ISSUED NOVEMBER 30, 2001

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

ARAMARK SPORTS AND ENTERTAINMENT SERVICES, INC. dba Dodger Stadium 1000 Elysian Park Avenue Los Angeles, CA 90012, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7586 File: 47/58-297611 Reg: 99047199 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: October 5, 2000 Los Angeles, CA

Aramark Sports and Entertainment Services, Inc., doing business as Dodger Stadium (appellant or "Aramark"), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 20 days for an employee having sold alcoholic beverages to a minor, and permitting consumption by him in the premises, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from

[1]The decision of the Department, dated January 20, 2000, is set forth in the appendix.

violations of Business and Professions Code §25658, subdivisions (a) and (b), and §24200, subdivisions (a) and (b).[2]

Appearances on appeal include appellant Aramark, appearing through its counsel, Alan D. Croll and Steve Cochran, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license and caterer's permit was issued on September 22, 1995. Thereafter, the Department instituted an accusation against appellant charging that one of its beer vendors, Nicholas Aguayo ("Aguayo"), sold an alcoholic beverage (beer) to Jeffrey Brentham, Jr. ("Brentham" or "the minor"), a 19-year-old minor.

An administrative hearing was held on December 1, 1999, at which time oral and documentary evidence was received. At that hearing, the parties stipulated that the sale had occurred, and that Aramark would present evidence "regarding any possible defenses regarding mitigation of the penalty recommended by the Department" [RT 6]. Testimony was presented by the minor and by the Department investigators who apprehended him with the beer he had purchased, and by Kenneth Caron, an Aramark Regional Vice President, and by Aguayo, in support of Aramark's defense.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation and determined that Aramark had failed to

[2] All statutory references are to the Business and Professions Code.

sustain a defense under Business and Professions Code §25660.

Appellant thereafter filed a timely notice of appeal, and now raises the following issues: (1) could Aguayo reasonably rely on an authentic, but expired, California driver's license; (2) may the Department conclude under §25660 that an expired license ceases to constitute proper identification; (3) did the Administrative Law Judge (ALJ) improperly substitute his own after-the-fact judgment and, in so doing, improperly exclude evidence and err in his decision; and (4) should the count charging that Aramark permitted Brentham to consume an alcoholic beverage be dismissed as having been pled improperly. Issues (1), (2), and (3) are necessarily related, and will be discussed together.

DISCUSSION

I

The principal issue in this appeal is whether the Department committed error in its determination that Aramark had failed to sustain its defense under Business and Professions Code §25660. Aramark says that it did, asserting variously that the Department improperly rewrote §25660 by adding a requirement that a driver's license relied upon for identification must not be expired; by holding Aguayo to an unreasonable standard of diligence; by refusing to consider a Department of Motor Vehicles publication detailing what constitutes a bona fide or valid license; by excluding expert testimony on the reasonableness of Aguayo's conduct; and by excluding evidence regarding the disposition of the criminal action against Aguayo.

The Department contends that the fact that the license had expired nearly

seventeen months earlier, coupled with the lack of resemblance between the description on the license and the appearance of the purchaser, demonstrates that Aguayo's reliance upon the license was not the product of due diligence.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[3]

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals.

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857]; Kruse v.

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[3] California Constitution, article XX, § 22; Business and Professions Code §§23084 and 23085; Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

The basic facts are not in material dispute.

On the day in question, Brentham attended a concert at Dodger Stadium, accompanied by friends who were also under the age of 21. Brentham was six feet one inch in height, weighed 180 pounds, and his hair and eyes were brown. Brentham was wearing a baseball cap which concealed his hair. On five separate occasions between approximately 4:00 p.m. and 7:00 p.m, Brentham purchased a beer from Aguayo. On each such occasion except the last, Brentham produced a California driver's license which purported to show that he was 21. The driver's license was one which had been issued to Brad Michael Shipley, and had been given to Brentham by a friend. The license, which was issued November 23, 1994, and which expired January 23, 1998, described its owner, Shipley, as being five feet six inches in height, weighing 145 pounds, and having blonde hair and blue eyes.

After examining the license on the four occasions, and, on the occasion of the first purchase only, asking Brentham if he was 21, Aguayo sold beer to him [RT 60-62]. By the time of the fifth purchase, Aguayo recognized Brentham from his prior purchases, and did not request identification.

Aguayo testified that it was his practice to ask for identification and look at it carefully when the purchaser appears to be close to the age of 21, and that he

did so with Brentham. [RT 156-157]. Because of doubts generated by the fact the license described a smaller person than Brentham, he asked Brentham his age, and was told 21. Aguayo ultimately made the sale because the license had issued five years earlier, and Brentham could have grown during the interim. Aguayo said he was "almost sure" the picture on the license was Brentham.

