

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

AB-8175

File: 21-216880 Reg: 03054616

MARY KHOURI and RAFIQ KHOURI, dba United Liquor Market
5298 Mission Street, San Francisco, CA 94112,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Robert R. Coffman

Appeals Board Hearing: March 11, 2004
San Francisco, CA

ISSUED MAY 12, 2004

Mary Khouri and Rafiq Khouri, doing business as United Liquor Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 25 days, with 10 days stayed for a probationary period of one year, for appellants' clerk selling alcoholic beverages to a person under the age of 21, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Mary Khouri and Rafiq Khouri, appearing through their representative, Mousa Khouri, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas Allen.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on May 10, 1988. On March 10, 2003, the Department filed an accusation against appellants charging the unlawful sale

¹The decision of the Department, dated August 14, 2003, is set forth in the appendix.

of alcoholic beverages by their clerk, Muhannad Rafiq Khouri (the clerk), to Natishae Basconcillo, who was then 20 years of age.

At the administrative hearing held on July 9, 2003, documentary evidence was received and testimony concerning the violation charged was presented by Basconcillo, by Department investigator Katherine Chavez, and by the clerk.

At the hearing, appellants stipulated that Basconcillo had purchased two 40-ounce bottles of Olde English brand malt liquor and one 24-ounce bottle of Smirnoff Ice, a malt beverage, as alleged in the accusation. The testimony established that Basconcillo brought the alcoholic beverages to the counter, the clerk asked to see her identification, and she showed him a California driver's license that showed the owner of the license to be 23 years of age. The driver's license was that of Basconcillo's cousin and it had expired in July of 1998, almost five years before the date of the sale. After looking at the driver's license, the clerk sold the alcoholic beverages to Basconcillo. The transaction was witnessed by investigator Chavez.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged, and no defense was established.

Appellants filed an appeal in which they raise the following issues: 1) The decision is not supported by the findings and the findings are not supported by substantial evidence, and 2) the penalty is excessive.

DISCUSSION

I

Appellants rely on the defense afforded by Business and Professions Code section 25660 when a licensee or a licensee's agent "demanded, was shown and acted in reliance upon . . . bona fide evidence" that the person attempting to buy was at least

21 years of age. The statute defines "[b]ona fide evidence of majority and identity of the person" as

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.

"It is well established that reliance in good faith upon a document issued by one of the governmental entities enumerated in section 25660 constitutes a defense to a license suspension proceeding even though the document is altered, forged or otherwise spurious." (*Kirby v. Alcoholic Bev. etc. Appeals Bd.* (1968) 267 Cal.App.2d 895, 897 [73 Cal.Rptr. 352].) To provide a defense, reliance on the document must be reasonable, that is, the result of an exercise of due diligence. (See, e.g., *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 189 [67 Cal.Rptr. 734] (*Lacabanne*); *5501 Hollywood, Inc. v. Dept. of Alcoholic Bev. Control* (1957) 155 Cal.App.2d 748, 753 [318 P.2d 820].)

Reasonable reliance cannot be established unless the appearance of the person presenting identification indicates that he or she could be 21 years of age and the seller makes a reasonable inspection of the identification offered. (*5501 Hollywood, Inc. v. Dept. of Alcoholic Bev. Control, supra*, 155 Cal. App. 2d at pp. 753-754.) A licensee, or a licensee's agent or employee, must exercise the caution which would be shown by a reasonable and prudent person in the same or similar circumstances. (*Lacabanne, supra*; *Farah v. Alcoholic Bev. Control Appeals Bd* (1958) 159 Cal.App.2d 335, 339 [324 P.2d 98]; *5501 Hollywood, Inc. v. Dept. of Alcoholic Bev. Control, supra*, 155 Cal. App. 2d at p. 753.)

Basconcillo's appearance and appellants' section 25660 defense are discussed in Findings of Fact 3 and 4 of the Department's decision:

3. Basconcillo's cousin's driver's license identified the holder of the license having black hair and brown eyes, weight 103 pounds and height 5 feet. Basconcillo somewhat resembles her cousin in that she also has brown eyes and black hair, and on December 13 was 5 feet tall and weighed 115 pounds.

At the July 9, 2003 hearing in this matter Basconcillo was the same height and weight as on December [13]. However, on December [13] her hair was braided and on July 9 was worn in a ponytail. The driver license photograph of Basconcillo's cousin depicts a woman with long, straight hair, quite different from [Basconcillo's] hair style on December [13] and on July 9.

4. Respondents rely upon Business and Professions Code section 25660, providing that reliance upon bona fide evidence of majority and identity is a defense to a license disciplinary proceeding based on violation of the laws prohibiting the sale to a minor.

Respondents' defense is not without some facial merit in that the identification presented by Basconcillo was a California driver's license, the usual document used to establish proof of identity and majority, and because Basconcillo and her cousin share some physical characteristics.

However, the defense fails in that the driver's license bears an expiration date of July 17, 1998, and Basconcillo, on December [13], 2002 and on July 9, 2003, did not closely resemble her cousin. Whether measuring Basconcillo's appearance at the July 9 hearing, or by the December [13] photograph, it does not clearly resemble her cousin's photograph that appears on the license.

A licensee, acting with due diligence, would have noticed that the license had expired and would have asked for a valid document evidencing majority and identity.

