

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

AB-9878

File: 21-475217; Reg: 19088748

TRADER JOE'S COMPANY,
dba Trader Joe's #236
265 Winston Drive
San Francisco, CA 94132-1921,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: November 6, 2020
Telephonic

ISSUED DECEMBER 3, 2020

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

Respondent: Patricia G. Huber, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

Trader Joe's Company, doing business as Trader Joe's #236 (appellant),
appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending

¹The decision of the Department under Government Code section 11517(c), dated April 30, 2020, as well as the administrative law judge's proposed decision, are set forth in the appendix.

its license for 20 days because its clerk sold an alcoholic beverage to a person under the age of 21, in violation of Business and Professions Code² section 25658(a).

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on August 12, 2009. Appellant's license was previously disciplined by the Department for a violation of section 25658(a) on May 4, 2017.

On April 19, 2019, the Department filed a two-count accusation against appellant charging that, on February 15, 2019, appellant's clerk, Victoria Galang (the clerk), sold alcoholic beverages, or caused such to be furnished, to 20-year-old Sophia Lloyd (the minor).

At the administrative hearing held on November 13, 2019, documentary evidence was received, and testimony concerning the sale was presented by the minor and Department Agent Michelle Ott (Ott). The clerk and John Martinez (Martinez), the manager of the licensed premises, testified for the appellant.

Evidence established that on February 15, 2019, the minor accompanied her boyfriend, Victor Bermudes³ (Bermudes), to the licensed premises to purchase alcohol to bring to a party. After entering the premises, the minor and Bermudes went towards the alcoholic beverage section and selected a bottle of wine and six-pack of beer to purchase. (Exhs. D-4, D-5.) Each of them carried one of the alcoholic beverages to the register area for purchase. They did not purchase any other items.

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

³ The Department's decision refers to him as "Bermudes" while appellant refers to him as "Bermudez". This decision shall refer to him by the former.

The clerk handled the transaction. She noted that the minor and Bermudes were a couple and appeared to be college-aged. Notably, a significant number of the premises' customers are from the nearby San Francisco State University. The clerk had a conversation with the minor and recognized her from a previous encounter at the premises.

Since the purchase involved alcoholic beverages, the clerk asked the minor for identification from whomever was going to pay for the transaction. The minor then directed the clerk to ask Bermudes for his identification. Upon being prompted, he handed his ID to the clerk, and the clerk noted it showed he was over 21 years of age.

The clerk then proceeded with the transaction. Bermudes paid by cash, and the clerk completed the transaction by returning the beverages along with a receipt and change to Bermudes. (Exh. D-6.) The minor and Bermudes then exited the store together with the alcoholic beverages. At no point did the clerk ask the minor any questions in order to confirm her age or ask for her identification.

After the minor and Bermudes left the store, Agent Ott detained the couple just outside the premises. After explaining the purpose of their detainment, Ott determined that Bermudes was over 21, but that the minor was only 20 years old. Ott then contacted the clerk about the transaction and the clerk prepared a written statement regarding the sale. (Exh. D-7.)

The administrative law judge (ALJ) issued a proposed decision on December 6, 2019. The proposed decision was rejected by Notice of the Department on January 21, 2020, which advised the parties that the Department would decide the matter under Government Code section 11517(c). The Notice requested additional oral argument from the parties, which was received on April 3, 2020.

On April 30, 2020, the Department issued its decision sustaining the two counts in the accusation as a single sustained allegation and imposing a 20-day suspension. Appellant filed a timely appeal contending that the Department's decision is not supported by substantial evidence and violates the Administrative Procedures Act (APA).

DISCUSSION

I

UNDERGROUND REGULATIONS

Appellant argues the decision below is "invalid" because it amounts to an underground 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 complains there is no formal rule or regulation in place about "carding companions" during sales of alcoholic beverages. (AOB, p. 3.) Specifically, the appellant claims that finding that the clerk should have taken steps "found nowhere in the regulations or statutes, such [as] carding the companion of a customer lawfully purchasing alcohol, amounts to a general rule narrowing protections for licensees and subjecting them to a new and higher standard of due diligence." (AOB, p. 13.) Appellant maintains such a "rule" constitutes an underground regulation and should void the decision below.

While it is true the ALJ interpreted section 25658 in more specific terms, appellant fails to articulate how the decision created a rule of general applicability. Nowhere did the ALJ order that his interpretation be generally applied to all cases involving section 25658. Rather, the ALJ makes clear that his analysis is specific to

the facts and circumstances of *this* case. For example, the Department noted:

[...] The Department has not determined that licensees must check the identification of all members of a group merely because they are shopping together. Rather, each case must be evaluated [on] the facts at hand. Here, it is determined that the [clerk] Galang was aware that the purchase of alcohol was both for Bermudes and Lloyd, who both carried alcohol to the checkout and placed it in front of her. While only one of them paid for the alcohol, this does not negate that the purchase was clearly for the two of them. Merely “shopping together” as a group is not the triggering factor. However, when the facts of an individual case support the conclusion that the transaction is a group purchase, then the licensee has an obligation to ascertain that all members of the purchasing group are of age. [...]

(Conclusions of Law, ¶ 19.) Rules are mandatory; the ALJ’s examination of the clerk’s conduct was explanatory. As the interpretation of section 25658 arose during the course of a case-specific adjudication, the decision falls under the *Tidewater* exception and does not violate the APA.

Appellant’s remaining arguments are likewise unpersuasive. The appellant predicts that the “Department’s Decision exposes every licensee in the state to liability.”

(AOB, p. 1.) However, the Board’s mandate is to follow the law as written, not speculate on what could happen as a result of its application of the law. Appellant further posits that while the minor companion here was 20, she “just as easily could have been the purchaser’s teenage or younger child; had that been the case should the [clerk] have asked the child for an ID or refused the parent the right to purchase alcohol?” (AOB, p. 1.) This hypothetical is beside the point. It was clear the minor and Bermudes were both of college age and a couple. The clerk herself noted this.

(Exh. D-7.)

Altogether, appellant fails to establish that the Department’s decision amounts to a rule, much less a rule to be applied generally. 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.

II

SUBSTANTIAL EVIDENCE

Appellant contends, on appeal, that alcohol was not “furnished” to the minor within the meaning of section 25658(a). Specifically, it alleges that “the Department erred as a matter of law because [appellant] did not furnish alcohol to [the minor], nor did it have any actual or constructive knowledge of anyone else furnishing alcohol to [the minor].” (AOB, p. 9.)

