

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

AB-8125

File: 21-237512 Reg: 02054005

THRIFTY PAYLESS, INC. dba Rite Aid
2240 West Sepulveda Blvd., Torrance, CA 90501,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: August 5, 2004
Los Angeles, CA

ISSUED NOVEMBER 29, 2004

Thrifty Payless, Inc., doing business as Rite Aid (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 25 days for its clerk, Estella Sue Geouge, having sold a 30-pack of Bud Light beer to Lisa Ann Pascoe, a minor who was then 18 years of age, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Thrifty Payless, Inc., appearing through its counsel, J. Daniel Davis, 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 on June 28, 1990. On November 12, 2002, the Department instituted an accusation against appellant charging the sale of

¹The decision of the Department, dated March 13, 2003, is set forth in the appendix.

an alcoholic beverage to a minor.

An administrative hearing was held on January 28, 2003, at which time oral and documentary evidence was received. At that hearing, Department investigator Jonathan Rubio testified that he observed the transaction between the clerk and the minor. The clerk requested and was shown identification, and then went forward with the sale. Rubio followed the minor from the store, and asked for her identification. She told him she was 22, and handed him a driver's license which purported to show that as her age. Rubio said that, based upon her appearance, the license did not appear to be hers. When he informed her he intended to check with the Department of Motor Vehicles, the minor admitted her true age and showed him her own driver's license, which showed her to be 18 years of age.

The license which was presented to the clerk bore an expiration date of March 26, 2002, six months prior to the transaction in question.

Department investigator Melissa Frasquillo testified that she informed the clerk of the violation, and that the license the clerk had been shown was an expired license. The clerk stated to her that she did not normally look for an expiration date except when taking checks. Frasquillo agreed that the decoy's eye and hair color, height and weight were the same or approximately the same as that of the person depicted on the expired license.

The minor testified that the driver's license she presented to the clerk was that of her cousin through marriage. She testified she had used the license twice before, without it having been questioned.

The clerk testified that she asked the minor for identification because she "looked young." She further testified that she relied on the driver's license which was

presented to her. She said she had never been instructed by anyone at Thrifty to look at the expiration date on a license except when presented with a check. Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged, and that appellant had failed to establish a defense under Business and Professions Code section 25660.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends that the Department erred in rejecting its defense under section 25660.

DISCUSSION

Section 25660 of the Business and Professions Code 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.

Appellant contends that the clerk's reliance upon the California driver's license which was presented by the minor entitles it to the defense created by section 25660, despite the fact that the license was that of the minor's cousin, and despite the fact that the license had expired six months earlier. Appellant stresses the finding of the administrative law judge (ALJ) of similarities between the minor and the photo on the license, and contends that he erroneously placed controlling weight on the fact the license had expired. The Department contends the clerk did not act reasonably.

The Appeals Board has addressed the issues involving the use of an expired driver's license for proof of identity and majority in eight cases since 1997.

The Board first confronted the issue in *Nourollahi* (1997) AB-6649, an apparent case of first impression - neither the Department nor the appellant cited any case in point, and our own research did not discover any.² The license used for identification had expired two and one-half years earlier. The Board addressed the issue at some length:

Appellants argue that an expired driver's license, no less than an expired passport, is sufficient for the purpose of identification of the owner. Since the person presenting the license resembled the person whose photo was on the license (a resemblance appellants contend was "clear and obvious [App.Br., p. 4] and which the Administrative Law Judge (ALJ) found was "striking" [Finding of Fact IV]), appellants argue that their reliance was reasonable and therefore sufficient under the statute.

This Board can speculate that the ALJ held as she did primarily for the purpose of focusing the issue on the legal sufficiency of the document presented as proof of age. This conclusion could account for the fact that despite differences in eye color (brown versus blue), height (5' 5" versus 5'10") weight (135 pounds versus 165 pounds) and, at least to this Board, upon comparing the photo on the license (Exhibit 2) to a photo of the 18-year old minor (Exhibit A), only a slight facial resemblance, the ALJ found the resemblance "striking."

Appellants argue that the ALJ erred in giving great weight to the fact that the license had expired two and one-half years earlier. The Department, on the other hand, contends that appellants' reasonable suspicions should have been aroused by a driver's license which had lapsed more than two years earlier.

Neither appellants nor the Department have cited any cases where the issue has been focused as it is here. The Department has the better of the argument, however.

Appellants' analogy to an expired passport as valid identification is unpersuasive. When a California [driver's] license expires, a new license may issue, in which case the old license is usually destroyed or discarded. In this case, it apparently was given to the minor by one of his friends [RT 10]. While it is also true that an expired passport can also be offered as purported identification and proof of age, its acceptance, without more, would not be considered an exercise of the due diligence the statute requires.³

² It is worth noting that, seven years later, neither side has been able to cite a court decision dealing with the expired license question.

