

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

AB-8242

File: 20-364253 Reg: 03055672

7-ELEVEN, INC., and BALDEV SINGH GREWEL, dba 7-Eleven Store # 2237
77 East Olive Avenue, Merced, CA 95340,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: October 7, 2004
San Francisco, CA

ISSUED DECEMBER 29, 2004

7-Eleven, Inc., and Baldev Singh Grewel, doing business as 7-Eleven Store # 2237 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk selling an alcoholic beverage to a person under the age of 21, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Baldev Singh Grewel, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean R. Lueders.

¹The decision of the Department, dated January 22, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 2, 2000. On August 12, 2003, the Department filed an accusation against appellants charging that, on May 16, 2003, appellants' clerk, Michael Benitez, sold an alcoholic beverage to 18-year-old Matthew Rosson (the minor).

At the administrative hearing held on November 20, 2003, documentary evidence was received, and testimony concerning the sale was presented by the minor, by Department investigators Guadalupe Ochoa and Christian Albrecht, and by Sukhbir Singh, a clerk at the premises.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellants filed a timely appeal raising the following issues: (1) Appellants established a defense pursuant to Business and Professions Code section 25660; (2) the ALJ erred in his credibility determinations; and (3) the Department based its penalty on an "underground regulation."

DISCUSSION

I

Appellants contend that they produced evidence during the hearing that established a defense under section 25660.

Section 25660 provides a defense to a sale-to-minor charge when the licensee or the 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.

A licensee has an affirmative duty to maintain and operate his or her premises in accordance with the law, and section 25660, as an exception to the general prohibition against sales to minors, must be narrowly construed. The statute provides an affirmative defense, and “[t]he licensee has the burden of proving . . . that evidence of majority and identity was demanded, shown and acted upon as prescribed by . . . section 25660.” (*Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 189 [67 Cal.Rptr. 734].)

Appellants do not point out what evidence they presented to establish this defense, but presumably it was the testimony of Singh, a clerk at the premises (not the clerk who sold to the minor). Singh testified that he was present when Benitez sold the alcoholic beverages to the minor; that he heard Benitez ask the minor for identification; that he saw Benitez look at the identification that the minor presented; and that he saw Benitez enter a birth date on the register before selling to the minor.

The minor testified that, at the time he purchased the alcoholic beverages from Benitez, he had in his possession an expired driver's license he had found that showed the owner was over the age of 21, but that Benitez did not ask him his age or for identification, so he did not show the driver's license to Benitez. He also testified that he had bought alcoholic beverages at the premises on a prior occasion, and he was not asked his age or for identification at that time. He was not sure whether he possessed the false identification at the time of his prior purchase, but he was sure that the clerk who sold to him then was not Benitez.

The minor's testimony that he was not asked for his age or identification was consistent with the Minor Affidavit he signed under penalty of perjury on the date of the sale. Investigator Ochoa, who was standing within three feet of the minor during the transaction, did not hear Benitez ask the minor his age or for identification, and did not see the minor present any identification to Benitez.

The ALJ evaluated the credibility of the witnesses and resolved this issue in favor of the statements of the minor and Ochoa. (Finding III.C.) The conclusion that no identification was shown by the minor to Benitez at the time of the sale, or at any prior time, obviously precludes any defense based on section 25660.

II

Appellants contend that the ALJ erred in concluding that the testimony of the investigators was consistent with that of the minor. The credibility determination, appellants argue, should really have been simply between the minor and Singh. Appellant asserts that, weighing only the minor's credibility against Singh's, the record as a whole "cannot support a finding that minor Rosson was more credible than witness Singh." (App. Br. at p. 9.)

It is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807]; *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640].) The Appeals Board will not interfere with those determinations in the absence of a clear showing of an abuse of discretion.

Appellants contend the testimony of the investigators should not be considered as supportive of the minor's testimony or inherently conflicting with Singh's because it was "not conclusive." They appear to base this contention on the lack of "context" the

investigators provided when they testified about the statements Benitez made after the minor identified him as the seller.

