

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

AB-8252

File: 21-375313 Reg: 03055736

ASHRAF A. YOUSSEF and JACQUELINE YOUSSEF, dba The Liquor Chest
5298 Kanan Road, Agoura Hills, CA 91301,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: February 3, 2005
Rehearing: June 2, 2005
Los Angeles, CA

ISSUED AUGUST 25, 2005

Ashraf A. Youssef and Jacqueline Youssef, doing business as The Liquor Chest (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 12 days² for their clerk selling or furnishing alcoholic beverages to two individuals under the age of 21, violations of Business and Professions Code section 25658, subdivision (a).³

Appearances on appeal include appellants Ashraf A. Youssef and Jacqueline Youssef, appearing through their counsel, Jeffrey S. Weiss, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated February 19, 2004, is set forth in the appendix.

²The Department's order imposed suspensions of 12 days for each of counts 1 and 3, with the two suspensions to run concurrently.

³Unless 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 May 15, 2001. The Department filed a three-count accusation against appellants charging that, on May 30, 2003, appellants' clerk, Haitham Hababa (the clerk), sold or furnished alcoholic beverages to 19-year-old Victoria Quinn (count 1), 18-year-old Zachary Gold (count 2), and 19-year-old Eric Appell (count 3).

An administrative hearing was held on December 4, 2003, at which time documentary evidence was received, and testimony concerning the sale was presented by two of the minors, Quinn and Appell; by Department investigators Ricardo Carnet and Brandon Shotwell; and by the clerk, Hababa. The third minor, Gold, was not present at the hearing.

On December 4, 2003, investigators Carnet and Shotwell observed three minors, later identified as Quinn, Gold, and Appell, enter appellants' licensed premises and go to the beer cooler. There each of the three minors selected beer and each carried his or her selection to the counter. At the counter, Quinn asked for a bottle of rum, which the clerk took from a shelf behind the counter and placed on the counter.

The clerk rang up the sale and Quinn paid for the beer with money from her wallet. Gold and Appell began to leave the store with the beer, but the clerk said they could not carry the beer out unless they were 21. Appell said he was not, and he and Gold left the premises. Gold returned shortly with the expired California driver's license of someone else who was over the age of 21. He was allowed to carry the beer out.

The three minors were stopped by the investigators outside the premises. Quinn was found to be carrying her own identification as well as her older sister's California driver's license. Gold had the expired driver's license he had shown the clerk.

The clerk testified that he had not asked for Quinn's ID because he remembered that she had purchased alcohol from him two days prior to the violation and showed him a California driver's license indicating that she was over the age of 21.

Subsequent to the hearing, the Department issued its decision which determined that the violations charged in counts 1 and 3 were proved; count 2 was not established because Gold, the minor named in that count, did not appear; and no defense under section 25660 was established.

Appellants filed an appeal making the following contentions: (1) Appellants established a defense to count 1 under Business and Professions Code section 25660; (2) evidence was improperly admitted with regard to Zachary Gold, the minor named in count 2, since he was not present at the hearing; and (3) the evidence does not support the finding that appellants' clerk furnished alcoholic beverages to Eric Appell, the minor named in count 3.

DISCUSSION

I

Appellants contend they established a defense to count 1 under Business and Professions Code 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.

They base this contention on the clerk's testimony that Quinn displayed a false ID to him two days before the sale at issue here.

The administrative law judge (ALJ) resolved the conflicts between Quinn's testimony and that of Hababa in Finding of Fact 9:

9. Quinn on the other hand denied Hababa's claim that she had purchased alcoholic beverages 2 days prior to the violation, but does admit having been in the premises on a prior occasion in the company of her sister sometime prior to May 30, 2003. There is no evidence that she had ever presented her own or any other driver's license to Hababa at any time. In terms of motives for bias, Quinn is found to be more believable than Hababa, and her testimony is found to be true.

Further, the license put in issue by Hababa is that of Quinn's sister and the data thereon does not in any way fit minor Quinn's physical characteristics in terms of height, weight and eye color.

This resolution necessarily disposed of appellants' attempted defense (Conclusion of Law 11):

11. With respect to the issue of whether Quinn had ever presented evidence of identification and majority to clerk Hababa 2 days prior to the date of the violation, the evidence established that Quinn did no such thing and Hababa was untruthful in this regard. Thus at the threshold, no colorable showing has been made of a defense under section 25660 of the code.

Resolving conflicts in the evidence is a task assigned to the ALJ. (See, e.g., *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 334 [96 P.3d 194; 17 Cal.Rptr.3d 906].) Where such conflicts exist, 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. (*Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734].)

It is also the province of the ALJ, as trier of fact, to determine witness credibility. (*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].) The Appeals Board will not interfere with those determinations in the absence of a clear showing of an abuse of discretion.

The ALJ here resolved the conflict in testimony, accepting Quinn's testimony that she had never shown an ID to Hababa over Hababa's that Quinn had shown him a false ID two days prior to the violation. We see no reason to question the ALJ's finding.

The ALJ even went so far as to consider what the outcome would have been if Quinn had shown the clerk her sister's driver's license. He concluded that the section 25660 defense would not have been available in any case, because the description on the license does not correspond with Quinn's physical appearance. Therefore, the clerk could not have reasonably relied on the license as bona fide identification of Quinn's majority and identity.

