

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

**AB-9421**

File: 21-479712 Reg: 13078209

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,  
dba CVS Pharmacy #9109  
6265 El Cajon Boulevard, San Diego, CA 92115-3917,  
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: November 6, 2014  
San Diego, CA

**ISSUED DECEMBER 5, 2014**

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #9109 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended their license for 15 days for selling alcohol to a minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, appearing through their counsel, Ralph Barat Saltzman and Jennifer L. Carr from the law firm of Solomon Saltzman & Jamieson, and the

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<sup>1</sup>The decision of the Department, dated March 7, 2014, is set forth in the appendix.

Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

### FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 14, 2009. On March 21, 2013, the Department instituted an accusation against appellants charging that on October 26, 2012, appellants' clerk, Francis Hernandez (the clerk), sold or furnished an alcoholic beverage to 20-year-old David Robert Moore II (the non-decoy minor), in violation of Business and Professions Code section 25658(a).

At the administrative hearing held on January 7, 2014, documentary evidence concerning the violation charged was presented and testimony was given by the minor, by Department of Alcoholic Beverage Control agents, Dean Maier and Richard Sotelo, and by the clerk.

Evidence established that on October 26, 2012, the minor entered the licensed premises and went to the liquor section where he selected a 12-pack of Shock Top Ale, an alcoholic beverage. He took the 12-pack to the sales counter, completed the sale, and exited the premises. The minor testified he did not recall whether he had shown identification on this occasion to the clerk, but was adamant he had previously visited the licensee's premises nearly one hundred times and purchased alcohol on about two-thirds of those occasions by showing fake identification, including to the clerk from whom he had purchased the Ale this time.

Outside the premises, the minor was detained and questioned by two undercover Department agents engaged in "a multi-agent enforcement detail" because he looked "youthful" and was carrying beer. (RT at p. 31.) The agents discovered he was 20 years old and had in his possession a fake Pennsylvania driver's license

showing him to be 22. (Exhibit 4.) On a follow-up visit to the licensee' premises within a month of the subject sale, Agent Sotelo spoke to the clerk who admitted she did not ask the minor for his identification on his October 26, 2012 visit because she had previously checked his identification, found it valid, and recognizing him "by sight" recalled this fact. (RT at pp. 47, 48-49.) Sotelo obtained a copy of the store's video recording of the sale, and it did not appear to him that the clerk asked for identification.

After the hearing, the Department issued its decision which determined that the violation charged had been proven and that no defense had been established.

Appellants then filed a timely appeal.

#### DISCUSSION

Appellants contend the Department's decision is not supported by substantial evidence and that a defense was established under Business and Professions Code section 25660. (App.Br. at p. 2.)

In reviewing the Department's decision affirming the ALJ's opinion, certain principles guide our review. We cannot interpose our independent judgment on the evidence, but must accept the decision if it is supported by "substantial evidence." This means we should indulge in all legitimate inferences made in support of the Department's determination. This Board cannot reweigh the evidence to overturn the Department's findings and reach a contrary, although perhaps equally reasonable result. (See *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control (Lacabanne)* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734].) In short, we are confined to reviewing the decision for error guided by the applicable standard of review, which in this case is the "substantial evidence" standard.

*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627 [29

Cal.Rptr.2d 191] explains how the "substantial evidence" standard is applied.

There are two aspects to a review of the legal sufficiency of the evidence. First, one must resolve all explicit conflicts in the evidence in favor of the respondent and presume in favor of the judgment all *reasonable* inferences.<sup>[fn]</sup> [Citations.] Second, one must determine whether the evidence thus marshaled is substantial. While it is commonly stated that [an appellate court's] "power" begins and ends with a determination that there is substantial evidence [citations],<sup>[fn]</sup> this does not mean that [it] must blindly seize any evidence in support of the respondent in order to affirm the judgment. The Court of Appeal "was not created . . . merely to echo the determinations of the trial court. A decision supported by a mere scintilla of evidence need not be affirmed on review." (*Bowman v. Bd. of Pension Comrs.* (1984) 155 Cal.App.3d 937, 944 [202 Cal.Rptr. 505].) "[I]f the word 'substantial' [is to mean] anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with 'any' evidence. It must be reasonable . . . , credible, and of solid value . . . ." (*Estate of Teed* (1952) 112 Cal.App.2d 638, 644 [247 P.2d 54].) The ultimate determination is whether a reasonable trier of fact could have found for the respondent based on the whole record. [Citations.] While substantial evidence may consist of inferences, such inferences must be "a product of logic and reason" and "must rest on the evidence" [citations]; inferences that are the result of mere speculation or conjecture cannot support a finding. [Citations.]

