

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

AB-9958

File: 21-520417; Reg: 22091883

WAYEL BACHIR DIAB,
dba Sunrise Spirits and Food Co.
25862 Tournament Road
Santa Clarita, CA 91355-2323,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: April 14, 2023
Telephonic

ISSUED APRIL 17, 2023

Appearances: *Appellant:* Jeffrey S. Weiss, as counsel for Wayel Bachir Diab,

Respondent: Bryan D. Rouse, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

Wayel Bachir Diab, doing business as Sunrise Spirits and Food Co. (appellant), appeals from a decision of the Department of Alcoholic Beverage Control (Department)¹ suspending his license for 10 days (with all 10 days stayed for a period of one year, provided no further cause for discipline arises during that period) because his employee

¹ The decision of the Department under Government Code section 11517(c), dated December 22, 2022, is set forth in the appendix. Section 11517(c) permits the Department to reject the proposed decision, as it did here, and decide the case upon the record, including the transcript of the hearing.

sold alcohol to a person under the age of 21, in violation of Business and Professions Code section 25658, subdivision (a).²

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on August 10, 2012. There is no record of prior departmental discipline against the license.

On February 9, 2022, the Department instituted a single-count accusation against appellant charging that on July 8, 2021, appellant's employee sold alcohol to an individual under the age of 21, in violation of section 25658(a).

At the administrative hearing held on April 28, 2022, documentary evidence was received and testimony concerning the violation charged was presented by Department Agents Jairo Perez and Oscar Zapata. The clerk, Mousa Bshara (the clerk), who sold the alcohol to the minor, also testified. The minor was not called as a witness.

Testimony established that on July 8, 2021, Department agents were parked outside the licensed premises when they observed Daniella Silva (the minor) pacing and talking on her phone. Subsequently, she entered the premises and selected a bottle of wine. Agent Zapata followed her into the premises and observed that she placed the bottle on the counter before exiting the premises. Agent Perez observed that the minor went to her car to get something, then re-entered the licensed premises and purchased the wine. The clerk did not ask to see her identification before making the sale.

The agents contacted the minor and asked her for her birth date. She gave them a date which, if true, would have made her 23 years old. The agents verified her

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

identity with the California Highway Patrol and determined that her correct date of birth³ made her 20 years old — one month shy of turning 21. The agents found a purported Washington identification (ID) in the minor's possession, showing the same false birth date she given them earlier. The minor was unwilling to tell the agents whether she had used the ID at the licensed premises, when she first obtained it, or which clerk sold her the wine. The agents asked her to pull up a list of recent purchases on her phone, and the most recent one was for \$22.66 at the licensed premises. (Exh. 5.)

The agents spoke to the clerk, who stated that he was familiar with the minor and that he had seen her ID on previous visits. He remembered that her birth year was 1998, but could not remember what state the ID was from. The clerk testified that in the six months he had worked at the licensed premises, the minor had purchased alcohol from him five or six times. He also recalled that the physical descriptors on the ID matched the minor's appearance. And, because he had checked her license multiple times in the past, he did not ask for it again on this occasion. The clerk did not, however, identify the Washington ID in evidence as the one he had seen in the past.

On July 5, 2022, the administrative law judge (ALJ) issued a proposed decision, finding that the licensee had established a defense under section 25660 and recommending that the accusation be dismissed.

The Department rejected the proposed decision on August 26, 2022, and issued its own decision under Government Code section 11517(c) on December 22, 2022 — sustaining the accusation, rejecting the ALJ's finding that an affirmative defense had been established, and instituting a penalty of 10-days' suspension (with the penalty

³ For privacy reasons, we have redacted the minor's actual birth date in the appendix and omitted it in this opinion.

conditionally stayed for a period of one year, dependent upon discipline-free operation during that time).

Appellant then filed a timely appeal arguing that the Department erred as a matter of law in determining that appellant failed to establish an affirmative defense.

DISCUSSION

Appellant contends that he presented an affirmative defense under section 25660, by establishing that the clerk had previously and reasonably relied on the minor's fake identification, and that the Department erred when it failed to adopt the ALJ's proposed decision reaching that same conclusion.

