

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

AB-8290

File: 21-183657 Reg: 03056290

CIRCLE K STORES, INC. dba Circle K Store #1767
12220-A Pigeon Pass Road, Moreno Valley, CA 92388,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: June 2, 2005
Los Angeles, CA

ISSUED AUGUST 25, 2005

Circle K Stores, Inc., doing business as Circle K Store #1767 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its off-sale general license for 10 days for its clerk, Paul Schreiber, having sold three 24-ounce cans of Miller High Life beer to Nicholas Allison, a 19-year-old minor, a 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 Ryan Kroll, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

PROCEDURAL HISTORY

Appellant's off-sale general license was issued on August 19, 1987. Thereafter,

¹The decision of the Department, dated May 13, 2004, is set forth in the appendix.

on November 20, 2003, the Department instituted an accusation against appellant charging the unlawful sale of an alcoholic beverage to a minor.

An administrative hearing was held on March 19, 2004, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Nicholas Allison (Allison), Scott Stonebrook, a Department investigator, Paul Schreiber (Schreiber), and Tony Bashkar, a Circle K market manager.

Allison testified that he was not asked his age or for his identification when he purchased the beer. Stonebrook, who observed the transaction from outside the store, also testified that Allison had not displayed any identification. Stonebrook further testified that he detained Allison when he left the store, and found that Allison was in possession of a California driver's license (Exhibit 2) originally issued to Aaron James Seibel. Seibel's date of birth was May 21, 1979, thus showing him to be 24 years of age on October 3, 2003, the day of the transaction. The license had expired on May 21, 2003. Allison's own driver's license, showing his true age of 19, was found in Allison's wallet.

Allison testified that he had purchased alcoholic beverages on prior visits to the store, and had displayed the Seibel license when asked for identification by Schreiber. This was the first time Schreiber did not ask him for identification. He said he was asked for, and displayed, the Seibel license on each of a dozen visits over a five or six week period. Allison said he obtained the license by claiming as his a wallet found in a mall. Allison admitted lying to Stonebrook about his age and whether he was carrying any identification.

Stonebrook testified that Allison initially claimed the Seibel license was his, and explained the differences in height and weight as due to the fact he had grown since

the license issued when he was 15. Stonebrook escorted Allison back into the store, and told Schreiber he had just sold an alcoholic beverage to a minor. Schreiber told him he thought Allison was over 21, was a regular customer, and had checked his identification in the past. When Stonebrook showed the Seibel license to Schreiber, Schreiber said he did not know whether that was the license shown to him on Allison's prior visits to the store.

Schreiber testified that he did not ask Allison for identification because Allison had been a regular customer, and he had checked and scanned Allison's identification on earlier occasions. Schreiber recalled Allison visiting the store over the previous five or six months, in contrast to Allison's testimony that he had been to the store over the past five or six weeks, and said he had not been carding Allison for the last three months or more. Each time that Allison had shown him a California driver's license, the photograph on the license appeared to match Allison. Schreiber said the identification shown him did not raise any suspicions, but he could not swear to the fact that it was the Seibel license he was shown.

On cross-examination Schreiber changed his earlier testimony, and said he had checked Allison's identification on each of six previous occasions, and this was the first time he had not checked. He could not swear that he was shown the same identification on each of the occasions. Schreiber further testified that he had been trained to refuse to go ahead with the transaction if the driver's license tendered for identification had expired, and that he had examined the license details, including expiration date, tendered by Allison, and had run the license through a scanning device which would have indicated whether the license was expired.

Subsequent to the hearing, the Department issued its decision which determined

that the violation had occurred as alleged, and that no defense had been established..

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant asserts a defense under Business and Professions Code section 25660.

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.)

It is apparent from what the administrative law judge (ALJ) wrote that he did not believe appellant had established a section 25660 defense on either of the two theories it argued at the hearing (Conclusions of Law 5 through 9):

Respondent asserts that the Section 25660 defense applies on the facts of this case. In the alternative, Respondent argues that if it was the Exhibit 2, or Seibel, identification Schreiber had seen before, the height and weight differences were slight enough as to not matter. Schreiber testified that he scanned it and it did not come up expired. Therefore, the defense applies. If, on the other hand, the ID shown to Schreiber on earlier occasions was not the Exhibit 2 ID, and, they argue, this is more likely the case, the defense has been established without more evidence than is in this record as to what ID was shown.

A licensee has a dual burden under Section 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 section 25660. Where all he shows is good faith in relying on evidence other than that within the ambit of section 25660, he has failed to meet his burden of proof.” *Kirby v. Alcoholic Beverage Control Appeals Board (Boyajian)* 267 Cal.App.2d 895, 899, 73 Cal.Rptr. 352.

In addition, other cases interpreting Section 25660 include the following:

A licensee making a diligent inspection of a document showing identity and majority presented by the customer at or about the time of the sale is entitled to rely upon its apparent genuineness.

A licensee must exercise the caution a reasonable and prudent person would use in the same or similar circumstances.

Respondent suggests, in the alternative, that the Section 25660 defense has been established by previous showings of an identification that was different from the Exhibit 2 identification. The defense is not established when the reliance is on a document not in evidence and the evidence does not establish that the identification was in the possession of the minor and could have been shown again at the time in question. Schreiber's contention that he relied on past showings of some identification that made Allison over the age of 21 years does not establish the defense. It is pure speculation to suggest otherwise.

