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

AB-8227
File: 20-235383 Reg: 03055526

CHEVRON STATIONS, INC., dba Chevron Gas Station
24101 Ventura Boulevard, Calabasas, CA 91302,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: December 2, 2004
Los Angeles, CA

ISSUED FEBRUARY 7, 2005

Chevron Stations, Inc., doing business as Chevron Gas Station (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days for its clerk selling an alcoholic beverage to a person under the age of 21, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Chevron Stations, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

---

[1]The decision of the Department, dated December 31, 2003, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on July 27, 1989. On July 31, 2003, the Department instituted an accusation charging that, on May 31, 2003, appellant's clerk, Rodrigo Uribe (the clerk), sold an alcoholic beverage to 16-year-old Ryan L., a non-decoy minor.

An administrative hearing was held on November 19, 2003, at which time documentary evidence was received, and testimony concerning the sale was presented by the minor, by Department investigator Victoria Wood, and by the clerk.

The evidence established that the minor displayed a fake California driver's license he purchased in downtown Los Angeles which bears the minor's picture, but a false date of birth showing him to be almost 23 years old. The document was in his wallet, visible behind a plastic cover. The clerk compared the photograph on the purported license with the minor, concluded it was the minor's driver's license, and proceeded to sell the alcoholic beverages to the minor.

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) Appellant established a defense under Business and Professions Code section 25660, and (2) the Department imposed the penalty pursuant to an underground regulation.

DISCUSSION

I

Business and Professions Code section 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.

The administrative law judge (ALJ) found that, "[e]xcept for a few minor discrepancies not apparent to the untrained eye, the balance of the card corresponded remarkably to a valid card, such as coloring and placement of information." (Finding of Fact 6.) He concluded that the clerk acted prudently and with due diligence in examining the license and reasonably believed that it was genuine. Nonetheless, the ALJ concluded that the clerk's reliance upon it was unreasonable, stating (Conclusions of Law 9, 10, and 11):

> 9. . . . As set forth in findings of fact nos. 7, 8 & 9, this minor looked remarkably young and his youthful appearance could hardly be mistaken. In some instances arguments have been made that the physical appearance of the minor is such that he/she can reasonably be taken to be of the age of majority. This is not the case here.
>
> 10. An appraisal of [the minor's] actual physical appearance in conjunction with [the] date of birth on the license showing him to be 22 years of age should in reason have raised a red flag in the mind of clerk Uribe that something was amiss and a further investigation with respect to the minor's age was warranted. It is found that Uribe never made such an appraisal.
>
> In fact the only thing that the clerk did by his own testimony was to look at the minor's date of birth on the purported license and to conclude that the photograph thereon resembled the minor's facial appearance. That was the end of his inquiry.
>
> 11. It appeared that the clerk's sole focus in the process was to determine solely by the data on the license whether the minor was of the age of majority and whether the minor resembled the photograph on the license. There is no showing that he ever attempted to apply the third prong of the test with respect to making a physical appraisal of the minor prior to the sale. Had he done so, it is unlikely that he would have made the sale.

Appellant contends the ALJ misinterpreted the third "test" articulated by the court in *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734] (*Lacabanne*). At pages 189-190 the court quoted *Farah v. Alcoholic Bev. Control Appeals Bd.* (1958) 159 Cal.App.2d 335, 339 [324 P.2d 98]:

> "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.]"

Appellant asserts that the third test does not mean that the clerk must determine the age of the person presenting the identification. Appellant interprets this test as requiring only that the clerk appraise the person's physical appearance prior to the sale to make sure the person offering the identification is the same person pictured on it. This, appellant urges, is exactly what the clerk did in the present case.

Appellant also contends that the decision must be reversed because the ALJ's conclusion that appellant did not establish a section 25660 defense is inconsistent with his findings. Appellant likens this case to *Keane v. Reilly* (1955) 130 Cal.App.2d 407 [279 P.2d 152] (*Keane*). There, appellant maintains, the court held that, in the absence of evidence that the seller acted in bad faith, a license suspension could not be sustained where the document offered appeared to be, and the seller believed it to be, officially issued. Appellant concludes that, since the ALJ in the present case did not find that the clerk acted in bad faith, his conclusion that appellant did not establish a section 25660 defense cannot be upheld.

