

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

AB-7753

File: 48-23503 Reg: 00048459

TUPEY CORPORATION dba Tip Top Inn
243-45 S. San Gabriel Blvd., San Gabriel, CA 91776,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: December 6, 2001
Los Angeles, CA

ISSUED FEBRUARY 22, 2002

Tupey Corporation, doing business as Tip Top Inn (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for five days for permitting a person under the age of 21 to enter and remain in the premises, 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 §25665.

Appearances on appeal include appellant Tupey Corporation, appearing through its counsel, Barry F. Hammond, and the Department of Alcoholic Beverage Control, appearing through its counsel, Michele L. Wong.

¹The decision of the Department under Government Code 11517, subdivision (c), dated December 11, 2000, is set forth in the appendix, as is a copy of the Administrative Law Judge's proposed decision.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on December 1, 1977. Thereafter, the Department instituted a two-count accusation against appellant charging that, on January 24, 2000, appellant, through its bartender, Ivan Chiu Kwan, permitted two 19-year-old women, Hoan My Vuong and Helen Lee, to enter appellant's premises and remain there for at least one-half hour.

An administrative hearing was held on May 3, 2000, at which time count 2 was dismissed because the Department had been unable to serve Helen Lee, and the matter was continued to June 8, 2000. At that time documentary evidence was received and testimony was presented by the minor, Vuong; by San Gabriel police officer Andy Textira; by appellant's security guard, Joseph Mosesean; and by appellant's general manager, Ken Cai. Appellant was represented by Cai at the hearing.

On direct examination, Vuong testified that she entered the premises on the night in question with four friends and that the security guard did not check her identification. [RT 8,11.] Later, on re-direct examination, Vuong testified that she did not remember showing the security guard her identification. [RT 52.] She also testified that she was carrying three identification cards that night, two that were her own² and one that was not, and that she had given all three to the police officer. [RT 52-53.]

Officer Textira testified that he encountered Vuong in the premises during the course of a routine bar check. [RT 13, 15.] When he asked Vuong for identification,

²She said that she had two California driver's licenses because of a name change.

she gave him a driver's license showing she was over 21, but the picture on it did not look like her. [RT 15.] He asked if she had other identification, but she said she did not. [RT 16, 21.] Textira testified that he asked the security guard if he had checked Vuong's identification, and the security guard said that he had not. [RT 17-18.] Textira also spoke with the bartender, and cited him for violation of Business and Professions Code §25665. [RT 19.]

Appellant's security guard on that night, Mosean, testified that he checked Vuong's identification and that he told the officer he had checked her identification. [RT 24, 26, 36.] He also testified that the officer showed him two identification cards obtained from Vuong, her own and one that showed she was over 21. [RT 26-27, 32.]

A copy of the expired California driver's license of Grace Kim, which Vuong had with her on the night in question, was admitted into evidence as Exhibit 3. A copy of appellant's security videotape from the night in question was viewed during the hearing and admitted into evidence³ as Exhibit A.

Subsequent to the hearing, the Administrative Law Judge (ALJ) issued a proposed decision in which he found that appellant had established a defense to the charge under Business and Professions Code §25660 and ordered the accusation dismissed. The Department refused to adopt the ALJ's proposed decision, instead issuing its own decision pursuant to Government Code §11517, subdivision (c), in which it determined that no defense had been established and ordered a five-day suspension of the license.

³A copy of the videotape was admitted into evidence sometime after the hearing. [RT 55-56.]

Appellant thereafter filed a timely appeal in which it raises the following issues: (1) the ALJ erred in admitting into evidence a false identification carried by Vuong on January 24, 2000; (2) there is not substantial evidence to support the findings and determinations; and (3) the penalty is excessive and an abuse of discretion.

DISCUSSION

I

Appellant contends it was error to admit into evidence, and give weight to, a California driver's license issued to Grace Kim (Exhibit 3), but carried by Vuong on the night in question, because there was no evidence presented that Vuong showed that identification to the security guard when she entered.

Appellant is correct that there is no direct evidence that Vuong showed Grace Kim's driver's license to the security guard. However, the ALJ admitted it into evidence based on the "strong inference that Exhibit 3 was the document that Ms. Vuong showed to the security guard." Since Grace Kim's identification was the only one Vuong had that could make it appear that she was over 21, the ALJ's inference is reasonable.