Section 25658(a) states, “Except as otherwise provided in subdivision (c), 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.” The Department found that the evidence established a violation of section 25658(a) with regard to appellant’s clerk furnishing alcohol to the minor. (Conclusions of Law, ¶¶ 4-5, 14.)

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 disregarded merely because a contrary finding would have been equally or more reasonable. (*Boreta, supra*, at p. 94.) The Board may not exercise independent judgment regarding the weight of the evidence; it must resolve evidentiary conflicts in favor of the Department's decision and view the whole record in a light most favorable to the 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 accept all reasonable inferences from the evidence which support the Department's decision. (*Harris*, at p. 113.)

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. N.L.R.B.* (1951) 340 U.S. 474, 477 [71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) Moreover, it is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Department of Alcoholic Beverage Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].).

Here, appellant argues it did not furnish alcohol to the minor and that its "lack of knowledge" of any furnishing of alcohol to the minor is a "complete defense." (AOB, p. 11.) Whether alcohol was furnished or not is a question of law. Accordingly, the Board is not bound by the ALJ's assumptions, but considers the question *de novo*. (*Rudd v. California Casualty Gen. Ins. Co.* (1990) 219 Cal.App.3d 948, 951-952 [268 Cal.Rptr. 624] ["It is well settled that the interpretation and application of a statutory scheme to an undisputed set of facts is a question of law [citation] which is subject to *de novo* review on appeal. [Citation.] Accordingly, we are not bound by the trial court's

interpretation.”]; *Pueblos Del Rio South v. City of San Diego* (1989) 209 Cal.App.3d 893, 899 [257 Cal.Rptr. 578] [An appellate court is free to draw its own conclusions of law from the undisputed facts presented on appeal].)

The definition of “furnish” has been discussed in previous cases. For example:

In order to violate section 25658, there must be some affirmative act of furnishing alcohol. "The word 'furnish' implies some type of affirmative action on the part of the furnisher" (*Bennett v. Letterly* (1977) 74 Cal.App.3d 901, 905 [141 Cal.Rptr. 682].) Among other things, it means to supply, to give, or to provide. (*Id.* at pp. 904-905.)

[¶ . . . ¶]

In order to furnish an alcoholic beverage . . . it is sufficient if, having control of the alcohol, the defendant takes some affirmative step to supply it to the drinker.

(*Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141, 1157-1158 [221 Cal.Rptr. 675]

(*Sagadin*.) In addition:

As used in a similar context the word "furnish" has been said to mean: "To supply; to offer for use, to give, to hand." [Citation.] It has also been said the word "furnish" is synonymous with the words "supply" or "provide." [Citation.] In relation to a physical object or substance, the word "furnish" connotes possession or control over the thing furnished by the one who furnishes it. [Citation.]

(*Bennett v. Letterly, supra*, at pp. 904-905.)

In its brief, Appellant relies on *Bennett*, *Ruiz*, and *Sagadin*. Applying *Bennett*, appellant argues that it “did not exercise possession or control over the alcohol after its purchase by Mr. Bermude[s].” (AOB, p. 11.) This misses the mark. The issue is not whether appellant exercised control subsequent to the transaction. The key issue is the clerk’s conduct *prior* to the transaction in failing to confirm if the minor was also over 21 under circumstances where it was clear the minor was part of the transaction for the alcoholic beverages. Therefore, *Bennett* is not helpful to the issues on appeal.

As for *Ruiz*, it too is inapposite on several grounds. First, *Ruiz* involves section 25602.1, not 25658. Appellant suggests there is no reason to read the cases differently as the two statutes contain similar phrasing and language. (AOB, p. 11.) However, the position it stakes out is only possible under a superficial reading. As summarized by the *Ruiz* court, section 25602.1 states:

[A] cause of action may be brought by or on behalf of any person who has suffered injury or death against any person licensed, or required to be licensed ... who sells, furnishes, gives or causes to be sold, furnished or given away any alcoholic beverage ... *to any obviously intoxicated minor* where the furnishing, sale or giving of that beverage to the minor is the *proximate cause of the personal injury or death sustained by that person.*

(*Ruiz, supra*, at p. 1460, emphasis added.) As an initial matter, section 25602.1 is the *lone* exception to the immunity granted to licensees who provide alcohol to a person who subsequently injures another as a result of their inebriation. (*Id.* at pp. 1459-1460; see Conclusions of Law, ¶ 9.) Thus, *Ruiz* emphasized that as the “single exception to what our Supreme Court has characterized as the ‘sweeping civil immunity’ granted by section 25602 ... [section 25602.1] must be construed *narrowly*.” (*Ruiz, supra*, at p. 1462, emphasis in original.) Unlike *Ruiz* and the cause of action contemplated under section 25602.1, the instant case does not involve the injury or death to an individual caused by an obviously inebriated minor. Moreover, although section 25602.1 must be construed narrowly, appellant provides no basis for stretching its purview to encompass the circumstances at issue here.

Second, unlike the narrow construction of section 25602.1, the law requires that the provisions of the Alcoholic Beverage Control Act—which includes section 25658—be applied broadly in order to effectuate the purposes behind the Act:

This division is an exercise of the police powers of the State for the protection of the safety, welfare, health, peace, and morals of the people

of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages. *It is hereby declared that the subject matter of this division involves in the highest degree the economic, social, and moral well-being and the safety of the State and of all its people.* All provisions of this division *shall be liberally construed for the accomplishment of these purposes.*

(Bus. & Prof. Code, § 23001, emphasis added.) Section 25658(a), which prohibits selling or furnishing alcohol to minors, is part of the division referenced and therefore implicates the economic, social, and moral well-being and safety of the public. Accordingly, we are obligated to liberally construe this provision to accomplish the purposes of the Act.

Third, a key factual distinction renders *Ruiz* distinguishable here. In *Ruiz*, two minors—Spitzer and Morse—entered a Safeway store to purchase beer. Although the two of them entered together, Spitzer was the one who presented his identification to the Safeway employee and paid for the beer. (*Ruiz, supra*, at pp. 1457-1458.) After leaving the store, Spitzer and Morse got into their car, and Morse began driving. (*Id.* at p. 1458.) During the drive, Spitzer, the one who made the purchase, handed a beer to Morse, who consumed a portion of it as he drove. (*Ibid.*) Morse then allegedly caused the car accident that led to the death of the appellants' son in that case. The court ultimately concluded that the store employee did not authorize "Spitzer to provide beer to Morse, nor did [the employee] take any affirmative step to provide the beer to Morse." (*Id.* at p. 1463.) Due to this lack of authorization or knowledge by the employee, with respect to the furnishing of beer to Morse, the *Ruiz* court declined to apply *Sagadin*. (*Ibid.*)

Notably, nothing in *Ruiz* gives a retail licensee immunity from furnishing alcohol to a minor when the evidence of furnishing is present in the record. Such evidence is

present in the instant case. Therefore, the *Ruiz* court's justification for distinguishing *Sagadin*—that there was no evidence the employee authorized beer to be furnished to a minor, either directly or through an intermediary—is absent here.

Unlike *Ruiz*, *Sagadin* involves the same statute at issue—section 25658(a)—and is more factually relevant. There, the father of the party-host tacitly allowed partygoers, many of whom were underage, to drink beer from his built-in beer dispenser. (*Sagadin, supra*, at p. 1149.) This tacit permission was established when the father told his son that any beer his friends drank would have to be replaced. (*Ibid.*) The father took the affirmative step of authorizing beer to be furnished to minors despite being aware of the totality of circumstances. Similarly, the clerk tacitly allowed alcohol to be furnished to the minor by completing the transaction with Bermudes despite being aware of the minor's presence, her relationship to Bermudes, her youthful appearance, and the licensed premises' close proximity to a college campus.

Here, appellant alleges there is “no evidence of actual or constructive knowledge” by appellant that Bermudes would provide alcohol to any minors, including the minor. (AOB, p. 9, emphasis in original.) Appellant cites to *Laube v. Stroh* (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779] (*Laube*) for the proposition that liability cannot attach to appellant because one cannot “permit something of which he or she is

unaware.” (AOB, p. 11.) However, *Laube* does not help appellant’s case.⁴ Actual knowledge is not required. Moreover, it is settled law that a licensee has constructive knowledge of the on-premises conduct of an employee, because the employee’s knowledge is imputed to the employer. (See *Harris v. Alcoholic Beverage Control Appeals Bd.* (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315]; *Mack v. Department of Alcoholic Beverage Control* (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629].)

Based on the above authority, the Department only needed to show that the clerk sold alcohol—despite being put on notice that it would be furnished to the minor—for that conduct to be imputed to the appellant. On appeal, this Board will uphold the Department’s findings so long as those findings are supported by substantial evidence. (See *Kirby v. Alcoholic Beverage Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815] [“When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the department.”].)

The evidence established that the minor and Bermudes “selected a bottle of wine and a six-pack of beer to purchase. [...] Each of them carried one of the selected items to the register area for purchase.” (Findings of Fact, ¶ 4.) After they

⁴ In that case, the court annulled the Department’s decision imposing discipline on a licensee for surreptitious drug transactions of which neither the licensee nor the licensee’s employees knew or had reason to suspect were occurring among patrons of the “upscale hotel, bar and restaurant.” The court criticized the Department’s use of a strict liability standard in “permitting” cases and extensively analyzed the line of cases on which the Department relied, concluding that, in fact, “the licensee’s knowledge is essential.” (*Laube, supra*, 2 Cal.App.4th at p. 376.) However, the licensee need not have actual knowledge; constructive knowledge, such as that imputed to the licensee through knowledge of a licensee’s employee, is sufficient. (*Id.* at pp. 376-377, emphasis added)

approached the register area, they each “placed the item they were carrying in the checkout area for the cashier to ring up the purchase.” (*Id.* at ¶ 6.) The clerk noticed the minor and Bermudes after they placed the alcoholic beverages at her register and noted that they were a couple that looked “college age.” (*Ibid.*) The clerk recognized the minor from a prior interaction and engaged in conversation with her. (*Ibid.*) The clerk asked the minor for the identification of “whoever was going to pay for the alcohol.” (*Id.* at ¶ 7.) The minor directed the clerk to Bermudes since he was paying. (*Ibid.*) After Bermudes showed the clerk his identification, the sale was completed. (*Ibid.*) The clerk did not ask “any age-related questions of Lloyd during the transaction even though she was aware they were together, and they were purchasing alcohol for potentially more than one person.” (*Ibid.*) These facts are sufficient to support the Department’s findings that the clerk furnished alcohol to the minor.

This result is consistent with the Board’s application of the term “furnish” in prior appeals. In *Circle K Stores, Inc.* (2004) AB-8209 at p. 4, this Board stated:

The clerk is the person in control of the sale. He or she must be alert to the substance of the transaction, and cannot ignore circumstances that ought to raise questions in the mind of a reasonably prudent person. When the transaction is in the nature of a group purchase, as the one in this case appeared to be, a clerk must establish that each of those who are involved in the transaction are 21 or over. It is not enough that the person who assembles the various selections and pays for them is 21. A clerk may not close his or her eyes to the reality of what is taking place. The critical fact in this case is not the mere presence of minors, it is their participation in the transaction, all of which took place in front of the clerk.

In a more recent appeal, *7-Eleven, Inc.* (2020) AB-9866, at p. 14, this Board held:

Appellants’ position is that there can be no affirmative act of furnishing to an individual who neither participated in the transaction nor interacted directly with the store employee. This depiction is not only undercut by the record, but we find appellants’ contention to be untenable, if not absurd. [The clerk] cannot avoid liability by alleging that he merely stood by as a passive observer. [...] To permit licensees or their employees to take the

word of a customer that they are purchasing alcohol for someone over 21, and complete the sale under these circumstances would incentivize negligent behavior. Needless to say, this would be wholly inconsistent with public welfare and morals.

While the Board affirms the Department's decision as the correct legal result, it does not do so without hesitation. This case is extremely close. In many areas, this matter is factually weaker than all the other cases the Board cites. The Board further notes that the clerk did not have the same knowledge as the Department agent, who watched Bermudes and the minor as they selected alcohol and carried it to the register for purchase. The clerk only noticed the pair after the alcohol was placed on the register. Therefore, the only notice the clerk had that the purchase was joint was her own personal observations of Bermudes and the minor while together at the register. To say the clerk knew more or should have known more would be speculative, at best.