Things apparently went well for Brentham until, the fifth beer in his hand, he was confronted by investigators employed by the Department of Alcoholic Beverage Control, their attention having been drawn to his youthful appearance. When asked his age by Department investigator Harris, Brentham said he was 19. Harris requested, and was provided, Brentham's true identification. Brentham then produced the Shipley driver's license.

Aramark's compliance procedures direct its employees not to serve a customer "unless they are 100% sure," and, if not, to check a second identification or get a second opinion from their manager. Aguayo was aware of these policies (see Exhibit E, third page; RT 127). Despite being only "almost sure" [RT 160], Aguayo did neither. Aguayo testified that he had been trained to ask his service manager when he was in doubt about a purchaser, but he did not check with him concerning Brentham because he, Aguayo, was too busy, and "it was hard to get to them." [RT 165-166].

Aramark asserts that "with the benefit of hindsight and unfairly, the ALJ substituted his own subjective opinion for that of a reasonably prudent bartender." Aramark is mistaken. What the ALJ did, as the trier of fact, was weigh the evidence and conclude that Aguayo did not act as a reasonably prudent bartender

in accepting the false identification.

The decision contains critical findings with respect to whether Aguayo acted reasonably:

> "A. Aguayo, the Respondent's bartender, asked the minor for identification, and the minor presented a California driver's license issued to Brad Michael Shipley. This driver's license (Exhibit 3) which the minor acquired from a friend is a bona fide form of identity, it indicates that Shipley was born on January 23, 1978, and that Shipley turned twenty-one on his birthday in 1999. However, there is no close resemblance between the minor and the photograph in Exhibit 3. Additionally, the physical description in Exhibit 3 indicates a height of five feet six inches, a weight of 145 pounds and blue eyes while the minor was six feet one inch in height, weighed 180 pounds as of the date of the sale and has brown eyes. (The minor's hair color was not considered because he was wearing a cap that covered most of his hair.)
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> B. Exhibit 3 also indicates an expiration date of January 23, 1998 which means that the driver's license expired about 18 months prior to the date of the sale to the minor.
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> C. Aguayo testified that because he still had some doubt as to the minor's age after looking at the identification which the minor provided, he asked the minor for his age and that the minor stated that he was twenty-one. Aguayo did not ask for a second identification or ask his manager for a second opinion before selling a beer to the minor.
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> D. Given all of the factors stated above, the evidence does not support a finding that Aguayo made a reasonable inspection of the identification or that he used due diligence in determining the minor's age. Therefore, it can not be concluded that Aguayo exercised good faith in relying on Exhibit 3 as bona fide documentary evidence of majority and identity prior to the sale of alcoholic beverages to the minor."[4]

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[4] The ALJ was obviously not persuaded by Aguayo's testimony that he examined the Shipley license carefully each time he sold Brentham beer. Supposedly, Aguayo had doubts on the first occasion, so asked Brentham if he was 21. Yet, even though he did not remember Brentham as a previous customer until the purchase of the fifth beer, Aguayo did not with respect to any of the second, third, or fourth purchases double-check by asking Brentham how old he was, or take any other steps to verify that Brentham was of drinking age. Would not a reasonably prudent person have experienced the same doubts as to

A licensee has a dual burden under §25660:

> "[N]ot only must he show that he acted in good faith, free from an intent to violate the law ... but he must demonstrate that he also exercised such good faith in reliance upon a document delineated by §25660.

(Kirby v. Alcoholic Beverage Control Appeals Board (1968) 267 Cal.App.2d 895 [73 Cal.Rptr. 352, 355].) As the cases contemporaneous with and prior to Kirby have made clear, that reliance must be reasonable, that is, the result of an exercise of due diligence. (See, e.g., Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 739]; 5501 Hollywood, Inc. v. Department of Alcoholic Beverage Control (1957) 155 Cal.App.2d 748 [318 P.2d 820, 823].)

The reason the reliance must be reasonable is obvious. Otherwise, a seller need only go through the motions of requesting identification, accept any driver's license handed to him, and sell the alcoholic beverage with impunity.

Without reference to any legislative history, appellant suggests the legislature deliberately decided, when it enacted §25660, not to require that a driver's license be current to constitute "bona fide evidence of majority and identity." Even if appellant's surmise is correct, the fact that a license is not current, as the Board has recognized on more than one occasion, is nonetheless a relevant factor in determining whether a seller may reasonably rely on it as proof the person tendering it is of legal drinking age.

