

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

AB-8570

File: 20-403410 Reg: 05060176

FAYEZ SHAFIK SEDRAK and MONA S. SEDRAK, dba Joe's 76 & Circle K
19248-B Harvill Avenue, Perris, CA 92570,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: February 1, 2007
Los Angeles, CA

ISSUED MAY 9, 2007

Fayez Shafik Sedrak and Mona S. Sedrak, doing business as Joe's 76 & Circle K (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days 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).²

Appearances on appeal include appellants Fayez Shafik Sedrak and Mona S. Sedrak, appearing through their counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated May 18, 2006, is set forth in the appendix.

²Unless otherwise indicated, all statutory references herein are to the Business and Professions Code.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 7, 2003. On July 13, 2005, the Department filed an accusation against appellants charging that appellants' clerk, Fantu Deldil, sold alcoholic beverages to 14-year-old Valerie Valentay on June 10, 2005.

At the administrative hearing held on February 7, 2006, documentary evidence was received and testimony concerning the violation charged was presented by Department investigator Steven Geertman, Valentay, and Deldil. Valentay's mother, Lorraine George, and her aunt, Angela Lazovich, also testified.

On June 10, 2005, Geertman observed Valentay and her 17-year-old step-sister, Jasmin George, enter appellants' premises, and he followed them in. He listened to their subsequent conversation with clerk Deldil, and watched Valentay bring several alcoholic beverages to the counter. The clerk did not ask Valentay her age or for identification. Geertman saw Valentay pay for the beverages and carry them, in a bag, out of the store, where she was detained by the investigator. Valentay told the investigator that she had not used a fake identification at the premises before.

On direct examination, Valentay denied ever having shown identification at appellant's premises. [RT 33.] Later, during rebuttal questioning, she said that on one occasion some time before June 10, 2005, she had shown Deldil some ID, probably that of her aunt, Angela Lazovich, but did not use it to buy anything.

Deldil testified that he did not ask for identification on June 10, 2005, because Valentay presented an ID showing her to be 21 years old on two prior occasions when she purchased alcohol. [RT 46-47, 52.] When he looked at the ID Valentay showed him, he said, he looked only to see the age and if the picture on the card looked like

Valentay. He said the identification showed her to be 21 years old and the picture resembled her. [RT 47-48, 52.]

Valentay's mother, Lorraine George, testified that Valentay had just that morning told her that she had used her aunt's ID two or three times before June 10, 2005, to purchase alcohol at appellants' premises. [RT 57, 59.] George said she had been a daily customer at appellants' premises since it opened, she had an excellent relationship with the people at the store, and she would not want to get anybody there in trouble because of her daughter lying about her age. She also stated her opinion that Valentay resembled her aunt Angela.

Valentay's aunt, Angela Lazovich, testified that Valentay would have had opportunities to take her driver's license from her purse, but that she had no knowledge of Valentay ever having done so. Lazovich stated she was also a regular customer of appellants' store. A copy of Lazovich's California driver's license was admitted into evidence as Exhibit A.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation was proved and that no defense under section 25660 was established. Appellants have filed an appeal contending that they established a defense under Business and Professions Code section 25660 and the penalty is excessive.

DISCUSSION

I

It is undisputed in this case that there was a sale of alcoholic beverages to a minor and that Valentay was not asked for, and did not show to the clerk, any identification on June 10, 2005. The only issue is whether the evidence established a

defense to the charge based on the clerk's having reasonably relied on false identification. The burden in such a case is on the party asserting the defense. To establish a defense under section 25660, there must have been displayed an identification which reasonably purported to be issued by a government agency and there must have been reasonable reliance upon that identification. (*Dept. of Alcoholic Bev. Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429 [13 Cal.Rptr.3d 826] (*Masani*).)

The defense is discussed in Conclusions of Law, paragraph 5, of the decision:

The evidence established that clerk Deldil did not request and was not shown any identification by Valerie Valentay at the time she purchased the alcoholic beverages on June 10, 2005. (Findings of Fact, ¶ 8.) It is very difficult to credit the hearing testimony of Valentay or her mother, George. Their motive to fabricate, to maintain their cordial relationship with Respondents and the timing of their attempt to help Respondents is way too convenient. In addition, clerk Deldil's story, that Valentay had shown him an ID twice before, that she had bought alcoholic beverages before and that the ID made her 21 years of age differs quite a lot from what Valentay testified. (Findings of Fact, ¶ 11.) She said she never bought alcoholic beverages there before and used the ID just one time to verify she was 28 years of age. (Findings of Fact, ¶ 13.) More important, however, if it was the Exhibit A ID that Valentay showed at Respondents' store in the past, it still does not provide Respondents a defense under Section 25660. The Exhibit A ID makes the presenter 28 years of age on June 10, 2005. There is just no way that a diligent sales clerk, who took the time to converse with Valerie Valentay as the evidence shows Deldil did, could reasonably believe that Valentay was 21 years of age, and certainly not 28 years of age. If it was not the Exhibit A ID that Valentay showed clerk Deldil on a prior occasion, there is not enough information in the record to establish the Section 25660 defense. (Findings of Fact, ¶ 11.) Either way, Respondents failed to carry their burden in establishing the affirmative Section 25660 defense.

Appellants' argument consists mainly in setting out the law with regard to the section 25660 defense and then to keep repeating that the clerk was diligent and reasonable in his inspection of the ID Valentay showed him at some prior date, which, appellants assume, was that of Lazovich. They also assert that "Clearly, . . . evidence

of majority was presented by one whose appearance indicated that she could well be twenty-one years of age." (App. Br. at 11.)

Unfortunately, "diligent" and "reasonable inspection" are not magic words that, repeated often enough, transform themselves into facts. Appellants want this Board to give a different interpretation to the evidence and reach a conclusion opposite to that of the ALJ. This, of course, the Board may not do.

The court in *Masani, supra*, 118 Cal.App.4th 1429, 1437, described the standards the Board must follow in reviewing a decision of the Department:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends, supra*, 100 Cal.App.4th at p. 1254; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; [Bus. & Prof. Code] §§ 23090.2, 23090.3.) We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] 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. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*)). 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.

The ALJ weighed the credibility of the witnesses, resolved the conflicts in the testimony, and made factual findings that are clearly supported by substantial evidence. The findings, in turn, fully and reasonably support his determinations. Appellants did not establish the affirmative defense of 25660.

II

Appellants contend the 15-day suspension imposed is excessive and constitutes cruel and/or unusual punishment.

A 15-day suspension is the "standard" penalty for a first sale-to-minor violation. The ALJ devoted a paragraph in the decision to explaining why he rejected the penalty recommended by the Department at the end of the hearing – a 25-day suspension with 10 of the days conditionally stayed for a year.

There are no unusual circumstances in this case that could make the "standard" penalty "excessive." Appellants' own definitions demonstrate that the penalty is neither "unusual" ("out of all proportion to the offense") nor "cruel" ("shocks the moral sense").

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, 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.