

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

AB-8351

File: 21-357844 Reg: 04056993

INDERJIT KAUR ATWAL and LAHORA SINGH ATWAL, dba Buck Liquor Store
1089 Baker Street, Unit A, Costa Mesa, CA 92626,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: August 4, 2005
Los Angeles, CA

ISSUED: NOVEMBER 9, 2005

Inderjit Kaur Atwal and Lahora Singh Atwal, doing business as Buck Liquor Store (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 25 days for their clerk selling and/or furnishing alcoholic beverages to two people under the age of 21, violations of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Inderjit Kaur Atwal and Lahora Singh Atwal, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Claire C. Weglarz, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on November 30, 1999. On March 29, 2004, the Department filed a two-count accusation against appellants charging that, on January 23, 2004, their clerk sold or furnished alcoholic beverages to 17-year-old Cole Campanaro (count 1) and 18-year-old Jeffrey Taylor (count 2).

At the administrative hearing held on August 3, 2004, documentary evidence was received, and testimony concerning the sale was presented by Department investigators Nicole Cleveland and Dan Hart; by the two minors, Campanaro and Taylor; and by the clerk, Gora. Co-licensee Inderjit Atwal also testified.

The testimony established that, on January 23, 2004, 17-year-old Cole Campanaro and 18-year-old Jeffrey Taylor entered appellants' licensed premises and proceeded to the beer cooler. Campanaro picked out two 20-packs of Budweiser beer and carried them to the counter, where he asked for a bottle of Sour Apple Pucker, an alcoholic beverage. The clerk, Satwinder Gora (the clerk), was talking on the telephone, but he got a 750 ml bottle of Sour Apple for Campanaro. Campanaro asked for a smaller bottle instead, and the clerk got a 375 ml bottle for him.

The clerk rang up the sale and asked Campanaro for identification. Campanaro took a California driver's license from his wallet and placed it on the counter. The driver's license belonged to Campanaro's older brother and had expired two years before. The clerk picked it up, looked at it, handed it back to Campanaro, and told him the price of the alcoholic beverages. When Campanaro found he didn't have enough money, he took one of the 20-packs back and got an 18-pack to replace it. The clerk rang up the sale, Campanaro paid him, and Campanaro and Taylor carried the alcoholic beverages out of the store.

Department investigators Nicole Cleveland and Dan Hart, doing enforcement spot-checking in the area, had observed a group of young-looking people in a car in the parking lot of appellants' premises, and when two males got out and went into the store, Cleveland followed them. Inside, she observed them purchase the alcoholic beverages. Cleveland and Hart stopped Campanaro and Taylor in the parking lot and ascertained that they were both under the age of 21. They also found the expired driver's license issued to Campanaro's brother.

The decision issued by the Department determined that the violations charged were proved and that appellants did not establish the defense provided by section 25660. Appellants appealed this decision, contending: 1) Their right to due process was violated; 2) they established a defense to the charge pursuant to Business and Professions Code 25660; and 3) the finding of furnishing to a minor (count 2) is not supported by substantial evidence.

DISCUSSION

I

Appellants contend that the Department's decision was made after the Department's decision maker received an ex parte communication from the Department's trial counsel, which violates due process.

The Appeals Board considered virtually identical allegations of due process violations, and reversed the Department's decisions, in three appeals: *Quintanar* (AB-8099), *KV Mart* (AB-8121), and *Kim* (AB-8148), all issued in August 2004 (referred to in this decision collectively as "*Quintanar*" or "the *Quintanar* cases").²

²The Department filed petitions for review with the Second District Court of Appeal in each of these cases. The cases were consolidated and the court affirmed the Board's decisions. In response to the Department's petition for rehearing, the court
(continued...)

The Board held that the Department violated due process by not separating and screening the prosecuting attorneys from any Department attorney, such as the chief counsel, who acted as the decision maker or advisor to the decision maker. A specific instance of the due process violation occurs when the Department's prosecuting attorney acts as an advisor to the Department's decision maker by providing a document entitled "Report of Hearing" before the Department's decision is made.

Although the legal issue here is the same as that in the *Quintanar* cases, there is a factual difference that requires a different result. In each of the three cases involved in *Quintanar*, the administrative law judge (ALJ) had submitted a proposed decision to the Department that dismissed the accusation. In each case, the Department rejected the ALJ's proposed decision and issued its own decision with new findings and determinations, imposing suspensions in all three cases. In this appeal, however, the Department adopted the proposed decision of the ALJ in its entirety, without additions or changes.

Where, as here, there has been no change in the proposed decision of the ALJ, we cannot say, without more, that there has been a violation of due process. Any communication between the advocate and the advisor or the decision maker after the hearing did not affect the due process accorded appellants at the hearing. Appellants have not alleged that the proposed decision of the ALJ, which the Department adopted as its own, was affected by any post-hearing occurrence. If the ALJ was an impartial adjudicator (and appellants have not argued to the contrary), and it was the ALJ's

²(...continued)
modified its opinion and denied rehearing. The cases are now pending in the California Supreme Court and, pursuant to Rule of Court 976, are not citable. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 127 Cal.App.4th 615, review granted July 13, 2005, S133331.)

decision alone that determined whether the accusation would be sustained and what discipline, if any, should be imposed upon appellants, it appears to us that appellants received the process that was due to them in this administrative proceeding. Under these circumstances, and with the potential for an inordinate number of cases in which this due process argument could possibly be asserted, this Board cannot expand the holding in *Quintanar* beyond its own factual situation.

