

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

AB-9083

File: 21-473939 Reg: 09071201

DORMAYA ENTERPRISES, INC., dba Cabana Liquor
4346 Van Nuys Boulevard, Sherman Oaks, CA 91403,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew Ainley

Appeals Board Hearing: September 2, 2010
Los Angeles, CA

ISSUED NOVEMBER 23, 2010

Dormaya Enterprises, Inc., doing business as Cabana Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days for its clerk selling an alcoholic beverage to a minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Dormaya Enterprises, Inc., appearing through its counsel, Leonard Chaitin, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on January 13, 2009. On May 28, 2009, the Department filed an accusation charging that appellant's clerk, Zouher

¹The decision of the Department, dated November 19, 2009, is set forth in the appendix.

Abdullah (the clerk), sold an alcoholic beverage to 17-year-old Amanda Noelle Violas on March 13, 2009. When asked for identification, Violas produced what purported to be, but was not, a genuine California driver's license. The clerk observed the ID for approximately 10 seconds (FF 6), asked her if she were over 21, to which she replied "yes" (FF 10), after which he completed the sale. The driver's license contained Violas' actual photograph, her correct physical description, and the correct month and day of her birth; only the year of her birth was altered to indicate that she was 22 years old (FF 7). Approximately 15 minutes after the first purchase of alcohol, Violas re-entered the premises and purchased additional alcoholic beverages (FF 5). The second sale was witnessed by an investigator for the Department (FF 8).

At the administrative hearing held on September 9, 2009, documentary evidence was received, and testimony concerning the sale was presented by Violas (the minor), by Esmeralda Reynoso, an investigator for the Department, and by the clerk. The minor testified that during the period from January 2009 to March 13, 2009, she had used the fake ID about 25 times at 12 different locations and was unable to purchase alcohol using the fake ID on 3 occasions (FF 9).

Reynoso (the investigator) testified that the fake ID differed from a genuine one in the font used, placement of the larger photo, smoothness of the magnetic strip, texture of the corners, the shade of red ink, and overall finish. She also noted that on the date the fake ID was supposedly issued, Violas would have been 20, and therefore the ID would have had a red stripe on it indicating when she would turn 21 (FF 11). The investigator further testified that the defects were mainly technical and that she would have been unaware of many of them prior to her specialized training as an investigator (FF 12).

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established.

Appellant filed an appeal contending that the clerk's good faith reliance on a what appeared to be a valid California driver's license is a defense under Business and Professions Code section 25660.

DISCUSSION

The sole issue in this case is whether the Department erred 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. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.²

The question before the Board in this matter is whether appellant failed to meet its burden under section 25660, of reasonable inspection and reasonable reliance on the fake identification, or, whether it was an abuse of discretion to define reasonable reliance as requiring detection of subtle and technical defects.

"[T]he propriety of the penalty imposed by an administrative agency is a matter vested in the discretion of such agency, and . . . its decision thereon will not be disturbed unless there has been a clear abuse of discretion." (*Martin v. Alcoholic Bev. Etc. Appeals Bd.* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].)

On many occasions the courts have attempted to define "abuse of discretion." In *Sharon v. Sharon*, 75 Cal. 1, 48 [16 P. 345], the court had this to say: "In a legal sense, discretion is abused whenever, in its exercise, a court exceeds the bounds of reason, -- all the circumstances

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].

before it being considered." Bouvier's Law Dictionary, Volume I, page 94, defines "abuse of discretion" as "A discretion exercised to an end or purpose not justified by and clearly against reason and evidence."

(*Schaub's, Inc. v. Department of Alcoholic Beverage Control* (1957) 153 Cal.App.2d 858 [315 P.2d 459].)

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*).)

In the instant case, even though the ALJ believed Violas' appearance was consistent with that of a 20-year-old person (FF 14), he found in his Conclusions of Law 9 that it was reasonable for Abdullah to rely upon an ID showing that Violas was 22. He said there:

The Department also argued that it was unreasonable for any clerk to rely upon the fake ID given Violas' actual age. Since Violas appeared older than her actual age (Finding of Fact ¶ 14), this argument must fail - it *was reasonable* for Abdullah to rely upon an ID making Violas 22, an age which was within a couple of years of her apparent age [italics added].

The fake ID showed her actual photograph, and her true hair color, eye color, height and weight, so there was no attempt to pass herself off as someone else - merely an attempt to pass for a 22-year-old. In addition, the clerk verbally attempted to confirm that Violas was over 21, and she said "yes."

The point in question then, is whether the clerk's inspection of the fake ID was unreasonable, or whether upon closer examination he would have detected subtle, technical differences from a valid California ID. The cases tell us that 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 Properties, Inc. v. Alcoholic Beverage etc. Appeals Board* (1968) 261 Cal.App.2d 181, 189 [67 Cal.Rptr. 734]; *Farah v. Alcoholic Bev. Control Appeals Bd.* (1958) 159 Cal.App.2d 335, 339 [324 P.2d 98]; *5501 Hollywood, supra*, 155 Cal.App.2d at p. 753.)

The ALJ found that “[t]he fake ID in this case is very good. The only differences between it and an actual California ID are technical” (CL 7). And a page later he states: “Abdullah was presented with a very good fake ID” (CL 11). Appellant maintains that it is unreasonable to hold a clerk to the same standard as an ABC Investigator, as the ALJ did here, and we agree.

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].)

Although the ALJ notes several defects in the fake ID (FF 11), he also notes the testimony of Investigator Reynoso that such defects were purely technical in nature, and that she would have been unaware of many of them prior to her training as an investigator (FF 12).³ Further, the ALJ fails to identify which of the technical defects would or would not have been reasonably apparent to a diligent clerk, and then goes on to identify a defect which is apparent to him that was not mentioned by the investigator

³We find it interesting to note that the investigator claims the photo on the fake ID is “too close to the edge” [RT 16], but when asked how much farther away it should have been, says a “couple centimeters” [RT 17]. Considering that this would be more than three-quarters of an inch, we question the investigator’s testimony on this point.

(FF 13). The law does not hold the clerk to the standard of a person with specialized training, such as a Department investigator or an ALJ, but only to the standard of a “reasonable and prudent person in the same or similar circumstances” (*Lacabanne, supra*).

Where, as here, the clerk inspected a very authentic-looking fake ID, showing the minor’s true photo and description, where it was found reasonable to believe that she displayed the appearance of a person over the age of 21, where numerous other establishments had accepted the identification over a two-month period, where the clerk asked the minor if she was over 21 and was told “yes,” and the discrepancies in the fake ID were subtle and technical, we believe a reasonable and prudent person in the same or similar circumstances would have done the same.

We cannot expect a clerk in a retail establishment to detect the hyper-technical defects identified by the Department investigator after specialized training. It exceeds the bounds of reason under the circumstances presented to redefine reasonable inspection as requiring such a level of expertise. We believe that appellant met its burden of proof under section 25660, of reasonable inspection and reasonable reliance upon the fake ID presented to the clerk in this case, and that it was an abuse of discretion to hold appellant to a higher standard of reasonable inspection than case law⁴ dictates.

⁴“The licensee should not be penalized for accepting a credible fake that has been reasonably examined for authenticity and compared with the person depicted.” (*Masani, supra*, 118 Cal.App.4th at 1445.)

ORDER

The decision of the Department is reversed.⁵

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁵This 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.