Brentham's age on the occasion of the subsequent purchases if he had no memory of having checked his identification earlier?

As the Board stated in Amir Nourollahi (1997) AB-6649, "there can be no per se rule, but the longer a license has been expired, the higher the level of diligence which should be required for a successful defense under §25660." The fact of expiration, the Board said

> "is a factor to be weighed in determining whether appellants' reliance was reasonable and in good faith. It is one thing for a person to offer their license as identification a few days after its expiration, when they may not have yet received its replacement. It is another for someone to carry a license outdated for more than two years. When the document's expiration is added to the fact that the person presenting the identification is youthful enough to put the seller on notice of inquiry in the first instance, it seems fair to say that the seller was derelict in not seeking further proof of identity. A driver's license which expired as long ago as the license in this case should be a 'red flag' to any potential seller."[5]

In Gurbachan Singh Sandhu (May 25, 2000) AB-7280, the Board rejected the notion that reliance upon an expired driver's license issued to a person other than the minor, containing a description which differs materially from that of the person displaying it, could ever be said to be reasonable.

In 22000, Inc. (August 22, 2000), the Board affirmed a decision of the Department which had rejected a §25660 defense based upon a driver's license which had expired three years earlier, in spite of the close similarity between the photo and description on the license and the appearance of the person presenting it. In so doing, the Board stated:

"Read literally, it would seem that §25660 is not available when the

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[5] Would not a reasonably prudent seller ask, "Why is this person who is obviously of driving age presenting me with an expired driver's license?" Ought he or she not ask, "Do you have a current license?" Is not the seller on notice that something is amiss if the answer is no? Is this not simply a measure - indeed, a critical measure - of the diligence exercised by the seller? We think it is.

> identification proffered by a minor is that of a person other than the minor. "Bona fide evidence of majority and identity of the person is a document ... including, but not limited to, a motor vehicle operator's license ... which contains the name, date of birth, description, and picture of the person." ... However, the Board need not go this far to sustain the Department in this case.
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> "The fact that the driver's license had expired nearly three years earlier cannot be ignored. The current validity of a document offered to prove identity is always a material factor to be considered in according the proper deference to the document. The likelihood that a licensed driver will present a license that is long expired, to prove his or her identity, is so unlikely that its acceptance cannot be said to have been reasonable."

In Alejandro and Remigia Loresco (January 6, 2000) AB-7310, a school identification card was held insufficient to sustain a §25660 defense, its expiration two years earlier cited as one of the grounds for its rejection.

Appellant relies upon S.S. Schooners, Inc. (1999) ABN-7039) where the Board held that the Department erred in rejecting the licensee's §25660 defense, stating:

> "The §25660 defense requires that the licensee or the licensee's employee act 'in good faith, that is, ... as a reasonable and prudent man would have under the circumstances.' ... The licensee may assume the holder of the identification is its owner, unless the appearance of the holder indicates above mere suspicion that he or she is not the legal owner. ... A licensee is required to act reasonably, not perfectly."

In S.S. Schooners, Inc., the two pieces of identification tendered (a passport and a resident alien card) fit so closely the person tendering them that it took trained detectives 20 minutes to satisfy themselves they did not belong to her.

Aramark places great reliance on Conti v. State Board of Equalization (1952) 113 Cal.App.2d 465 [248 P.2d 31, 32], a case which sustained a defense where a minor presented an out-of state license of a friend. Stating that possession of

the license is presumptive evidence that it belonged to the holder, the court said that to hold otherwise would require the seller to determine at his peril whether the driver's license had been legally issued, whether it had not been revoked or suspended, and whether the party presenting it was in truth and fact the legitimate holder. But even this broad pronouncement was qualified by the court's implicit acknowledgment that if the personal appearance of the holder demonstrates above mere suspicion that he is not the legal owner, the seller would not be justified in making the sale.

In Dethlefsen v. State Board of Equalization (1956) 145 Cal.App.2d 561 [303 P.2d 7, 11], the court affirmed a superior court reversal of a decision of the Board which had rejected a defense under §25660. The appellate court found a lack of evidentiary support for the Board's conclusion that an alteration to a draft registration card should have been apparent from a reasonably careful inspection of the card. The court noted, however, that

> "In this case there is no finding of bad faith and no finding that the employee in fact discovered the alteration of the card. There is no express finding of want of diligence on the part of respondent's employee." (Emphasis supplied.)