As an initial matter, it should be noted that when a case is decided under section 11517(c)(2), the Appeals Board reviews only the Department's decision, *not* the ALJ's proposed (but rejected) decision. Government Code section 11517, subdivision (c)(2), provides that the Department may adopt a proposed decision in its entirety, adopt it with some modification, or reject it as it did here. If the Department rejects the decision, it may refer the matter back to the ALJ to take additional evidence or it may decide the matter itself, making its own findings, determinations, and order as it did here. When the Department issues its own decision, the rejected proposed decision "serves no identifiable function in the administrative adjudication process or, for that matter, in connection with the judicial review thereof." (*Compton v. Bd. of Trustees* (1975) 49 Cal.App.3d 150, 158 [122 Cal.Rptr. 493].)

Therefore, the Board does not ask whether the Department's decision is a better decision than the ALJ's, but rather, whether the Department's inferences and conclusions, standing alone, are reasonable, and whether its findings are supported by substantial evidence. The existence of a proposed but rejected decision reaching a

different conclusion does not function as a evidentiary presumption bolstering an appellant's case.

An affirmative defense to the sale of alcohol to a minor is found in section 25660(3)(b). Section 25660 provides:

(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.

(Bus. and Prof. Code § 25660, emphasis added.)

Certain principles guide our review of the Department's decision. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

Section 25660 establishes an affirmative defense, and the burden of proof is on the party asserting it. (*Farah v. Alcoholic Bev. Control Appeals Bd.* (1958) 159 Cal.App.2d 335, 338-339 [324 P.2d 98] (*Farah*).) Section 25660, as an exception to the general prohibition against sales to minors, must be narrowly construed. (*Lacabanne Properties, Inc. v. Alcoholic Bev. Control Appeals Board* (1968) 261 Cal.App.2d 181, 189 [67 Cal.Rptr. 734] (*Lacabanne*).)

In *Masani*, the court wrote:

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

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

The case law regarding section 25660 makes clear that to provide a defense, reliance on the document must be reasonable, that is, the result of an exercise of due diligence. (See, e.g., *Lacabanne, supra*; *5501 Hollywood v. Department of Alcoholic Beverage Control* (1957) 155 Cal.App.2d 748, 753-754 [318 P.2d 820] (*5501 Hollywood*).) A licensee, or a licensee's agent or employee, must exercise the caution that would be shown by a reasonable and prudent person in the same or similar circumstances. (*Lacabanne, supra*; *Farah, supra*; *5501 Hollywood, supra*.)

Reasonable reliance cannot be established unless the appearance of the person presenting identification indicates that he or she could be 21 years of age *and* the seller

makes a reasonable inspection of the identification offered. (*5501 Hollywood, supra.*) Thus, if the appearance of the individual presenting the identification is such that they could not be 21 years of age, then the defense fails regardless of any subsequent inspection of the fake identification.

While a licensee may rely on a prior showing of evidence of majority, the same reasonable reliance standard applies. (See *Lacabanne, supra*, at p. 190.) Between 1955 and 1959, section 25660 required that identification be shown immediately prior to the purchase of alcohol. The words “immediately prior” were deleted, however, in a 1959 statutory amendment. The California Attorney General opined:

[I]t must be concluded that by the elimination of the words “immediately prior” from section 25660 in the 1959 amendment, the time requirement for the presentation of documentary evidence has been altered. Thus the evidence of majority and identity need no longer be shown immediately prior to the alleged offense to constitute a valid defense. *However, it is clear that a defense is not made out unless it is proved that the required documentary evidence was demanded, that it was shown, and that the defendant-licensee, his agent or employee, was acting in good faith in reliance upon that prior showing at the time of the alleged violation.*

(36 *Ops. Cal. Atty. Gen.* 124, 126 (1960), emphasis added; see also *Lacabanne, supra*, at p. 190 [citing Attorney General opinion]; *7-Eleven, Inc.* (2011) AB-9081, at pp. 11-12 [holding section 25660 defense was proved where “minor was memorable and well known to appellants,” the clerk had “reasonably relied on the false identification on multiple prior occasions,” and “the actual fake ID was available for examination” as evidence].)

Whether or not a licensee, or their agent or employee, has made a reasonable inspection of an ID to determine that it is bona fide is a question of fact (*Masani, supra*; *5501 Hollywood, supra*), and this Board is obligated to defer to the Department’s factual

determinations. The findings regarding the appellants' section 25660 defense will be upheld as long as they are supported by substantial evidence.

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

In the decision, the Department found as follows:

2. The Respondent argued that he established a defense under 25660 on the basis that the identification presented and examined at hearing

appeared to be a real Washington driver license. The Respondent is incorrect. While the fake identification is extremely good and has a number of the security features of valid Washington identifications, **the Respondent did not establish that the fake Washington identification in evidence was in fact the same identification Bshara claimed to have previously viewed.** Indeed, the Respondent failed to establish that minor Silva even possessed the fake Washington identification on any of the prior occasions that Bshara claimed to have viewed her identification. Other than stating that the identification he claims to have previously viewed was from a state other than California, Bshara could not recall the state from which it was purportedly issued.

