

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

AB-7923

File: 20-186043 Reg: 00049186

CIRCLE K STORES, INC., dba Circle K Store # 1904
1015 Hartnell Avenue, Redding, CA 96002,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja

Appeals Board Hearing: October 24, 2002
San Francisco, CA

ISSUED JANUARY 15, 2003

Circle K Stores, Inc., doing business as Circle K Store # 1904 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days for appellant's clerk selling an alcoholic beverage to a person under the age of 21 in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Circle K Stores, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and James S. Eicher, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

¹The decision of the Department, dated December 20, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 9, 1993. Thereafter, the Department instituted an accusation against appellant charging that, on September 24, 1999, appellant's clerk, Clare Cserep (the clerk), sold an alcoholic beverage to 19-year-old Brody Jackson (the minor).

An administrative hearing was held on October 18, 2000, and July 3 and August 28, 2001, at which time documentary evidence was received and testimony concerning the transaction was presented by the minor, by Redding police officer Robert D. Wilson, by Department investigator Jerry Berenger, and by the clerk.

On September 24, 1999, Wilson and Berenger observed three young-looking people walk into appellant's premises and walk out a short time later, one of them, the minor, carrying a plastic bag that contained two six-packs of beer. The officers asked the minor his age, which he told them was 19, and for identification. Officer Wilson testified that the minor said he had no identification. However, in the minor's wallet, the officer found an expired California identification card issued to Rory Jackson, the minor's older brother. The identification card had expired on June 13, 1998, approximately 15 months before. Both officers testified that the minor told them he had not used the false identification to purchase the beer. Wilson testified that he thought the minor looked similar to the picture on the identification, except for his hair.

The minor testified that the clerk did not ask him for identification and he did not show her any. He also said that he believed he had shown the officers some form of his own identification when they asked for it, before they found the false identification in his wallet. He acknowledged having used the false identification one or more times to purchase alcohol at locations other than appellant's premises. He also admitted to

having been cited, before this incident, as a minor in possession of an alcoholic beverage and that his driver's license at that time was suspended because of a DUI.

The minor testified that at the time of the violation, as well as at the hearing, he was 5'10" tall and weighed 130 pounds, his hair was brown, and his eyes were hazel. The identification card showed his brother as being 5'10" tall, weighing 150 pounds, and having brown hair and eyes.

The clerk testified that when the minor brought the beer to the counter, he showed her a California identification card or driver's license when she asked him for identification. She said she checked for his date of birth, which showed him to be over 21, and the height and weight, but that she did not notice the expiration date. She also said that she thought the minor looked like the person shown on the identification, so she sold him the beer.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged and no defense had been established. Appellant thereafter filed a timely appeal in which it contends that the decision is not supported by the findings and the findings are not supported by substantial evidence.

DISCUSSION

Appellant contends that the decision is not supported by the findings and the findings are not supported by substantial evidence. Although appellant has couched the issue in these terms, it's argument is that the Administrative Law Judge (ALJ) erred in determining that a defense was not established under Business and Professions Code² section 25660.

²Unless otherwise noted, statutory references are to the Business and Professions Code.

The ALJ found that the minor testified credibly that the clerk had not asked him for his age or identification, but he also found that the clerk testified credibly that she had asked for identification and the minor produced identification that showed he was over 21. (Findings III.4., V.A.) The ALJ concluded that, "[s]ince the Department has the burden of proof in this matter, it is found that the minor was asked for his identification and showed the clerk some identification (State's Exhibit No. 2) prior to the sale of beer to him." (Finding V.A.)

Having found that the clerk was shown the identification card of the minor's older brother, the ALJ found that there were "obvious differences in appearance, including the difference in weight," which should have put the clerk on notice to examine the identification more closely and to inquire further. He concluded that the clerk did not take the steps a reasonable and prudent person should have taken under the circumstances and, therefore, a defense was not established under section 25660.

Appellant argues that there clearly is substantial evidence that the clerk reasonably relied on the identification presented by the minor. Appellant has confused the burden-of-proof standard to be used. On appeal, this Board, and the appellate courts, review a case to see if there is substantial evidence *to support the Department's decision*. It is really irrelevant whether or not substantial evidence exists to support appellant's position on appeal. At the administrative hearing, however, the ALJ looked to see if the Department proved its case by a preponderance of the evidence. There appears to be no question that the Department established a violation of section 25658, subdivision (a). Then, the licensee could raise, as it did, an affirmative defense under section 25660. The burden of proof as to that defense, however, was on the licensee.

Appellant has raised the wrong issue, or at least stated the issue incorrectly. What it needs to show is either that there is not substantial evidence to support the finding that a violation occurred or that it established, by a preponderance of the evidence, a defense under section 25660.

Contrary to appellant's contention, the decision is supported by the findings. The violation of section 25658, subdivision (a), is supported by Findings III. and IV., which recite the facts, noted above, that the minor purchased an alcoholic beverage from appellant's clerk. Likewise, the determination that the evidence failed to establish a section 25660 defense is supported by Finding V., which recites the circumstances that should have put the clerk on notice to make further inquiry and that she failed to exercise due diligence in not inquiring further.

Appellant asserts that substantial evidence does not support the finding that the clerk failed to take the "additional steps a reasonable and prudent employee should have taken under similar circumstances." (Finding V.C.) The evidence relied upon by the ALJ to make this finding was the clerk's admission that she did not read the expiration date.

What appellant actually argues is that the ALJ should have found that it established the defense because the clerk looked at the birth date and saw that it showed the person it identified was over 21; she looked at the description and the picture on the license and determined that they corresponded to the appearance of the person presenting the identification; and the officer also testified that the minor looked substantially similar to the picture on the identification.

Appellant contends the ALJ placed too much emphasis on the fact that the license was expired. It is true, as appellant says, that this Board has not held that an

expired license cannot be bona fide evidence of majority and identity under section 25660. However, the Board has also not held, as alleged by appellant at the hearing, that a license expired less than two years may be reasonably relied on.

In *7-Eleven / Pearce* (2001) AB-7573, where the Board found that the clerk had not reasonably relied on a California driver's license that had expired two years before and which had belonged to the minor's older brother, the Board observed:

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].)

In *22000, Inc.* (2000) AB-7543, the Board affirmed a decision of the Department that rejected a section 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 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.

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 response to the argument in *22000, Inc., supra*, that the clerk had focused on the photograph and not on the expiration date, the Board went on to say,:

Further, there is no basis for the implication that the clerk was entitled to focus only on the photograph on the license. Common sense dictates that he is required to give appropriate weight to each item of information on the license which tends to show that it is the property of the person tendering it, and that the person is 21 years of age or older. A license which expired three years earlier must be seen as a red flag which should not be ignored. (See Nourollahi (1997) AB-6649 ("[T]he longer a license has been expired, the higher the level of diligence which should be required for a successful defense under §25660."))

Given that the license in the present case had expired over 15 months before, and there was enough of a discrepancy between the photograph on the identification and the minor's appearance to raise a question as to whether the identification was his, we cannot say that the ALJ erred in concluding that the clerk had not acted reasonably in making further inquiry.

A seller of alcoholic beverages has a duty to see that alcoholic beverages are not sold to minors. Due diligence is not accomplished when a seller fails to observe information that is clearly presented, such as the expiration date in this case, that would put the seller on notice that the document presented might in some way not be bona fide evidence of the age and identity of the person presenting it.

ORDER

The decision of the Department is affirmed.³

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

³This 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.