respect to out-of-state identifications, there was an identification guide book accessible to the employees at the store's service center. She had used it a few times, but the last time was years ago when another clerk wanted to check an identification and Tindell was involved in using the guidebook then. Occasionally she had asked patrons follow up questions about identifications they presented, but that was done with a casual or social intent, and not for purposes of verifying their identifications. Tindall testified that she does wear glasses to help her read very small type/print, but that she could read the minor's identification without her glasses on December 7, 2018. On December 7, 2018, the store was busy and its five check stands were all open. She still works at Respondent's store and was not disciplined by them over this incident. She has received no subsequent training from Respondent regarding examination of identifications.

10. Agents Griffin and Thalken, after witnessing what they suspected had just been a sale of alcoholic to a minor, followed minor-Wang outside and detained him. When the agents first questioned the minor about his age, he told him he was 21 and presented the counterfeit New Jersey driver license to the agents. Agent Griffin suspected the New Jersey driver license was not authentic because: 1) it looked of overall poor quality; 2) it felt thicker than an authentic license; 3) is appeared too shiny/glossy; and 4) the photo of the minor on the license appeared as though it were superimposed on the identification as opposed to reflecting an actual photo taken of the minor. As the agents were in the process of contacting the California Highway Patrol to confirm the authenticity of the counterfeit New Jersey license, the minor confessed he was only 18 years old and presented the agents with his authentic Arizona Driver license containing his true birthdate that made him 18 years old at that time. (Exhibit 5A: authentic Arizona license) At the hearing, the minor testified he had purchased the false identification over the internet about one week prior to his purchase at the store. He provided his photo as used in the false identification. The agents cited the minor for possession of the alcohol he just purchased, possession of a false identification, and falsely representing himself to a police officer. The minor signed his citation and was released at the scene.

11. Agents Griffin and Thalken then entered the licensed premises and made contact with the store manager, Steven Harden. (Hereafter Harden) They informed him Tindall sold beer to a minor and he went to get her. Agent Griffin told Harden he was aware other agents saw prior violations involving the licensed premises but no action was taken because those minors had quality fake identifications, but this time the false identification was not very good so it would be handled differently. Harden was not aware of those or any prior incidents like that at the licensed premises. In an office area at the licensed premises, the agents informed Tindall that she sold beer to a minor. She made no substantive statement to them regarding the sale.

12. Harden told the agents the licensed premises was close to the University of the Pacific campus and they saw many out-of-state identifications. Agent Griffin told Harden that they could return to the licensed premises to provide Respondent's staff added training especially as to examining out-of-state identifications since the licensed premises was near the UOP campus. Harden said he would pass that offer on to management and indicated he thought that would be a good idea to do. Agent Griffin was not aware if any added training was given to Respondent's staff since his December 7, 2018, visit.

13. Harden also testified Respondent's clerks were directed to check the identifications of those patrons buying alcoholic beverages who did not appear at least 30 years old. Sales clerks are trained to look at the height, weight, photo, and expiration date on the identifications presented and that takes only a short time. On December 7, 2018, the store was busy with at least 3-4 check-stands open. Harden believed the minor's false identification appeared valid and that he too may have made the sale to the minor based on it. He testified employee training comes from corporate headquarters. Sometimes it consists of information sheets or computerized on-line training that must be completed by employees.

14. Harden added that with respect to out-of-state identifications, the clerks should call a manager to view the identification. In this case, the clerk (Tisdell) was a manager or the person to inspect the identification. Harden also testified there was a book available at the store's service center to refer to about authenticating out-of-state identifications. Harden testified that if he is unfamiliar with a particular identification, he refers to that book as needed. He testified that out-of-state identifications call for a closer inspection. Occasionally, he has asked the patron to recite their zip code as a way to test the authenticity of the identification presented to him as proof of age.

15. Agent Griffin testified he would advise clerks to closely inspect the identification presented and even ask certain follow up questions that presenters of false identifications may not be able to readily answer. However, Agent Griffin indicated he was not aware of any Department rule that directed licensees where and when such type of follow-up questions by retailers were to be used.

16. Sometime after December 7, 2018, Agent Griffin re-examined the minor's false identification using the Keesing Identification Guide as a resource. He found that the driver license serial number was incorrect because it started with an "M" when it should have started with a "W", the first letter of the driver's last name. He also discovered that the last set of five digits in the serial number were wrong. The first four of those digits should have been "1097" to correspond with the month and year of the birthdate of the driver, and the last number, "6", should have been a "1" to correspond with a code for the

driver's eye color for New Jersey driver licenses. He also believed that on the lower right corner of the false identification, some of the laminate film cover was beginning to separate from the base of the identification.

