ISSUED MARCH 11, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

HO MIN KANG and HO IN KANG dba American Liquor & Market 18027 Magnolia Avenue Fountain Valley, CA 92708, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6676 File: 21-302573 Reg: 96035480 Administrative Law Judge at the Dept. Hearing Sonny Lo Date and Place of the Appeals Board Hearing January 8, 1997 Los Angeles, CA

Ho Min Kang and Ho In Kang, doing business as American Liquor & Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended appellants' license for ten days for having sold alcoholic beverages to an 18-year-old customer, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25568, subdivision (a).

[1] The decision of the Department, dated June 13, 1996, is set forth in the appendix.

Appearances on appeal include appellants Ho Min Kang and Ho In Kang, appearing through their counsel, Sunil Lewis Vatave; and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued in March 1995. Thereafter, the Department instituted an accusation alleging that on December 21, 1995, appellant Ho Min Kang (hereinafter "Kang") sold three bottles of alcoholic beverages to a customer who was 18 years old.

An administrative hearing was held on April 23, 1996, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that Kang had sold alcoholic beverages (three bottles of butterscotch schnapps) to a minor, in violation of Business and Professions Code §25658, subdivision (a), and that appellants failed to establish a defense under Business and Professions Code §25660. Appellants thereafter filed a timely notice of appeal.

In their appeal, appellants raise the following issues: (1) the Department failed to comply with the requirements of Government Code §11517 regarding the filing and service of the ALJ's proposed decision; and (2) appellants established a defense under Business and Professions Code §25660.

DISCUSSION

I

Appellants contend that the decision must be reversed because it was not filed and served on appellants by the Department within the 30 days specified in Government Code §11517. The ALJ's decision was received by the Department on May 9, 1996, but not served on appellants until June 13, 1996, 5 days beyond the 30-day period stated in §11517.

Appellant argues that the language in §11517 is mandatory because its purpose is to protect an aggrieved individual, rather than to address administrative concerns such as fiscal or time efficiency. Appellant relies upon People v. McGee (1977) 19 Cal.3d 948 [140 Cal.Rptr.657], where the Supreme Court held that a statutory requirement that "restitution shall be sought" was intended, at least in part, to provide some measure of procedural protection to welfare recipients being criminally prosecuted for welfare fraud. In that case, the Court stated that statutory procedures designed to protect individuals who are the subject of adverse governmental action should generally be accorded mandatory effect, so that a failure to comply with applicable procedures invalidates any sanctions taken against them. However, as the Court later explained (19 Cal. 3d at 961), this rule is not without exceptions:

> "Some statutory procedures which are obligatory in nature, i.e., which a governmental entity is required to follow, are still accorded only directory effect, in that the failure to comply with such procedures does not invalidate subsequent actions."

As the Court observed, there is no simple mechanical rule: "' When the object is to subserve some public purpose, the provision may be held directory or mandatory as will best accomplish that purpose.'" (19 Cal.3d at 962) (Court's emphasis).

The Court in McGee cited and quoted from French v. Edwards (1872) 80 U.S. 506, 511, in which Justice Field noted that many statutory requirements are intended to guide government officials in the conduct of their business, but do not limit their power or render its exercise ineffective if the officials do not comply with those requirements. "Such generally are regulations designed to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory."

Appellants also cite Garcia v. Los Angeles County Board of Education (1981) 123 Cal.App.3d 807, 809-810 [177 Cal.Rptr. 29], where the failure of a school board to hold an expulsion hearing within 20 days from the time expulsion was recommended resulted in the setting aside of an order of expulsion. The court found that the timely conduct of a hearing was essential if the District was to have sufficient time to deliberate before taking action on the expulsion recommendation.

The Department relies upon Outdoor Resorts/Palm Springs Owners' Association v. Department of Alcoholic Beverage Control (1990) 224 Cal.App.3d 696 [273 Cal.Rptr.748], where the court held that the Department's failure to give notice of its

rejection of a proposed decision within 30 days did not deprive the Appeals Board of jurisdiction or require reversal of the Department's refusal to issue a duplicate club license. The court pointed out that while §11517, subdivision (b), requires that the ALJ's decision be filed within 30 days, §11517, subdivision (d), allows the Department up to 100 days within which to adopt or reject that decision. Therefore, the court held there was no prejudice caused by the delay in that case.

That conclusion is also appropriate in this case. Since the Department has 100 days within which to adopt or reject a proposed decision, it is difficult to see how the 30-day filing requirement is intended to provide appellants any degree of protection. It is also difficult to see how appellants are prejudiced by the Department's failure to file or serve the proposed decision within the 30-day period. Appellants contend they are prejudiced because they are unable to sell their store while the license suspension/revocation proceedings are pending.[2] Given the 100-day umbrella within which the Department can act, any claim of prejudice is unfounded.

Appellants criticize the test urged by the Department - that the time requirement is directory unless there is some penalty or sanction contained in the statute upon failure to meet the time requirement (Dept. Brief, p. 3). However, this test is one which courts use (see Edwards v. Steele (1979) 25 Cal.3d 406, 410 [158 Cal.Rptr.

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[2] There is no evidence in the record indicating appellants are attempting to sell their store.

662]), and in this case it seems particularly appropriate. As the court observed in the Outdoor Resorts/Palm Springs case, the Department retains jurisdiction for 100 days to adopt or reject a decision, strongly indicating that the 30-day requirement is more an administrative directive, intended to set a standard for processing decisions rather than one affording procedural protections to litigants. See French v. Edwards, supra.

