

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

ALEJANDRO and REMIGIA LORESCO	)	AB-7310
dba 7-Eleven Store #13591)	
275 E Street	)	File: 21-152493
Chula Vista, CA 91910,	)	Reg: 98044097
Appellants/Licensees,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Rodolfo Echeverria
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	December 3, 1999
	)	Los Angeles, CA

Alejandro and Remigia Loresco, doing business as 7-Eleven Store #13591 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 25 days for appellant's employee selling an alcoholic beverage to a person under the age of 21, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellants Alejandro and Remigia Loresco, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and

¹The decision of the Department, dated December 10, 1998, is set forth in the appendix.

the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on March 26, 1984.

Thereafter, the Department instituted an accusation against appellants charging that, on June 2, 1998, appellants' clerk, Joseph Ortiz ("the clerk"), sold beer to Carlos Lavallo ("the minor"), who was then 17 years of age.

An administrative hearing was held on October 19, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Chula Vista police officer Ben Chassen, by the minor, and by appellant Remigia Loresco.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as charged and that no defense had been established pursuant to Business and Professions Code §25660.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) they established a §25660 defense; (2) the age of the buyer was not established by credible evidence; and (3) the date of the prior violation was not properly established.

DISCUSSION

I

Appellants contend that, contrary to the finding in the Department's decision, they established a defense under Business and Professions Code §25660. That section provides:

"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 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. Proof that the defendant-licensee, or his employee or agent, demanded, was shown and acted in reliance upon such bona fide evidence in any transaction, employment, use or permission forbidden by Sections 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 minor showed the clerk an identification card issued by the Chula Vista Adult School, part of the Sweetwater Union High School District, to Eduardo Acevedo. It contained a picture, a date of birth of January 9, 1977, and an expiration date of June 30, 1996. Appellants argue that this identification met the criteria for bona fide identification under §25660 and that the clerk's good faith reliance on that identification is a defense to the violation charged.

The ALJ stated in Finding IV that "it is arguable that this identification card was issued by a subdivision of a municipal government" The identification was issued by an entity of the Sweetwater Union High School District. A school district is a local government agency. (Gov. Code §82041; Kirchmann v. Lake Elsinore Unified School Dist. (1997) 57 Cal.App. 4th 595, 602 [67 Cal.Rptr. 2d 268].) Therefore, the identification was issued by a governmental entity as required by the statute.

The ALJ stated further in Finding IV that the identification “contains a name, a purported date of birth under Acevedo’s name and a photograph, [but] the card does not contain a physical ‘description’ as required by Section 25660” Appellants argue that a description is not necessary for a bona fide identification unless it is an Armed Forces identification card. This argument is based on the legislative history annotation of §25660 found in West’s Annotated California Codes:

“The 1987 amendment deleted Selective Service registration certificates as acceptable identification, and specified contents for an acceptable armed forces identification card.”

Deering’s California Codes Annotated states:

“1987 Amendment: (1) Amended the first sentence by (a) deleting ‘, a registration certificate issued under the Federal Selective Service Act,’ after ‘operator’s license’; and (b) adding ‘, which contains the name, date of birth, description, and picture of the person’;”

The Legislative Counsel’s Digest for AB 566 (as amended March 24, 1987), the 1987 bill that amended §25660, states that the bill “would delete the registration certificate issued under the Selective Service Act . . . and would require the identification to contain the name, date of birth, description, and picture of the person producing the identification.” The Enrolled Bill Report from the Department states, under the heading “Impact Assessment”:

“It would . . . require an identification card to contain the name, date of birth, picture, and description of the person producing the identification.

“Creating a requirement that a picture and a description be mandatory for identification cards will strengthen the law in such a fashion as to eliminate some inappropriately used defenses involving identification cards. . . . The additional requirements imposed by this bill will mandate that alcoholic beverage licensees take more care in inspecting identification cards prior to service of alcoholic beverages to persons who may be minors.”

We see nothing in this legislative history that would lead us to believe the legislature intended the requirements of name, date of birth, picture, and description to

be limited to armed forces identification cards. To limit these requirements to only that one type of identification card would hardly comport with the stated objective of fewer sales to minors. Logically, the requirements must apply to all identification cards sought to be used as “bona fide evidence of majority and identity” under §25660. Since the Adult School ID card used in this instance did not contain a description, it does not qualify as a bona fide ID and cannot support a defense under §25660.

