

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

**AB-9378**

File: 20-381831 Reg: 13078285

7-ELEVEN, INC. and M & M SILVER OAKS  
dba 7-Eleven #2133-13880  
50 East Wilbur Road, Thousand Oaks, CA 91360,  
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: June 5, 2014  
Los Angeles, CA

**ISSUED JUNE 27, 2014**

7-Eleven, Inc. and M & M Silver Oaks, doing business as 7-Eleven #2133-13880 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended their license for 5 days for selling alcohol to a minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc. and M & M Silver Oaks, appearing through their counsel, Ralph Barat Saltsman and Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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<sup>1</sup>The decision of the Department, dated October 3, 2013, is set forth in the appendix.

## FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 11, 2001. The premises were previously licensed to appellants' witness Nadhusudan Singh Sandhu and his wife as individuals. That license was granted in 1996. In 2001, the couple incorporated as M & M Silver Oaks and transferred the license. Appellants have no disciplinary history under either license.

On April 3, 2013, the Department instituted an accusation against appellants charging that appellants' clerk, Sinhara Eranga Manjula Silva, sold an alcoholic beverage to Fadi Akram Raja Amin Nassar, a 20-year-old non-decoy minor.

At the administrative hearing held on August 8, 2013, documentary evidence was received and testimony concerning the violation charged was presented by Agent Steven Geertman of the Department of Alcoholic Beverage Control; by Nassar, the minor; by Silva, the clerk; and by Nadhusudan Singh Sandhu, an agent of the co-licensee corporation M & M Silver Oaks.

Testimony established that on February 8, 2013, Nassar and a friend went to the licensed premises. Nassar entered and proceeded to the coolers at the back. He selected three cans of Four Loko and took them to the counter. Silva, the clerk, rang up the alcohol and placed the three cans in a bag. Silva did not ask to see Nassar's identification. Nassar then exited the premises.

Agent Geertman, who had observed the transaction from outside the premises, approached Nassar. Nassar indicated he was only 20 years old, and produced valid California identification. Agent Geertman searched Nassar and determined that he did not have any fake identification.

Agent Geertman escorted Nassar inside the premises, and asked him to identify

the person who had sold him the alcohol. Nassar pointed to Silva and indicated that Silva had sold the alcohol.

Silva acknowledged selling alcohol to Nassar, but claimed Nassar had purchased alcohol and shown identification indicating he was over 21 during previous visits. He testified that he had worked for appellants for six years and was familiar with Nassar, whom he had seen in the premises two or three times a week. He stated that he had asked to see Nassar's identification in connection with the first five or six alcoholic beverage purchases, but stopped once he became familiar with Nassar.

Silva stated that, when he had previously checked Nassar's identification, he had verified the photo, the date of birth, and the expiration date, and had concluded it was a valid identification indicating Nassar was over 21.

Silva further testified that he had entered a date in the register in order to proceed with the sale in question, but could not recall the date he used.

Appellants' agent Sandhu testified that the store uses 7-Eleven's "Come of Age" training program. Employees are trained when they are first hired, and retrained annually thereafter. Moreover, the registers prompt the clerk to check identification when a transaction involves alcohol. They may enter a birthdate, swipe the identification, or press a button indicating that they have made a visual identification in order to proceed with the sale. Following this incident, the last option was eliminated to prevent clerks from manually overriding the prompt.

Subsequent to the hearing, the Department issued its decision which determined that the charge had been proven and no defense was established. The ALJ took note of appellants' training program and 17 years of discipline-free operation and imposed a mitigated penalty of 5 days' suspension.

Appellants have filed an appeal contending that the ALJ failed to consider testimony proffered in support of an affirmative defense under section 25660.

#### DISCUSSION

Appellants contend that the ALJ ignored testimony showing that Silva relied on bona fide evidence of Nassar's age, an affirmative defense as provided in Business and Professions Code section 25660, subdivision (b). Specifically, appellants direct this Board to Silva's testimony, in which he states that he had examined Nassar's (presumably false) identification in the course of previous transactions. Silva testified that he had examined the photograph, the date of birth, and the expiration date, and concluded the identification was legitimate and that Nassar was of age to purchase alcohol. Appellants argue that Silva therefore relied on bona fide evidence of majority, supplied in the past, when he proceeded with the present transaction.

In particular, appellants object to the ALJ's decision to credit Silva's testimony over Nassar's, and yet reject the conclusion that Silva relied on bona fide evidence of majority.

While Business and Professions Code section 25658, subdivision (a), designates criminal liability for the sale of alcohol to a minor, section 25660, subdivision (b) provides a defense where the licensee demanded and relied upon bona fide documentary evidence of majority and identity issued by a governmental agency. (*Dept. of Alcoholic Bev. Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1438 [13 Cal.Rtpr.3d 826] (*Masani*).) The statute defines "[b]ona fide evidence of majority and identity of the person" as

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, which contains the name, date of birth, description, and picture of the person.

Even a fake or spurious identification can support a defense under this section if the apparent authenticity of the identification is such that reliance upon it can be said to be reasonable. (*Id.* at p. 1445.)

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.

(*Masani, supra*, 118 Cal.App.4th at p. 1445.)

There is, however, more to establishing a section 25660 defense than simply comparing the person with the picture. 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].) The licensee or his agent must act in good faith and with due diligence in relying on an apparently valid but actually fraudulent identification:

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.

(*Keane v. Reilly* (1955) 130 Cal.App.2d 407, 409-410 [279 P.2d 152].) The burden for establishing such a defense rests with the licensee. "The licensee has the burden of proving . . . that evidence of majority and identity was demanded, shown and acted upon as prescribed by . . . section 25660." (*Lacabanne Properties, Inc., supra*, 261

Cal.App.2d at p. 189.)

