

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

AB-7870

File: 21-355409 Reg: 01050491

JCM FOODS, INC. dba El Toro Market III
1581 East Vista Way, Vista, CA 92084,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: June 4, 2002
Los Angeles, CA

ISSUED AUGUST 8, 2002

JCM Foods, Inc., doing business as El Toro Market III (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for appellant's clerk 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 appellant JCM Foods, Inc., appearing through its counsel, David S. Cutler, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

¹The decision of the Department, dated August 16, 2001, is set forth in the appendix.

Appellant's off-sale general license was issued on August 27, 1999. Thereafter, the Department instituted an accusation against appellant charging that, on January 12, 2001, appellant's clerk, Khalil Abushkhaidem ("the clerk"), sold an alcoholic beverage to 18-year-old Ross B. Jones ("the minor").

An administrative hearing was held on June 1, 2001, at which time documentary evidence was received, and testimony concerning the charged violation was presented by Department investigator James Sims, by San Diego County Deputy Sheriff Ronald Edwards, by the minor, and by the clerk.

The testimony established that investigator Sims observed the minor enter the premises and leave it a short time later with an 18-pack of Coors Light Beer. The minor put the beer in the cab of his truck and drove off. Sims contacted deputy Edwards and asked him to stop the minor's vehicle, which Edwards did, about a half mile from the premises. The minor admitted he had just purchased the beer, found in the cab of his truck, at the premises using an expired driver's license issued to Matthew Arthur Middleton.

Edwards took the minor back to the premises, where the minor identified the clerk as the person who sold him the beer. Edwards testified that the clerk denied ever having seen the minor or the identification he used to purchase the beer.

The minor testified that he showed Middleton's driver's license to the clerk, who glanced at it before selling the beer to him. The clerk testified that he asked the minor for identification and thought he resembled the picture on the driver's license the minor showed him. He stated that he did not notice that the license had expired in 1998. He also testified that he had received no training in alcoholic beverage sales before January 12, 2001.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation was proven and no defense was established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) a defense was established under Business and Professions Code §25660, and (2) the decision is erroneously based on inconsistent testimony and not supported by the evidence.

DISCUSSION

I

Appellant contends it established a defense pursuant to Business and Professions Code §25660, which 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 and description 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 physical description on the expired driver's license used by the minor stated that the person was 5 feet, 9 inches tall, weighed 145 pounds, and had brown hair and blue eyes. The minor was approximately six feet, one inch tall, weighed 160 pounds and had brownish blond hair and blue eyes. The minor pointed out during his testimony that the person in the picture on the driver's license had bigger ears and bushier eyebrows than he has, as well as being 15 pounds lighter and 4 inches shorter than he is. The ALJ found that the minor "is a very youthful looking male who has an extremely 'boyish' look about him." (Finding IV.E.)

The ALJ ended his findings regarding the §25660 defense with the following two paragraphs (Finding IV., F. and G.):

"F. This ALJ found very little if any resemblance between [the minor] and the photo depicted in Exhibit 2 other than the hair and eye color. Additionally, the only real evidence regarding how much time the clerk spent looking at the driver's license was from [the minor] who testified that the clerk simply glanced at the driver's license. The clerk certainly did not look at it long enough to discover that it had expired a little over two years prior to the date of the sale even though the expiration date appears in red and is located directly over the photograph.

"G. Based upon the extremely youthful appearance of [the minor], the fact that the driver's license had expired in November of 1998, the fact that the clerk failed to see the expiration date, the fact that there is little if any resemblance between the appearance of [the minor] and the photo depicted in Exhibit 2 and based on the height and weight difference as indicated above, the evidence did not establish that [appellant's] clerk reasonably inspected the identification or that he used reasonable caution examining the appearance of [the minor] and the photograph on the identification. Therefore, a defense under Section 25660 of the Business and Professions Code was not established."

A licensee has a dual burden under §25660: "[N]ot only must he show that he acted in good faith, free from an intent to violate the law, . . . but he must demonstrate that he also exercised such good faith in reliance upon a document delineated by section 25660." (Kirby v. Alcoholic Beverage Control Appeals Board (1968) 267 Cal.App.2d 895 [73 Cal.Rptr. 352, 355].) As Kirby and other cases have made clear, that reliance must be reasonable, that is, the result of an exercise of due diligence. (See, e.g., Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 739]; 5501 Hollywood, Inc. v. Department of Alcoholic Beverage Control (1957) 155 Cal.App.2d 748 [318 P.2d 820, 823].)