We feel the Department puts a tremendous onus on the clerk in this matter, given the limited facts, to conclude that the purchase was joint. Given that Bermudes was of legal age, and there was only a limited amount of alcohol being purchased, it would have been equally reasonable to conclude that the purchase was his alone. The Board strongly feels that a warning and an opportunity to act as community partners with licensees to further education and training would have a more appropriate action for the Department to take in this instance. However, as we are bound by the Department's factual findings, and cannot say that these findings are unsupported, we reluctantly affirm.

ORDER

The decision of the Department is affirmed.⁵

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

⁵ 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:**

Trader Joes Company
DBA: Trader Joes 236
265 Winston Dr.
San Francisco, California 94132-1921

Respondent

Off-Sale General License

File No.: 21-475217

Reg. No.: 19088748

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Alcoholic Beverage Control
Office of Legal Services

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department on April 30, 2020, for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held on November 13, 2019, before Administrative Law Judge Alberto Roldan, and the arguments of the parties, and good cause appearing, the following decision is hereby adopted:

Colleen Villareal, Attorney, Office of Legal Services, Department of Alcoholic Beverage Control, appeared for and represented the Department of Alcoholic Beverage Control. (Department.)

Gillian Garrett, Attorney, represented Respondent Trader Joes Company. (Respondent.)

After evidence was received at the hearing, the matter was argued by the parties and submitted for decision on November 13, 2019. The Administrative Law Judge issued a proposed decision dated December 6, 2019, which was rejected by the Director by Notice dated January 21, 2020. Both the Department and Respondent submitted written arguments on or about April 3, 2020.

The Department seeks to discipline the Respondent's license in a two count Accusation on the grounds that;

- 1) On or about February 15, 2019, Respondent-Licensee's agent or employee, Victoria Galang, sold, furnished, gave, or caused to be sold, furnished or given, an

alcoholic beverage, to-wit: wine, to Sophia Lloyd, a person under the age of 21 years, in violation of Business and Professions Code section 25658(a)¹

2) On or about February 15, 2019, Respondent-Licensee's agent or employee, Victoria Galang, sold, furnished, gave, or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Sophia Lloyd, a person under the age of 21 years, in violation of section 25658(a) (Exhibit D-1).

In each of the above two allegations in the accusation, the Department further alleged that there is cause for suspension or revocation of the license of the Respondent in accordance with section 24200 and sections 24200(a) and (b). The Department further alleged that the continuance of the license of the Respondent would be contrary to public welfare and/or morals as set forth in Article XX, Section 22 of the California State Constitution and sections 24200(a) and (b).

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 November 13, 2019.

FINDINGS OF FACT

1. The Department filed the Accusation on April 19, 2019. (Exhibit D-1)
2. On August 12, 2009 the Department issued a Type-21, off-sale general license to the Respondent for the above-described location (the Licensed Premises).
3. The following is the record of prior Department discipline against the Respondent's license as established by official records introduced by the Department (Exhibit D-2):

Violation Date	Violation	Registration Date	Registration Number	Penalty
5/04/2017	25658(a)	10/11/2017	170860008	10 day suspension

4. Sophia Lloyd (Lloyd) was born on June 28, 1998 and was 20 years old on February 15, 2019. On that date, Lloyd accompanied her boyfriend, Victor Bermudes (Bermudes) to the Licensed Premises in order to purchase alcoholic beverages to bring to a party. Lloyd and Bermudes entered the Licensed Premises, a supermarket, and they went to where the

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

alcoholic beverages were displayed. They selected a bottle of wine and a six-pack of beer to purchase. They did not buy any other items. Each of them carried one of the selected items to the register area for purchase.

5. Lloyd appeared and testified at the hearing. Her appearance at the hearing was generally as depicted in an image that was taken of her when she was contacted by law enforcement on February 15, 2019. (Exhibit D-3) On that date, Lloyd was wearing her hair pulled back so that her face was exposed. She wore earrings and jewelry and had makeup on her face. Her appearance was consistent with her chronological age of 20 years old. Bermudes was dressed casually but neatly as depicted by the photograph that was taken of him during the law enforcement contact on February 15, 2019. He was clean shaven and had a slender build and youthful face that made him appear younger than his age even though he was over 21 years of age. (Exhibit D-5)

6. When Bermudes and Lloyd approached the register area, there were multiple registers open. They selected one of the lines and waited for their turn. They each placed the item they were carrying in the checkout area for the cashier to ring up the purchases. The only items they presented for purchase were the wine bottle and the six-pack of beer. (Exhibits D-4 and D-5) Victoria Galang (Galang) was the cashier working at the register. Galang first noticed Lloyd and Bermudes after they had placed the alcoholic beverages at her register for purchase. She noted that they were a couple and that they looked college age. A significant number of the customers at the Licensed Premises are from the adjacent University of San Francisco.

7. Galang initially engaged in conversation with Lloyd. She recognized Lloyd from a prior interaction at the Licensed Premises. Galang noted that they were purchasing alcoholic beverages and she asked Lloyd for identification from whoever was going to pay for the alcohol. Lloyd directed Galang to ask Bermudes for identification since he was paying. Bermudes then produced his identification and gave it to Galang. She checked his date of birth in the register and it showed that he was over 21 years of age. Based on this, Galang completed the transaction for the bottle of wine and the six-pack of beer after Bermudes paid with cash. Galang did not ask any age related questions of Lloyd during the transaction even though she was aware they were together, and they were purchasing alcohol for potentially more than one person. After Galang asked who was paying, the only conversation she had with Lloyd was regarding a grocery purchase Lloyd had made the week before in the Licensed Premises. Galang bagged the alcohol purchases and gave the receipt and change to Bermudes. (Exhibit D-6) Lloyd and Bermudes walked out together with the purchases. Galang described the sale unfolding in the above manner during her sworn testimony in the hearing. She also prepared a written statement after the event describing the sale unfolding in essentially the same manner. (Exhibit D-7)

8. Department Agent M. Ott (Ott) was on a general enforcement assignment on February 15, 2019. At approximately 7 p.m. she went into the Licensed Premises. She saw Bermudes and Lloyd in the alcohol section of the Licensed Premises selecting their beer and wine purchases. Ott was concerned because both appeared to be youthful enough to be potentially under 21 years of age. She saw them bring the wine and beer to the register to purchase. Ott watched the transaction and saw that only Bermudes was carded. After the transaction, Ott saw Lloyd carry the bagged items away when she and Bermudes left. Ott followed Lloyd and Bermudes out and contacted them just outside of the Licensed Premises. Ott explained that she was a Department agent and her purpose for detaining them. After Ott contacted Lloyd and Bermudes, Lloyd initially stated she was only carrying the alcoholic beverages for Bermudes. Ott determined that Bermudes was over 21 but that Lloyd was only 20 years of age.