(*Id.* at pp. 1632-1633, emphasis in original.)

Appellants maintain that a defense to the charge of the accusation was established under Business and Professions Code section 25660, which provides:

(a) Bona fide evidence of majority and identity of the person is any of the following:

(1) 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 that contains the name, date of birth, description, and picture of the person.

(2) A valid passport issued by the United States or by a foreign government.

(3) A valid identification card issued to a member of the Armed Forces that includes a date of birth and a picture of the person.

(b) 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.

Section 25660 establishes an affirmative defense, and the burden of proof is on the party asserting it. The law is clear that 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 said to be reasonable. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1445 [13 Cal.Rptr.3d 826].)

The ALJ made the following findings specifically regarding appellants' defense under section 25660:

A. It is undisputed that the clerk did not ask Moore, a minor, for identification on October 26, 2012, that Moore had in his possession a false Pennsylvania driver's license on that date and that Moore had previously shown his false Pennsylvania driver's license to several clerks at the premises. Therefore, the question presented here is whether the evidence established that Hernandez was previously shown and acted in reliance upon bona fide evidence of majority shown to her by Moore. After considering all the evidence presented at the hearing, the preponderance of the evidence did not establish that Hernandez had previously been shown a Pennsylvania driver's license by Moore and that Hernandez made a reasonable inspection of the identification presented by Moore. Therefore, a defense under Section 25660 of the Business and Professions Code was not established.

B. There was a conflict in the evidence as to whether Moore had presented a false Pennsylvania driver's license to Hernandez prior to October 26, 2012 indicating that he was over the age of twenty-one. After evaluating the credibility of the witnesses pursuant to the factors set forth in Evidence Code Section 780, including their demeanor, their capacity to recollect, the existence or nonexistence of a bias or motive and prior inconsistent statements, greater weight was given to the testimony of Agent Sotelo than to the testimony of Francis Hernandez in resolving the conflict in the evidence.

C. When Agent Sotelo spoke to Hernandez in November of 2012 (within

a month after the subject sale), Hernandez told Sotelo that she **thought** that the identification previously shown to her by Moore was a California identification. Since Hernandez was not sure one month after the sale to the minor what identification had been previously shown to her by Moore and since she did not mention any out-of-state identification when she was questioned by Agent Sotelo within one month of the subject sale, it is not credible that fifteen months later Hernandez would remember not only that Moore had previously shown her a Pennsylvania driver's license but also a detailed account of what steps she had taken to test whether the driver's license was a valid license and whether the photograph and descriptors on the license matched the customer. Also taken into consideration in making this determination, is the fact that Hernandez checked up to one hundred identifications a day and the fact that she had sold an alcoholic beverage to Moore on maybe two of the previous three or four times that she had waited on Moore.

(Findings of Fact ¶¶ IV.A-C, emphasis in original.)

Review of the entire record in this case establishes that, based on uncontradicted, corroborating evidence, there are several errors in the ALJ's findings that undercut the Department's position. (See *Kuhn, supra*, 22 Cal.App.4th at p. 1633.) First, the ALJ misinterprets the testimony regarding what the clerk said in response to questions about whether or not she had previously seen the minor's false identification. The pertinent testimony concerning this issue from the clerk proceeded as follows:

[MR. SAKAMOTO, counsel for the Department]. Now, sometime later did you -- do you remember talking to someone -- and maybe it was over the phone. It could have been a person, but someone who indicated he was from ABC, about this incident? And it could have been over the phone, too.