Appellant argues that the statute does not require a seller to consider the fact that a license is expired, and, in any case, the current validity of the license is only one factor among many to consider in according the proper deference to the license. It asserts that its clerk was diligent and acted in good faith in relying on the driver's

license presented, thereby meeting the "dual burden" set out in Kirby, supra.

In Nourollahi (1997) AB-6649, the Board said that, while "there can be no per se rule, . . . the longer a license has been expired, the higher the level of diligence which should be required for a successful defense under §25660." The Board went on to explain that the time which has passed since the license in question expired is a factor to be weighed in determining whether 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 age and identity. A driver's license which expired as long ago as the license in this case [about two and one-half years] should be a 'red flag' to any potential seller."

In 22000, Inc. (2000) AB-7543, the Board affirmed a decision of the Department that rejected a §25660 defense based upon a driver's license which had expired three years earlier, in spite of the close similarity between the photo and description on the license and the appearance of the person presenting it. In so doing, the Board stated:

"The fact that the driver's license had expired nearly three years earlier cannot be ignored. The current validity of a document offered to prove identity is always a material factor to be considered in according the proper deference to the document. The likelihood that a licensed driver will present a license that is long expired, to prove his or her identity, is so unlikely that its acceptance cannot be said to have been reasonable."

In Loresco (2000) AB-7310, a school identification card was held insufficient to sustain a §25660 defense, one of the reasons being that its expiration two years earlier should have put the clerk on notice to ask for additional ID.

In 7-Eleven and Pearce (2001) AB-7573, the Board upheld that Department's decision rejecting the defense of §25660, where the minor used his older brother's

driver's license, which had expired just over two years before and there was little facial resemblance between the picture on the license and the minor.

Appellant goes over the testimony, pointing out portions thereof which, it asserts, support its contention that the clerk acted in good faith and reasonably relied on the document presented. In essence, appellant asks this Board to re-weigh the evidence and reach a result different from that reached by the ALJ. That is not the province of this Board. The ALJ made specific findings, concluding that the clerk's reliance on the identification presented was not reasonable. Absent some showing of abuse of discretion, we will not question those findings. Rather than leading us to question the ALJ's findings, however, our review of the record assures us that the ALJ's findings are reasonable and supported by the evidence presented.

As discussed above, the fact that the license had expired two years before the sale should have been a "red flag" to the clerk to ask for further identification. The clerk was the only witness who testified that he thought the minor resembled the picture on the driver's license, and the ALJ found the clerk not to be a reliable witness. (Finding III.G.) The investigator believed there was a slight resemblance, the minor himself did not think the photo looked like him, and the ALJ found "little if any resemblance between [the minor] and the photo" (Finding IV.F.) The lack of resemblance and the "extremely 'boyish'" look of the minor should have also put the clerk on further inquiry.

Appellant did not establish a defense under §25660.

II

Appellant contends there is a lack of substantial evidence to support a finding of a violation. Appellant asserts that none of the peace officers involved witnessed the

minor purchase the beer, and there are inconsistent and contradictory statements in their reports and by the minor.

The inconsistencies and contradictions alleged by appellant are differences in the estimates of how far away from the premises the minor's vehicle was when the deputy stopped it; differences in the estimates of what times certain things happened or how long they took; and the failure of the deputy to recall whether he showed the clerk the minor's actual driver's license or the fake one.

The testimony of the minor, appellant argues, is "fraught with inconsistencies and admission of perjury." (App.Br. at 7.) The minor testified on direct examination that the clerk asked for his identification, yet on the minor's affidavit that he signed, under penalty of perjury, after the incident, he stated that "The clerk didn't really ask for I.D., but I showed one anyways." [RT 15, 26.] The minor also admitted that the identification he used was not a friend's expired driver's license, as he had said in the minor's affidavit, but that he had found the driver's license. [RT 33-34.]

The Department's witnesses, appellant asserts, "are too inconsistent to contravene the testimony of the clerk, and the only witness to the sale was the minor himself, who admits to lying." (App.Br. at 12.)

The ALJ, however, made specific findings that the testimony of the minor was credible and that the clerk was not a reliable witness. (Findings III.F. and III.G.)

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals.

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.²

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1951) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].) Where there are

²The California Constitution, article XX, § 22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

While there are some inconsistencies and contradictions, the material facts are uncontroverted. The minor went into the premises, picked out and purchased an 18-pack of beer, the clerk was shown a driver's license that was not the minor's, and merely glanced at it before selling the beer to the minor. We conclude that there is substantial evidence supporting the findings and the decision of the Department.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN

³This 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.

E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD