

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

PRESTIGE STATIONS, INC. dba AM/PM Mini Mart
633 Birmingham, Encinitas, CA 92007,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent
AB-7386

File: 20-331652 Reg: 98044780

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: October 5, 2000
Los Angeles, CA

ISSUED NOVEMBER 14, 2000

Prestige Stations, Inc., doing business as AM/PM Mini Mart (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for appellant's clerk selling an alcoholic beverage to a person under the age of 21, 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 §25658, subdivision (a).

Appearances on appeal include appellant Prestige Stations, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

¹The decision of the Department, dated March 25, 1999, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on July 9, 1997.

Thereafter, the Department instituted an accusation against appellant charging that, on June 27, 1998, appellant's clerk, Fayaaz A. Rather ("the clerk") sold malt liquor to Gialiano² Vaccaro ("the minor"), who was then 16 years old.

An administrative hearing was held on January 26, 1999, at which time documentary evidence was received and testimony concerning the sale was presented by the minor and by Department investigator James Sims.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proved.

Appellant thereafter filed a timely appeal in which it raises the following issues: (1) appellant established a defense under Business and Professions Code §25660, and (2) the Department did not use the correct standard under §25660. These two issues are interrelated and will be discussed together.

DISCUSSION

Appellant contends that it has established a defense under Business and Professions Code §25660³ because the clerk reasonably relied on a government-

² The Department decision spells the minor's name Giuliano, but the minor spelled his name at the hearing Gialiano. We use the spelling given by the minor.

³ Business and Professions Code §25660 provides:

"Bona fide evidence of majority and identity of the person is a document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a motor vehicle operator's license or an identification card issued to a member of the Armed Forces, which contains the name, date of birth, description, and picture of the

issued identification, a California driver's license. The Administrative Law Judge (ALJ) erred, appellant argues, by using the following as the standard for reliance on the identification presented: "Taking all of these factors into consideration, the clerk did not act reasonably in accepting Exhibit 2 as evidence of majority without making any further inquiry." (Dept. Decision, Finding IV-C., p. 3.) Appellant appears to contend that the standard used should have been simply whether the clerk acted in good faith, that is, as a reasonable and prudent person would have acted under the circumstances.

The ALJ's finding with regard to the §25660 defense (Finding IV) is as follows:

"A. The minor was not asked his age, but he was asked for identification by the clerk.

"B. The minor produced his brother's California driver's license (Exhibit 2) which had expired on July 10, 1997. The date of birth in Exhibit 2 indicates that the minor would have been 24 years old as of June 27, 1998, but the minor does not have the appearance of a 24 year old. The physical description on Exhibit 2 indicates green eyes and a weight of 160 pounds. However, the minor weighed about 181 pounds at the time of the sale and he has blue eyes. Additionally, there is not a close resemblance between the appearance of the minor as depicted in the photograph in exhibit 3-B which was taken on June 27, 1998 and the photograph depicted in Exhibit 2.

"C. It was not established by a preponderance of the evidence that the clerk reasonably relied on bona fide evidence of majority based upon the fact that the minor does not bear a close resemblance to the photograph in Exhibit 2, the fact that the minor does not give the appearance of a 24 year old, the fact that there was twenty-one pound difference in the weight indicated on Exhibit 2 and the actual weight of the minor as of June 27, 1998, the fact that the minor had blue eyes and not green eyes as indicated on Exhibit 2 and the fact that Exhibit 2 had expired almost twelve months prior to the sale. Taking all of these factors into consideration, the clerk did not act reasonably in accepting Exhibit 2 as evidence of majority without making any further inquiry."

person. Proof that the defendant-licensee, or his employee or agent, demanded, was shown and acted in reliance upon such bona fide evidence in any transaction, employment, use or permission forbidden by Sections 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."

Appellant relies on Keane v. Reilly (1955) 130 Cal.App.2d 407 [279 P.2d 152] for the standard it says should be used to determine whether it is entitled to the defense. However, appellant does not quote or refer to the following pertinent language setting forth the standard used in that case:

“[A] licensee does not establish an absolute defense by evidence that the minor produced an identification card purporting to show that the person in possession of the card is 21. The defense must be asserted in good faith, that is, the licensee or the agent of the licensee must act as a reasonable and prudent man would have acted under the circumstances. *Obviously, the appearance of the one producing the card, or the description on the card, or its nature, may well indicate that the person in possession of it is not the person described on such card. In such a case the defense permitted by [§25660] could not be successfully urged.* [Keane v. Reilly, *supra*, 130 Cal.App.2d at 4XX.] (Emphasis added.)

The ALJ used the standard he should have, as described above. In doing so, he also used the standard urged by appellant as stated in Keane v. Reilly, *supra*. Nothing in his finding indicates that he did other than to consider whether the clerk reasonably relied on the identification proffered, that is, whether he acted as a reasonable and prudent person would have acted under the circumstances.

A reasonable and prudent person would have inquired further given the circumstances outlined by the ALJ. Appellant downplays the discrepancies between the appearance of the minor and the picture on the identification, arguing that they are only the normal discrepancies that would result from the passage of time from issuance of the identification to presentation of it to the clerk. We believe that, while the increase in height and weight might not raise questions, the additional facts of a difference in eye color and the expiration of the license, taken together with the obviously young appearance of this 16-year-old, should have alerted any reasonable and prudent

person to request additional proof of majority and identity.

Appellant contends that the minor's purchase of alcoholic beverages from this premises before, using the same identification, should somehow make the clerk's reliance on the identification in the present case reasonable. We do not believe that previous unreasonable reliance on this identification, no matter how many times, makes the reliance reasonable this time.

The ALJ reasonably concluded that the clerk did not reasonably rely on the identification presented, and we will not disturb that conclusion.

ORDER

The decision of the Department is affirmed.⁴

RAY T. BLAIR, JR., ACTING CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.