(Decision at p. 5, ¶ 2, emphasis added.)

In this case, the evidence showed that the minor was 20 years and 11 months old on the date of the incident (Decision at p. 2, ¶ 8), and appellant did not present any evidence to the contrary. Accordingly, there is substantial evidence to establish that appellant's clerk sold an alcoholic beverage to an individual under the age of 21. It was properly appellant's burden to establish a defense under section 25660.

In finding that appellant did not establish an affirmative defense under section 25660, the Department determined that there was a failure of proof that the licensee, or his employee, demanded, was shown, and acted in reliance upon bona fide evidence as required by section 25660. In short, while reliance upon the fake Washington ID may have been reasonable — *if it had been proved that the clerk demanded and relied upon that same ID* — the decision determined that the necessary proof of demand and reliance was lacking. This is a question of fact, not of law. Therefore we do not even reach the question of whether reliance was reasonable, without proof that the ID was shown.

We acknowledge that the evidence shows the fake ID in evidence was noticeably sophisticated, that the Department agents possessed significant training and

experience in identifying the minor problems with the fake ID, and that such expertise is not typically found in the average employee.

However, the issue before us in this case is *not* whether reliance on this particular fake ID was reasonable, as it so often is in section 25660 cases. Instead, the issue is whether the record supports the Department's conclusion that the record did not support a finding that this clerk had indeed relied upon *this particular fake ID* in the past. We have examined the entire record, and find that substantial evidence supports the Department's conclusion that appellant failed to establish this affirmative defense.

Given the factual finding in the decision that there was a failure of proof that the licensee's employee demanded, was shown, and acted in reliance upon what appeared to be a bona fide ID — as required to establish a defense under section 25660 — even if a contrary conclusion would have been equally or more reasonable, this Board cannot impose its independent judgement to reweigh the evidence and reach a different result.

ORDER

The decision of the Department is affirmed.⁴

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

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

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 *et seq.* Service on the Board pursuant to California Rules of Court (Rule 8.25) should be directed to: 400 R Street, Ste. 320, Sacramento, CA 95811 and/or electronically to: abcboard@abcappeals.ca.gov.

APPENDIX

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

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

Wayel Bachir Diab
dba Sunrise Spirits and Food Co.
25862 Tournament Rd.
Santa Clarita, California 91355-2323

Licensee(s).

File No.: 21-520417

Reg. No.: 22091883

RECEIVED

DEC 28 2022

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 December 22, 2022, for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held on April 28, 2022, before Administrative Law Judge Matthew G. Ainley, and the written arguments of the parties, and good cause appearing, the following decision is hereby adopted:

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter by videoconference on April 28, 2022.

Bryan D. Rouse, Attorney, represented the Department of Alcoholic Beverage Control.

Jeffrey S. Weiss, attorney-at-law, represented respondent Wayel Bachir Diab, who was present.

The Department seeks to discipline the Respondent's license on the grounds that, on or about July 8, 2021, the Respondents, through their agent or employee, sold, furnished, or gave alcoholic beverages to Daniella Silva, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. At the conclusion of the hearing, the parties were provided the opportunity to submit briefs on the issue of whether the minor was required to appear in light of

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

the recent amendments to section 25666. The Department submitted its brief on May 6, 2022. (Exhibit 12.) On May 11, 2022, the Respondent submitted its Withdrawal of Objection to the Department Not Producing the Minor at Hearing. (Exhibit A.) The record was closed and the matter submitted for decision on that date. The Director rejected the proposed decision prepared by the Administrative Law Judge on August 30, 2022, pursuant to Government Code section 11517(c).