II

Appellants contend there is insufficient evidence in the record to support the determination that they failed to establish a defense under Business and Professions Code §25660.[3] This section is the statutory defense to a charge of an unlawful sale to a minor which is available when the seller has relied on a document purporting to be bona fide evidence of majority.

Appellant Kang testified that the minor presented a driver's license to him and to his wife on numerous prior occasions [RT 49-50]. Stewart, the minor who made the purchase, denied presenting any proof of age at the time he purchased the liquor or on any prior occasion, and a search immediately after the sale found only his own driver's license, showing his age to be 18. The ALJ, undoubtedly influenced by his viewing of a videotape, discussed below, found that Stewart had on prior occasions shown Kang what was a faked driver's license.

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[3] The text of Business and Professions Code §25660 is set forth in the appendix.

Appellants rely on Conti v. State Board of Equalization (1952) 113 Cal.App.2d 465 [248 P.2d 31], which held that unless the personal appearance of the holder of the driver's license demonstrates above mere suspicion that he is not the legal owner of the license, a licensee is justified in assuming the validity of the license and that its holder is the legal owner [248 P.2d at 32]. Appellants also rely on Keane v. Reilly (1955) 130 Cal.App.2d 407 [279 P.2d 152], arguing that where a licensee establishes that a document complying with §25660 is shown to him, and he believes it to be an official identification, the Department is without power to suspend a license in the absence of a supported finding that appellants acted in bad faith and without due diligence.

In Keane v. Reilly, a bartender served drinks to three minors without asking for proof of age. However, he had asked for proof of age on prior occasions, and as to two of the three minors had been shown a driver's license and a selective service card. The statutory defense with respect to these two minors was sustained on appeal to the Superior Court. The third minor had displayed a homemade identification prepared from the kind of blank card found in billfolds. The card, as prepared by him, contained his name, address and telephone number, his picture, fingerprints, height, weight and his age, misrepresented to show him as 21. The Superior Court found that the bartender's reliance on this document was unjustified.

The Court of Appeal reversed:

> "The law does not require the bartender to inspect the identification presented to him at his peril. If he acts in good faith and with diligence he is protected, and that is so whether the document is validly issued by some agency or is made to look like an officially issued document. Where the evidence shows that a document apparently complying section with 61.2 [the predecessor of §25660] has been submitted to him, and he has testified that he believed it was an official identification, the Board and Courts are without power to suspend the license in the absence of a supported finding that the bartender acted in bad faith and without due diligence."

Keane v. Reilly, supra, 279 P.2d at 155.

The ALJ's proposed findings do not contain any express finding that, in this case, appellant Kang acted in bad faith. However, in that part of his proposed decision denoted "Order," the ALJ concluded that Kang had "relied on fake evidence which he carelessly believed to be bona fide," conduct the ALJ equates with a lack of due diligence. The ALJ states in his proposed decision, as a determination, that the fake license "probably contained the friend's height, which is substantially different from the customer's" (Determination of Issues C). It should be noted that appellant Kang twice volunteered that the person who bought the liquor was over six feet tall [RT 50, 51].[4] We cannot say that the ALJ erred in drawing the inference that the fake identification, prepared for the purchaser's friend, contained the friend's height, and not that of the

[4] The ALJ stated in the section of his proposed decision denominated "Findings Regarding Business and Professions Code Section 25660" that while the friend was approximately 5'9" and weighed 150, no evidence was presented to show what height and weight were indicated on the license. Nor does the record indicate whose picture was on the fake license. Given these gaps in the evidence, it is, perhaps, understandable why the ALJ concluded that appellants had not sustained their burden of proof under Business and Professions Code §25660.

purchaser.

Appellants produced at the hearing a surreptitiously recorded videotape featuring Stewart's 18-year-old friend Stothers (the source of the fake identification the ALJ found to have been displayed), attempting to extract money from appellant in return for his testimony at the forthcoming hearing. The videotape was made with a camera which had been mounted above appellants' cash register a week after the sale involved in this case, supposedly to assist appellant Kang in matching photographs to faces [RT 60]. In the course of a frequently-interrupted conversation, much or most of which is unintelligible, the 18-year-old Stothers is seen and heard coolly describing the fake license, how it was obtained, and how his friend had used it or, at least, how he was prepared to testify that his friend had used it, depending upon whether or not Kang would pay the money he was demanding. This tape, vague and ambiguous as to whether what it depicted was the solicitation of a bribe or an attempt at extortion, was viewed by the ALJ without objection from counsel for the Department [RT 56, 60], and formed the basis for portions of the ALJ's findings and conclusions.

It is apparent upon reading the proposed decision that the ALJ believed what he heard on the videotape with respect to the existence of the fake license. He accepted Kang's testimony that he had on prior occasions been shown a driver's license purporting to show that the purchaser was over 21. (Finding C). He made no specific finding that Kang acted in bad faith, but, as noted, stated in his Order that Kang had

acted carelessly. This statement, we think, is the equivalent of a finding or determination that Kang did not act as a reasonably prudent person man would have acted under the circumstances, thus satisfying the requirements of the Conti and Keane decisions.

CONCLUSION

The decision of the Department is affirmed.[5]

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[5] This final order is filed as provided in Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.