Even if the license had not expired in 1998, a reasonable licensee, under the circumstances, would have questioned the use of a license depicting a person who does not closely resemble the purchaser of alcoholic beverages. Here, the clerk requested identification, an indication that he believed that the purchaser may have been under 21, then examined a license that contained a photograph of a person that did not look like the purchaser. A licensee, acting reasonably and in good faith, would have taken additional steps to determine whether the individual was of majority before selling her an alcoholic beverage, e.g.,

requesting another document bearing the same name as the person listed on the license, asking her her date of birth and her address, both of which appear on the license, requesting her signature which he could compare with the signature appearing on the license, and obtaining a reasonable explanation why her facial appearance differed from the photograph on the license. [Fn. omitted.]

Appellants contend that substantial evidence does not support the finding in the decision that appellants' defense failed because "the driver's license bears an expiration date of July 17, 1998, and Basconcillo, on December 12, 2002 and on July 9, 2003, did not closely resemble her cousin." (Finding of Fact 4.) Appellants argue that, "allowing for a commonly occurring difference in hairstyle and an insignificant 12 pound difference in weight, Ms. [Basconcillo] did indeed reasonably resemble her relative depicted on the ID."

Appellants base this argument on what they call the "conflicting testimony" regarding whether Basconcillo resembled the picture of her cousin on the driver's license. They point out the investigator's statement that Basconcillo and the person depicted on the driver's license "seemed to be of a different ethnicity" [RT 17] and contrast that with Basconcillo's statement that she and her cousin "are both full Filipino" [RT 34]. They also note that Basconcillo's hairstyle on the date of the sale was different from her hairstyle at the hearing, and that neither of Basconcillo's hairstyles matched that worn by her cousin in the picture on the driver's license. The clerk testified that he noticed the difference in hairstyles, but "figure[d] girls change their hair style all the time" [RT 27]. Comparing the driver's license description of brown eyes, black hair, a height of 5 feet, and weight of 103 pounds, with Basconcillo's testimony that she has brown eyes, black hair, was 4 feet 11 inches or 5 feet tall, and weighed 115 pounds on the date of the sale, appellants argue that "a mere 12 pounds is the only difference

between Ms. Basconcillo and the person depicted on the driver's license." Appellants conclude that, contrary to the finding in the decision, Basconcillo did bear a reasonable resemblance to her cousin's picture on the driver's license.

While the description on the driver's license sounds similar to the description of Basconcillo, and both Basconcillo and her cousin are "full Filipino," these are not determinative factors in this case. Common experience tells us that even with the same eye and hair color, height and weight, and ethnicity or national origin, two people may appear very different when they are seen. This is the case here. Having seen the photograph of Basconcillo and the picture of her cousin on the driver's license, we cannot say that they resemble each other.

Even if the Board did not have the photograph and driver's license to look at, it seems that the Board should give the same deference to the ALJ's finding in this case that it does to an ALJ's finding that a minor decoy displayed an appearance generally to be expected of a person under the age of 21. In both cases, the ALJ's have the opportunity to observe the minor in person, an opportunity this Board does not have.

Appellant also notes that the Department's Web site, explaining in the Frequently Asked Questions (FAQ's) what an identification must show, does not say that the expiration date should be checked.² However, the Department's answers to FAQ's on its Web site are not, and cannot reasonably be used as, a definitive statement of all aspects of the applicable law.

²This was true on the date appellant printed the pertinent page from the Department's Web site. However, the Web site currently states that "No defense will exist if the card has obviously been altered or has expired." (Dept. of Alcoholic Beverage Control, *Frequently Asked Questions*, Q. 74 <http://www.abc.ca.gov/questions/enforcement_faq.html#Q.%2074> (as of March 15, 2004).)

The Appeals Board has discussed the effect of an expired driver's license or identification card in other cases. In *Nourollahi* (1997) AB-6649, the driver's license presented had expired two and a half years before. The Board said:

It is one thing for a person to offer their expired 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 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.

In *22000, Inc.* (2000) AB-7543, in spite of the close similarity between the photo and description on the license and the appearance of the person presenting it, where the driver's license offered as identification expired three years earlier, the Board said:

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 this case, the driver's license had expired five years before and the person presenting it did not resemble the photograph on the license. We conclude it was unreasonable for the clerk to rely on this card as proof of legal age to purchase alcoholic beverages.

II

Appellants contend that, if a penalty is to be imposed, it would be in the public interest to impose a fine in lieu of a suspension. The state would not only benefit financially from the monetary fine itself, but it would also gain sales tax revenue that would otherwise be lost if the premises served a suspension.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

While a fine instead of a suspension would have some financial benefit to the state, the Legislature has determined that public welfare and morals, which the Department is charged with protecting, require that a licensee serve an actual suspension when a second sale to a minor occurs within 36 months of a prior sale to a minor. (Bus. & Prof. Code, §25658.1, subd. (a).)

In any case, a fine in lieu of suspension is only available if the suspension ordered is for 15 days or less. (Bus. & Prof. Code, § 23095.) Because the penalty here was for a 25-day suspension, with 10 of the days stayed for a one-year probationary period, appellants are not eligible to petition for paying a fine in lieu of serving the suspension.

The only basis for relief from a penalty is the Department's abuse of its discretion in imposing the penalty. The penalty in this case is not unreasonable or an abuse of the Department's discretion, so it must be affirmed.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
KAREN GETMAN, 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.