

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

AB-7736

File: 21-351667 Reg: 99047417

HUSSAIN ENTERPRISES, INC. dba Regal Liquor
9501 Van Nuys Blvd., #116, 117, and 118, Panorama City, CA 91402,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Arnold Greenberg

Appeals Board Hearing: September 6, 2001
Los Angeles, CA

ISSUED NOVEMBER 14, 2001

Hussain Enterprises, Inc., doing business as Regal Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for fifteen days for its clerk, Harminderjit Sidhu, having sold alcoholic beverages (three bottles of Special Brew, two bottles of Special Brew-Kiwi, and one 40-ounce bottle of Budweiser beer) to Zeid Michael Ammari, a sixteen-year old minor, 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 Hussain Enterprises, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the

¹The decision of the Department, dated November 9, 2000, is set forth in the appendix.

Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on April 29, 1999. Thereafter, on October 6, 1999, the Department instituted an accusation against appellant charging the sale of beer by appellant's clerk to Ammari on August 20, 1999.

An administrative hearing was held on August 23, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by the minor; by Department investigator Kevin Kenny; by Armando Gonzalez, a Department trainee investigator; and by Abdul Hai, appellant's manager.

Ammari, the minor, testified that, when asked for identification by the clerk, he displayed a California driver's license issued to Randy De La Puente, a friend. De La Puente was seventeen at the time of the sale. The De La Puente license (Exhibit 5) has two warnings regarding his age: the phrases "PROVISIONAL UNTIL AGE 18 IN 2000" and "AGE 21 IN 2003." The license was issued on June 18, 1998, and showed that Puente was 5' 10" tall and weighed 110 pounds on that date. Ammari was 5' 11" and weighed 150 pounds on the day of the hearing.

The transaction was witnessed by Department investigator Kevin Kenny, who had followed Ammari into the store, and was standing about fifteen feet away. After observing the sale, Kenny left the store, and apprehended Ammari as he left the store with the six bottles of beer. At Kenny's instruction, Gonzalez, a Department investigator in training, conducted a pat search of Ammari, but failed to notice the friend's license,

which was located in Ammari's right front pants pocket. It had been placed there immediately after it was shown to the clerk, and while Kenny was watching. When Kenny then asked Ammari to produce the identification he had shown the clerk, Ammari removed the license from the pocket. No other false identification was found, either during the trainee's search or when Kenny had Ammari turn his front pockets inside out.

Appellant's manager, Abdul Hai, testified that he had sold alcoholic beverages to Ammari on earlier occasions after having been shown identification showing Ammari as having been born in 1977. Hai also testified that the clerk told him that, on other occasions, he also had sold alcohol to Ammari previously after having been shown identification showing Ammari to be older than 21.

Subsequent to the hearing, the Department issued its decision which determined that the transaction occurred as alleged, and that appellant had failed to establish a defense under Business and Professions Code §25660.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends, in substance, that the failure of the Administrative Law Judge to understand the testimony of appellant's manager deprived it of the opportunity to present a defense under Business and Professions Code §25660.

DISCUSSION

Appellant contends that, because the ALJ failed to understand the testimony of appellant's manager, he made an erroneous finding which had the effect of preventing appellant from presenting a defense under Business and Professions Code §25660.

Although appellant is correct that the finding in question is factually inaccurate,

the error is not such as to affect the ALJ's ultimate determinations.

Section §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 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."

Paragraph G of Finding of Fact III, the finding in question, states:

"Respondent's manager Abdul Hai (hereinafter "Hai") who had not been on the premises during the alcohol purchase, testified that he received a telephone call from Sidhu after the incident. According to Hai, Sidhu told him that he had sold alcohol to the minor a couple of times prior to August 20, 1999. In such regard, Sidhu said that he believed the minor to be 21 years or older, actually 22 years of age, because Sidhu said he was certain that the date of birth on the identification presented to him (Exhibit 5) showed that the minor was born in 1977. This hearsay statement attributed by Hai to Sidhu is not persuasive, since De La Puente's California Driver's License clearly shows that De La Puente was born in 1982."