II

Appellant contends there was not sufficient evidence to sustain the accusation because both the minor and the police officer lied, as was shown by the videotape of Vuong as she entered the premises. Appellant argues that, because neither of the Department's witnesses had any credibility, the only credible evidence presented was the testimony of the security guard and the security videotape from that night.

There is no question that the violation occurred. Appellant does not dispute that Vuong entered and remained in the premises or that the security guard and/or the

bartender permitted Vuong to enter and remain there. The real question is whether there is a defense available to appellant pursuant to Business and Professions Code §25660.⁴ It is appellant's burden to prove all the elements of this affirmative defense. Therefore, appellant needs to prove that the security guard demanded, was shown, and acted in reliance upon bona fide evidence of majority and identity as defined in the statute.

The videotape clearly contradicted the testimony of Vuong and is consistent with the testimony of the security guard. Vuong testified that she entered with four friends and the security guard did not check her ID. The videotape shows that she entered the premises with two friends and showed the security guard something she took out of her pocket.

The police officer testified that the security guard said he had not checked the ID's of Vuong and her friends because they looked as if they were at least 21. The security guard denied making such a statement to the officer; rather, he testified, he told the officer he had checked Vuong's identification. The videotape appears to confirm that the security guard checked Vuong's identification, and it is reasonable to

⁴ Business and Professions Code §25660 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."

infer that he would have told the officer the truth when asked if he had checked Vuong's identification.

Assuming that Vuong showed the security guard the expired California driver's license of Grace Kim, the question to be answered is whether the security guard reasonably relied on this as evidence of majority and identity. In this context, the damaged credibility of the Department's witnesses, while obvious, is irrelevant.

The Department determined that a §25560 defense was not established (Determination I):

"The [security guard] failed to make a diligent inspection of Ms. Vuong's identification [Exhibit 3], and thus did not exercise the caution a reasonable and prudent person in a similar position should or would have. [5501] Hollywood, Inc. v. Department of Alcoholic Beverage Control 155 Cal.App.2nd 748. Had [the security guard] been as diligent and cautious as the law requires, he would have noticed that the California Driver License [Exhibit 3] expired approximately 15 months prior to Ms. Vuong's entry into the premises.

"The length of time a document has expired is a relevant consideration in assessing whether an employee has acted as a reasonably prudent person in reliance on the identification. Quik Stop Markets AB-6759. The longer a license has been expired, the greater diligence a licensee must exercise in determining a patron's age. Loresco AB-7310 and Nourollahi AB-6649. Under the circumstances and facts presented in this case, the licensee has failed to meet its burden of proof to establish the affirmative defense of Section 25660 of the Business and Professions Code."

It appears reasonable to infer that the identification shown the security guard by Vuong was that of Grace Kim. It also appears that Vuong did not look very much like the picture on Grace Kim's driver's license: the officer testified that she did not look like the picture [RT 15] and the security guard, while stating that she more closely resembled the picture on Grace Kim's driver's license than the picture on her own license, said that she did not look very much like the picture on the identification she showed him [RT 33].

Both the lack of resemblance to the picture on the license and its expiration 15 months before should have put the security guard on notice to make further inquiry about Vuong's age and identity. He apparently ignored the lack of resemblance and overlooked the expiration date. There is no hint here of intentional misconduct by the security guard. However, it cannot be said, under the circumstances, that he used due diligence in examining the identification shown him by Vuong. Therefore, his reliance on that identification was not reasonable and cannot support a defense under §25660.

III

Appellant contends that the penalty is excessive and an abuse of discretion. It points out that it has a security guard who checks for identification at the door and it is clearly making a good faith effort to comply with the law. It asserts that a suspension would force the premises to close and cause a financial hardship. It concludes that a fine or warning would be the appropriate discipline in this case.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

The penalty imposed, five days' suspension, is very minimal and may reflect the Department's recognition of appellant's efforts to comply with the law. It is also eligible for a Petition for Offer in Compromise, which, if granted, would allow appellant to pay a fine as prescribed in Business and Professions Code §23095. Although reasonable

minds could disagree about the appropriateness of the penalty imposed, it is not so clearly excessive that it constitutes an abuse of the Department's discretion.

ORDER

The decision of the Department is affirmed.⁵

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁵This 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.