9. Ott contacted a manager of the Licensed Premises and then contacted Galang regarding the transaction. Galang stated that when she made the sale, she obtained identification from Bermudes and he was over 21. Galang also prepared a handwritten statement on February 18, 2019 regarding the sale. The narrative portion of the statement, in its entirety, read as follows:

“All of this happened on Friday, February 15, 2019. I was working at register 11 when a couple came up to me to pay for their groceries. They were a young couple (probably in college), and I noticed the alcohol. I then looked at both of them and asked to see someones (sic) ID for whoever was paying. The girl turns and looks and says the guy was paying. I took his ID, put his birthdate in the system and everything was okay. The girl said she recognized me from the last time she came in because I had suggested a product to her. After the guy paid, they took their drinks and left.” (Exhibit D-7)

10. Galang testified that she was 19 years old and that this was her first job. She had been working for two months prior to the incident. Galang testified that she completed the transaction as she had been trained. Galang had not been trained to ask for identification from persons other than the purchaser. Galang has refused to make sales when the purchaser was unable to prove they were over 21 years of age. Subsequent to this incident, Galang and the other cashiers were trained to make affirmative inquiries of groups making alcohol purchases rather than just focusing on the person paying for the alcoholic beverages.

11. John Martinez (Martinez) is the manager of the Licensed Premises. He established in his testimony that the Licensed Premises trains cashiers, like Galang, about alcohol sales starting with their initial onboarding. Cashiers are taught the laws regarding alcohol sales and they are shown how to look for proper identification and how to use the register to check ages. They are taught to seize fake identifications and they have a system of ringing for managers to support the cashiers during problem transactions. The Licensed Premises

uses a secret shopper program to reinforce the importance of checking identifications during alcohol sales. In the last year, the Licensed Premises passed all 21 of the checks performed. Two of those checks involved Galang. Martinez confirmed that Galang completed the transaction in this incident as she had been trained and that Galang was considered a responsible and conscientious employee.

12. According to Martinez, the 2017 violation by the Licensed Premises involved the use of a fake identification that was not apparent to the cashier. The certified record of the prior discipline established that a 19 year old minor used a fake South Carolina driver's license to make the purchase of alcohol at the Licensed Premises. The identification was not taken out of the wallet and it was viewed from a distance by the cashier in that transaction. (Exhibit D-2) Subsequent to that incident, cashiers were given additional training regarding checking identifications. This included requiring that identifications be taken out of their holders. Martinez confirmed that after the incident in this case, a new policy was enacted requiring that alcohol purchases involving more than one person require that identifications be checked of all the persons present. Employees were trained regarding this new policy in small groups.

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) as alleged in counts one and two of the Accusation on the basis that on February 15, 2019 the Respondent's clerk, Galang inside the Licensed Premises, sold alcoholic beverages to Bermudes and Lloyd under circumstances where it was apparent that the alcoholic beverages were going to be furnished or given away by Bermudes to Lloyd, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 2-12)

5. Here, there is no dispute that Lloyd was under 21 when she and Bermudes presented a six-pack of beer and a bottle of wine for purchase in the Licensed Premises. Both Lloyd and Bermudes appeared youthful enough that they would be subject to the requirement to show identification if either was individually making an alcohol purchase. Bermudes was checked for identification but Lloyd was not. (Findings of Fact ¶¶ 4-11) The Department contends that under the facts of this case, Lloyd should also have been asked for identification and that Galang should have subsequently voided the sale because Lloyd was underage, and it was clear that both Bermudes and Lloyd were seeking to possess the alcoholic beverages.

6. In this matter, Respondent contends that the facts and holding in *Ruiz v. Safeway, Inc.* (2012) 209 Cal.App.4th 1455 should be controlling. In *Ruiz*, the appellate court found that, under the facts presented, the defendant's supermarket checker did not "furnish" beer, pursuant to section 25602.1, to an 18 year-old when the cashier sold beer to his friend while the 18 year-old was passively present. The 18 year-old subsequently consumed some of the purchased alcohol and was in a fatal motor vehicle accident.

7. Respondent contends that Galang sold to Bermudes, who was old enough to purchase alcohol, and that Galang met her legal responsibility by obtaining identification from Bermudes. The Respondent argues the surrounding facts of the present matter are similar to the *Ruiz* case and Respondent should not be held liable for any subsequent furnishing or giving away of alcoholic beverages that may have occurred as a result of Bermudes sharing his purchase with Lloyd.

8. *Ruiz* had an extensive discussion regarding the limits of liability created by section 25602.1:

"The latter statute, section 25602.1 is the statute upon which appellants rely. They argue Safeway can be held liable because its checker Gonzalez "furnished" or "caused ... to be ... furnished or given" alcohol to Morse within the meaning of the statute.

"We begin our analysis by turning to the statute at issue. 'As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose.' (*People v. Murphy* (2001) 25 Cal.4th 136, 142, 105 Cal.Rptr.2d 387, 19 P.3d 1129.) We begin by examining the statutory language, giving it a plain and commonsense meaning. (*Ibid.*) We do not, however, consider the statutory language in isolation; rather, we look to the statute's entire substance in order to determine its scope and purpose. (*Ibid.*) If the statutory language is unambiguous, then its plain meaning controls. (*In re Young* (2004) 32 Cal.4th 900, 906, 12 Cal.Rptr.3d 48, 87 P.3d 797.)

“With these principles in mind, we turn to appellants’ allegations. First, appellants contend Safeway can be held liable because checker Gonzalez ‘furnished’ beer to Morse. The common meaning of the word ‘furnish’ is ‘to provide with what is needed’ (Merriam–Webster’s Collegiate Dict. (10th ed.2001) p. 473), and here there is no evidence that Gonzalez supplied beer to Morse, the young man who allegedly caused the accident that led to the death of appellants’ son. Rather, the undisputed evidence is that Gonzalez *sold* beer to *Spitzer* who was using a false identification.