Whether or not a licensee has made a reasonable inspection of an ID to determine if it is bona fide is a question of fact. (*Masani, supra*, 118 Cal.App.4th at p. 1445; *5501 Hollywood, Inc. v. Dept. of Alcoholic Bev. Control* (1957) 155 Cal.App.2d 748, 754 [318 P.2d 820].) This Board is bound by the Department's factual findings. (*Masani, supra*, 118 Cal.App.4th at p. 1437.)

Where a licensee claims a defense under section 25660 without the benefit of the alleged false identification, the level of proof required to show reasonable reliance does not change. Where the identification has been confiscated and entered into evidence, the ALJ as factfinder will typically examine the photograph, the date of birth, the expiration date, *as well as the physical description* including hair color, eye color, weight, and height. (See, e.g. *Durghalli* (2012) AB-9232; *Komi* (2004) AB-8092; *Hong* (2003) AB-7979; see also AB-7543, at p. 5 ["Common sense dictates that [a clerk] is required to give appropriate weight to each item of information on the license."].)

Where, as here, the evidence consists solely of the clerk's testimony, the exact same elements must be scrutinized. Where a clerk chooses to rely solely on past transactions as proof of age, he is not excused from the burden of recalling, in sufficient detail, the height, weight, hair color, and eye color on the identification and to what extent they matched the minor. Because of this, establishing reasonable reliance under section 25660 is extremely difficult without the actual identification in evidence. (See *Circle K Stores, Inc.* (2003) AB-8116; accord *Fulton & Fulton, Inc.* (2008) AB-8638 ["With no opportunity to view the supposed false identification, neither the ALJ nor this Board could make any assessment whatsoever as to whether a clerk may have reasonably relied upon it."].)

This is indeed a stringent level of proof, particularly for a clerk recalling details from a transaction that occurred well in the past. However, section 25660 must be narrowly construed, lest it become the argument *du jour* for licensees whose clerks have failed to verify identification.

It is undisputed that Nassar had only his actual identification, showing that he was a minor, on his person when he was apprehended by Agent Geertman. It is also undisputed that Silva did not ask for Nassar's identification during the course of the transaction. According to the ALJ, testimony presented by Nassar and Silva differed "on two main points: (1) the frequency of Nassar's visits to the Licensed Premises and (2) whether Nassar ever used a fake ID." (Conclusions of Law ¶ 6.) The ALJ relied upon the factors described in section 780 of the Evidence Code, and concluded that Silva's testimony was the more credible of the two.

Silva's testimony is summarized in the decision:

¶ 9. At the hearing, Silva testified that he had been employed at the Licensed Premises for approximately six years. He was familiar with Nassar, having seen him inside the Licensed Premises two to three times a week. He further testified that Nassar had purchased alcohol from him in the past. Silva asked to see Nassar's ID in connection with the first five or six such purchases. Nassar showed him an ID which indicated that he was of age. Silva stopped asking to see any ID once he became familiar with Nassar. On February 8, 2013, Silva testified that he entered a date of birth into the register to proceed with the sale, but did not recall the date he used.

¶ 10. Silva testified that he checked the photo, the date of birth, and the expiration date of the ID when Nassar showed it to him. In his opinion, it appeared to be a valid ID which indicated that Nassar was at least 21 years old. The photo appeared to be a photo of Nassar.

(Findings of Fact ¶¶ 9-10.) The ALJ gave weight to Silva's testimony and nevertheless concluded appellants had not established their defense. He provided his reasoning in the decision:

¶ 7. Notwithstanding this credibility determination, the Respondents did not establish a defense under section 25660. Obviously, since the fake ID in question was not produced at the hearing, no examination of it could be conducted. Case law makes clear that this is not fatal to a 25660 defense, which can be established through sufficiently detailed testimony.

In the present case, Silva's testimony fell short. First, Silva could not recall if the ID in question were an identification card or a driver's license. Second, Silva only looked at the photo, the date of birth, and the expiration date. In other words, he did not examine — and therefore did not testify about — the height, weight, hair color, or eye color listed on the ID, much less how those things related to Nassar's actual appearance. Third, although Silva opined that the ID appeared to be genuine, his opinion is not determinative. In fact, given that he only looked at three things when examining the ID (date of birth, photo, and expiration date), this opinion warrants little weight.

(Conclusions of Law ¶ 7.)

Appellants do not challenge the ALJ's credibility determination, but rather argue that because the ALJ credited Silva's testimony over Nassar's, the ALJ was required to find that appellants had established a defense under section 25660. It is contradictory, they contend, to credit Silva's testimony and nevertheless reject their affirmative defense.

Appellants conflate two independent legal standards. The evaluation of a witness' credibility is separate from a determination of whether that witness' testimony establishes a statutory defense. The ALJ clearly gave full weight to Silva's statement that he checked the date of birth, photo, and expiration date on the identification, but found that this examination of the identification was inadequate and therefore insufficient to support an affirmative defense under section 25660, subdivision (b). Moreover, the ALJ is correct that Silva's opinion on the legitimacy of the identification is not binding — whether the identification appeared genuine is a factual determination for the ALJ. There is no contradiction — he merely evaluated witness credibility and

sufficiency of the evidence separately, as was proper.

The ALJ is correct that, regardless of credibility, Silva's opinion on the apparent legitimacy of the identification is not determinative. Whether the identification appeared genuine, and whether reliance on it was reasonable, is a factual determination for the ALJ, and this Board may not overturn a finding of fact.

ORDER

The decision of the Department is affirmed.<sup>2</sup>

BAXTER RICE, CHAIRMAN  
FRED HIESTAND, MEMBER  
PETER J. RODDY, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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<sup>2</sup>This 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.