

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

AB-8044

File: 21-308323 Reg: 02052995

AIYAZ K. MASANI and SHAMIN S. VASANI, dba Emil's Liquor
2030-A Redwood Road, Napa, CA 94558,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Robert R. Coffman

Appeals Board Hearing: June 12, 2003
San Francisco, CA

ISSUED AUGUST 28, 2003

Aiyaz K. Masani and Shamin S. Vasani, doing business as Emil's Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 25 days for their clerk selling an alcoholic beverage to a person under the age of 21, in violation of Business and Professions Code² section 25658, subdivision (a).

Appearances on appeal include appellants Aiyaz K. Masani and Shamin S. Vasani, appearing through their counsel, Harold G. Spaulding, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

¹The decision of the Department, dated October 10, 2002, is set forth in the appendix.

²Unless otherwise indicated, statutory references in this opinion are to the Business and Professions Code.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 27, 1995. Thereafter, the Department instituted an accusation against appellants charging that, on March 22, 2002, appellants' clerk, Jessica Salazar ("the clerk"), sold an alcoholic beverage to 19-year-old Matthew Johnson.

At the administrative hearing on September 11, 2002, documentary evidence was received and testimony concerning the transaction was presented by Johnson and Department investigator Elisardo Favela. Appellant Aiyaz Masani also testified.

The testimony established that Johnson entered the premises and picked up two six-packs of Rolling Rock beer, which he took to the counter. The clerk asked him for identification and he showed her an identification card that purported to be a California Identification Card issued by the California Department of Motor Vehicles. The card, which Johnson had purchased in San Francisco, bore his own photograph, but a false birthdate that showed his age as 22 rather than his actual age of 19. Johnson left the card in his wallet, behind a plastic window, when he showed it to the clerk. She held the flap of the wallet containing the identification card while she looked at it, but did not remove the card from the wallet. The clerk then sold Johnson the beer.

Investigator Favela observed Johnson and two male companions when they drove into the parking lot of appellants' premises. All three appeared to be underage. Favela saw the two companions give money to Johnson before he entered the store and he guessed that Johnson was going to try to buy alcohol, so he followed him in and observed the transaction. When Johnson left the store, Favela apprehended him and confiscated the false identification.

Subsequent to the hearing, the Department issued its decision which determined that appellants had violated section 25658, subdivision (a), as charged and had not established a defense. Appellants filed a timely appeal in which they contend that Findings of Fact 3(e) and 4 are not supported by substantial evidence.

DISCUSSION

Appellants state the issue as whether substantial evidence exists to sustain two specific Findings, 3(e) and 4. They assert that the evidence is insufficient to support the charge of violating section 25658, subdivision (a), but it appears they are really arguing that they established a defense to the charge under section 25660.

A. FINDINGS 3(e) AND 4

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Board* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (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].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Kirby v. Alcoholic Bev. Control App.*

Bd. (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]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*); *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

The findings challenged by appellants state:

[3.](e) Salazar's acceptance of the false identification was not at all justified under the circumstances it was presented to her: it remained in Johnson's wallet in a position where the top portion of the card could not be seen. Salazar could not see the lettering "California" that appears at the top of the card, or the next line that contains the words "Identification Card." She also could not see the upper corners of the card that appear to bear the initials "DMV."

4. Respondents' reliance on a Department form entitled "Clerk's Affidavit," that purports to inform sellers of alcoholic beverages what is legally acceptable identification, is also misplaced. The first requirement stated on the form, that the document must be issued by a government agency, was lacking in this case. Salazar was not acting in good faith reliance upon a document purportedly issued by a government agency; that portion of the document she viewed did not purport to be issued by any government agency.

Appellants assert there is no evidence in the record supporting the conclusion in Finding 3(e) that the clerk could not see the lettering at the top of card saying "California," "Identification Card," and "DMV." This finding appears to be the basis for the conclusion of the administrative law judge (ALJ) that the clerk was "not at all justified [in relying on the identification] under the circumstances it was presented to her" Appellants also assert that Finding 4, which concludes that the clerk "was not acting in good faith reliance upon a document purportedly issued by a government agency" because she could not see that the words "California Identification Card" and

"DMV" were at the top of the card, is not supported by substantial evidence in light of the record.

Appellants are correct that there is no evidence in the record to support Finding 3(e). The minor testified that when he took two six-packs of Rolling Rock beer to the counter, the clerk asked to see his identification. He showed her the fake identification he had in his wallet, inserted behind a clear plastic window on the flap of the wallet. [RT 9.] The clerk touched that part of the wallet with her hand while looking at the identification, although the minor still held the wallet in his hand. [RT 18.] The identification was not removed from the wallet. [RT 10.]