In Keane v. Reilly (1955) 130 Cal.App.2d 407 [279 P.2d 152, 155], a case dealing with the predecessor statute to §25660, the court noted the absence of any finding that the bartender acted in bad faith "or failed to act as a reasonably prudent man would have acted under similar circumstances," and held the absence of such a finding a ground for reversal of a Board of Equalization decision rejecting a defense under that statute:

"The law does not require the bartender to inspect the identification submitted to him at his peril. If he acts in good faith and with diligence he is protected. ... [T]he Board and the 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." (Emphasis supplied.)

In Young v. State Board of Equalization (1949) 90 Cal.App.2d 256, 258 [202 P.2d 587], the minor had presented an altered draft registration card. The court sustained a defense under §25660's predecessor statute, stating:

> "The clerk, if he acted in good faith and without actual knowledge, gained from the appearance of the purchaser, or otherwise, that the card did not and could not belong to the minor, and if the alteration was with reasonable diligence not discernible or ascertainable, had a right to assume that anyone presenting such a card would not unlawfully possess or use it." (Emphasis supplied.)

We have reviewed the record and considered Aramark's arguments in support of its §25660 defense, and find them unpersuasive. There is substantial evidence in support of the Department's findings, and this Board is not free to substitute its own, even were it so inclined.

We find little merit in Aramark's contention that evidence was improperly excluded.

The Department of Motor Vehicles pamphlet (Exhibit C) was offered by Aramark to show that a license need not be current for it to be a "bona fide" form of identification. We find nothing in the pamphlet purporting to support that claim. At the most, the pamphlet shows examples of licenses which would have expired by the time the pamphlet was published. The pamphlet contains no reference to §25660. It appears that its principal focus is on distinguishing between genuine and counterfeit or altered licenses.

In any event, the Department did not find that an expired license was not a bona fide form of identification. Instead, consistent with earlier rulings by this Board, it simply found that the length of time between the expiration of the license and its presentation as identification was an important factor in determining whether the seller acted reasonably in accepting it as valid identification.[6]

Nor do we find error in the exclusion of the so-called expert testimony of an experienced bartender that she would have sold beer to Brentham if presented with the identification shown to Aguayo. Given the array of undisputed factors which should have led a reasonable person to decline the sale, such testimony would have been entitled to little weight, and we seriously doubt it would have swayed the trier of fact.

Lastly, Aramark contends the ALJ improperly refused to permit evidence that the criminal proceeding against Aguayo had been dropped by the City Attorney's office. It is well settled that an acquittal in a criminal proceeding has no relevance in the administrative proceeding before the Department. (See Cornell

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[6] We are compelled to comment on Aramark's claim (App. Cl. Br., pages 1, 3) that its Regional Vice President, Caron, testified that the identification used by Brentham closely resembled him. What Caron said in his testimony was only that the photo on the Shipley license "looked similar" to the photo of Brentham marked as Exhibit 4. In fact, Department investigator Richardson quoted Caron as saying on the day in question that the false identification presented by Brentham did not look like him [RT 81]. Department investigator Harris testified to the same effect, stating that Caron said, after looking at the Shipley license, "That doesn't even look like him." [RT 184]. Caron testified that he did not recall ever making such a statement, but could not remember what he actually had said to the investigators [RT 146, 150].

v. Reilly (1954) 127 Cal.App.2d 278 [273 P.2d 572, 578]). A city's decision not to go forward with a case is even less relevant.

We have considered the evidence presented by Aramark regarding the measures it has taken to prevent the sale of alcoholic beverages to minors. As comprehensive as its program may be, whether such a program is effective ultimately boils down to how it is executed at the individual level. And even an experienced seller, who fails to follow through when the suspicions of a reasonably prudent person ought to have been aroused, can undercut the efficacy of such a program. That, we think, is what happened here.

II

Aramark contends that Count 2 of the accusation should be dismissed because it was not pled properly. Count 2 charges that Aramark violated §25658, subdivision (b), by causing or permitting Brentham to consume an alcoholic beverage while in the premises. Aramark contends the count should have been pled under §25658, subdivision (d).

The Department's position with respect to Count 2 is that Aramark permitted Brentham to consume the alcohol - i.e., permitted a violation of §25658, subdivision (b) - and, in so doing, violated §24200, subdivision (b). Section 24200 sets forth a number of grounds which constitute a basis for suspension or revocation, one of such grounds set forth in subdivision (b) being a "violation or the causing or permitting of a violation." This would appear to be a more cumbersome form of pleading than simply charging a violation of §25658, subdivision (d), but we cannot say it is legally insufficient, nor can we see how

appellant was prejudiced, since the penalty, a 20-day suspension, is the norm for a second sale to minor violation. Given that this was appellant's third such violation since 1995, the suspension would appear to be lenient.

ORDER

The decision of the Department is affirmed.[7]

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

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[7] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.