

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

AB-8138

File: 21-316693 Reg: 02053790

HASSAN ALI DHANANI, dba Sunshine Liquor
3360 East Colorado Boulevard, Pasadena, CA 91107,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Joseph C. Montoya

Appeals Board Hearing: February 19, 2004
Los Angeles, CA

ISSUED MAY 25, 2004

Hassan Ali Dhanani, doing business as Sunshine Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his license for 15 days, with 10 days stayed for a probationary period of one year, for his clerk selling an alcoholic beverage to a person under the age of 21 years, a violation of Business and Professions Code² section 25658, subdivision (a).

Appearances on appeal include appellant Hassan Ali Dhanani, appearing through his counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

¹The decision of the Department, dated April 24, 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

Appellant's off-sale general license was issued on April 2, 1996. On September 24, 2002, the Department filed an accusation against appellant charging that, on July 18, 2002, appellant's clerk, Sukhi Singh (the clerk), sold an alcoholic beverage to 20-year-old Joseph Manuel Reyes.

At the administrative hearing held on December 19, 2002, documentary evidence was received, and testimony concerning the sale was presented by Reyes; Department investigator Rene Guzman; Singh, the clerk; store manager Gorge Kerio; and Aaron Perez.

Guzman testified that he saw Reyes enter appellant's premises with some companions and, because of Reyes's youthful appearance, he followed them inside. There he saw Reyes and two others at the counter, on which were four cans of beer. Guzman watched Reyes pay for the beer with a credit card and then left the store to notify the other investigator who was with him.

When Reyes did not come out within a few minutes, Guzman re-entered the store, where he saw Reyes and his companions choosing beer from the beer cooler. Reyes tried to pay for a 12-pack of beer with his card, but it was denied, so he went back to the cooler and picked out two bottles of Old English 800 malt liquor. Guzman saw Reyes place the bottles on the counter and he saw Reyes leave the store with the bottles, but he did not see the sales transaction itself.

Guzman and his partner stopped Reyes and his companions outside the store, and discovered that Reyes had two identification cards: his own and a DMV identification card for Christopher Banuelos. The latter card showed that the individual was over 21 years old.

Reyes told Guzman that he had not used the false identification to buy the beer and that he had not bought beer at appellant's premises before. He also said that the clerk had asked him for identification, but when he said he had none, the clerk sold him the beer anyway.

At the hearing, Reyes testified that when the clerk asked him for identification, he said he did not have any, but that his friend was 21 and Reyes was going to pay for the beer. At the hearing, he also said that he had bought alcohol at the premises before the date in question, "most likely" using the false identification card.

The clerk said that Reyes had shown proper identification at some prior time, and that he had sold alcohol to Reyes before, believing him to be 21. The store manager testified to having sold alcohol to Reyes about 10 days before the date in question, having been shown some form of identification.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellant filed an appeal making the following contentions: 1) The decision is not supported by the findings and the findings are not supported by substantial evidence; 2) section 24210 is unconstitutional, resulting in a denial of due process and equal protection; and 3) the penalty is excessive.

DISCUSSION

I

Appellant contends that the Department did not show that Reyes was the person to whom the clerk sold an alcoholic beverage or that the beverages sold were alcoholic beverages. Appellant also asserts that he established a defense to the charge pursuant to section 25660.

"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. (*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 credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].)

Appellant argues that the testimony regarding the sale transaction "was equivocal at best," apparently meaning that it was not shown clearly that Reyes was the

purchaser of the alcoholic beverages, and not his companions, who were over 21 years old.

The ALJ heard and considered the testimony of the witnesses, and found that on July 18, 2002, Reyes "entered the licensed premises and purchased alcoholic beverages, four cans of Boddington's Pub Ale, and two cans of Old English 800 malt liquor. He purchased the alcoholic beverages from a clerk employed by Respondent Dhanani." (Factual Finding 3.) It was the ALJ's responsibility to assess the credibility of the witnesses and to resolve the conflicts in their testimony. The ALJ did so, stating in Factual Finding 13 that "More credit is given to the testimony of investigator Guzman than that of the other witnesses." We have no reason to question the ALJ's conclusions.

Appellant's contention that the Department failed to establish the items purchased by Reyes were alcoholic beverages was not raised at the hearing and this Board may deem it waived. In any case, the contention is unsupported: Guzman testified that he saw Reyes purchase cans of beer [RT 11-12] and malt liquor [RT 15]; the cans he identified as the alcoholic beverages that Reyes purchased (Exhibits 2 and 3) bore labels stating that they contained 7½ percent alcohol by volume; Reyes testified that he bought "alcohol" [RT 47]; and the clerk said he sold beer to Reyes [RT 71]. The testimony was sufficient to establish that the items purchased were alcoholic beverages.

Appellant also argues he established a complete defense to the charge in accordance with section 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, 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.

He bases his contention on the testimony of the clerk and the store manager that Reyes had shown them, on several prior occasions, identification indicating he was over 21 years old. Because of this, appellant argues, the clerk was reasonable in relying on his recognition of Reyes as someone who was over the age of 21.

Guzman testified that when he questioned Reyes outside the liquor store, "Reyes denied using [the false] identification to buy the beer, and he denied buying beer at the location before. He claimed that Mr. Singh had asked for identification, that Reyes had told the clerk that he didn't have it with him, and that Mr. Singh went ahead and sold Reyes the beer." (Factual Finding 7.)

In Factual Finding 13, the ALJ said, "More credit is given to the testimony of Investigator Guzman than that of the other witnesses. . . . The testimony of Singh and his manager that Reyes had previously purchased alcohol with an identification is given little credit." The ALJ's credibility determination does away with appellant's contention which relies on the discredited testimony of the clerk and the store manager.

Even if the ALJ had found that Singh had relied on prior showings of the false identification, the defense of section 25660 would fail. 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*, 261 Cal.App.2d 181, 185; *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* (1957) 155 Cal. App. 2d 748, 753-754 [318 P.2d 820].) 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*, 261 Cal.App.2d 181, 185; *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 753.)

In Factual Finding 6, the ALJ stated that "The depiction of Mr. Banuelos on the identification card does not look especially like Mr. Reyes." In other words, it would not have been reasonable for the clerk to rely on the identification of Banuelos to prove that Reyes was over 21, because a reasonable inspection of the card would show that Reyes was not depicted on the identification card.

II

Appellant contends that section 24210, which allows the Department to employ its own administrative law judges to hear cases, is unconstitutional, depriving appellant of his rights to due process and equal protection.

The Appeals Board is precluded by section 3.5 of article III of the California Constitution from declaring an act of the Legislature unconstitutional. Consequently, the Board declines to address this issue.

We note that the ALJ in this case, Joseph Montoya, is not employed by the Department, but by the Office of Administrative Hearings, an independent governmental agency that provides administrative law judges to conduct hearings for many state

agencies. As such, he did not act as a judge in this matter by virtue of section 24210. Appellant's argument does not apply to ALJ Montoya.

III

Appellant contends that the 15-day suspension with 10 days stayed for a probationary period of one year is excessive, out of all proportion to the offense, and "extraordinarily disproportionate," such that it constitutes cruel and unusual punishment.

It is difficult to believe appellant is serious in his characterization of the suspension.

The decision stayed 10 of the 15 days of suspension, "as this is the Respondent's first offense." Presumably, the ALJ and the Department took into consideration the fact that appellant had been licensed for over six years at the time of this violation.

The Department routinely imposes a 15-day suspension for an initial violation of section 25658, subdivision (a). If anything, this penalty is lenient, not excessive.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This 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.