During cross-examination, the minor was asked to place the false identification card in his wallet as it had been on the night of the sale. The wallet was the same one he used that night, and he testified that the identification card was in the same position as it had been that night. [RT 17.] Appellant's counsel then asked the ALJ to examine the identification while it was in the wallet, which he did. [RT 18.]

We find no other testimony regarding the position of the identification card in the wallet, and the clerk did not testify, so there is no testimony about what she actually saw. There is, however, a comment by appellants' counsel during closing argument that relates to this issue. Counsel said, "I noted that the Court made notes once that particular identification was placed in the wallet. You could still see all the pertinent information that you needed and that it appeared to be a good I.D." [RT 50.]

It is possible that the ALJ, when he looked at the identification card in the wallet, saw that the wording at the top was covered up. He may have put that together with the minor's affirmation that the identification card was in the wallet the same way it had been when he showed it to the clerk, and from that inferred that the clerk could not see

the wording at the top when she looked at it. However, there is nothing in the record to indicate what the ALJ saw.

A decision may be supported by an inference, as long as the inference is a reasonable conclusion deduced from the evidence and not based on mere suspicion, conjecture or guesswork. (*Beck Development Co., Inc. v. Southern Pacific Transportation Company* (1996) 44 Cal.App.4th 1160, 1204 [52 Cal.Rptr.2d 518]; *Krause v. Apodaca* (1960) 186 Cal.App.2d 413, 418 [9 Cal.Rptr. 10].) While the Board must accept all reasonable inferences that support the Department's decision, an inference not supported by evidence in the record cannot be considered reasonable.

We conclude that Finding 3(e) is not supported by substantial evidence. If 3(e) fails, Finding 4 must also fail because it is based on Finding 3(e).

B. SECTION 25660 DEFENSE

Section 25660 provides a defense to a sale-to-minor charge when the licensee or his agent "demanded, was shown and acted in reliance upon . . . bona fide evidence" that the person attempting to buy was at least 21 years of age. The statute defines "[b]ona fide evidence of majority and identity of the person" as

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.

There is an affirmative duty on a licensee to maintain and operate his or her premises in accordance with law, and section 25660, as an exception to the general prohibition against sales to minors, must be narrowly construed. (*Lacabanne, supra*, 261 Cal. App. 2d at p.189.) The statute provides an affirmative defense, and "[t]he

licensee has the burden of proving . . . that evidence of majority and identity was demanded, shown and acted on as prescribed by . . . section 25660." (*Ibid.*)

"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. etc. Appeals Bd.* (1968) 267 Cal.App.2d 895, 897 [73 Cal.Rptr. 352] (*Kirby*)). To provide a defense, reliance on the document must be reasonable, that is, the result of an exercise of due diligence. (See, e.g., *Lacabanne, supra*; *5501 Hollywood, Inc. v. Dept. of Alcoholic Bev. Control* (1957) 155 Cal.App.2d 748, 753 [318 P.2d 820].)

Reasonable reliance cannot be established unless the appearance of the person presenting identification indicates that he or she could be 21 years of age and the seller makes a reasonable inspection of the identification offered. (*5501 Hollywood, Inc. v. Dept. of Alcoholic Bev. Control, supra*, 155 Cal. App. 2d at pp. 753-754.) A licensee, or a licensee's agent or employee, must exercise the caution which would be shown by a reasonable and prudent person in the same or similar circumstances. (*Lacabanne, supra*; *Farah v. Alcoholic Bev. Control Appeals Bd* (1958) 159 Cal.App.2d 335, 339 [324 P.2d 98]; *5501 Hollywood, Inc. v. Dept. of Alcoholic Bev. Control, supra*, 155 Cal. App. 2d at p. 753.)

Appellants argue that the clerk, in good faith, reasonably relied on the false identification card that appeared to be a governmentally issued California Identification Card. The false identification used by Johnson looks very much like an authentic

California identification card, more so than most others this Board has seen.³ It appears that the clerk, in good faith, believed the card to be genuine, and, relying on its authenticity, focused on whether the photo looked like the person offering the card (it did) and whether the birth date shown indicated that the person was at least 21 (it did). However, the section 25660 defense is only available if the clerk's reliance was reasonable.