The ALJ also noted that “the card shows an expiration date of June 30, 1996.” As appellants point out, this Board held in Nourollahi (1997) AB-6649, that an expired identification card is not automatically barred as a bona fide identification card, but the fact of expiration

“is a factor to be weighed in determining whether appellants’ reliance was reasonable and in good faith. It is one thing for a person to offer their expired license as identification a few days after its expiration, when they may not have yet received its replacement. It is another for someone to carry a license outdated for more than two years. When the document’s expiration is added to the fact that the person presenting the identification is youthful enough to put the seller on notice of inquiry in the first instance, it seems fair to say that the seller was derelict in not seeking further proof of identity. A driver’s license which expired as long ago as the license in this case should be a ‘red flag’ to any potential seller.”

In the present case, the expiration date of almost two years before should have put the clerk on notice to ask for additional ID.

II

Appellants contend that the age of the buyer was not established by credible evidence, since the only evidence of his age was his own testimony.

The buyer testified that he was 17 at the time of the purchase. A person’s age may be proved by his own testimony. (California v. Ratz (1896) 115 Cal. 132, 133 [46 P. 915, 915-916], overruled on other grounds, California v. Hernandez (1964) 61 Cal.2d

529 [393 P.2d 673, 39 Cal.Rptr. 361]; California v. Lew (1947) 78 Cal.App. 2d 175, 179 [177 P.2d 60].)

Officer Chassen also testified that he had verified the buyer's age through information on the Chula Vista police dispatch computers as well as the San Diego County computer system. Appellants' counsel objected to the officer's testimony as hearsay, which the ALJ noted. However, hearsay may be used to support other evidence, such as the buyer's testimony as to his age.

III

Appellants contend that the date of a prior sale-to-minor violation was not properly proven, and, therefore, this violation should not be considered a "second strike" under Business and Professions Code §25658.1.

Exhibit 3 consists of an "Order Granting Offer in Compromise," with file # 21-152493 and Reg. # 97040817, and a copy of an accusation against appellants for an alleged violation on or about June 14, 1997. The accusation bears the same file number as the Order, but no Reg. number. The Order does not recite the date of the violation to which it applies. The Order bears a proper certification and attestation, but the accusation is not certified, although it is stapled to the Order.

This is not the first appeal in which this problem has appeared. In the appeal of Kim (1999) AB-7103, the Department attempted to base a penalty upon prior violations that were not properly proven. The Board said there:

"Copies of 'public writings,' such as Department accusations, may be used as secondary evidence if properly certified to be accurate copies. Proper certification involves a written statement by the legitimate custodian of the writing that the copy is a true and correct copy of an official document, the custodian's signature, the date the certification was signed, and the place where it was signed.

“In this case, only one copy of each accusation is relevant: that with the filing date and the Reg. number. The certification of this copy was signed ‘Rheba Chastain, OSSI / Hearing & Legal.’ The place is provided in the certification itself, which says that the document is from Department headquarters in Sacramento. There is no date, however, nor is there any indication that Rheba Chastain is the legitimate custodian of the writing.

“The accusations were not properly certified and were not competent evidence of the dates of the prior violations. Since there was no other evidence of the dates of the prior violations, the Department erred in applying Business and Professions Code §25658.1, subdivision (b), and revoking the license on the basis of ‘three strikes.’”

The present case also lacks a certified copy of a document setting forth the date of the prior violation. Even if the accusation in question had been properly certified, it did not bear a Reg. number to connect it to the Order. There was no other evidence of the date of the prior violation. Indeed, the ALJ did not even bother to use the date of the violation when finding that there had been a prior strike. He said, in Finding VI: “On August 18, 1997, [appellants] were found to have violated Section 25658(a)” We can find no reference to August 18, 1997, on any of the documents in Exhibit 3. It is certainly not the date of the prior violation. The Department exceeded its authority and acted without jurisdiction in finding that there was a prior violation that made this violation a second strike.

ORDER

The decision of the Department is affirmed, but the penalty is reversed and the matter is remanded to the Department for reconsideration in light of this opinion.²

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.