3 Documents which do not on their face state an expiration date, such as military identification cards, may require greater diligence on the part of the licensee or the licensee's clerks. However, this Board does not see it as unreasonably burdensome to require the seller to look for some indication of current validity of the identification tendered by the purchaser, which, in this case, was conspicuously absent.

The Department thus concedes that there may be circumstances where an expired license may qualify under §25660 - its example is a license that expired two days earlier. Appellants would recognize no degree of staleness, arguing a literal reading of the statute. This Board believes, in keeping with the direction in Business and Professions Code §23001 that the provisions of the Alcoholic Beverage Control act be liberally construed so as to protect the economic, social and moral well-being and the safety of the state and of all its people, that 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 §25660.⁴

⁴ The responsibility is upon the licensee not to sell alcoholic beverages to a minor. (Munro v. Alcoholic Beverage Control & Moss (1957) 154 Cal.App.2d 326, 316 P.2d 401; and Mercuno v. Department of Alcoholic Beverage Control (1956) 144 Cal.App.2d 626, 301 P.2d 474. Before a sale is made of an alcoholic beverage, it is the responsibility of the seller to determine the true age of the customer who is offering to purchase the alcoholic beverage (Business and Professions Code §25658, subdivision (a)).

Thus, the Department argues here, and the ALJ found (Finding 5), that the time which had passed since the license in question expired 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 expired license as identification a few days after its expiration, when he or she 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 age and 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.

The Board revisited the issue four times in the year 2000. The first of these cases (*Loresco* (January 6, 2000) AB-7310) concerned an adult school identification that lacked a physical description, and which had expired two years earlier. The Board quoted from *Nourollahi, supra*, and concluded that the clerk should have asked for additional ID. Next, in *Sandhu* (May 25, 2000) AB-7280, where the license had expired at an unspecified earlier date, and where there was a wide discrepancy between the minor's appearance and the description on the license, the Board said:

We reject 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, can ever be said to be reasonable.

In the third case of the year, *22000, Inc.* (August 22, 2000) AB-7543, the license had expired nearly three years earlier. The Board wrote:

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.³

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 identification 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 has long been expired, to prove his or her identity, is so unlikely that its acceptance cannot be said to have been reasonable.

The fourth case of the year, *Aramark Sports and Entertainment Services, Inc.* (November 30, 2000) AB-7586, involved five separate sales of beer at Dodger Stadium to a minor who displayed a California driver's license purporting to show that he was 21. The license had expired nearly 17 months earlier. The Board treated as *critical* findings: no close resemblance between the minor and the photograph on the license; discrepancies in the physical description (5'6" vs. 6'1", 145 pounds vs. 180 pounds, and blue vs. brown eyes); an expiration date on the license 18 months prior to the sale; doubt on the part of the seller, who simply asked the minor his age, was told 21, and then made the sale; and, finally, a finding that the seller had not made a reasonable inspection. The Board wrote:

³ When this was written, it was intended to be no more than dicta, and has since so been considered by the Board, despite having been reiterated in subsequent decisions of the Board. Despite the claim to the contrary in the reply brief filed by Thrifty Payless, Inc. (at p. 6, n. 4), this "extremely restrictive interpretation" was not rejected, or even addressed, in *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd./Masani* (2004) 118 Cal.App.4th 1429 [13 Cal.Rptr.3d 826].

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 identity and majority." 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.

The Board cited its decisions in *Nourallahi*, *Sandhu*, and *22000, Inc.*, and quoted the language from *Nourollahi* to the effect that a license which had expired more than two years earlier was a "red flag" to a potential seller, adding a footnote which asked:

Would not a reasonably prudent seller ask, "Why is this person who is obviously of driving age presenting me with an expired 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.

The Board noted that the Department had not found that an expired license was not a valid form of identification. Instead, its decision was consistent with the Board's earlier rulings, that "the length of time between the expiration of the license and its presentation as identification [is] an important factor in determining whether the seller acted reasonably in accepting it as valid identification."