The "license" used by the minor in the present case looks remarkably authentic. Indeed, it appears that it almost perfectly mimics the genuine California drivers' licenses issued between March 1999 and July 2001, as shown in Exhibit 7, a booklet published by DMV titled "California Driver License & Identification Card Verification Procedures: Is It Valid?" In spite of the apparent authenticity of the card used by the minor, however, we do not find appellant's arguments for reversal of the decision persuasive.

We believe that both the ALJ and appellant misinterpreted the third test listed in *Lacabanne*, *supra*. The ALJ appears to read the third test as requiring an appraisal of the customer's physical appearance to determine if he or she could possibly be old enough to legally purchase alcoholic beverages. Appellant reads the test as requiring a comparison of the identification and the customer's physical appearance to make sure they match.

The emphasis in the third test, however, is on the necessity to examine the identification and the person offering it *immediately prior to the sale,* language that was included in section 25660 only from 1955 to 1959. This interpretation of the test is supported by the court's use of quotation marks around the words "immediately prior" and the citation, in the original text, to *People v. Garrigan* (1955) 137 Cal.App.2d Supp. 854 [289 P.2d 892].[2] (*Farah v. Alcoholic Bev. Control Appeals Bd., supra,* 159

[2]In *People v. Garrigan*, the court held that section 25660 could be used as a defense in a criminal case charging a sale to a minor as well as in a license disciplinary proceeding. The court rejected the appellant's argument that identification need not be checked every time in order to qualify for the defense, as long as the licensee relied on some prior verification of age and identity which qualified. In its discussion of this issue, the court said that section 25660 "has now been clarified by the amendments enacted in 1955. The section now specifically requires that the demand and showing of evidence of identity and majority shall be accomplished 'immediately prior to furnishing any alcoholic beverage to a person under 21 years of age. . . .' " (*People v. Garrigan*, *supra*, 137 Cal.App.2d Supp. at pp. 857-858.)

Cal.App.2d at p. 339.) *Lacabanne*, *supra*, 261 Cal.App.2d at pages 189-190, in connection with the third test, takes note of the 1959 deletion from the statute of the "immediately preceding" language and an Attorney General's opinion discussing the effect of this deletion.

Although the "third test" in *Lacabanne* may not require it, the ALJ was correct in interpreting the case law to require an appraisal by the seller of the prospective purchaser's appearance sufficient to judge whether that person could reasonably be old enough to legally purchase alcoholic beverages. This requirement is part of the "good faith and due diligence" that the seller must demonstrate to be eligible for the section 25660 defense.

In *5501 Hollywood, Inc. v. Department of Alcoholic etc. Control* (1957) 155 Cal.App.2d 748, 753-754 [318 P.2d 820] (*5501 Hollywood*), the 18-year old minor displayed a driver's license she had found. The person to whom the license was issued was 21 on the day in question. A superior court reversed the decision of the Department, and was, in turn, reversed by the district Court of Appeal, which wrote:

> It is essential to a successful defense that the operator's license or other evidence of majority be presented *by one whose appearance indicates that he or she could be 21 years of age*, and a reasonable inspection of the document must be made by the licensee or his agent. "Obviously, to protect a vendor, such evidence of majority and identity *would have to be presented by a person whose appearance was such as to make it doubtful on which side of the line dividing minority from majority the purchaser was*.

(*5501 Hollywood, supra,* 155 Cal.App.2d at p. 753, italics added.)

Keane, *supra*, relied on by appellant, when read as a whole, does not support appellant's position that a section 25660 defense is available as long as the identification offered looks official, the seller believed it to be official, and there is no

specific finding of bad faith. Appellant appears to ignore language in the court's decision explaining that an examination of the minor's appearance, and a reasonable judgment as to whether or not the minor could possibly be old enough to legally purchase alcoholic beverages is required to demonstrate that the seller examined the purported license in "good faith."

> Under [section 61.2(b), the predecessor to section 25660] a licensee does not establish an absolute defense by evidence that the minor produced an identification card purporting to show that the person in possession of the card is 21. *The defense must be asserted in good faith, that is, the licensee or the agent of the licensee must act as a reasonable and prudent [person] would have acted under the circumstances. Obviously, the appearance of the one producing the card, or the description on the card, or its nature, may well indicate that the person in possession of it is not the person described on the card.* In such a case the defense permitted by section 61.2(b) [now section 25660] could not be successfully urged."

(Keane v. Reilly, *supra*, 130 Cal.App.2d 407, 410, italics added.)