17. Agent Griffin also noticed that the clear over-lay on the face of the false identification appeared bubbly and not smooth. He believed the hologram was not very clear. He believed it was too thick. He believed a flag shaped symbol next to the "Y" in New Jersey was not clear. On the back side of the false identification, he believed that some of the text was fading. He also believed a larger bar-code was not in proper alignment and at an angle. He also believed some brackets on the lower right corner were misaligned.

18. Respondent called Susan Dworak who testified she had created a company called "Real Identities" which provides the service of supplying information and techniques to government and business as to how to detect false identifications.⁵ She had earlier researched the topic of false identifications and discovered there was little training available as to how to detect them. She and her company gathered what information they could find on the topic of identifications and false identifications. She discovered the Department's Licensee Education on Drugs and Alcohol (LEAD) training was weak on instructing how to detect false identifications.⁶ Over four years, she and her company have gathered various data regarding the manufacture, sale, and use of false identifications and created a data base. She determined that the appearance or quality of an identification, including false identifications, can vary based on the materials used to manufacture it, the equipment used to manufacture it, the manufacturing process used, and the environment the identification was manufactured in and what it was later exposed to. She also indicated even the lighting under which an identification is viewed can be important in determining its authenticity. She also opined the quality of false identifications can be very good, in part, because the same manufacturing machinery, processes, and components/materials used to make authentic identifications are available to those who make false identifications. Ultimately, her company plans to offer a computerized application that would be able to help users/subscribers on exactly what to examine/look for when evaluating the authenticity of various types of identifications.

⁵ Dworak also testified she had a B.A. degree from UCLA in political science and public law, attended Santa Clara Law School, and worked for large law firms where she eventually focused on securities law.

⁶ Dworak testified she took the Department's LEAD class four years ago, and again three years ago.

19. As to this matter, she inspected the minor's false New Jersey identification, Exhibit 3. She opined it had the appropriate feel and degree of flex as would an authentic license. She observed there was no damage to it and it had other security features. It appeared authentic.

20. After consulting the Keesing I.D, Guide, a resource book, she determined the license serial number listed on the face of the false identification, Exhibit 3, was not correct for an authentic New Jersey License. (Exhibit F).

21. She indicated a high-gloss finish on the license would not necessarily be the trait of a false license because some licenses are manufactured with that characteristic.

22. Specifically, as to New Jersey licenses, she testified that there was a 2004 version, a 2011 version, and a 2019 version, each version referred to as a "suite". She indicated all versions had generally the same format and artwork. She testified an authentic 2019 version had a clearer image of the state-house on it than the false identification, Exhibit 3. She testified that the surface texture between Exhibit 3 and an authentic New Jersey driver license can appear very similar. She also indicated that the appearance of the texture of the license's surface can vary depending upon the exterior lighting conditions. (Exhibit D-3, D-4, D-5, and D-6: images of portions of the identification)

23. She also testified that authentic identifications often include a layer of laminate over the surface of the base card. Such was the case with 2011 New Jersey driver licenses. Sometimes, the laminate can peel away from the poly vinyl chloride (pvc) or polyethylene terephthalate (pet) plastic card base depending on any manufacturing defects that might have occurred and the environment the finished identification is exposed to, such as heat or cold.

24. She also testified that the back side of the minor's false identification resembled what an actual New Jersey driver license would look like. Features shown thereon, such as the silhouette of the State of New Jersey, two sets of bar coding, and other assorted printing are consistent with the back/reverse side of an authentic New Jersey driver license. She did acknowledge some slight imperfections in some of the text on the back side of the false identification but indicated those types of defects could have also occurred from the manufacturing process of an authentic card.

25. Dworak also testified that holograms that appear on false identification were not inconsistent with holograms that appear on an actual New Jersey driver license. She indicated that as holograms are superimposed on large plastic sheets then placed over large sheets of licenses, the hologram symbols themselves may appear on varying locations on the face of individual cards.

26. Dworak also testified that the photo of the minor on the false identification does show some shadows as would a real identification photograph. She testified the driver's appearance in their driver license photo might vary slightly one from another based upon the conditions existing when and where their actual photo was taken. She testified the photo of the minor on the counterfeit New Jersey license would not clearly indicate it was a false identification.