FINDINGS OF FACT

1. The Department filed the accusation on February 9, 2022.
2. The Department issued a type 21, off-sale general license to the Respondent for the above-described location on August 10, 2012 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondent's license.
4. Daniella Silva was born on **XXXXXXXXXX**. (Exhibit 8.) On July 8, 2021, she was 20 years and 11 months old.
5. On July 8, 2021, various agents were parked outside the Licensed Premises, including Agent J. Perez and Agent O. Zapata. Agent Perez noticed Silva on her phone, pacing. Silva subsequently entered the Licensed Premises. Silva obtained a bottle of wine, which she brought to the counter. Agent Zapata, who followed Silva inside, saw Silva place the bottle of wine down on the counter, then exit.
6. Agent Perez observed Silva go to her car, retrieve something, then re-enter the Licensed Premises. Silva walked to the register and paid for the wine. The clerk, Mousa Bshara, did not ask to see any identification.
7. The agents contacted Silva. When asked, she indicated that she was born on **XXXXXXXXXX**. The agents subsequently verified her identity through CHP dispatch and determined that she was actually born on **XXXXXXXXXX**.
8. The agents located a fake Washington identification bearing Silva's name and photo. It listed her date of birth as **XXXXXXXXXX**. (Exhibits 4 & 11.) Silva was unwilling to say if she used the fake identification at the Licensed Premises or not; nor did she give any information as to when she obtained the fake Washington identification. She was similarly unwilling to identify the clerk who sold the wine to her. The agents had her pull up a list of recent purchases on her phone. The most recent purchase was for \$22.66 at the Licensed Premises. They took a photo of it. (Exhibit 5.) They also took photos of her and the wine. (Exhibits 2-3.)

9. Agent Zapata contacted the Bshara. Bshara stated that he knew Silva and that he had previously seen her identification. He also stated that the identification he had seen indicated that she had been born in 1998. However, during questioning following the sale, Bshara was not sure whether the identification he claims to have previously seen was from California or from another state.

10. Bshara testified that he had been employed at the Licensed Premises since August 2020. He first saw Silva approximately six months earlier. She had purchased alcohol from him on five or six prior occasions. The first time she purchased alcohol, he asked for her identification. The identification she showed him appeared to be accurate. The photo and physical descriptors matched Silva. Because he had seen the identification four or five times in the past, he did not ask to see identification in connection with the purchase of the wine on July 8, 2021. Bshara did not testify that the fake Washington identification seized was the identification that he claimed to have viewed on these prior occasions.

11. Bshara further testified that he sees a lot of out-of-state identifications because the Licensed Premises is located near College of the Canyons. CalArts is also nearby. However, Bshara testified that he did not have any particular awareness of what different state identifications looked like or about any specific security features that may be contained within such identifications.

12. Agent Zapata subsequently examined the fake identification in the office using the State of Washington website. The fake identification contains Silva's photo, and the physical descriptors match her appearance. The identification has a number of the security features which a valid Washington identification should have, including color-shifting ink and microprinting. He could only find one flaw-the numbers on the left side of the photo were not in a straight line (the number "20" was slightly offset from the rest of the numbers).

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

LEGAL BASIS OF DECISION

1. Article XX, section 22, of the California Constitution and Business and Professions section 24200, subdivision (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, subdivision (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, subdivision (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.

The defense afforded by this section is an affirmative defense. As such, the licensee has the burden of establishing all of its elements, namely, that evidence of majority and identity was demanded, shown, and acted on as prescribed.² This section applies to identifications actually issued by government agencies as well as those which purport to be.³ A licensee or his or her employee is not entitled to rely upon an identification if it does not appear to be a bona fide government-issued identification or if the personal appearance of the holder of the identification demonstrates above mere suspicion that the holder is not the legal owner of the identification.⁴

² *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).

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

⁴ *Masani*, 118 Cal. App. 4th at 1445-46, 13 Cal. Rptr. 3d at 838; *5501 Hollywood, Inc. v. Department of Alcoholic Beverage Control*, 155 Cal. App. 2d 748, 753, 318 P.2d 820, 823-24 (1957); *Keane v. Reilly*, 130 Cal.

The defense offered by section 25660 is not established if the appearance of the minor does not match the description on the identification.⁵

DETERMINATION OF ISSUES

1. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that, on July 8, 2021, the Respondent's employee, Mousa Bshara, sold an alcoholic beverage to Daniella Silva, a person under the age of 21, in violation of section 25658(a). (Findings of Fact ¶¶ 4-12.)

2. The Respondent argued that he established a defense under 25660 on the basis that the identification presented and examined at hearing appeared to be a real Washington driver license. The Respondent is incorrect. While the fake identification is extremely good and has a number of the security features of valid Washington identifications, the Respondent did not establish that the fake Washington identification in evidence was in fact the same identification Bshara claimed to have previously viewed. Indeed, the Respondent failed to establish that minor Silva even possessed the fake Washington identification on any of the prior occasions that Bshara claimed to have viewed her identification. Other than stating that the identification he claims to have previously viewed was from a state other than California, Bshara could not recall the state from which it was purportedly issued.