“Appellants also argue Safeway can be held liable because it ‘caused’ beer to be ‘furnished or given’ to Morse on the night in question. Citing language in *Hernandez v. Modesto Portuguese Pentecost Assn.* (1995) 40 Cal.App.4th 1274, 48 Cal.Rptr.2d 229 (*Hernandez*), appellants argue that ‘liability under the statute is not limited to acts constituting a technical sale of alcohol to a minor.’ They urge that the Legislature’s intent—to impose liability on persons or organizations in a position to detect signs of intoxication in a minor seeking to purchase alcohol and thereby to reduce the risk of injury—would sweep in vendor Safeway, despite the absence of a sale to driver Morse.

“We disagree. The court in *Hernandez* focused on the meaning of the section 25602.1 language ‘ “causes to be sold” ’ where the defendant’s only acts relating to the sale of alcohol to an obviously intoxicated minor were its rental of a facility to the organizers dispensing the alcohol and the defendant’s acquiescence in the liquor license application. The court ruled the phrase ‘ “causes to be sold” ’ requires an affirmative act directly related to sale of alcohol, which necessarily brings about the resultant action to which the statute is directed, i.e., the sale of alcohol to an obviously intoxicated minor. For example, one who, having control over the alcohol, directs or explicitly authorizes another to sell it to a minor who is clearly drunk falls within the statutory language. On the other hand, merely providing a room where alcoholic beverages will be sold by others is not sufficient to satisfy section 25602.1’s phrase, ‘ “causes [alcohol] to be sold.” ’ (*Hernandez, supra*, 40 Cal.App.4th at p. 1282, 48 Cal.Rptr.2d 229.)

“Applying a similar analysis to the facts presented here, the evidence shows Safeway’s checker Gonzalez sold beer to Spitzer. But nothing about that sale constitutes an affirmative act directly related to a sale to Morse, or an act that *necessarily* would have resulted in Spitzer furnishing or giving that beer to Morse. We conclude there is no evidence that Safeway caused beer to be furnished or given to Morse.

“In sum, because there is no evidence that Safeway ‘furnished’ or ‘cause[d] [alcohol] to be ... furnished or given’ to Morse within the meaning of 25602.1, the trial court correctly granted Safeway summary judgment.” *Ruiz v. Safeway, Inc.* (2012) 209 Cal.App.4th 1455, 1460–1461.

9. While informative, the analysis in *Ruiz* has its limits, however. That case involved the specific analysis of section 25602.1, a statute designed to carve out a narrow exception to the immunity from civil liability created by section 25602(b). Section 25658 is a criminal statute that makes it a misdemeanor to sell, furnish, give, or cause to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years. Its purpose is to prevent the possession and consumption of alcohol by minors by criminalizing behavior that would facilitate the possession and consumption of alcohol by minors.

10. *Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141 is a civil case that resulted from tort actions involving an accident that flowed from the consumption of alcohol by a minor. Some of the stated causes of action involved allegations of indirect furnishing alcohol to the minor by the parents of the minor's friend. These allegations led to an analysis of section 25658 and whether liability can be established in situations where there is not a direct sale or furnishing. *Sagadin* held:

"In order to violate section 25658, there must be some affirmative act of furnishing alcohol. 'The word "furnish" implies some type of affirmative action on the part of the furnisher....' (*Bennett v. Letterly* (1977) 74 Cal.App.3d 901, 905, 141 Cal.Rptr. 682.) Among other things, it means to supply, to give, or to provide. (*Id.*, at pp. 904–905, 141 Cal.Rptr. 682.) Consequently, allegations which do not allege that the defendant 'actually furnished liquor' fail to state a cause of action for negligence under a furnishing statute." *Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141, 1157

11. In finding that the cause of action against the father was supported by the evidence, the *Sagadin* court further held:

"In order to furnish an alcoholic beverage the offender need not pour the drink; it is sufficient if, having control of the alcohol, the defendant takes some affirmative step to supply it to the drinker. By authorizing his son to supply beer to the underage partygoers, Mr. Boal's act was one of misfeasance rather than nonfeasance; his affirmative conduct created the risk. Robert Boal may then be said to have furnished beer." *Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141, 1158

12. Although not controlling precedent, Appeals Board ("Board") decisions can be instructive in analyzing the issues presented. Here, two Board decisions have addressed the question of a licensee's responsibilities in the context of a group purchase of alcoholic beverages. In *Circle K Stores, Inc.* (2004) AB-8209, which involved the purchase of beer by one person who was 21 years old, accompanied and helped by several other people who were not yet 21, the Board said:

“The clerk is the person in control of the sale. He or she must be alert to the substance of the transaction, and cannot ignore circumstances that ought to raise questions in the mind of a reasonably prudent person. When the transaction is in the nature of a group purchase, as the one in this case appeared to be, a clerk must establish that each of those who are involved in the transaction are 21 or over. It is not enough that the person who assembles the various selections and pays for them is 21. A clerk may not close his or her eyes to the reality of what is taking place. The critical fact in this case is not the mere presence of minors, it is their participation in the transaction, all of which took place in front of the clerk. Business and Professions Code section 23001 declares that ‘the subject matter of this division involves in the highest degree the economic, social, and moral well-being and safety of the state and of all its people,’ and mandates that ‘all provisions of this division shall be liberally construed for the accomplishment of these purposes.’ It would be an unduly restrictive reading of the word ‘furnish’ to accept appellant’s contention that there was no furnishing in this case.”

13. The Board reiterated this analysis in *7-Eleven, Inc. and Woods* (2005) AB 8357, in which two minors each carried alcoholic beverages to the counter, while only one of them paid. The Board noted that it was, “reasonable for the ALJ to have viewed these facts as reflecting a transaction in which [the two minors] acted as partners, at least in the eyes of the clerk. They entered the store together, selected alcoholic beverages, took them to the counter, and left the store carrying the alcoholic beverages each had selected from the cooler. The clerk’s statements to Detective Darwent show that he, the clerk, knew the alcoholic beverages were for both Houston and Moriarty, and, possibly, other of their classmates.” Based upon the facts of that case, the Board had no difficulty finding that the Department correctly determined a furnishing to the non-paying minor occurred.

