

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

AB-8822

File: 48-401982 Reg: 07066636

STATION 81 HOLDINGS, LLC, dba The Vault
81 West Santa Clara Avenue, San Jose, CA 95113,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: January 15, 2009
San Francisco, CA

ISSUED JUNE 22, 2009

Station 81 Holdings, LLC, doing business as The Vault (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for permitting a person under the age of 21 to enter and remain in the licensed premises without lawful business there, a violation of Business and Professions Code² section 25665.

Appearances on appeal include appellant Station 81 Holdings, LLC, appearing through its counsel, Nicholas G. Emanuel, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

¹The decision of the Department, dated January 18, 2008, is set forth in the appendix.

²Unless otherwise indicated, statutory references in this opinion are to the Business and Professions Code.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on July 29, 2004, and on August 13, 2007, the Department instituted an accusation against appellant. The accusation charged that appellant's employees, on December 15, 2006, permitted 19-year-old Christina Kailani Estrada (the minor) to enter and remain in the licensed premises without lawful business there in violation of section 25665 (count 1) and permitted the minor to enter and remain in the licensed premises in an intoxicated condition in violation of Penal Code section 647, subdivision (f) (count 2).

At the administrative hearing held on October 24, 2007, documentary evidence was received and testimony concerning the violation charged was presented by San Jose police officer Amir Chalighi and the minor. Two of appellant's owners, Mauricio Mejia and Douglas Cookerly, testified about the security personnel at the premises and the policies and procedures for checking identification.

Chalighi testified that he and another officer entered appellant's licensed premises about 1:30 a.m. in the course of doing routine undercover "bar checks." The bar has a main entrance at the front where security personnel are stationed to check patrons' identification. Patrons who are admitted have their hands stamped. There is also a side door leading to a chained-off outdoor smoking area. The side door also functions as the exit from the premises. A security person stands at the side door to make sure that anyone entering through that door has a stamped hand and that anyone going out does not have an alcoholic beverage.

Chalighi saw a young woman, later identified as Christina Estrada, enter the building from the outside smoking area and stand with some companions near one of

the fixed bars. Although she appeared to Chalighi to be under the age of 21, she had walked within a foot of a security guard when she entered, but was not checked by any employee for identification.

After a few minutes, Chalighi approached her, identified himself as a police officer, and asked her for identification. She produced a California driver's license bearing the name of Tierra Bergh and a date of birth that would make her 25 years old. Chalighi was convinced that Estrada was not that old, and noted that the height, weight, and eye color listed on the license did not correspond to Estrada's. He also saw that the license had expired in 2005. Although Chalighi said that Estrada "somewhat resembled" the photograph on the license, he also said "it didn't look like her. It wasn't her." [RT 14-15.]

After taking Estrada outside for further questioning, Chalighi noticed that she had a dark stamp mark on the back of her right hand. He determined that Estrada was 19 years of age. She was also obviously intoxicated.

Subsequent to the hearing, the Department issued its decision which determined that count 1 was established, but count 2 was not and it was dismissed. It was also determined that a defense pursuant to section 25660 was not established. An earlier violation of section 25665, occurring approximately 18 months before, was considered an aggravating circumstance.

Appellant filed an appeal contending it had established a defense to the charge pursuant to section 25660.

DISCUSSION

Appellant contends it established a defense to the charge pursuant to section 25660. That section provides, in relevant part:

(a) Bona fide evidence of majority and identity of the person is 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, that contains the name, date of birth, description, and picture of the person. [¶] . . . [¶]

(c) Proof that the defendant-licensee, or his or her employee or agent, demanded, was shown, and acted in reliance upon bona fide evidence in any transaction, employment, use, or permission forbidden by Section 25658, 25663, or 25665 shall be a defense to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon.

In his proposed decision, later adopted by the Department as its decision, the administrative law judge (ALJ) reviewed the evidence from the hearing and concluded (Finding of Fact IX):

[T]he evidence is clear that the minor entered the front door by showing a California driver [*sic*] license and received an entry stamp on her hand. The license used to gain entry had expired almost one and one-half years prior to the evening in question.

The ALJ found it was not reasonable for the person checking identification to rely on the license as evidence of Estrada's majority and identity because the license had expired almost 18 months before. Therefore, he concluded, the section 25660 defense was not established.

On appeal, appellant asserts that the findings show the necessary elements of the defense were present. Reliance, it says, was established by the finding that Estrada resembled the photograph on the license. The requirements for a bona fide identification were met, appellant asserts, because the license was issued by a government agency and contained the required information and photograph. Since the statute does not require the identification to be unexpired, appellant argues that the Department cannot reject the defense on the basis that the identification was expired.

Section 25660, as an exception to the general prohibition against sales to minors, must be narrowly construed. (*Lacabanne Properties, Inc. v. Alcoholic Beverage etc. Appeals Board* (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.*)

The case law regarding section 25660 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] (*5501 Hollywood*)). A licensee, or a licensee's agent or employee, must exercise the caution that 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, supra*.) 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, supra*, pp. 753-754.) Whether or not a licensee has made a reasonable inspection of an ID to determine that it is bona fide is a question of fact. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1445 [13 Cal.Rptr.3d 826]; *5501 Hollywood, supra*, at pp. 753-754.)

The court in *Masani, supra*, 118 Cal.App.4th at 1437, summarized the standard of review for questions of fact:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends[, Inc. v. Alcoholic Beverage Control Appeals Bd.* (2002)] 100 Cal.App.4th [1250,] 1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; §§ 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.