In *7-Eleven, Inc./Pearce* (March 5, 2001) AB-7573, beer was sold to a 17-year-old who displayed a California driver's license which had been issued to his brother. The license had expired two years earlier. After reference to its earlier decisions, and to cases it read as requiring due diligence as a factor in determining whether the reliance was reasonable, the Board concluded:

There are several factors here which lead us to believe the defense was properly rejected in this case. First, the license, on its face, revealed that it had expired two years earlier.³ Second, the ALJ concluded that there was little facial

resemblance between Arciniega and that of the brother pictured on the license, a view shared by Department investigator Ackley. Third, where there is doubt that the person presenting an identification document is its true owner, as was the case here, we do not think a seller acts reasonably when he or she does no more than ask if it belongs to that person. Such a question will almost certainly produce an affirmative response, and the seller has really done little to negate any initial suspicion or uncertainty. Had a second identification been requested in this case, for example, Arciniega's artifice would have been discovered, or, at least, frustrated. He would have had to choose between saying he did not have a second form of identification, or tendering another license, with a different name.

³ The license expired two years and three months before the sale in question. The date of expiration appears on the license directly above the photograph.

These factors in combination support the result reached by the Department. This does not mean, contrary to Young and Conti, that a licensee acts at his or her peril. The issue is whether the clerk's reliance was reasonable. Here, the ALJ concluded on the facts before him that it was not.

Circle K Stores, Inc. (2003) AB-7923, involved the use by one brother of another brother's expired California identification card. The card had expired 15 months earlier.

The Board wrote:

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.

The most recent case decided by the Appeals Board which involved an expired driver's license was *Khouri* (May 12, 2004) AB-8175. The minor displayed a license which had been issued to her cousin, and which had expired five years earlier. The clerk examined the license, and made the sale. The Board concluded that the clerk's reliance on the license was unreasonable in light of the fact that it had expired five

years earlier and the person presenting it did not resemble the photograph on the license.

Which brings us back to the case at bar. The facts of the case are fairly straightforward. The 18-year-old minor displayed a driver's license which had been issued to her 22-year-old cousin. The license had expired six months earlier. A Department investigator observed the transaction. He followed the minor from the store and questioned her. She told him she was 22, and showed him a license purporting to show she was that age. The investigator concluded, based upon her appearance, that the license was not hers. She then admitted her true age, and showed him her own driver's license, which showed her to be 18.

The clerk testified [RT 32]:

A customer came up to my register. She looked young, so I asked her for ID. She showed me ID. I looked at the picture. It looked like her. The birth date on the ID, I entered that into my register. It passed as legal age. I sold her the alcohol and she left.

She testified further that she did not look at the expiration date, since store policy required that she do that only if the customer wished to cash a check.

The Department investigator who observed the transaction testified that the minor, when asked for identification, displayed a wallet. The clerk looked briefly at something in the wallet, but did not remove anything from it. The investigator further testified that when he examined the license, he did not believe the minor was the person pictured on the license.

Judge Lo wrote (Determination of Issues II-A and II-B):

Alcaraz's driver license is bona fide evidence of Alcaraz's majority. There are several similarities between [the minor's] appearance on September 27, 2002, and the description and appearance of Alcaraz on Alcaraz's driver license. However, these similarities are not sufficient to provide a defense for

Respondent.

On September 27, 2002, Alcaraz's license had been expired for six months. Under such circumstances, a clerk reasonably relying on the license should have asked Pascoe why she was carrying an expired license, and / or asked to see additional proof of Pascoe's majority. Respondent's clerk did not do so. As the Appeals Board said in the 7 Eleven/Pierce [sic] case cited above, "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." Although Alcaraz's license had been expired for six months, not three years as the license in the 22000, Inc. case referenced in 7 Eleven/Pierce [sic], the Appeals Board's reasoning is just as valid here. It is "unlikely" that a licensed driver trying to prove his or her own identity would present a driver's license that has been expired for six months. Therefore, Respondent's clerk's reliance on Alcaraz's driver license was not reasonable. Accordingly, the defense provided by Business and Professions Code Section 25660 is not applicable in this case.

The ALJ found that similarities in appearance between the minor and the photo of the person on the license were not enough to show that due diligence had been exercised, because the clerk ignored the expiration date of the license.

The Board has never held that an expired license can never be used for identification. Instead, as Department counsel posed the question, "How long is too long?"

As the Board said in *22000, Inc., supra*, "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." We do not think the fact that a license has expired can be ignored, any more than we think it should be an automatic disqualification. Here, we conclude that the ALJ treated the expired license as an automatic disqualification, and ignored the reasonable possibility that the similarities he observed caused the photo on the license to resemble the minor enough to indicate she was its

true owner. For these reasons, we think the decision must be reversed.⁴

ORDER

The decision of the Department is reversed.⁵

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

⁴ If the Department intends to apply a rule that an expired license of whatever vintage is an unacceptable form of identification, it ought to do so in a regularly promulgated rule rather than leave licensees in a state of uncertainty as to what will constitute reasonable reliance.

⁵ 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.