3. The Department argued that the Respondent failed to meet its section 25660 burden since Bshara did not inspect the identification at or about the time of the sale and that, even if a prior showing of identification is acceptable, the Respondent failed to establish that any claimed prior inspection of the identification purportedly presented by minor Silva was reasonably diligent.

4. Because the Respondent failed to establish that the fake Washington identification in evidence was the actual identification Bshara claims to have previously viewed, the Respondent cannot satisfy its burden under section 25660. However, even if it could be reasonably concluded that Bshara did previously view the fake Washington identification, the Respondent has nonetheless failed to meet its burden of establishing the affirmative defense afforded by section 25660 both because the claimed prior showing of identification here does not comport with the requirements of section 25660 and because even if it did, there was insufficient evidence to establish that Bshara was reasonably diligent in his inspection of such identification.

App. 2d 407, 411-12, 279 P.2d 152, 155 (1955); *Conti v. State Board of Equalization*, 113 Cal. App. 2d 465, 466-67, 248 P.2d 31, 32 (1952).

⁵ *5501 Hollywood*, 155 Cal. App. 2d at 751-54, 318 P.2d at 822-24; *Keane*, 130 Cal. App. 2d at 411-12, 279 P.2d at 155 (construing section 61.2(b), the predecessor to section 25660).

5. In 1959, section 25660 was amended to remove a requirement that the checking of the identification occur contemporaneously with or immediately prior to the unlawful sale at issue for a defense under section 25660 to apply. The California Attorney General, in its opinion at 36 Ops. Cal. Atty. Gen. 124 (1960), opined that section 25660 no longer required that the checking of a bona fide identification occur immediately prior to the selling or furnishing of the alcoholic beverage at issue for a defense under section 25660. That conclusion was based on the Legislature's amendment deleting that very time-based requirement, "immediately prior", from the statute's text. The Attorney General's opinion concluded by stating: "Thus, the evidence of majority and identity need no longer to be shown immediately prior to the alleged offense to constitute a valid defense." (*Id.* at p. 126; underlining in original.)

6. As to the weight or significance to be given a formal opinion of the Attorney General, in *Spring Valley Lake Assn. v. City of Victorville* (2016) 248 Cal. App. 4th 91,105, the Court stated:

While not binding, an opinion of the Attorney General is entitled to considerable weight. (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 716, th. 14.) Absent controlling authority, an Attorney General opinion as to the construction of a statute ""is persuasive because we presume that the Legislature was cognizant of the Attorney General's construction of [the statute] and would have taken corrective action if it disagreed with that construction."" (*Ibid.*; see *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1013; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 103-104.)

7. The Attorney General Opinion was discussed by the Court of Appeal in *Lacabanne Properties, Inc. v. Dept. of Alcoholic Beverage Control* (1968) 261 Cal.App.2d 181. That case involved the sale of alcohol to a minor in an on-sale premises. The issue was whether the section 25660 defense applies when a bartender relies upon the demand and inspection of identification by a doorperson at the time the customer enters the premises. In considering this issue, the Court stated (at pp. 189-190), "The cases interpreting section 25660, Business and Professions Code, have generally set forth three tests by which to measure the conduct of the licensee in determining whether there has been a compliance with the provisions of the section. [First, the licensee who makes a diligent inspection of the documentary evidence of majority and identity offered by the customer **at or about the time of the sale** is entitled to rely upon its apparent genuineness. [Citations.] [Second, a licensee must exercise the caution which would be shown by a reasonable and prudent person in the same or similar circumstances. [Citation.] [il] Third, a licensee must make the inspection of the documentary evidence and his appraisal of the physical appearance of the customer 'immediately prior' to the sale. [Citation.]" (Quoting from *Farah v. Alcoholic Beverage etc. Appeals Board*, (1958) 59 Cal.App.2d 335, 339; emphasis added.) With respect to the Attorney General Opinion, the Court observed that, "The

opinion does not discuss whether the use of the phrase 'in any transaction etc.' requires the licensee to prove that the evidence was demanded and shown in connection with the particular transaction which is the basis of the proceedings against him." (*Lacabanne, supra*, 261 Cal.App.2d 181, 190.)