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].) The licensee or the licensee's agent must act in good faith and with due diligence in relying on an apparently valid but actually fraudulent ID:

[T]he 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 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.

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

Appellant asserts that reliance on the driver's license Estrada had was established by Finding of Fact IX, quoted above. In other words, since the ALJ found that Estrada had shown the driver's license and been allowed to enter the licensed

premises, the person checking identification at the front door had to have relied on the driver's license. Simple reliance, however, is not sufficient to establish the defense under section 25660. The case law noted above clearly recognizes the implicit requirement of *reasonableness* in the explicit requirement of *reliance*.

The Board addressed a contention similar to appellant's in *Aramark Sports and Entertainment Services, Inc.* (2000) AB-7586, saying:

The reason the reliance must be reasonable is obvious. Otherwise, a seller need only go through the motions of requesting identification, accept any driver's license handed to him, and sell the alcoholic beverage with impunity.

Appellant asserts that the "reliance" required by section 25660 depends only on "whether the appearance of the person presenting the identification resembles the photograph and description." (App. Cl. Br. at p. 3.) However, as the case law makes clear, reasonable reliance requires more than just a cursory comparison of the photograph on the identification with the person presenting the identification. The apparent age of the presenter must also be considered, that is, as noted above, the person presenting identification must appear as if he or she *could* be 21 years old.

As appellant acknowledges, the Board is bound to accept the Department's factual findings unless clearly erroneous. Appellant asserts the ALJ found that Estrada resembles the photograph on the license (Finding of Fact V). That finding describes Chalighi's testimony regarding his examination of the California driver's license Estrada gave him. The pertinent part of the finding says:

[Estrada] produced what appeared to be a valid California driver [*sic*] license indicating her date of birth as June 26, 1981. She would have been 25 years of age. *However, [Chalighi] did not think she looked it though she did resemble the photograph on the license.* [Italics added.]

What appellant describes as a "factual finding" is simply a description of the officer's testimony. In any case, although Chalighi said there was some resemblance between Estrada and the photograph on the license, he also said he thought she did not appear to be 25 years old, as indicated on the license. This testimony contradicts appellant's argument at least as much as it supports it, since it demonstrates appellant's employees should have been alerted by Estrada's young appearance even if they mistakenly believed that the photograph on the license was Estrada's.

Beyond that, Chalighi made the affirmative statement that although "[Estrada] somewhat resembled [the photograph on the license], . . . it didn't look like her. It wasn't her." [RT 14-15.] Besides this uncontradicted testimony, the ALJ was also able to observe Estrada in person and reach his own conclusion as to the resemblance or lack thereof.

The appearance and nature of the document presented also determines whether the reliance was reasonable. If the document gives some indication, after reasonable inspection, that it may not be the identification of the person presenting it, reliance on the document may not be considered reasonable. In this case, the ALJ concluded that it was not reasonable for the person who checked Estrada's identification to rely on that document, since it had been expired for a year and a half.

Appellant is correct that the statute does not require a document to be unexpired for it to constitute a bona fide identification. However, the question here is about reasonable reliance; i.e., whether it was reasonable for the person checking identification to rely on a license that expired almost 18 months earlier. The appellant in *Aramark Sports and Entertainment Services, Inc., supra*, also argued that the statute does not require that identification be unexpired to be bona fide. The Board responded:

Without reference to any legislative history, appellant suggests the legislature deliberately decided, when it enacted §25660, not to require that a driver's license be current to constitute "bona fide evidence of identity and majority." Even if appellant's surmise is correct, the fact that a license is not current, as the Board has recognized on more than one occasion, is nonetheless a relevant factor in determining whether a seller may reasonably rely on it as proof the person tendering it is of legal drinking age.

The Board has considered a number of appeals involving expired drivers' licenses. (See, e.g., *Thrifty Payless, Inc.* (2004) AB-8125, and cases reviewed there.) The time that has passed since a license expired has long been held to be a factor to be weighed when determining whether reliance was reasonable. (*Nourollahi* (1997) AB-6649.) In *22000, Inc.* (2000) AB-7543, the Board said that "[t]he current validity of a document offered to prove identification is always a material factor to be considered in according the proper deference to the document." The Board explained in *Circle K Stores, Inc.* (2003) AB-7923:

A seller of alcoholic beverages has a duty to see that alcoholic beverages are not sold to minors. Due diligence is not accomplished when a seller fails to observe information that is clearly presented, such as the expiration date in this case, that would put the seller on notice that the document presented might in some way not be bona fide evidence of the age and identity of the person presenting it.

The ALJ applied the proper legal standard in including the substantial period of expiration shown on the license as a material factor in determining reasonable reliance.

The evidence the ALJ had to consider pertaining to reasonable reliance was the following: there was some slight resemblance between Estrada and the person in the photograph on the license; Estrada appeared younger than the age indicated on the license; and the license bore, in red capital letters above the photograph, the following: EXPIRES 06-26-05, an expiration date approximately one and one-half years before the date of the incident.

On this record, and indulging, as we must, in all legitimate inferences in favor of the Department's decision (*Masani, supra*, 118 Cal.App.4th at p. 1437), we cannot say that the decision is an abuse of discretion. We are therefore bound by the ALJ's factual determination that the person checking identification at the front door of appellant's licensed premises did not reasonably rely on bona fide identification as evidence of Estrada's identity and majority. Appellant did not establish a defense under section 25660.

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.