Actually, as appellant points out, Hai actually testified that he himself had sold alcohol to Ammari "a couple of times," and that he himself had been shown a California identification with a birth date showing Ammari to be 22 years of age. He further testified that in a telephone conversation with the clerk immediately following the sale, the clerk told him he too had relied on the same identification on an earlier occasion.²

Contrary to the ALJ's finding, Hai did not testify that Sidhu told him he had relied on

² Sidhu had apparently been present and ready to testify on the date originally set for the hearing in this matter, but in the interim was required to travel to New York to visit a sick relative. This appears to have resulted in some liberality on the ALJ's part in permitting the introduction of hearsay testimony.

Exhibit 5.

Appellant contends that the ALJ erred by failing to acknowledge that it was unnecessary in the circumstances of this case for the clerk himself to rely upon bona fide documentary evidence of majority. It is appellant's position that, under the rule established in Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181, 186-187 [67 Cal.Rptr. 734], the clerk was entitled to the protection of §25660 when he made the sale, because he had been shown identification previously which showed Ammari to be 22 years of age.

In Lacabanne Properties, Inc., two minors gained entry to an on-sale public premises by displaying what the hearing officer found was bona fide documentary evidence of majority under §25660. The administrative law judge so found, and dismissed counts of an accusation which had charged the licensee with having permitted the minors to enter and remain on the premises without lawful business thereon, in violation of Business and Professions Code §25665. The hearing officer refused to dismiss charges of sales of alcoholic beverages to the two minors, in violation of §25658, subdivision (a), and of permitting them to consume such beverages, in violation of §25658, subdivision (d). The Appeals Board reversed the counts applicable to one of the two minors, holding that the bartender who served that minor had met the requirement of §25660 by confirming with the doorman that the minor had displayed bona fide documentary evidence of majority. The Board affirmed the two remaining counts applicable to the other minor because the bartender who served that minor had requested identification but had not followed up on his request after another customer vouched for the minor.

The appeals court reversed the Board as to the two counts the Board had sustained, holding that there was no duty to make a second demand for identification before serving the minor, because the licensee had the right to rely on the original determination by the doorman that the patron had shown bona fide documentary evidence of majority.

The Lacabanne Properties, Inc. decision does not control this case, for several reasons.

In that case, the court was strongly influenced by the fact that the sale occurred shortly after the minor “possessed, had shown, and could have again exhibited a driver’s license, which, although altered, was found to show he was over the age of 21 years.” (See Lacabanne Properties, Inc., *supra*, 67 Cal.Rptr. at 740.) The same thought is expressed on the following page (67 Cal.Rptr. at 741):

“It may well be that the licensee and his employees act at their peril in serving a minor, but it does not follow that they may not be relieved when the requirements for a defense were not only in fact complied with on entry, but, as in this case, were also present, although unexhibited at the time the minor was served.”

The court summed up its position in what can only be described as an extremely narrow holding:

“It is concluded that where the minor patron has exhibited to one employee on entry, and at all times thereafter has on his person, what is found to be bona fide evidence of majority and identity, the licensee may assert reliance on the original demand and exhibition in selling, furnishing or permitting the consumption of an alcoholic beverage by that minor following that entry; and that such defense is not lost because a second employee pursued an inadequate inquiry before serving the minor. “ (Lacabanne Properties, Inc., 67 Cal.Rptr. at 742.)

It follows that the Lacabanne decision simply does not lend itself to a §25660 defense where the identification supposedly relied upon is nowhere to be found.

The only indication that any identification other than the De La Puente license ever existed is in the testimony of appellant's manager, Hai, that some form of California identification was shown to him on previous occasions, and Sidhu's hearsay statement that he too had been shown the same identification prior to the night in question. What that identification supposedly was is a mystery. It certainly was not "present, although unexhibited at the time the minor was served."

Weighing against this is the fact that, prior to making the sale to Ammari, the clerk asked for identification. Why would he have done so if he was really relying on his past experience with Ammari? Could it be said that Sidhu was relying on some other identification than the one he requested and examined before he made the sale? We think not.

Appellants' suggestion that Ammari may have used false identification and then "ditched it" is little but speculation. Ammari was in Kenny's sight the entire time, was searched twice, and no false identification was found, other than the De la Puente license. In addition, Ammari denied having any other identification.

The facts of this case are simple. A sixteen-year-old minor used a seventeen-year-old friend's driver's license to purchase beer. The defense asserted in this appeal that the clerk relied on identification presented to him by the minor on prior occasions purporting to show that the minor was 21 or 22 years old appears to be the product of nothing more than desperation.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³ 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.