We believe the context was clear in each instance. Ochoa testified that Benitez said "Oh man, I just didn't ask," in response to being identified by the minor as the seller. [RT 42-43.] Supervising investigator Albrecht testified that, when he admonished Benitez about always checking identification before selling alcoholic beverages, Benitez said, "Yeah, we got a scanner, but half of us don't even use it. I usually just look at them. I didn't even check him." [RT 48-49.] The statements of Benitez to which the investigators testified are acknowledgements by Benitez that he was careless and did not check the minor's identification. The statements clearly support the minor's testimony and conflict with Singh's testimony.

Although appellants assert that the record as a whole shows that the minor was not more credible than Singh, they do not point us to anything in the record that supports that statement. Our review of the record has not revealed any indication that the ALJ's credibility determination was unreasonable or an abuse of discretion.

III

Appellants contend that the 15-day suspension imposed cannot stand because it is based on an "underground regulation" in violation of provisions of the Administrative Procedure Act. (Gov. Code, § 11340 et seq. (APA).)

Government Code section 11340.5, subdivision (a), states:

No state agency shall utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

Section 11342.600 defines "regulation" as:

every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

Section 11425.50, subdivision (e), provides:

a penalty may not be based upon a guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule subject to Chapter 3.5 (commencing with section 11340) unless it has been adopted as a regulation pursuant to Chapter 3.5 (commencing with section 11340).

In *Vicary* (2003) AB-7606, the Board determined that the penalty guidelines found in the Department's Instructions, Interpretations and Procedures Manual (the Manual) at pages L225 through L229 were "underground regulations," i.e., regulations that have not been adopted as such under the provisions of the APA. Appellant alleges that these same penalty guidelines were the basis for the penalty imposed in the present case.

There is no evidence in the record to support a determination that the penalty imposed was pursuant to the guidelines. The ALJ made no reference to any guidelines in his proposed decision, nor did Department counsel when making the penalty recommendation on behalf of the Department. Hence, it would be unwarranted for the Board to assume that the penalty order was based upon the guidelines, and appellants have offered nothing to support their argument that any guidelines were followed. We cannot assume, simply because penalty guidelines exist, that they controlled the penalty imposed by the Department.

Appellants assert that this case differs from *Gannon* (2004) AB-8174, in which the Board concluded it could not assume the penalty was pursuant to an underground

regulation where there was no reference to the penalty guidelines as the basis for the penalty that was imposed. In the present case, appellants argue, they specifically objected to the penalty because it would be made pursuant to the penalty guidelines. This allegation was made in appellants' Special Notice of Defense,² filed in response to the Department's accusation. In Finding V of the Department's decision, the ALJ overruled "[e]ach of the demurs and/or objections raised in the Respondents' Special Notice of Defense . . . as the Respondents failed to establish those demurs or objections."

Neither the guidelines nor appellants' objection to them were mentioned in the record at any time after appellants' Special Notice of Defense. We fail to see how this "anticipatory" objection in appellants' opening pleading in this case can provide any support for appellants' allegation that the Department based the penalty on the penalty guidelines. It seems to us more likely that the Department, put on notice that use of the penalty guidelines would be objected to, would be careful to avoid any use of or reference to the guidelines in imposing the penalty.

²Paragraph 11 of the Special Notice of Defense states:

Respondent(s) object to the penalty to be recommended by the Department on the basis that said penalty will be made pursuant to the Department's written policy, regulation and rule adopted by the Department not pursuant to the Department's rule making authority stated in Business and Professions Code Sections 25750 and pursuant to the rule and regulation adoption procedure set forth in Government Code Sections 11342 and 11343 et seq.; further, said rule and regulation has not been published pursuant to Government Code Section 11344 et seq. and as such is illegal and improper. The intended penalty recommended by the Department and imposed by the Department is based upon and constitutes an "underground regulation" not adopted by statute or by rule within the Department's rule making authority. This "underground regulation" violates the Due Process and Equal Protection clauses of the California and United States Constitutions.

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 section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.