Do you remember?

A. I would say yes.

Q. Okay. And do you remember making a statement to them that you thought, at least at that point in time, that Mr. Moore may have shown you a California I.D. versus this, which is -- this blue one is actually Pennsylvania --

A. No.

Q. But do you remember saying something to the effect of think he did?

A. Not on this date.

[Objection; Overruled]

Q. Do you remember telling one of the investigators that you thought that Mr. Moore had shown you a California I.D. in the past; that is, before October 26th?

A. No.

Q. Okay. What did you remember telling --

A. That it was out of state.

(RT at pp. 62-64.) Nowhere in this exchange or in the record is there any testimony from the clerk that supports the ALJ's finding that she told Sotelo she thought the identification previously shown to her by the minor was a "California identification."

(See Findings of Fact ¶¶ III.D, IV.C.)

Neither does Agent Sotelo's testimony on this same topic support the ALJ's finding:

[MR. SAKAMOTO]. And at some point did you have some discussion with [the clerk] about whether or not she had checked Mr. Moore's I.D. or had ever done it in the past, something along those lines?

A. Yes.

Q. Okay. And so first off -- Well, what did you say about that, whether on any occasions she thought she had checked something from Mr. Moore in the past?

THE WITNESS: Yeah.

[Objection; Noted for the record.]

A. She said that she had previously, in other visits that he had been at the store buying alcohol, she had checked his I.D.

Q. And did you ask her any follow-up questions regarding any

more detailed recollection she had?

A. Yes. I asked her if she remembered what state the I.D. was from.

Q. Okay. What did she indicate to you in that response?

[Objection; Noted for the record]

A. That she indicated it was some other identification.

Q. Did she ever mention to you that she thought it was some other out-of-state identification?

A. No.

(RT at pp. 69-70.)

Not even the most generous reading of Agent Sotelo's testimony supports the ALJ's finding that the clerk told him she thought the identification previously shown her by the minor was from California. All that can reasonably be discerned from Sotelo's testimony is that, when asked if she remembered what state the identification was from, the clerk replied Agent Sotelo that it was "some other identification" — other than what, exactly, we do not know from the record. The only way the ALJ could find that the clerk told Sotelo she thought the identification was from California was by "speculation" and "conjecture," which are insufficient to support the factual finding made. (See *Kuhn, supra*, at p. 1633.) This is a serious error because the ALJ references the supposed "fact" that the clerk incorrectly recalled the identification shown her by the minor was a "California driver's license" to discount her testimony that she had previously been shown what appeared to be valid identification of majority status by the minor as lacking in credibility. (Findings of Fact ¶ IV.B.)

The second error in the ALJ's findings relates to and is based on the first. Specifically, the ALJ relies upon his misinterpretation of Agent Sotelo's testimony to

create what he characterizes as a "conflict in the evidence as to whether [the minor] had presented a false Pennsylvania driver's license to [the clerk] prior to October 26, 2012 indicating that he was over the age of twenty-one." (Findings of Fact ¶ IV.C.) In fact, there was no evidentiary "conflict." The clerk testified the minor had shown her before October 26, 2012 "some other identification" that appeared valid. (RT at pp. 54-55.) The clerk's testimony was corroborated by the minor's testimony as shown by the following colloquy:

[MS. CARR, counsel for the licensee]. Were you familiar with that clerk?

A. I believe so.

Q. Familiar enough to know her name?

A. No.

Q. In your prior occasions in coming to the location and dealing with this particular clerk, do you recall if she had ever asked you for your identification?

A. I don't remember any specific times. But I do know that I had shown my identification to probably every clerk in the store at least once, whenever they had been the one selling to me.

Q. So it's your testimony that you would have shown this Pennsylvania driver's license to this clerk at least one time before?

A. Yes.

(RT at pp. 19-20.)