In the alternative, the defense is similarly not established in this case if the reasonable reliance is upon the Exhibit 2 ID. Reliance on Exhibit 2 would be unreasonable. First, the license was expired after May 21, 2003. While Allison was continually untruthful during the incident of October 3, 2003, his testimony at the hearing was credible when he testified that October 3, 2003, was the first time Schreiber had failed to ask him for ID. Allison was also credible when he said he had showed the Exhibit 2 ID on numerous occasions within weeks of October 3, 2003. When the discrepancies in height, weight, eye color, hair color and differences in the photograph on the Exhibit 2 ID from the appearance of Allison in person, with particular reference to the ears, are added to the identification's being expired, reliance on it is not reasonable.

The Section 25660 defense was not established in this case.

Appellant no longer contends that Schreiber may have relied upon some identification other than the Seibel license. Instead, it argues that the ALJ should not have relied on the discrepancies he saw between Allison's appearance and that depicted on the Seibel license, because those discrepancies were not sufficiently significant.

Citing *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control App. Bd.* (2004) 118 Cal.App. 4th 1429 [13 Cal.Rptr.2d 826] ("*Masani*"), appellants say that the discrepancies in the minor's appearance in this appeal are of lesser significance than those which persuaded the *Masani* court that the reliance there was unreasonable.

We do not read *Masani* as setting some kind of minimum standard. Instead, we

read that case as reaffirming the proposition that an ALJ's determination that reliance upon certain identification was unreasonable is a finding of fact that this Board may not go behind. As the court there stated:

We cannot interpose our independent judgment on the evidence and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor this court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citation.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control App. Bd., supra, at p. 1437.)

Both Allison and Schreiber agreed that this was the first time Schreiber had not asked Allison for identification. The two disagreed over whether Allison's visits to the store extended over the previous five or six weeks, as Allison claimed, or five or six months as Schreiber claimed. The ALJ chose to believe Allison. The license expired in May, and Allison's visits to the store over the five or six weeks preceding October 3 would have been well after that date. If, as Schreiber claimed, he had checked and scanned Allison's identification every time but this that he had purchased an alcoholic beverage, he would have been on notice that the license Allison was displaying had expired. Store policy would have required him to refuse the sale, and there is no evidence that he ever refused to sell to Allison.

We find no reason to reverse the Department's decision for the reasons stated in appellant's brief.

II

Appellant asserts the Department violated its right to procedural due process

when the attorney (the advocate) representing the Department at the hearing before the ALJ provided a document called a Report of Hearing (the report) to the Department's decision maker (or the decision maker's advisor) after the hearing, but before the Department issued its decision. Appellant also filed a Motion to Augment Record (the motion), requesting that the report provided to the Department's decision maker be made part of the record. The Appeals Board discussed these issues at some length, and reversed the Department's decisions, in three appeals in which the appellants filed motions and alleged due process violations virtually identical to the motions and issues raised in the present case: *Quintanar* (AB-8099), *KV Mart* (AB-8121), and *Kim* (AB-8148), all issued in August 2004 (referred to in this decision collectively as "*Quintanar*" or "the *Quintanar* cases").²

The Board held that the Department violated due process by not separating and screening the prosecuting attorneys from any Department attorney, such as the chief counsel, who acted as the decision maker or advisor to the decision maker. A specific instance of the due process violation occurs when the Department's prosecuting attorney acts as an advisor to the Department's decision maker by providing the report before the Department's decision is made.

The Board's decision that a due process violation occurred was based primarily

² The Department filed petitions for review with the Second District Court of Appeal in each of these cases. The cases were consolidated and the court affirmed the Board's decisions. In response to the Department's petition for rehearing, the court modified its opinion and denied rehearing. The cases are now pending in the California Supreme Court and, pursuant to Rule of Court 976, are not citable. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 127 Cal.App.4th 615, review granted July 13, 2005, S133331.)

on appellate court decisions in *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575 [5 Cal.Rptr.2d 196] (*Howitt*) and *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81 [133 Cal.Rptr.2d 234], which held that overlapping, or "conflating," the roles of advocate and decision maker violates due process by depriving a litigant of his or her right to an objective and unbiased decision maker, or at the very least, creating "the substantial risk that the advice given to the decision maker, 'perhaps unconsciously' . . . will be skewed." (*Howitt, supra*, at p. 1585.)

Although the legal issue in the present appeal is the same as that in the *Quintanar* cases, there is a factual difference that we believe requires a different result. In each of the three cases involved in *Quintanar*, the administrative law judge (ALJ) had submitted a proposed decision to the Department that dismissed the accusation. In each case, the Department rejected the ALJ's proposed decision and issued its own decision with new findings and determinations, imposing suspensions in all three cases. In the present appeal, however, the Department adopted the proposed decision of the ALJ in its entirety, without additions or changes.

Where, as here, there has been no change in the proposed decision of the ALJ, we cannot say, without more, that there has been a violation of due process. Any communication between the advocate and the advisor or the decision maker after the hearing did not affect the due process accorded appellant at the hearing. Appellant has not alleged that the proposed decision of the ALJ, which the Department adopted as its own, was affected by any post-hearing occurrence. If the ALJ was an impartial adjudicator (and appellant has not argued to the contrary), and it was the ALJ's decision alone that determined whether the accusation would be sustained and what discipline,

if any, should be imposed upon appellant, it appears to us that appellant received the process that was due it in this administrative proceeding. Under these circumstances, and with the potential of an inordinate number of cases in which this due process argument could possibly be asserted, this Board cannot expand the holding in *Quintanar* beyond its own factual situation.

Under the circumstances of this case and our disposition of the due process issue raised, appellant is not entitled to augmentation of the record. With no change in the ALJ's proposed decision upon its adoption by the Department, we see no relevant purpose that would be served by the production of any post-hearing document. Appellant's motion is denied.

ORDER

The decision of the Department is affirmed.³

SOPHIE C. WONG, MEMBER
FRED ARMENDARIZ, 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.