14. In this matter, Galang was expressly aware that the alcohol being paid for by Bermudes was a shared purchase by both Bermudes and Lloyd. Galang first spoke to Lloyd regarding the purchase in recognition that she had a role in purchasing the alcohol. Lloyd told Galang that Bermudes was paying, but she never stated that the alcohol was not for her. Galang described the beer and wine as “their” groceries at the time it was presented for purchase. Galang stated that, after the transaction, “they took their beer and left” which reiterated that she understood the alcohol purchase was a joint purchase by Lloyd and Bermudes for their use even though Bermudes paid. The purchase was for two different types of alcoholic beverages and the amount was consistent with consumption by more than one person which further reinforced that this was a joint purchase. As such, the facts of this case are dissimilar from *Ruiz* where Morse, the minor who was present, was only established to be a bystander to the purchase made by Spitzer. This matter more closely tracks the circumstances in *Sagadin*. Galang was aware Bermudes was sharing the purchase with Lloyd. It was a joint purchase. She had the authority to have Lloyd present identification and then void the transaction to prevent a minor from being furnished alcohol. This was the Respondent’s

duty, under the circumstances. The fact that Galang was not trained to do so by the Respondent is no defense when the circumstances compelled the Respondent to prevent the sale to Lloyd and Bermudes.

15. In its written argument upon review of the Proposed Decision, Respondent advanced two additional arguments in support of its position that the accusation should be dismissed. First, Respondent contends that it has established the defense afforded by section 25660 (reasonable reliance on bona fide identification). Second, Respondent claims that the “requirement” that a licensee verify the age of all members of a group shopping together is an underground regulation in violation of the Administrative Procedure Act.

16. Respondent asserts that by relying on the Bermudes’s identification, the person who actually paid for the alcohol and who was over the age of 21, Galang thus reasonably relied on bona fide identification as to Lloyd. However, it is unclear how this theory applies here since it is based upon the sale itself being made to a person over the age of 21. In that respect there was no violation of law and the defense has no application. If, however, it is intended to support the position that the defense applies to the furnishing of alcohol to Lloyd, the minor, then it cannot stand because the affirmative defense applies only in connection with reasonable reliance on bona fide identification of the person to whom the alcohol was sold or furnished, which did not occur here. Lloyd’s identification was not checked at all, thus Respondent has failed to establish the affirmative defense.

17. Respondent also contends that, “no current law, rule or regulation requires checkers to card all members of a group shopping together. As such, the ALJ’s Proposed Decision on Count Two amounted to an enforceable ‘underground regulation’ in violation of the APA.”² Respondent’s argument fails.

18. First, Respondent provides no analysis of the claim that this decision constitutes an underground regulation. As such, Respondent has waived this issue.

19. Second, even if considered on the merits, this contention fails. The Department has not determined that licensees must check the identification of all members of a group merely because they are shopping together. Rather, each case must be evaluated the facts at hand. Here, it is determined that the Galang was aware that the purchase of alcohol was for both Bermudes and Lloyd, who both carried alcohol to the checkout and placed it in front of her. While only one of them paid for the alcohol, this does not negate the fact that the purchase

² The reason why Respondent asserts this argument only in connection with Count Two is because the ALJ considered both counts to really be a single count as they related to the identical transaction with Count One referring to “beer” and Count Two referring to “wine.” Further, it is assumed that Respondent made a typographical error in claiming that the ALJ’s determination is an “enforceable ‘underground regulation’.” Of course, if it is “enforceable” then Respondent’s argument must fail. However, underground regulations, by their nature, are not enforceable.

was clearly for the two of them. Merely “shopping together” as a group is not the triggering factor. However, when the facts of an individual case support the conclusion that the transaction is a group purchase, then the licensee has an obligation to ascertain that all members of the purchasing group are of age. As the Court in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, stated, “Interpretations of statute that arise in the course of case-specific adjudications are not regulations subject to the rulemaking procedures of the APA.” (*Id.*, at p. 571.)

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

PENALTY

While there are two counts in the Accusation, it is noted that this case factually involves only one sale of alcoholic beverages being made. The same conduct is reflected in each count with the only difference being that the wine purchased is one count and the beer purchased is the other count. The wine and beer were purchased in one transaction. As a result, for purposes of penalty, this case is being treated as a single sustained allegation of violating section 25658.

The Department recommended that the Respondent’s license be suspended for the standard penalty of 25 days because of the prior discipline. The Department asserts several aggravating factors are present in this case. Specifically, the Department points to the fact that the clerk failed to check identification or ask any age-related questions of the non-paying minor, that Respondent’s training did not include information regarding group purchases (at least prior to this incident), and that despite its proximity to San Francisco State College and the fact that the store is frequented by college students the store’s policy was to only check the identification of the purchaser regardless of the youthful appearance of any companions.

In contrast, Respondent argued that the Accusations were not proven, but that if discipline was warranted, a stayed penalty would be appropriate given several mitigating factors, including positive actions by the Licensee to correct the problem, the track record of employee training, and the cooperation of the licensee in the investigation. In addition, Respondent noted that there was no evidence of knowledge or misconduct by management, that the store is not located in a high crime area, that there was cooperation in the investigation, that the minor wore makeup and jewelry and was sophisticated, that Respondent has demonstrated a commitment to safety and compliance, and no notice was provided to Respondent that its clerks should check the identification of all patrons in a group even if they are not making a purchase.

Significant evidence was presented regarding the Respondent's policies to prevent sales of alcoholic beverages to underage individuals. Employees are trained in alcohol sales and these policies appear to be enforced through repeated training and the use of secret shopper checks to ensure the training is applied in practice. The Respondent has been licensed since August 2009 and this is their second incident. It is noted that in the prior discipline and in this case, the cashiers did check for identification as they were trained.

The prior incident revealed a flaw in training that was addressed by requiring that identifications be removed from wallets and scrutinized. In this incident, the cashier followed a flawed policy that was revised after the incident occurred. In both incidents, the Respondent improved its training protocols to respond to flaws that allowed for underage sales to occur.

While Respondent has identified several valid mitigating factors, this is the second violation of section 25658 within less than two years. Moreover, despite its protestations of how seriously it takes its responsibilities to ensure alcohol is not sold or furnished to minors, Respondent continues to assert that it is "not reasonable for the Department to expect checkers to ascertain purchasers' intent about their alcohol purchasers; nor is it reasonable to expect checkers to ask for identification from all persons shopping in a group, regardless of whether they are making a purchase." However, this is a perfectly reasonable expectation that has been long established as such by legal precedent cited above. When the circumstances clearly indicate that alcohol is being purchased jointly by several individuals, some of whom may well be under the legal age the Respondent had a legal duty to void the sale. It begs the question of how serious Respondent really is in preventing sales or furnishing of alcohol to minors when all it seems to do is react to violations rather than proactively undertake measures to prevent minors obtaining alcohol from this store. Respondent's reactive attitude of only taking steps to better a flawed training policy after the licensee is caught by the Department selling or furnishing to minors largely blunts the weight of the mitigating evidence presented by Respondent on the record.