Clearly, none of the evidence supports use of the section 25660 defense.

II

Appellants contend that evidence was improperly admitted with regard to Zachary Gold, the minor named in count 2, since he was not present at the hearing.

They rely on section 25666, which provides:

In any hearing on an accusation charging a licensee with a violation of Sections 25658, 25663, and 25665, the department shall produce the alleged minor for examination at the hearing unless he or she is unavailable as a witness because he or she is dead or unable to attend the hearing because of a then-existing physical or mental illness or infirmity, or unless the licensee has waived, in writing, the appearance of the minor. When a minor is absent because of a then-existing physical or mental illness or infirmity, a reasonable continuance shall be granted to allow for the appearance of the minor if the administrative law judge finds that it is reasonably likely that the minor can be produced within a reasonable amount of time. Nothing in this section shall prevent the department from taking testimony of the minor as provided in Section 11511 of the Government Code.

Appellants objected early in the hearing to any reference to Gold, arguing that it would be prejudicial to their case. Their objections were overruled.

The second sentence of Finding of Fact 4 states: "Count 2 was not proved for failure of the complainant to produce the alleged minor associated with that count [Gold] as required under Business & Professions Code Section 25666." Thus, Gold's absence from the hearing resulted in no disciplinary action being imposed based on count 2, charging the sale or furnishing of alcoholic beverages to Gold.

We have found no judicial decisions involving section 25666 and only a few Board decisions, none of which appear to be similar to the present appeal. The question in most of those cases was whether the Department was required by section 25666 to produce at the hearing anyone other than the minor or minors named in the accusation. The Board's response is exemplified in *BP West Coast Products, LLC* (2004) AB-8131, where the Board said: "We do not read section 25666 as requiring the Department to produce anyone other than the minor who is the subject of the claimed violation of section 25658, subdivision (a)." The dismissal of count 2 in the present case is consistent with that interpretation. We find nothing in section 25666, however, suggesting that reference may not be made to any minor who is not present at the hearing.

Appellants allege that the testimony about Gold's conduct was "clearly prejudicial" because he was not present to be cross-examined. They assert that Conclusions of Law 8 and 9 show that the testimony about Gold had an effect on the ALJ's decision:

8. The evidence clearly established that the 3 minors were engaged together in the enterprise of purchasing beer and rum at the premises, and by observation, conduct and conversation with the minors, that clerk Hababa had knowledge of this fact. Minor Quinn paid for the items while minors Gold and Appell did the physical labor of bringing the cartons and 12 packs of beer to the cashier counter.

9. The clerk was aware of what was taking place from the time the minors took beer from the cooler to the actual sale and payment by minor Quinn, and knew or should have known that he was selling and furnishing alcoholic beverages to all 3 minors.

We simply fail to see any evidence of prejudice in this. Appellants have not explained how omission of any reference to Gold would have changed the outcome. Without such a showing, they cannot be said to have been materially prejudiced.

III

Appellants contend the evidence does not support the finding that appellants' clerk furnished alcoholic beverages to Eric Appell, the minor named in count 3. They assert the evidence shows that Appell did no more than carry a case of beer to the counter, which, they contend is not enough to support the finding of furnishing.

With regard to appellants' contention, the Appeals Board must review the Department's decision to determine if substantial evidence exists, even if contradicted, to reasonably support the Department's 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].) "Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (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].)

In making its 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]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [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, supra*, 261 Cal.App.2d 181, 185; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

In the present case, Appell went with Quinn to the beer cooler, selected several large bottles of beer from the cooler and took them to the counter, stood next to Quinn while she paid for the beer, and began to pick up a case of the beer from the counter after the purchase when the clerk, belatedly, asked him how old he was. All this took place within the view of the clerk.

We believe that these facts constitute the substantial evidence necessary to support the ALJ's finding that the clerk furnished beer to Appell. In *Circle K Stores, Inc.* (2004) AB-8209, which involved the purchase of beer by one person who was 21 years old, accompanied and helped by several other people who were not yet 21, the Board said:

The clerk is the person in control of the sale. He or she must be alert to the substance of the transaction, and cannot ignore circumstances that ought to raise questions in the mind of a reasonably prudent person. When the transaction is in the nature of a group purchase, as the one in this case appeared to be, a clerk must establish that each of those who are involved in the transaction are 21 or over. It is not enough that the person who assembles the various selections and pays for them is 21. A clerk may not close his or her eyes to the reality of what is taking place. The critical fact in this case is not the mere presence of minors, it is their participation in the transaction, all of which took place in front of the clerk.

Business and Professions Code section 23001 declares that "the subject matter of this division involves in the highest degree the economic, social, and moral well-being and safety of the state and of all its people," and mandates that "all provisions of this division shall be liberally construed for the accomplishment of these purposes." It would be an unduly restrictive reading of the word "furnish" to accept appellant's contention that there was no furnishing in this case.

While the facts in AB-8029 were somewhat different from those in the present appeal, they are sufficiently similar to provide appropriate guidance. We have no difficulty concluding that the participation of Appell in this transaction was sufficient to put a reasonable clerk on notice that it was necessary to verify Appell's age, as well as Quinn's, before completing the sale.

ORDER

The decision of the Department is affirmed.⁴

SOPHIE C. WONG, MEMBER
FRED ARMENDARIZ, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This 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.