

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

AB-8105

File: 21-112932 Reg: 02053844

CHAN Y. BANG and INSOOK BANG, dba Amity Market
3350 Taraval Street, San Francisco, CA 94116,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ruth S. Astle

Appeals Board Hearing: January 8, 2004
San Francisco, CA

ISSUED JULY 19, 2004

Chan Y. Bang and Insook Bang, doing business as Amity Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 20 days for their clerk selling alcoholic beverages to a person under the age of 21, a violation of Business and Professions Code² section 25658, subdivision (a).

Appearances on appeal include appellants Chan Y. Bang and Insook Bang, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas Allen.

¹The decision of the Department, dated February 13, 2003, 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 October 26, 2001. On October 3, 2002, the Department filed an accusation against appellants charging the sale of distilled spirits to 18-year-old Emma Buchbinder.

At the administrative hearing held on December 17, 2002, documentary evidence was received and testimony concerning the violation charged was presented by Buchbinder, by Department investigator Christopher Brookman, and by the clerk who sold the distilled spirits. The Department adopted the proposed decision of the administrative law judge (ALJ) which determined that the violation charged was established and a defense pursuant to section 25660 was not established.

Appellants have filed an appeal in which they raise the issue of whether the seller was reasonable in his reliance on the identification shown by the minor, thereby establishing a defense under section 25660.

DISCUSSION

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*

Properties, Inc. v. Dept. of Alcoholic Bev. Control (1968) 261 Cal.App.2d 181, 189 [67 Cal.Rptr. 734] (*Lacabanne*.) 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].) 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] (*5501 Hollywood*).)

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, 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, supra*, 155 Cal.App.2d at p. 753.)

Appellants contend the identification card³ displayed by Buchbinder was

³Although appellants, and some of the witnesses, referred to the identification used by Buchbinder as a California driver's license, it was created to look like a California identification card, which is also issued by the Department of Motor Vehicles.

"indistinguishable" from a valid California identification card, it bore a clear photograph of Buchbinder, and the clerk made a reasonable inspection of the card before selling the distilled spirits to Buchbinder. Therefore, they argue, the elements of a section 25660 defense were established.

The false identification used by Buchbinder looks very much like an authentic California identification card. 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. However, the section 25660 defense is only available if the clerk's reliance was reasonable.

The ALJ discussed the circumstances of the sale and the defense raised by appellants in Findings of Fact 2 through 5:

2. The minor entered the store with two friends, requested three bottles of distilled spirits, and paid for the items. The licensee^[4] placed the bottles in a paper bag and the minor left the premises where two ABC investigators stopped the minor.

3. The investigators determined that the minor had purchased alcoholic beverages. The minor told the investigators that she used false identification. The minor's actual California driver's license was in her wallet. Based on the minor's appearance at the hearing and in a photograph taken at the scene, she did not appear any older than her true age. She is very young in appearance and her two friends look even younger.

4. The minor had purchased alcohol at this premises once before but the owner did not recognize her. It was well known at the minor's high school that minors could purchase alcoholic beverages at this premises with false identification. The minor and her friends drove across town specifically to purchase alcohol at these premises because of their reputation. The false identification had a 1980 birth date on it. The minor showed this identification to the licensee who looked at it quickly. Had he examined it more carefully he would have seen that the front is different than a real

⁴The ALJ referred to the seller as the licensee, Chan Y. Bang, but the seller was actually the licensee's brother, Chan Soon Bang.

identification card and the "hologram" covers the picture and the writing and is not imbedded in the plastic. While this is a better false identification than many, it still is clearly false when compared to true identification.

5. It was unreasonable for the respondents to rely on such a false identification without actually comparing it to true identification, especially because of the youthful appearance of the minor and her friends.

This is one of several cases the Board has seen recently involving professionally made false identification cards or driver's licenses. The identification cards are quite realistic: they are the same size and shape, with the same rounded corners; they are laminated so they look and feel very similar to real California identification cards; the colors are the same colors used on real identification cards, although the tones are a little "off" in some instances; they bear watermarks of the California state seal; they appear to have the holograms found on real identification cards, although they may be less subtle than the real ones; and some have black stripes on the back to imitate the magnetic strips on the backs of real cards.

In *Masani and Vasani* (2003) AB-8044, the Department contended that a false identification could not provide a section 25660 defense, since it would not have been issued by the government. That case involved a false identification card similar to the one in the present case. The Appeals Board found that the section 25660 defense had been established and reversed the action of the Department. The Court of Appeal granted the Department's petition for writ of review, and vacated the Board's decision. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (Masani et ALJ.)* (May 27, 2004, A104012) ___ Cal.App.4th ___ [2004 Cal. App. Lexis 819].) In doing so, however, the court rejected the Department's contention that section 25660 does not apply to a false identification purportedly issued by a

governmental agency, but found that the clerk who sold the beer did not reasonably rely on the false identification.

In the present case, the ALJ found that Buchbinder "did not appear any older than her true age," and that "[s]he is very young in appearance" (Finding 3.) The ALJ also concluded that "[i]t was unreasonable for the respondents to rely on such a false identification without actually comparing it to true identification, especially because of the youthful appearance of the minor and her friends."⁵

Although the Identification was a good fake, and the clerk appeared to have examined the card in good faith (making sure that it had a hologram, which he believed would only appear on a true Identification, and noting that the card did not "peel" at the edges, as fake Identification's often do), reasonable reliance is also judged by whether the person presenting the Identification appears as if he or she could be 21 or older. In the present case, the ALJ did not believe that a reasonable person would think that Buchbinder could be 21 years old or older and concluded, on that basis, that the clerk did not reasonably rely on the identification card. It seems that the Board should give the same deference to the ALJ's finding in this case as it does to the finding of an ALJ that a minor decoy displayed an appearance generally to be expected of a person

⁵Appellants contend that the ALJ has set a new requirement for proving a section 25660 defense: the identification offered must be compared with "true identification." We disagree. The obviously young appearance of the minor and the clerk's failure to carefully inspect the card are the crucial factors here that make the clerk's reliance unreasonable. The minor's appearance should have caused the clerk to investigate further. Since he did not, his reliance on the identification offered without verifying its authenticity was unreasonable. Comparing the offered identification with an identification card he knew to be authentic would be one way of verifying the validity of the identification, but not the only way. He could have questioned the minor about the information on the card or required an additional form of identification from her. The ALJ's statement does not create a new "test" for a section 25660 defense.

under the age of 21. In both cases, the ALJ's have the opportunity to observe the minors in person, an opportunity this Board does not have.

ORDER

The decision of the Department is affirmed.⁶

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

⁶This 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.