Upon consideration of all the factors in aggravation and mitigation, on balance it appears that some minimal mitigation is warranted here. The penalty recommended herein complies with rule 144.

ORDER

The Respondents' off-sale general license is hereby suspended for a period of 20 days.

Sacramento, California

Dated: April 30, 2020



Jacob A. Appelsmith
Director

Pursuant to Government Code section 11521(a), any party may petition for reconsideration of this decision. The Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or on the effective date of the decision, whichever is earlier.

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9, of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

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

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

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

OFF SALE GENERAL - LICENSE

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

CONCORD DISTRICT OFFICE

File: 21-475217

Reg: 17086008

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on April 4, 2018. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

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

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

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

Sacramento, California

Dated: April 23, 2018

RECEIVED

APR 23 2018

**Alcoholic Beverage Control
Office of Legal Services**



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

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

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

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

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

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

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

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

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

LEGAL BASIS OF DECISION

1. Article XX, section 22 of the California Constitution and Business and Professions section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.
2. Business and Professions Code Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.
3. Business and Professions Code Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.
4. Business and Professions Code Section 25660 provides that:
 - (a) Bona fide evidence of majority and identity of the person is any of the following:
 - (1) A document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a valid motor vehicle operator's license, that contains the name, date of birth, description, and picture of the person.
 - (2) A valid passport issued by the United States or by a foreign government.

(3) A valid identification card issued to a member of the Armed Forces that includes a date of birth and a picture of the person.

(b) Proof that the defendant-licensee, or his or her employee or agent, demanded, was shown, and acted in reliance upon bona fide evidence in any transaction, employment, use, or permission forbidden by Section 25658, 25663, or 25665 shall be a defense to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon.

DETERMINATION OF ISSUES

1. Cause for suspension or revocation of Respondent's license does exist under Article XX, section 22 of the California State Constitution and Business and Professions Code sections 24200(a) and (b) because on May 4, 2017, Respondent's employee, Riley Michael Boulger, inside the Licensed Premises, sold an alcoholic beverage to Julia Francis Stafford, a person under the age of 21, in violation of Business and Professions Code section 25658(a).
2. The evidence established Respondent's clerk sold an alcoholic beverage to the minor during the normal course of Respondent's business. Further, the evidence established that the clerk made the sale after asking for and viewing the decoy's false South Carolina Driver's License, Exhibit 2.
3. The evidence established the minor appeared youthful and as someone who just might or might not be 21 years old.
4. Respondent asserted that under section 25660, a defense to the accusation was proven because the clerk asked for, inspected, and reasonably relied on the minor's false identification at the time he sold her the beer.
5. Generally, section 25660 provides a defense to a licensee or person accused of selling an alcoholic beverage to a minor if the person asked for and reasonably relied on the identification provided by the minor-customer.
6. However, section 25660 is an affirmative defense, so a licensee has the burden of establishing all of its elements, namely, that evidence of majority and identity was demanded by the seller, shown by the buyer, and reasonably relied on by the seller.⁹ To provide a defense, reliance on the document must be reasonable, that is, it was based on due

⁹ *Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control*, 261 Cal. App. 2d 181, 189, 67 Cal. Rptr. 734, 739 (1968); 27 Ops. Atty. Gen. 233, 236 (1956).

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

A licensee or his or her employee is not entitled to rely upon an identification if it does not appear to be a bona fide government-issued identification or replica thereof if the appearance of the presenter of the identification demonstrates above mere suspicion that the holder is not the legal owner of the identification.¹¹ The defense is also inapplicable if the appearance of the presenter does not match the description on the identification.¹² Thus, reasonable reliance cannot be established unless the appearance of the person presenting identification indicates that he or she could be 21 years of age and the seller makes a reasonable inspection of the false identification.

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

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

¹⁰ *Dept. of Alcoholic Beverage Control v. Alcoholic Control Appeals Bd. (Masani)*, 118 Cal. App. 4th 1429, 1444-45, 13 Cal. Rptr. 3d 826, 837-38 (2004).

¹¹ *Masani*, 118 Cal. App. 4th at 1445-46, 13 Cal. Rptr. 3d at 838; *5501 Hollywood, Inc. v. Department of Alcoholic Beverage Control*, 155 Cal. App. 2d 748, 753, 318 P.2d 820, 823-24 (1957); *Keane v. Reilly*, 130 Cal. App. 2d 407, 411-12, 279 P.2d 152, 155 (1955); *Conti v. State Board of Equalization*, 113 Cal. App. 2d 465, 466-67, 248 P.2d 31, 32 (1952).

¹² *5501 Hollywood*, 155 Cal. App. 2d at 751-54, 318 P.2d at 822-24; *Keane*, 130 Cal. App. 2d at 411-12, 279 P.2d at 155.

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

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

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

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

¹⁴ This was similar to the clerk in *Dept. of Alcoholic Beverage Control v. Alcoholic Control Appeals Bd. (Masani)*, 118 Cal. App. 4th 1429, 1444-45, 13 Cal. Rptr. 3d 826, 837-38 (2004) who also missed deficiencies in the false identification because he only looked at it when positioned within the minor's wallet.

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

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

PENALTY

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

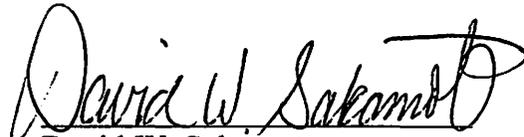
¹⁶ Up to that point, Respondent had not instructed its clerks to hold and feel identifications as part of checking their authenticity, which they have since been instructed to do.

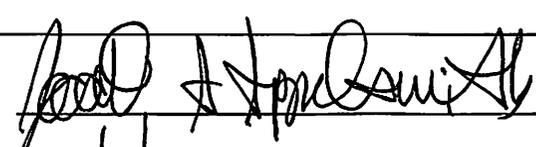
ORDER

Count 1 of the accusation is sustained.

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

Dated: March 5, 2018


David W. Sakamoto
Administrative Law Judge

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