The court quoted from the earlier case of *Young v. State Bd. of Equalizatio*n (1949) 90 Cal.App.2d 256, 258 [202 P.2d 587], in which a 17-year-old was served an alcoholic beverage after presenting the bartender with a draft registration card he had found and altered to make it appear that the person described was 21. In holding that a defense was established, the court said:

> The clerk, if he acted *in good faith and without actual knowledge, gained from the appearance of the purchaser*, *or otherwise, that the card did not or could not belong to the minor*, and if the alteration was with reasonable diligence not discernible or ascertainable, had a right to assume that anyone presenting such a card would not unlawfully possess or use it.

(Keane v. Reilly, *supra*, 130 Cal.App.2d at p. 410, italics added.)

The court also quoted from *Conti v. State Board of Equalization*, 113 Cal.App.2d 465, 466-467 [248 P.2d 31], in which a 19-year-old presented the out-of-state driver's

license of another person who was over 21. In *Conti*, the appellate court affirmed the reversal of the suspension imposed by the Department. While the court said that the statute did not require the licensee to determine "at his peril whether the driver's license is a bona fide license of the party presenting it," the court noted that a licensee was, nevertheless, required to exercise due diligence: "*Unless the personal appearance of the holder of the driver's license demonstrates above mere suspicion that he is not the legal owner of the license* the bartender is justified in assuming the validity of the driver's license and in accepting the holder as the legal owner." (*Keane v. Reilly*, *supra*, 130 Cal.App.2d at p. 411, italics added.)

The court in *Keane*, *supra*, at page 412, explained the bases for its decision to reverse, noting, among other things, that there was "no finding that the bartender acted in bad faith, or failed to act as a reasonably prudent [person] would have acted under similar circumstances" and that there was "no evidence or finding as to whether [the minor] looked 21 or younger." It is only thereafter that the court makes the statement relied on by appellant: "Where the evidence shows that a document apparently complying with section 61.2(b) has been submitted to him, and he has testified that he believed it was an official identification, the board and the courts are without power to suspend the license in the absence of a supported finding that the bartender acted in bad faith and without due diligence."

That statement, by its terms, requires the licensee to act in good faith and use due diligence, which includes making a sufficient examination of the person purchasing an alcoholic beverage to determine whether that person could reasonably be considered to be over 21 years of age. If the seller fails to observe and appraise the purchaser's appearance or simply ignores an appearance that should alert the seller

that this person might not be old enough, the seller has not acted in good faith or with due diligence, and the most authentic appearing identification card in the world will not provide a defense if that person turns out to be younger than 21.

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*, *supra*, 159 Cal.App.2d at p. 339; *5501 Hollywood, Inc., supra*, at p. 753.)

The ALJ concluded the clerk acted in good faith in examining and accepting the validity of the proffered driver's license (Concl. of Law 7 & 8), but that he did not act in good faith and with due diligence in appraising the appearance of the minor (Concl. of Law 9, 10, & 11). Had the clerk done so, he could not have reasonably concluded that the minor could be at least 21, much less almost 23, as shown on the fake driver's license. There was no inconsistency in the ALJ's findings and his conclusion.

Appellant attempts to distinguish the recent Court of Appeal decision in *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd./Masani* (2004) 118 Cal.App.4th 1429 [13 Cal.Rptr.3d 826] ("*Masani*"). In *Masani*, the Department found that the clerk had not reasonably relied upon a fake ID. The Board reversed the Department, concluding that the clerk accepted the ID in good faith, believing it to be genuine, and finding nothing in the record to show that her reliance was unreasonable.

The court in *Masani* reversed the Board, stating:

> [T]he Department ALJ found, as a question of fact, there was no reasonable reliance on the particular ID in this case. In reaching the contrary conclusion the Board impermissibly reweighed the evidence and substituted its independent judgment for the Department's. We will therefore vacate the decision of the Board and affirm the Department.

(*Masani*, *supra*, at p. 1437.)

> The ultimate question is not whether the section 25660 defense is categorically unavailable to the licensees in this case. Rather, the question is whether the licensees reasonably relied on [the minor's] fake ID.
>
> Whether or not a licensee has made a reasonable inspection of an ID to determine that it is bona fide is a question of fact. [Citation.] As we noted at the outset, the ALJ found that [the clerk] did not reasonably rely on the ID. The ALJ viewed the ID as it had been placed in the wallet, and made factual findings based on his observations. We are not only bound by those findings, as we noted above, but we must assume the ALJ's observations of physical evidence support his findings.