27. In conclusion, Dworak testified the minor's counterfeit New Jersey driver license was authentic in its appearance and could have been reasonably relied on by the clerk as evidence of the minor's age.

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 section 24200, subdivision (a), because on December 7, 2018, Respondent's employee, Michele Tindell, inside the Licensed Premises, sold an alcoholic beverage to Michael Sherwin Wang, a person under the age of 21, in violation of Business and Professions Code section 25658, subdivision (a).
2. The evidence established Respondent's employee or agent, Michelle Tindell, sold an alcoholic beverage to the minor, Michael Wang, during the normal course of Respondent's business at the licensed premises. Further, the evidence established that Tindell made the sale after asking for, holding, and viewing Wang's counterfeit/false New Jersey driver license. (Findings of Fact ¶¶ 2-8)
3. The evidence established the minor appeared youthful and as someone who might be 21 or very close to that age.
4. Respondent asserted under section 25660, it established a defense to the accusation because the clerk asked for, inspected, and reasonably relied on the minor's false identification at the time she sold him alcoholic beverages, a six-pack of Corona 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 bona-fide evidence of majority and identity provided by the minor-customer. Bona-fide evidence is "(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."

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.⁷ To provide a defense, reliance on the document must be reasonable, that is, it was based on due diligence of the seller. This section applies to identifications actually issued by government agencies and identifications that are false replicas of government identifications.⁸

7. 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.⁹ The defense is also inapplicable if the appearance of the presenter does not match the description on the identification.¹⁰ 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.

8. In this instance, the minor's false identification was not issued by any governmental agency but was a counterfeit New Jersey driver license purchased by the minor over the internet about a week prior to him presenting it to Respondent's clerk as proof of his age. The evidence established the false identification generally had appropriate outward features consistent with an authentic New Jersey driver license such as its size, color-scheme, formatting, printing, an expiration date, a birthdate, the driver's name, address, sex, height, and eye color. The minor's actual photo and actual name was in the false identification. His sex was correctly indicated as male and his height noted at 5'-06", close to his actual height. The false identification was not torn, bent, mutilated, cut, stained, or unduly worn

⁷ *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).

⁸ *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).

⁹ *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).

¹⁰ *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.

out. As the minor was youthful appearing, it was appropriate for the clerk to demand an identification from him on that December 7, 2018 to verify his age.

9. In this instance, the clerk testified Respondent trained her to check identifications of patrons seeking to purchase alcoholic beverages who did not appear at least 30 years old. She also knew the store was a few blocks from the University of the Pacific campus, and that many of its students patronized the licensed premises. In this instance, she asked for and inspected the identification the minor presented to her. The minor clearly appeared substantially under 30 years old. She looked at the photo of the minor on the identification, noted his height as reflected thereon, his birthdate thereon, making the minor 21 years old, and its expiration date. However, she also testified she never recalled ever examining a New Jersey license on any prior occasion. Therefore, she was unfamiliar and otherwise unknowledgeable about their appearance and characteristics and thus had no idea whether the identification she was looking at was an authentic New Jersey license or reasonably resembled one in any way. Apparently, she assumed it was a New Jersey license merely because that was what it held itself out to be. In terms of the clerk's assessment, that the minor's identification turned out to resemble an authentic New Jersey license was merely fortuitous and a coincidence.

10. Respondent presented evidence to establish the false identification, was, in fact, a reasonable counterfeit of a New Jersey License. The evidence did establish the false identification had the general format and outward appearance of an authentic New Jersey identification. However, this was not an instance where the clerk made the sale based upon her prior knowledge or familiarity with a New Jersey license and Respondent's evidence was relevant to corroborate the clerk's then existing knowledge or state of mind about the appearance or features of an authentic New Jersey license. Rather, what should be given greater weight in this matter are the specific facts and circumstances known to the clerk at the time of her decision to rely on the false identification. In this instance, the fact the false New Jersey license she inspected turned out to resemble an actual New Jersey license was merely fortuitous should certainly not be given controlling weight. To permit a defense under section 25660 based on that allows Respondent to take unfair advantage of a chance circumstance rather than assessing this specific clerk's reasonable attempt to verify the authenticity of the New Jersey license theretofore completely unknown and unfamiliar to her before she relied on it as bona fide proof of the minor's age.

