

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

AB-9081

File: 20-404320 Reg: 09070968

7-ELEVEN, INC., dba 7-Eleven Store 2236 16965C
11400 Donner Pass Road, Truckee, CA 96161,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: January 6, 2011
San Francisco, CA

ISSUED JANUARY 18, 2011

7-Eleven, Inc., doing business as 7-Eleven Store 2236 16965C (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for its clerk selling an alcoholic beverage to an individual under the age of 21, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant 7-Eleven, Inc., appearing through its counsel, Beth Aboulafia, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean R. Lueders.

¹The decision of the Department, dated November 9, 2009, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on October 8, 2003. On April 27, 2009, the Department instituted an accusation against appellant charging that appellant's clerk, Hardial Singh Bains (the clerk), sold an alcoholic beverage to 17-year-old Eric R. (the minor) on March 13, 2009.

At the administrative hearing held on September 3, 2009, documentary evidence was received, and testimony concerning the violation charged was presented by the minor, the clerk, and Bret Ajax, a Department Investigator.

The testimony established that the minor purchased four bottles of beer on March 13, 2009, and that the clerk did not ask for identification prior to the sale on that day, because the minor was a regular customer whose identification had been checked by the clerk on five or six prior occasions [RT 50]. The clerk testified that the minor had been coming to the premises up to three times per day for a period of four to five years, so he was well known to appellant's employees [RT 51-52]. In addition, the minor was memorable to the clerk because he is African-American and, according to the clerk, there are very few black individuals in Truckee [RT 53].

The identification that was shown to the clerk on previous occasions was a false California driver's license, which showed the minor's true picture and accurate physical description (Findings of Fact 9). The fake ID was produced as evidence and found by the administrative law judge (ALJ) to be a credible fake (Determination of Issues 10 and 11). The Department Investigator testified that the identification had been confiscated by the minor's father approximately a month and a half prior to the incident in question [RT 75].

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

that the violation charged was proven and no defense was established.

Appellant filed a timely appeal raising the following issue: The administrative law judge erred in finding that a defense under Business and Professions Code section 25660 did not exist where the clerk's good faith reliance, on what appeared to be a valid California driver's license, was based on prior showings of the false identification.

DISCUSSION

The sole issue in this case is whether the Department erred, as a matter of law, in determining that appellant failed to establish a defense under Business and Professions Code section 25660.

Section 25660 provides:

(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, an identification card issued to a member of the Armed Forces that contains the name, date of birth, description, and picture of the person, or a valid passport issued by the United States or by a foreign government.

[¶] . . . [¶]

(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.

The burden in such a case is on the party asserting the defense.

In *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1445 [13 Cal.Rptr.3d 826] (*Masani*), the court said:

The licensee should not be penalized for accepting a credible fake that has been reasonably examined for authenticity and compared with the person depicted. A brilliant forgery should not ipso facto lead to licensee

sanctions. In other words, fake government ID's cannot be categorically excluded from the purview of section 25660. The real issue when a seemingly bona fide ID is presented is the same as when actual governmental ID's are presented: reasonable reliance that includes careful scrutiny by the licensee.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings.²

The question before the Board in this matter is whether it was an abuse of discretion to define reasonable reliance as failing, as a matter of law, when the false identification had not been viewed by the clerk for approximately a month and a half prior to the sale in question.

Reasonable reliance on a fake ID 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 v. Dept. of Alcoholic Bev. Control* (1957) 155 Cal.App.2d 748, 753-754 [318 P.2d 820] (5501 *Hollywood*).)

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*).)

²The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

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, supra*.) 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*, at 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 (*Masani, supra*, 118 Cal.App.4th 1429 at p. 1445; *5501 Hollywood, supra*, at pp. 753-754.) and this Board may not go behind that factual finding. The court in *Masani, supra*, at page 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.

In the instant case, the ALJ made a factual finding that the clerk's reliance on the fake ID was reasonable: "the court concludes Eric R. *could* have appeared 21 years old to Bains [the clerk]. On the occasions that Hardial Singh Bains demanded and was shown Exhibit B [the false identification], his reliance on said document was reasonable and in good faith." (Determination of Issues 10.)

Having made a factual finding that reasonable reliance existed on prior occasions, and that the minor could have appeared to be 21 to the clerk, the ALJ goes on to deny that a defense exists under Section 25660, based on a "separate transaction" theory. We believe this is error.

Both the ALJ and the Department cite *Lacabanne, supra*, 261 Cal.App.2d 181, for the proposition that it was not necessary for the bartender in that case to recheck the identification of the minor, who had already passed an ID check by the doorman, because the two events were part of the same "transaction." In the instant case, they assert, the reasonable reliance occurring a month and a half prior to the date of the accusation, cannot carry over to this incident because they are "separate transactions." There is nothing, however, in *Lacabanne* that says reasonable reliance evaporates after a specific period of time; the court merely held that it was not necessary for the bartender to recheck the minor's identification, but could rely on the check done at the door.

Section 25660, between 1955 and 1959, required that identification be shown

immediately prior to the purchase of alcohol. The words "immediately prior" were deleted, however, in the 1959 amendment to that section. The California Attorney General opined:

[I]t must be concluded that by the elimination of the words "immediately prior" from section 25660 in the 1959 amendment, the time requirement for the presentation of documentary evidence has been altered. Thus the evidence of majority and identity need no longer be shown immediately prior to the alleged offense to constitute a valid defense. However, it is clear that a defense is not made out unless it is proved that the required documentary evidence was demanded, that it was shown, and that the defendant-licensee, his agent or employee, was acting in good faith in reliance upon that prior showing at the time of the alleged violation.

(36 Ops.Cal.Atty.Gen. 124, 126 (1960).)

The Attorney General's opinion is cited with approval in *Lacabanne, supra*, at page 190: "The Attorney General . . . suggested that this omission has restored the law to the situation where a licensee may rely upon a prior exhibition of the evidence of majority and identity (see *Keane v. Reilly* (1955) 130 Cal.App.2d 407 [279 P.2d 152])."

As originally written, Section 25660 required "proof that the defendant licensee . . . demanded and was shown, *before* furnishing any alcoholic beverage . . ." documentary proof of majority. In *Keane v. Reilly, supra*, the California Court of Appeal, interpreting this language, held that the licensee was entitled to the protection of Section 25660 where the licensee's bartender demanded and was shown bona fide identification by the minors on prior occasions, even though none was presented at the time of the charged violation. The minors involved in that case had presented bona fide identification to the bartender "some months" - and in the case of one of the minors, five or six months - prior to the date of the incident. (*Keane, supra* at page 408.) In amending the statute in 1959 to eliminate the words "immediately prior," the legislature demonstrated a clear intent to remove the time requirement for the

examination of identification by the seller and to go back to the law as it existed under *Keane*.

When a regular customer, who is well-known to appellant and to appellant's employees, has shown identification multiple times, has an appearance that could be that of a person 21 years of age, and the ALJ has made factual findings that reliance on the (albeit false) identification was reasonable on previous occasions, we do not believe the 25660 defense is lost because the ID was not requested immediately prior to the sale. Having found that the clerk reasonably relied on the false identification on multiple prior occasions, and under the facts in this case, where the minor was memorable and well-known to appellants, and the actual fake ID was available for examination, we believe a defense was established.

ORDER

The decision of the Department is reversed.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.