(*Masani*, *supra*, at pp. 1445-1446.)

The minor factual differences between *Masani* and the present case are of no consequence. Appellant's contention that in the present case there was no finding that the clerk acted unreasonably in relying on the driver's license presented by the minor simply ignores what we pointed out above: the clerk may have acted reasonably with regard to the driver's license itself, but not with regard to appraising the appearance of the minor. Whether or not the ALJ used "magic words," like "reliance," the import of his analysis is very clear. The ALJ clearly concluded that the clerk's reliance on the driver's license, in the context of the minor's appearance, was not reasonable. Although the ALJ included these comments in a section of the decision denominated "Conclusions of Law," we think they necessarily involve a factual determination of the kind the courts, including *Masani*, *supra*, have said must be left to the trier of fact. We do so here.

II

Appellant contends that the 10-day suspension cannot stand because it is based on an "underground regulation" in violation of the Administrative Procedure Act. (Gov. Code, § 11340 et seq. (APA).)

Government Code section 11340.5, subdivision (a), states: "No state agency shall utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter." Section 11342.600 defines regulation as "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." Section 11425.50, subdivision (e), provides that "a penalty may not be based upon a guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule subject to Chapter 3.5 (commencing with section 11340) unless it has been adopted as a regulation pursuant to Chapter 3.5 (commencing with section 11340)."

In *Vicary* (2003) AB-7606, the Board determined that the penalty guidelines found in the Department's Instructions, Interpretations and Procedures Manual were "underground regulations," i.e., regulations not adopted as such under the APA. Appellant alleges that these same penalty guidelines were the basis for the penalty imposed in the present case. However, there is no evidence in the record that would support such a determination.

The Department counsel recommended a penalty of 10 days. He explained the rationale for this recommendation (RT 86):

> Normally we aggravate cases involving sale to a juvenile, a 16 year old. In this case, we're not asking an aggravated penalty. In fact, we're asking for a mitigating penalty in light of the licensee's disciplinary history. Although they have a prior for sales to minors going back to about 1996, they've been licensed since 1989 without any other priors, and so we are asking for a 10-day suspension in this case.

In Conclusion of Law 13, the ALJ explained his proposed penalty order:

> The complainant recommended a penalty of a 10-day suspension. Independent of this recommendation, the undersigned has independently evaluated the evidence in determining an appropriate penalty taking into account the licensee's relatively discipline free record since 1989. In the exercise of his discretion as required by Vicary v. Department of Alcoholic Beverage Control, (Appeals Board AB-7606a, 2003,) the undersigned enters the following order:
>
> ORDER
>
> The license is suspended for 10 days.

The Department made no reference to any guidelines in its decision, nor did Department counsel when making the penalty recommendation on behalf of the Department. Hence, it would be unwarranted for the Board to assume that the penalty order was based upon guidelines, and appellants have offered nothing to support their argument that any guidelines were followed.

We cannot assume, simply because penalty guidelines exist, that they controlled the penalty imposed by the Department. The mere fact that Department counsel recommended, and the Department adopted, a 10-day suspension is not, by itself, proof that it was based upon an underground regulation. Appellant's approach, carried to its logical conclusion, would require the ALJ to deviate from the Department recommendation in imposing a penalty, whether or not he thought it reasonable and appropriate. We find this logic unpersuasive.

Although appellants included an objection to the penalty to be recommended by the Department as one of a number of defenses in a special notice of defense filed prior to the hearing, no reference was made to this defense in the course of the hearing, no evidence was offered in support of the contention, and no argument was presented respecting this assertion during closing argument. It cannot be said that this contention was raised in a manner that would have reasonably put the ALJ on notice that appellants intended to preserve the objection.

The ALJ stated that he independently evaluated the evidence in determining the appropriate penalty. We have been given no reason to doubt that he did so.

Without some evidence suggesting the ALJ felt bound by the Department's recommendation and/or its guidelines, we cannot say with sufficient certainty to justify reversal that the penalty was based on such guidelines. Surely, knowing that its guidelines have been said to be underground regulations, the Department is not precluded from imposing a certain penalty simply because it is the same as the penalty stated in the guidelines criticized in *Vicary*.

ORDER

The decision of the Department is affirmed.[3]

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

---

[3]This 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.