

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

AB-8339

File: 21-357844 Reg: 03055451

INDERJIT KAUR ATWAL and LAHORA SINGH ATWAL, dba Buck Liquor Store
1089 Baker Street, Unit A, Costa Mesa, CA 92626,
Appellants/Licensees

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

Inderjit Kaur Atwal and Lahora Singh Atwal, doing business as Buck Liquor Store (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 25 days for their clerk selling an alcoholic beverage to 18-year-old Michael Simonoff, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Inderjit Kaur Atwal and Lahora Singh Atwal, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry Winters.

¹The decision of the Department, dated September 9, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on November 30, 1999. On May 17, 2003, appellants' clerk, Parshotam Singh, sold a 20-pack of Coors Light beer and a 12-pack of Keystone Light beer to 18-year-old Michael Simonoff (Michael). Singh requested an ID from Michael, who gave him a California driver's license issued to Aaron Alexander Simonoff, Michael's older brother. The birthdate on the driver's license, June 5, 1981, showed the holder to be almost 22 years old on the date it was presented to Singh, and the license had expired on June 5, 2001, almost two years before its presentation.

Singh looked at the identification for a few seconds, handed it back to Michael, and sold the beer to him. Department investigator Naureen Zaidi saw Michael and a friend enter the licensed premises and, thinking that they looked rather young, followed them into the store, where she observed the sale of the beer. She followed Michael out of the store, where she detained him and ascertained that he was only 18 years old. She obtained from him both his brother's expired driver's license that he had shown to Singh and his own valid California driver's license.

On July 24, 2003, the Department filed an accusation against appellants charging the unlawful sale of alcoholic beverages to a person under the age of 21. At the administrative hearing held on July 13 and 20, 2004, documentary evidence was received and testimony concerning the sale was presented by Michael Simonoff (the minor or Michael), by investigator Zaidi, and by Singh (the clerk). Co-licensee Inderjit Kaur Atwal also testified. The Department's decision determined that the violation charged was proved and no defense was established. Appellants filed an appeal contending that they established a defense under Business and Professions Code

section 25660, and the Department violated their right to procedural due process.

DISCUSSION

I

Appellants contend that their clerk reasonably relied on the California driver's license Michael presented to him, thereby establishing a defense to the sale-to-minor charge as provided by Business and Professions Code section 25660.

Section 25660 provides a defense to a sale-to-minor charge in cases where a seller has "demanded, was shown and acted in reliance upon" "bona fide evidence of majority and identity of the person," which is defined as a governmentally issued document, such as a driver's license or a military ID, "which contains the name, date of birth, description, and picture of the person."

Section 25660, as an exception to the general prohibition against sales to minors, must be narrowly construed. (*Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 189 [67 Cal.Rptr. 734] (*Lacabanne*)). 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 on as prescribed by . . . section 25660." (*Ibid.*)

Appellants assert that the plain language of section 25660 does not prevent an expired license from satisfying the requirements for the defense. While that is true, the case law regarding that section makes clear that 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, supra*; *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.)

Although section 25660 was designed "to relieve vendors of alcoholic beverages from having in all events to determine at their peril the age of the purchaser" by allowing them to rely on certain documentary evidence of majority and identity, "*the bona fides of such documents must be ascertained if the lack of it would be disclosed by reasonable inspection, the circumstances considered.*" (*Dethlefsen v. State Bd. of Equalization* (1956) 145 Cal.App.2d 561, 567 [303 P.2d 7] (italics added).)

The licensee or his agent must act in good faith and with due diligence in relying on an apparently valid but actually fraudulent ID:

The defense must be asserted in good faith, that is, the licensee or the agent of the licensee must act as a reasonable and prudent [person] would have acted under the circumstances. Obviously, the appearance of the one producing the card, or the description on the card, *or its nature*, may well indicate that the person in possession of it is not the person described on such card. [Italics added.]

(*Keane v. Reilly* (1955) 130 Cal.App.2d 407, 409-410 [279 P.2d 152].)

In *Thrifty Payless, Inc.* (2004) AB-8125, the Board made an extensive review of appeals it has heard involving the use by minors of expired identification cards to purchase alcoholic beverages. In these cases, the Board has consistently found that a reasonable and prudent seller cannot simply ignore the expiration date on a document offered as proof of age and identity. In *Nourollahi* (1997) AB-6649, the Board said 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."

The Board continued:

[T]he 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.

Appellants point out that the administrative law judge (ALJ) here said that the minor bore "a resemblance" to the photograph of his brother on the driver's license. They do not, however, put that into context, because the context negates the point they wish to make (Finding of Fact 11):

Despite the fact that Michael Simonoff and Aaron Simonoff are brothers, the photograph of Aaron on Exhibit 4 [Aaron Simonoff's expired California driver's license] and the facial features of Michael do not match. While there is a resemblance, the photograph on Exhibit 4 differs from the physical facial appearance presented by Michael at the hearing and from that shown in Exhibit 5 [photographs of Michael taken at the licensed premises].

Appellants complain that the ALJ "focused on discrepancies between" the minor's appearance and his brother's photograph, while ignoring evidence that the minor would naturally be taller and weigh more than the description on the license indicated because the license had been issued several years earlier and the minor was obviously in the process of physically maturing. Although appellants disagree with the ALJ's focus, that does not provide a basis for this Board to attempt to substitute its own judgment for that of the ALJ, much less a basis for reaching a conclusion different from that reached by the ALJ, who is the trier of fact. Looking at Exhibits 4 and 5, we cannot

say that the ALJ's conclusion was unreasonable, and we will not second-guess him.

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.

(*Khouri* (2004) AB-8175; see *Bang* (2004) AB-8105.)

Appellants appear to miss the point the ALJ was making when he mentioned the discrepancy between the description on the driver's license and the actual appearance of the minor. When the clerk testified, he did not say he noticed that the minor was 45 to 50 pounds heavier and 2 inches taller than the description, but attributed that to the natural process of physical maturation, as appellants seem to imply; rather, he said that *he did not notice any difference* between the minor's physical appearance and the description on the license. Nor did he notice that the license had been expired for almost two years. He looked only at the birth date and the photograph, and made the sale on that basis alone.

In *22000, Inc.* (2000) AB-7543, the Board addressed a similar argument asserting that a clerk used due diligence by simply comparing the picture on the proffered identification with the customer presenting it:

[T]here 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.

We agree with the ALJ that the clerk "certainly should have made a more diligent inquiry," and that "[t]he Section 25660 defense was not established." (Concl. of Law 6.)

II

Appellants assert the Department violated their 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. Appellants 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 on appellate court decisions in *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575 [5

²The 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.)

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 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 appellants at the hearing. Appellants have 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 appellants have 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 appellants, it appears to us that appellants received the process that was due to them in this administrative proceeding. Under

these circumstances, and with the potential for 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, appellants are 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. Appellants' motion is denied.

ORDER

The decision of the Department is affirmed.³

SOPHIE C. WONG, MEMBER
FRED ARMENDARIZ, 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.