There simply is no evidence in the record that conflicts with the testimony of the clerk and the minor on this matter; they are consistent with and corroborate each other. Moreover, there is no reason to doubt the minor's testimony that he had shown his fake identification previously to this particular clerk when purchasing alcohol; indeed, the minor's testimony on this point is self-incriminating given the criminal sanctions for any

minor who presents false identification to any licensee. (Bus. & Prof. Code § 25661.) Agent Sotelo's testimony merely informs us the clerk did not mention to him that the minor's identification was "out-of-state," only that it was "some other identification." (RT at p. 70.) While we are well aware of and sensitive to the rule that, in examining the sufficiency of the evidence, this Board must resolve all conflicts in favor of the Department, (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815, 817]), we cannot permit a purported conflict in evidence predicated upon a misreading of testimony to pass as "substantial evidence."

The third error in the ALJ's findings concerns the resolution of appellants' defense. The ALJ states:

[T]he question presented . . . is whether the evidence established that [the clerk] was previously shown and acted in reliance upon bona fide evidence of majority shown to her by [the minor]. After considering all the evidence presented at the hearing, the preponderance of the evidence did not establish that [the clerk] had previously been shown a Pennsylvania driver's license by [the minor] and that [the clerk] made a reasonable inspection of the identification presented by [the minor]. Therefore, a defense under Section 25660 of the Business and Professions Code was not established.

(Findings of Fact ¶ IV.A.)

We agree with the ALJ's identification of the "question presented," but his statement that "the preponderance of the evidence did not establish that [the clerk] had previously been shown a Pennsylvania driver's license by [the minor] and that [the clerk] made a reasonable inspection of the identification presented by [the minor]" is not based on "substantial evidence" in the record. (*Id.*) The "preponderance of the evidence" standard is defined as follows:

The greater the weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not

sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue other than the other.

(Black's Law Dictionary (3d pocket ed. 1996) p. 556.) Here, as discussed above, aside from Agent Sotelo's testimony which the ALJ mischaracterized as "conflicting" with the clerk's testimony, appellants' evidence that the clerk had previously been shown the minor's false driver's license was uncontradicted. While it was certainly within the ALJ's discretion to find the clerk's testimony to be less than credible based on the factors he listed from Evidence Code section 780, what is significantly absent from the ALJ's assessment is any consideration of the minor's consistent, corroborating testimony to the clerk's or discussion of the minor's credibility. The record, in sum, clearly shows "substantial evidence" that the clerk had previously been shown the minor's fake identification, recognized the minor at the time of this transaction, and, as a result, did not ask him to produce identification for this purchase.

Determining that the clerk was previously shown the minor's false identification, however, does not end our inquiry. Section 25660 provides a defense to the charge of selling alcohol to minors if the licensee demanded and reasonably relied upon bona fide documentary evidence of majority and identity purportedly issued by a governmental agency. (*Masani, supra*, at p. 1438.) Whether a licensee has made a reasonable inspection of an identification to determine if it is bona fide is a question of fact. (*Id.*; *5501 Hollywood, Inc. v. Dept. of Alcoholic Bev. Control* (1957) 155 Cal.App.2d 748, 754 [318 P.2d 820].)

Here, likely because the ALJ mistakenly found the evidence insufficient to establish the clerk saw the identification in the first place, he did not make any specific findings regarding the apparent authenticity of the minor's false Pennsylvania

identification. As an appellate body, this Board is precluded from making such findings of fact. Accordingly, remand of this matter is necessary for further findings on whether the clerk's previous reliance on the minor's false identification was reasonable and permitted her to forego asking him to present ID for the subject sale because she recognized him by sight.

#### ORDER

The decision of the Department with regard to appellants' defense under Business and Professions Code section 25660 is reversed.<sup>2</sup> This case is remanded for further fact finding concerning the authenticity of the minor's false Pennsylvania identification, and whether the clerk's decision to rely on her previous recollection of it and the minor was reasonable this time.

BAXTER RICE, CHAIRMAN  
FRED HIESTAND, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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<sup>2</sup>This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.