The Department's decision, disregarding Findings 3(e) and 4 for lack of substantial evidence in the record (see section A., above), does not find that it was unreasonable for the clerk to rely on the false identification. The closest it comes is in Finding 3 where the ALJ says that "Respondents' [i.e., the licensees'] reliance upon section 25660 is without merit for the following reasons" However, this is different from finding that the *clerk's* reliance on the *identification card* was not *reasonable*. The ALJ may have meant that, but that is not what he said, and it raises real questions about the standard he was using.

The Department's only possible bases for concluding that the clerk's reliance was not reasonable are Findings 3(a) through (d):

(a) The lettering on the false identification card is typewritten on the card, whereas an identification card issued by the Department of Motor Vehicles contains computer generated lettering.

(b) The matting that forms the background of Johnson's picture is white or off-white. Cards issued by the Department of Motor Vehicles do not contain a white or off-white background.

³The card is the same size and shape, it bears the same lettering in the same colors, the same DMV logo at the top, the same notation that the card is issued only for identification purposes, an image of the state seal, and even iridescent images overlaying the picture and text that mimic the holographs on a genuine card.

(c) Johnson's picture appearing on the card is not an appropriate fit on the matting. The picture is somewhat raised, indicating it was taken separately and attached to the card.

(d) The back of the card does not contain a magnetic strip, as do cards issued by the Department of Motor Vehicles.

The items listed in Finding 3 come from the testimony of the Department investigator when he was asked what indicated to him that the identification card was false. It is not clear whether the ALJ thought that these items would have put a reasonable and prudent seller on notice that the card was false.⁴ The ALJ did not discuss any of these four attributes, but concluded that the clerk's reliance on the card was not justified based on his finding in 3(e), which we have already rejected because it was not supported by any evidence in the record.

The Department's decision consists of nothing more than a summary of the evidence presented with a conclusion that a violation occurred. The ALJ's failure to analyze and apply, or even mention, the case law interpreting section 25660, together with the lack of a critical finding, causes us to conclude that this decision is arbitrary and an abuse of discretion.

In its brief, the Department argues, ineffectively, that the findings are supported by substantial evidence, but then, "for the sake of argument," addresses the section 25660 defense. The Department argues that the result in this case is simple: the minor admitted that he had purchased the identification card in San Francisco; since it is admittedly a false identification card, it is not "a document issued by a federal, state, county, or municipal government, or subdivision or agency thereof"; therefore

⁴It is not even clear what standard the ALJ was using since he provided no analysis of the statutory requirements and the case law interpreting them, only a brief and incomplete paraphrasing of the statute.

regardless of any other factor, appellant cannot establish a defense under section 25660. The Department's simplistic solution, however, simply ignores or misinterprets the statute involved and the case law interpreting it.

The Department misreads the statute when it argues that the phrase "document issued by a federal, state, county, or municipal government" is modified by the term "bona fide." The statute does not say that a bona fide governmentally issued document is required; instead, it defines, for this particular purpose, what constitutes "[b]ona fide evidence of majority and identity of the person." For purposes of the statute, "a document issued by a federal, state, county, or municipal government" is "[b]ona fide evidence of majority and identity of the person."

Kirby, supra, cited by the Department as "[t]he seminal case interpreting §25660," stated:

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, supra*, 267 Cal.App.2d at 897.)

Contrary to the Department's statement in its brief, this is not a quote from *Dethlefsen v. St. Board of Equalization* (1956) 145 Cal.App.2d 561 [303 P.2d 7] (*Dethlefsen*), but an affirmative statement by the *Kirby* court summarizing the conclusion reached in *Dethlefsen*. The Department insists that, "after a full review of the underlying cases, the only conclusion that can be drawn is that *Kirby* overruled *Dethlefsen*," (Dept. Br. at 6), but the Department's conclusion, based on fallacious reasoning, is clearly wrong. Far from overruling *Dethlefsen*, *Kirby* reaffirms that false identification may suffice for a defense under section 25660.

In *Kirby*, the licensee hired a minor, relying on a birth certificate (that of the minor's older sister) and a notarized, self-made identification card. The court of appeal held that the Department had not abused its discretion in imposing discipline even though the licensee acted in good faith because the evidence of majority he relied upon did not consist of documents issued by a governmental entity. The court said that a licensee in such case has a dual burden: "not 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, supra*, 267 Cal.App.2d at p. 899.)

The documents relied on in *Kirby* were not issued by a governmental agency, nor did they purport to be governmentally issued. Since the court had already said that a defense could arise from a "document issued by one of the governmental entities enumerated in section 25660 . . . even though the document is altered, forged or otherwise spurious," the court's insistence upon a document delineated by section 25660 would seem to include spurious or forged documents that purport to be governmentally issued.