II

Section 25660 provides a defense to a sale-to-minor charge in cases where a seller has "demanded, was shown and acted in reliance upon" "bona fide evidence of majority and identity of the person," which is defined as a governmentally issued document, such as a driver's license or a military ID, "which contains the name, date of birth, description, and picture of the person."

Appellants contend that the clerk reasonably relied on the expired California driver's license presented by Campanaro. They point out that one of the investigators testified that Campanaro looked very similar to the picture on the driver's license and that the ALJ found that there is a resemblance between Campanaro and the picture. Because of these similarities, appellants assert, it was reasonable for the clerk to rely on this license, even though it was expired.

Appellants concede that the expiration date "may be a factor" when determining whether the person presenting an identification card is the owner of the identification. However, they argue, the section 25660 defense should not be denied merely because the license expired two years before, where, as in this case, the clerk has a "strong and reasonable belief" that the person depicted on the identification is the person in front of him. To hold that the defense is per se precluded by an expired license, they insist,

would be to impermissibly add language to the statute. They add that even though an expired license does not permit one to drive, the information on the license does not change. Therefore, they conclude, a clerk should be able to establish reasonable reliance on a driver's license even if it is expired.

It is true that the investigator testified she thought Campanaro's appearance was "very similar" to the picture on his brother's driver's license [RT 23]. The ALJ said, in Finding of Fact 14: "Cole Campanaro and John Campanaro are brothers. There is some resemblance between the photograph in Exhibit 3 and Cole Campanaro." He also found, in Finding of Fact 13, that Campanaro did "not present the general appearance of a person 21 years of age," either at the hearing or at the time of the illegal sale.

However, there is more to establishing a section 25660 defense than simply comparing the person with the picture. 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.*)

The case law regarding that section makes clear that 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.)

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 such card.

(*Keane v. Reilly* (1955) 130 Cal.App.2d 407, 409-410 [279 P.2d 152].)

While it may have been reasonable for the clerk to compare the person with the picture and conclude that they were probably the same person, it was not reasonable for the clerk to ignore the expiration date or the apparent age of the person presenting the license. In *22000, Inc.* (2000) AB-7543, the licensee argued that a clerk used due diligence by simply comparing the picture on the proffered identification with the customer presenting it. The Board responded:

[T]here is no basis for the implication that the clerk was entitled to focus only on the photograph on the license. Common sense dictates that he is required to give appropriate weight to each item of information on the license which tends to show that it is the property of the person tendering it, and that the person is 21 years of age or older.

In *Thrifty Payless, Inc.* (2004) AB-8125, the Board made an extensive review of appeals it has heard involving the use by minors of expired identification cards to purchase alcoholic beverages. In these cases, the Board has consistently found that a

reasonable and prudent seller cannot simply ignore the expiration date on a document offered as proof of age and identity. In *Nourollahi* (1997) AB-6649, the Board said that "there can be no per se rule, but the longer a license has been expired, the higher the level of diligence which should be required for a successful defense under §25660."

The Board continued:

[T]he time which had passed since the license in question expired is a factor to be weighed in determining whether appellants' reliance was reasonable and in good faith. It is one thing for a person to offer their expired license as identification a few days after its expiration, when he or she may not have yet received its replacement. It is another for someone to carry a license outdated for more than two years. When the document's expiration is added to the fact that the person presenting the identification is youthful enough to put the seller on notice of inquiry in the first instance, it seems fair to say that the seller was derelict in not seeking further proof of age and identity. A driver's license which expired as long ago as the license in this case should be a "red flag" to any potential seller.

Appellants assert that the plain language of section 25660 does not prevent an expired license from satisfying the requirements for the defense. While that is true, case law has required reasonable reliance and due diligence. A reasonable and prudent person would at least make inquiry if an expired driver's license is used for identification, especially when, as here, the appearance of the person presenting the license makes it unlikely that he is 21. It was not reasonable for the clerk to rely on this license without asking any questions.

III

Appellants contend that there is not substantial evidence to support the finding that the clerk furnished alcoholic beverages to Taylor. They assert that the evidence fails to show the clerk was put on notice that Taylor and Campanaro were together and without that notice no duty arose for the clerk to inquire about Taylor's age.

The Department's decision addresses this issue in Conclusion of Law 8:

Taylor accompanied Campanaro at each step in the process of acquiring the alcoholic beverages. He was with him when the beer selection was made. He was with Campanaro at the sales counter and Taylor carried some of the alcoholic beverages out of the store. In light of the quantity of alcoholic beverages sold to Campanaro on January 23, 2004, clerk Gora had a responsibility to inquire as to the age of Taylor. He failed in that duty.

"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].) 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, 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 (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821, 826-827 [40 Cal.Rptr. 666].)

Appellants assert that "reasonable minds would not accept this record as reasonable support for the Department's Decision" with regard to Taylor. We disagree.

Taylor went with Campanaro to the beer cooler, accompanied him to the counter, stood near Campanaro while he asked for the Sour Apple, waited at the counter while Campanaro went to exchange some of the beer for a smaller pack, remained there while Campanaro paid for the alcoholic beverages, and helped Campanaro carry the items to the car. Much of this took place within a few feet 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 Taylor. In spite of the clerk's testimony that he did not notice another person with Campanaro, it was not unreasonable or arbitrary for the ALJ to infer that the clerk was sufficiently on notice that Taylor was accompanying Campanaro that he should have inquired about Taylor's age.

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 Taylor in this transaction was sufficient to put a reasonable and prudent clerk on notice that it was necessary to verify Taylor’s age, as well as Campanaro’s, before completing the sale.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, 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.