11. Not knowing what a real New Jersey license looked like, the clerk could have taken some reasonable alternate paths. For example, the clerk could have: 1) denied the sale of beer to the minor. Merely because the patron presented an identification, that did not compel the sale proceed, especially when the identification presented was unfamiliar to the clerk. Making the sale of an alcoholic beverage to him should have been less important than confirming he was at least 21 years old, especially as he did have a youthful outward appearance; 2) used the identification booklet that was located at the Licensed premises'

service center to determine if the document the minor presented resembled, in any way, a New Jersey license. The purpose of having the identification booklet at the store was for it to be used as a resource to aid Respondent's employees in authenticating unfamiliar identifications. The clerk knew of and had used the booklet in the past. In this instance, Respondent's service center identification booklet was not introduced into evidence so it was not actually established what it said or showed about New Jersey identifications anyway. However, it still seemed such booklet would have been the resource for this clerk to have used in verifying the New Jersey identification. Yet, it was ignored on an occasion precisely when she should have used it; 3) had the minor produce some added document with his name, photo, and birthdate to corroborate the authenticity of the New Jersey identification in some way; or 4) asked some other knowledgeable employee or supervisor for guidance. The aforementioned options are not meant to be an exclusive list of alternative actions the clerk could have taken, but merely examples of how the clerk could have acted more prudently and exercised due diligence under the circumstances presented to her in this instance to justifiably warrant a defense under section 25660.

12. Based upon the above, as the evidence established the clerk sold the minor an alcoholic beverage and it was not established the clerk reasonably relied on the identification the minor presented to her as proof of his age, Count 1 of the accusation was sustained by the evidence.

13. 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.

PENALTY

1. In assessing an appropriate measure of discipline, the Department's penalty guidelines are in California Code of Regulations, title 4, section 144. (Hereafter 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 Respondent had been licensed since 1997 with no record of any prior disciplinary action.

4. Respondent argued a defense to the accusation under section 25660 was established. Respondent did not recommend any penalty in the event the accusation was sustained.

5. Respondent was licensed for just over 21 years with no prior disciplinary action. That was a significant term of discipline free licensure. 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 30 years old. Respondent did have a resource book for its employees to refer to when checking unfamiliar identifications, although it was not used in this instance. The clerk in this case did ask for and inspect the identification of the youthful appearing minor, however, as explained above, that was not sufficient to establish a section 25660 defense in this instance. Therefore, sufficient mitigation was present to warrant a downward adjustment to the 15-day suspension specified in rule 144.

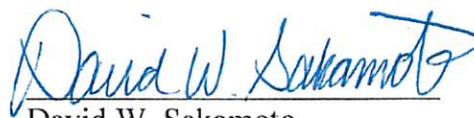
6. Except as set forth herein, all other arguments raised by the parties with respect to the appropriate penalty did not have merit.

ORDER

1. Count 1 of the accusation is sustained.

2. Respondent's license is suspended for a period of 10 days, with all 10 days of suspension stayed for a period of 12 months commencing the date the decision in this matter becomes final, upon the condition that no subsequent final determination is made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred during the period of the stay. Should such a determination be made, the Director of the Department of Alcoholic Beverage Control may, in the Director's sole discretion and without further hearing, vacate the stay and impose the 10 stayed-days of suspension, and should no such determination be made, the stay shall become permanent.

Dated: November 12, 2019


David W. Sakamoto
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: <u>Jacob A. Smith</u>
Date: <u>12/23/19</u>

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

SAVE MART SUPERMARKETS,
Save Mart #334
3215 Pacific Avenue
Stockton, CA 95204-3641,
Appellant/Licensee,

v.

DEPARTMENT OF ALCOHOLIC
BEVERAGE CONTROL,
Respondent.

) AB-9859
)
) File: 21-331696
) Reg: 19088715
)

**DECLARATION OF SERVICE
BY MAIL**

I, MARIA SEVILLA, declare that I am over the age of eighteen (18) years, and not a party to the within action; that my place of employment and business is 1325 J Street, Suite 1560, Sacramento, CA; that on the 6th day of July, 2020, I served a true copy of the attached **Decision** of the Alcoholic Beverage Control Appeals Board in the above-entitled proceeding on each of the persons named below:

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

Gillian Garrett
Hinman & Carmichael, LLP
260 California Street
San Francisco, CA 94111
ggarrett@beveragelaw.com

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

I declare under penalty of perjury that the foregoing is true and correct.
Executed at Sacramento, California, on the 6th day of July, 2020.

Maria Sevilla

MARIA SEVILLA