"Spurious" means "Lacking authenticity or validity in essence or origin; not genuine; false," and "forge" means "To fashion or reproduce for fraudulent purposes; counterfeit" (American Heritage Dict. (4th ed. 2000).) The false identification card in the present case is a forged or spurious document purporting to be governmentally issued. Absent some more specific direction from a court, this Board is not willing to reject, categorically, spurious documents that purport to be governmentally issued. The determining question is whether the seller's reliance on a governmentally issued, or purportedly governmentally issued, document was in good faith and reasonable.

With regard to "reasonable reliance," the Department quotes the listing in *Lacabanne, supra*, 261 Cal.App.2d 181, 189-190,⁵ of three tests for determining if there has been compliance with section 25660:

"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 upon its apparent genuineness.

[Citations.]

"Second, a licensee must exercise the caution which would be shown by a reasonable and prudent person in the same or similar circumstances.

[Citation.]

"Third, a licensee must make the inspection of the documentary evidence and his appraisal of the physical appearance of the customer 'immediately prior' to the sale. [Citation.]"

The Department then simply asserts that appellant "failed on all three of the elements as outlined by the ALJ's Findings"

The Department has an obligation, just as does an appellant, to aid the Board in its review; citing only general legal principles without relating them to specific evidence in the record does not adequately meet that obligation. (See, e.g., 9 Witkin, Cal. Procedure (4th ed. 2003) Appeal, § 612; *Guthrey v. California* (1998) 63 Cal.App.4th 1108, 1115 [75 Cal.Rptr.2d 27]; *Mosher v. Johnson* (1921) 51 Cal.App. 114, 116 [196 P. 84].) Despite the Department's failure in this regard, we have reviewed the findings to see if we find any support for the Department's contentions.

While there is no finding that the clerk failed to make "a diligent inspection" of the identification, Finding 2 states that when the clerk looked at the card, she did not remove it from Johnson's wallet, nor did she ask Johnson to remove it. If this is the basis for contending that a diligent inspection was not made, we find it insufficient. The

⁵*Lacabanne* quoted this passage from *Farah v. Alcoholic Beverage etc. Appeals Board, supra*, 159 Cal.App.2d at pages 338-339.

failure to hold the card itself cannot be considered a lack of diligence unless there was some reason for the clerk to question the authenticity of the card. The card, on its face, appears to be a California identification card, except for the background color of Johnson's photograph and the typeface of some of the information on the card. Given that the rest of the card corresponds almost exactly to a valid card, we would find it unreasonable and an abuse of the Department's discretion for it to find that the failure to remove the card from the wallet demonstrated a lack of diligent inspection. However, there is no such finding, so the Department's contention is unsupported.

Similarly, there is no finding that the clerk failed to exercise the caution of a reasonable and prudent person in the same or similar circumstances. The clerk asked for identification and looked at it. The identification card appeared to be a California Identification Card. The photograph corresponded with the person offering the identification and the birthdate showed him to be over the age of 21. We have not been informed why the Department believes the clerk's actions to be unreasonable or imprudent and we see no basis for concluding that they were. This contention is also unsupported.

The third "test" says that the clerk must look at the identification and the person "immediately prior" to the sale. If that remains a requirement⁶ for the defense, it was complied with. This contention is also unsupported.

The problem of sales to minors and the attendant problems of underage drinking, justify strict enforcement of the sale-to-minor prohibition in section 25658, subdivision (a). Strict enforcement, however, is not the same as strict liability for such

⁶See the court's comments regarding this point in *Lacabanne, supra*, 261 Cal.App.2d at page 190.

sales. In enacting section 25660, the Legislature created a method intended to afford protection for licensees in particular situations. While the statute should be narrowly construed, it should not be construed so narrowly that it disappears.

The courts have stated that section 25660 was designed to be a "safe harbor" for licensees who inspect the appropriate types of identification in good faith and with due diligence. "Good faith" and "due diligence" mean that licensees and their employees are required to act reasonably, not perfectly.

It is true that the identification card used in this case is not a perfect copy of a genuine California identification card. On the other hand, the distinguishing factors on the face of the card are subtle, especially in light of how closely the rest of the card resembles a genuine one. It is not surprising to this Board that the clerk did not question the authenticity of the card when she looked at it.

We conclude that the determinative finding in the decision is not supported by evidence in the record and that the Department abused its discretion in finding that appellants did not establish a section 25660 defense to the sale-to-minor charge.

ORDER

The decision of the Department is reversed.⁷

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

⁷This 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.