

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

AB-9435

File: 21-520356 Reg: 13079667

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store #10121
2655 Telegraph Avenue, Berkeley, CA 94704,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: January 8, 2014
Sacramento, CA

ISSUED JANUARY 29, 2015

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store #10121 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 15 days because their clerk sold an alcoholic beverage to a minor, a violation of Business and Professions Code section 25658(a).

Appearances include appellants Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, through their counsel, Margaret Warner Rose, of the law firm Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, through its counsel, Dean Lueders.

¹The decision of the Department, dated April 23, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 20, 2012. On December 13, 2013, the Department instituted a two-count accusation against appellants charging that, on August 23 and 30, 2013, separate clerks sold alcoholic beverages to separate non-decoy minors.

At the administrative hearing held on March 5, 2014, documentary evidence was received concerning the violation charged, and testimony was presented by David, the minor identified in count 2; by Wilson Kanau, appellants' clerk identified in count 2; and by Department Agent Michelle Ott.

Testimony established that on August 30, 2013, Kanau sold a twelve-pack of Corona beer to David, who was 17 years old at the time. Before making the sale, Kanau asked to see David's identification. David handed his wallet to the clerk. Inside the wallet, in a flap covered by plastic, was a fake California driver's license David had purchased. The clerk took the wallet, looked at the fake license, and returned the wallet to David. The clerk also asked David for his date of birth. David replied that he was born on December 5, 1991, the date of birth stated on the fake license.

The fake license also contained a photograph of David, and the height, weight, hair color, and eye color were all consistent with David's actual features.

The ALJ examined the fake identification and found that it was shinier and much thinner than a real California driver's license. Additionally, the ALJ found that David had a youthful appearance consistent with that of 17-year-old man.

After the hearing, the Department issued its decision which determined that count 2 had been proven and no defense had been established. The Department presented no evidence in support of count 1, and it was accordingly dismissed. The

decision imposed a penalty of 15 days' suspension.

Appellants' appeal contends that the ALJ applied the wrong standard in evaluating appellants' defense under section 25660. Also, on the date of the hearing for this appeal, appellants submitted a motion to continue oral argument until such time as all three Board members could be present to hear it.

DISCUSSION

I

Appellants contend the ALJ applied an improper and "draconian" legal standard in determining whether they proved their affirmative defense under Business and Professions Code section 25660. (App.Br. at p. 5.) According to appellants, "the licensee has the burden to prove that 'evidence of majority and identity was demanded, shown and acted on as prescribed by'" the statute. (App.Br. at p. 6, citing *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181.) Appellants argue this is a "reasonable person" standard, and that the ALJ instead applied an elevated standard of scrutiny appropriate for an ABC agent with expert training in the features of fake identification.

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. (Cal. Const. art. XX, § 22; Bus. & Prof. Code §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].)

Our review "is limited to a determination of whether the Department has proceeded without or in excess of its jurisdiction; whether the Department has proceeded in the manner required by law; whether the Department's decision is supported by its findings; whether those findings are supported by substantial evidence; or whether there is a relevant evidence which, in the exercise of reasonable diligence could not have been produced or was improperly excluded at the hearing before the Department." [Citations.]

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

At the administrative hearing, appellants conceded the fact of the sale to a minor, but relied on section 25660 as an affirmative defense. That section 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 valid motor vehicle operator's license, that contains the name, date of birth, description, and 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.

(Bus. & Prof. Code § 25660.) The statute creates an affirmative defense; the burden of proof lies with the party asserting it.

Case law explicitly extends the defense to include convincing forgeries: "It is well established that reliance in good faith upon a document issued by one of the

governmental entities enumerated in section 25660 constitutes a defense to a license suspension proceeding even though the document is altered, forged, or otherwise spurious." (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1968) 267 Cal.App.2d 895, 897 [73 Cal.Rptr. 352]; see also *Masani, supra*, 118 Cal.App.4th at pp. 1444-1445.)

Courts have consistently applied a good faith reasonable reliance standard, with reference to the circumstances of the sale, in cases raising a section 25660 defense.

In *Keane*,² for instance, the court wrote:

[A] licensee does not establish an absolute defense by evidence that the minor produced an identification card purporting to show that the person in possession of the card is 21. *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.*

(*Keane v. Reilly* (1955) 130 Cal.App.2d 407, 410 [279 P.2d 152], emphasis added; accord *5501 Hollywood, Inc. v. Dept. of Alcoholic Bev. Control* (1957) 155 Cal.App.2d 748, 753 [318 P.2d 820].) The court echoed this standard in *Dethlefsen*. If a "good faith" doubt as to the purchaser's age arose, said the court, "[the statute] intended that the vendor could rely upon documentary evidence of majority and identity such as motor vehicle operators' licenses . . . but 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], emphasis added.)

In *5501 Hollywood*, the court affirmed this standard, citing both *Keane* and

²*Keane*, as well as *Dethlefsen, infra*, predate a 1955 amendment to section 25660. That amendment modified the modes of identification accepted and the timing of the request for identification. (See Stats 1955, ch. 627, § 1.) The amendment, however, did not change the standard to be applied in evaluating whether a licensee has proven its defense.

Dethlefsen. (See *5501 Hollywood, Inc.*, *supra*, 155 Cal.App.2d 748.) While the court did acknowledge that "[i]t is essential to a successful defense that the operator's license or other evidence of majority be presented by one whose appearance indicates that he or she could be 21 years of age," it nevertheless applied the same reasonable person standard: "Although the licensee is not required to act at his peril, he must exercise the caution which would be shown by *a reasonable and prudent [person] in the same circumstances*." (*Id.* at p. 753, emphasis added.)

In *Farah*, the court again affirmed this standard. (See *Farah v. Alcoholic Bev. Control Appeals Bd.* (1958) 159 Cal.App.2d 335 [324 P.2d 98].) It wrote:

First, the licensee who makes a diligent inspection of the documentary evidence of majority and identity offered by the customer at or about the time of the sale is entitled to rely on its apparent genuineness. . . .
Second, a licensee must exercise the caution which would be shown by *a reasonable and prudent person in the same or similar circumstances*.

(*Id.* at p. 339, emphasis added.)

The Department does not contend that the clerk acted in bad faith, only that his reliance on the minor's identification was unreasonable. Assuming the correct standard was applied below — that is, that the ALJ reached his conclusions by comparing the clerk's actions to that of a reasonable and prudent person in the same circumstances — then this Board has no grounds to question the Department's decision. (See *Masani*, *supra*, 118 Cal.App.4th at p. 1145 ["Whether or not a licensee has made a reasonable inspection of an ID to determine that it is a bona fide is a question of fact."])
If, however, the ALJ applied an unfairly stringent legal standard — for example, if he compared the clerk's actions to that of a law enforcement officer trained to identify forgeries, or to that of a well-paid ALJ who has repeatedly encountered and examined

known fakes at his leisure in a well-lit hearing room — then the Department has failed to proceed in the manner required by law, and we must reverse.

In the decision below, the ALJ defined the applicable standard as follows:

III

"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, cited above, at 1445.

IV

"It is essential to a successful (Section 25660) defense that the operator's license or other evidence of majority be presented by one whose appearance indicates that he or she could be 21 years of age, and a reasonable inspection of the document must be made by the licensee or his agent." 5501 Hollywood, Inc. v. Department of Alcoholic Beverage Control (1957) 155 Cal.App.2d 748, 753, 318 P.2d 820.

(Legal Basis for Decision III and IV.) Based on these citations, the ALJ concluded appellants had failed to carry their burden of proving a section 25660 defense:

II

As stated in Paragraph V in the Findings of Fact, David displayed the appearance of a seventeen-year old young man at the hearing. It is reasonable to assume that he did not appear older some seven months earlier when he purchased the beer at Respondent store. More importantly, no evidence or argument was presented that the seventeen-year old David's appearance indicates he could have been twenty-one years old when he purchased the beer. In accordance with the 5501 Hollywood, Inc. decision cited above, Respondent's argument of a Section 25660 defense fails.

III

Moreover, considering that a youthful-appearing seventeen-year old customer was purchasing the beer, Respondent's clerk's comparison of David's features with the information on the fake driver license, without asking David to take the license out of the wallet, was not "careful scrutiny." Accordingly, the clerk's reliance on the fake driver license as David's proof of majority was not reasonable. Therefore, Respondent's argument of a Section 25660 defense also fails in accordance with the Masani decision cited above.

(Determination of Issues II and III.)

There are two flaws in the decision below. First, the ALJ misinterprets the *5501 Hollywood* quote as imposing an unusually onerous burden on appellants to prove that the minor "could have been twenty-one years old when he purchased the beer." In fact, the *5501 Hollywood* court was not adding to the burden of proof, but rather acknowledging that there will be instances in which an individual is so obviously underage that any identification they present purporting they are over 21 is almost certainly fraudulent.³ In the decision below, the ALJ ruled against appellants' section 25660 defense largely because "no evidence or argument was presented" to carry this nonexistent burden. (Determination of Issues II.) Accordingly, the conclusion is flawed as a matter of law.

Second, while the decision accurately refers to reasonable reliance as part of the section 25660 standard, it does not qualify reasonable reliance with reference to the circumstances of the transaction. (See *Farah, supra*, 159 Cal.App.2d at p. 339 ["same or similar circumstances"]; *5501 Hollywood, Inc., supra*, 155 Cal.App.2d at p. 753 ["same circumstances"]; *Dethlefsen, supra*, 145 Cal.App.2d at p. 567 ["reasonable inspection, the circumstances considered"]; *Keane, supra*, 130 Cal.App.2d at p. 410 ["licensee must act as a reasonable and prudent [person] would have acted under the circumstances"]; see also *Masani, supra*, at 118 Cal.App.4th at p. 1446 [affirming factual finding of no reasonable reliance because clerk could not have observed portion

³One can imagine, for instance, a small child presenting identification claiming she is over 21. In general, however, there are many instances — particularly in a city like Berkeley, where the population is largely university students — in which a purchaser may not look 21, but is, in fact, over 21, often by mere days or weeks. Section 25660 is intended to *protect* sellers who rely on identification in such moments of doubt — not add an additional burden of proving the buyer's apparent age.

of ID purporting government issuance under circumstances in which ID was presented].)

Indeed, the decision below presumes knowledge of facts not possibly within the knowledge of the clerk: "considering that a youthful appearing *seventeen-year old* customer was purchasing the beer, Respondent's clerk's comparison of David's features with the information on the *fake* driver license . . . was not careful scrutiny." (Determination of Issues III, emphasis added.) The clerk, however, had no knowledge of David's actual age — only his outward youthful appearance — nor did he know that the identification David presented was fake.

We remind the Department of the weight courts have given to reasonableness *under the circumstances* of the sale. The ALJ's judgment as to David's age, based on his appearance, was a leisurely one, made with the full knowledge of David's actual age and the fraudulence of his proffered identification. His interaction with David was far more lengthy and in-depth than the clerk's, and he was privy to factual information David deliberately concealed from the clerk. The reasonableness standard employed by the ALJ turns on a fully transparent courtroom examination, and gives little more than lip service to the narrow circumstances of the sale.

In fact, the clerk here did precisely what a reasonable clerk would do under the circumstances — he asked for identification, and once it was in his possession, he verified the information on the identification, including physical description, photo, and date of birth. There is absolutely nothing in section 25660 that required him to make a *provable* judgment on the spot as to David's actual age. Indeed, section 25660 exists to relieve clerks from having to accurately guess a buyer's age, provided they demand, are shown, and act in reliance upon ostensibly bona fide identification. Given that the

decision below turns entirely on this supposed failure of proof, we must reverse.

II

In their motion for a continuance, appellants contend that, because Article XX of the California Constitution states that the Alcoholic Beverage Control Appeals Board shall consist of three members, oral argument on this matter should be continued until such time as all three Board members would be present. The Board explained to appellants' counsel that it would proceed to hear the matter, as the presence of two members constituted a quorum, but if in the deliberations there was a difference of opinion between the members present as to the proper disposition of the case, we would reset it for reconsideration and hearing (unless waived) when all members could be present. Accordingly, we denied the motion, but, to avoid a party making future motions on this same reasoning, further clarify our reasons and authority for denying it.

There is nothing in the language of the California Constitution creating the Appeals Board or in the legislation implementing its provisions that addresses the question of whether the Board may hear and decide an appeal when it does not have a full complement of members. Similarly, there is no general statutory provision applicable to the Board or other administrative agencies, and our research has not disclosed any California case law addressing the subject. While some California administrative agencies are governed by a statute as to what constitutes a quorum for conducting business, (see, e.g., Bus. & Prof. Code § 5524 [California Architects Board]; Bus. & Prof. Code § 8524 [Structural Pest Control Board]), the Appeals Board is not one of them.

However, authorities from courts of other jurisdictions, relying on common law, support the Board's long-standing practice of deciding cases when a simple majority of

the three-member Board is present for oral argument. (See, e.g., *Fed. Trade Comm. v. Flotill Prods., Inc.* (1967) 389 U.S. 179, 183-184 [88 S.Ct. 401] ["[I]n the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body. Where the enabling statute is silent on the question, the body is justified in adhering to that common-law rule."]; see also *Ho Chong Tsao v. Immigration & Naturalization Service* (5th Cir. 1976) 538 F.2d 667, 669.)

Until such time as an appellants provide us with persuasive law to the contrary, or a reviewing court or the California Legislature holds otherwise, our position stands.

ORDER

The decision of the Department is reversed.⁴

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

⁴This 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.