8. In considering what may constitute the "transaction" for purposes of section 25660, the Court held that, "The fact that permitting the entry and permitting the consumption may be separate offenses (see *Harris v. Alcoholic Beverage etc. Appeals Board, supra*, 197 Cal.App.2d 182, 187) does not necessarily mean that they are separate transactions when, as here, the entry is immediately followed by the sale, furnishing and consumption of the alcoholic beverage. If there is no duty to make a second demand before serving the minor, the fact that the second employee made an inadequate inquiry should not defeat the right of the licensee to rely on the original determination that the patron had shown the evidence required by law." (*Id.*, at p. 191.)

9. While *Lacabanne* involved an on-sale transaction, similar principles may be readily applied to the application of section 25660 in connection with off-sale businesses. The Court essentially determined that "transaction" means more than an individual sale or service of alcohol and can encompass the totality of the time during which a minor may be inside the licensed premises and interacting with the licensee and employees or agents. This is a significant consideration here for two reasons. First, the Court considered that the "any transaction" language of the statute has continuing relevance and application notwithstanding the amendment removing the "immediately prior to" requirement. Second, it noted that when looking at what reasonably constitutes the "transaction," there must be some rational temporal nexus to the evaluation of identification and the actual sale or service of alcohol.

10. The C Appeals Board addressed a similar factual situation as that presented in the instant case in *7 Eleven, Inc. v. Department of Alcoholic Beverage Control* (2011) AB-9081, where the false identification was displayed by the minor on prior occasions at the involved licensed premises. It concluded a defense under section 25660 could be based upon an inspection of a false identification that was done on a date or dates prior to the date of the violation at issue. While Appeals Board opinions are not precedential, they can provide guidance in factually similar cases. In holding that the section 25660 defense was established, the Appeals Board concluded by observing that, "Having found that the clerk reasonably relied on the false identification on multiple prior occasions, and under the facts in this case, where the minor was memorable and well-known to appellants, and the actual fake ID was available for examination, we believe a defense was established." It is the Department's position that, while the end result in that case may have been appropriate (as explained further below), the conclusion that the affirmative defense had been established is contrary to the plain language of section 25660 and the rationale of the Court of Appeal in *Lacabanne* because it does not consider the relationship between a prior showing and the transaction at issue. If a prior showing of identification on any

prior occasion is acceptable, then the statutory requirement that identification be demanded, shown, and relied upon in any transaction has no relevance.

11. In this matter, Silva's false driver license had the basic required objective elements set forth in section 25660. It did not, on its face, appear to be an obviously fraudulent or counterfeit driver license. While Bshara claims to have relied on his own previous inspections of an identification when he later sold alcoholic beverages to Silva on July 8, 2021, without again requesting or reviewing her identification, as stated above the Respondent failed to establish that the fake Washington identification in evidence was the same identification Bshara claims to have viewed. Moreover, there is no evidence in the record as to when Bshara claims to have previously viewed Silva's identification. As such, even if there was a prior demand and inspection of identification, there is no reasonable temporal nexus to the transaction at issue.

12. In addition, the Respondent failed to establish that Bshara was reasonably diligent in his inspection of Silva's identification on any prior occasion. The only evidence in the record is Bshara's testimony as to how he would typically view an identification-namely, he would look at the picture, the height, the weight, and the birth date. He testified that he does nothing more than evaluate "the basics" and had no familiarity with Washington identifications, let alone any particular security features, nor did he utilize any resources to authenticate out-of-state identifications. This is simply not adequate to establish a "diligent inspection" (see, *Lacabanne, supra*) of any identification, let alone an out-of-state identification in an area known to be frequented by out-of-state students attending the nearby college and CalArts.

13. Even if the Board's reasoning in the *7 Eleven* matter is applied in this case, the Respondent has failed to meet its burden of proof as to two of the three criteria required for the section 25660 affirmative defense to apply.

14. Notwithstanding the failure to establish an affirmative defense, it may still be reasonable to consider the totality of the circumstances in determining what level of discipline (or whether any discipline at all) is warranted. In cases such as this in which it is asserted that there was a reasonable inspection of a bona fide identification on prior occasions, if a licensee presents sufficient evidence to show that it was reasonable to believe the minor was in fact over the age of 21 based upon those prior inspections, it may be more appropriate, depending upon all of the circumstances, to consider such evidence as possible mitigation in determining the appropriate level of discipline. In the instant case, when looking at the totality of circumstances surrounding the claimed prior viewing of Silva's identification, no mitigation is warranted for all the reasons previously discussed.

15. However, some mitigation of the discipline is warranted given that the Respondent has been licensed for over eight years without discipline. The penalty below is reasonable in light of all considerations.

ORDER

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

Sacramento, California

Dated: December 22, 2022



Eric Hirata
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.