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

AB-8398
File: 21-367265 Reg: 04057690

LE NGUYET TO and KENNY WANG, dba Prices Liquor
7371 Florence Avenue, Downey, CA 90240,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: December 1, 2005
Los Angeles, CA

ISSUED: FEBRUARY 3, 2006

Le Nguyet To and Kenny Wang, doing business as Prices Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license, with revocation stayed on the conditions that appellants operate discipline free for one year and serve a 30-day suspension, for co-licensee To 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 appellants Le Nguyet To and Kenny Wang, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Ryan M. Kroll, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated February 3, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on August 21, 2000. On July 22, 2004, the Department filed a three-count accusation against appellants charging that, on February 7, 2004, co-licensee To sold an alcoholic beverage, whiskey, to 18-year-old Breeana Alvarado (count 1- Bus. & Prof. Code, § 25658, subd. (a)); on the same date To furnished whiskey to 19-year-old Molly Alvarado (count 2 - Bus. & Prof. Code, § 25658, subd. (a)); and on that date appellants' employee, Tom Oo, delayed or obstructed a Department investigator during his investigation (count 3 - Pen. Code § 148, subd. (a)(1)).

At the administrative hearing held on November 18, 2004, documentary evidence was received and testimony concerning the violations charged was presented by Breeana Alvarado (the minor or Breeana); by Department investigators Enrique Alcala and Joseph Perez; and by co-licensee To (appellant).

Investigator Alcala testified that when he and investigator Perez saw two youthful-looking females enter appellants' premises, he followed them in. He stood near them at the counter and heard one of them, (later identified as Breeana) ask the other (later identified as Molly) what she wanted. Molly responded, "Jack Daniels." Appellant and Oo were standing on the other side of the counter during this exchange and when Molly said "Jack Daniels," one of them got a bottle of Jack Daniels whiskey and put it on the counter. Appellant bagged the bottle and Breeana paid for it. Neither appellant nor Oo asked either young woman for her age or identification.

Perez stopped Breeana and Molly outside the store and asked for their identification. When Alcala came out, Perez asked his opinion about the ID Breeana had given him, because he did not think it was hers. The California driver's license

Breeana gave Perez was issued to Jacklyn Oliver, and when Alcala looked at it, he immediately noted differences between Breeana's appearance and Jacklyn Oliver's photograph on the license. In his testimony, Alcala noted that Breeana's nose and lips were thinner than Oliver's and Breeana had dark eyes, while Oliver's were listed on the license as hazel. When Alcala told Breeana he was going to verify the information on the license, Breeana admitted the license was not hers and that she was only 18 years old. She also told Alcala that she had purchased alcoholic beverages at appellants' premises, using Jacklyn Oliver's ID, several times in the past few months.

Breeana Alvarado confirmed Alcala's testimony about the events in appellant's premises and outside with the investigators. She also said that she told one of the investigators that she had used Oliver's ID to purchase alcoholic beverages at appellants' premises several times in the preceding months. She remembered showing Oliver's driver's license twice, and on at least one of those occasions she showed it to appellant.

Investigator Perez testified that he asked Alcala to look at the ID Breeana had given him "to get a second opinion to say, Yes, it didn't look like her," although he had already formed the opinion that the picture on Oliver's driver's license did not look like Breeana.

Appellant To testified that she had seen Breeana in the store several times over the months preceding the sale in question, that she had checked the driver's license Breeana used more than once, and that she believed the driver's license was Breeana's and, based on the driver's license, that Breeana was 21.

Subsequent to the hearing, the Department issued its decision dismissing counts 2 and 3 as not proved, but sustaining count 1. Appellants filed an appeal contending

they established a defense to the charge pursuant to Business and Professions Code section 25660, and that the Department violated their right to due process by an ex parte communication.

DISCUSSION

I

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 To reasonably relied on the California driver's license Breeana had previously presented to her, thereby establishing a defense to the sale-to-minor charge as provided by Business and Professions Code section 25660.

The decision has this to say about the California driver's license belonging to Jacklyn Oliver that was seized from Breeana (Finding of Fact II, ¶¶ 3-5):

> The license showed that Ms. Oliver was 5' 3" tall, weighed 115 pounds, and had brown hair and hazel eyes. It also indicated that Ms. Oliver's date of birth was October 16, 1982, making Ms. Oliver twenty-one years old.
>
> The investigator took a photograph of Breeana. The photograph shows that Breeana had features which are similar to Ms. Oliver's features as listed and depicted on Ms. Oliver's driver license. The photograph also shows that Breeana's nose is not nearly as flat as Ms. Oliver's.
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> Breeana had shown Jacklyn Oliver's license to Respondent To on at least two prior occasions in order to purchase alcoholic beverages. On February 7, Respondent To remembered having previously relied on Ms. Oliver's license as proof of Breeana's majority.

Determination of Issues I addresses appellants' argument made at the hearing that a section 25660 defense had been established (¶¶ 5 & 6):

> The difference in shape between Breeana Alvarado's nose and Jacklyn Oliver's nose is very noticeable. If Respondent To had conducted a "careful scrutiny" of Ms. Oliver's driver license, she would have noticed the difference, and would have seen that Breeana Alvarado was not the person on Jacklyn Oliver's driver license.
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> Therefore, it was not reasonable for Respondent To to rely on Jacklyn Oliver's license as proof of Breeana's majority. Respondents did not establish a Section 25660 defense.

Certain general principles guide our review in this case: In reviewing a decision of the Department, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but must determine, 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. The Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94-95 [84 Cal.Rptr. 113].)

Where there are conflicts in the evidence, 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. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826] (*Masani*); *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, supra,* 261 Cal.App.2d at p. 185; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

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 section 25660 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].) 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*, at p. 753.)

> [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 man 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. In such a case the defense permitted by section [25660] could not successfully be urged.

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

Appellants assert that To had carefully examined the identification presented by Breeana prior to the night in question. They contend that the ALJ erred when he found To's inspection was not sufficiently diligent because he compared To's examination of

the driver's license to that of the Department's trained professional investigators. However, appellants have not pointed out any evidence in the record or any language in the decision which supports that assertion, nor have we found any.

At oral argument before this Board, appellants asserted that the ALJ was required to consider the circumstances surrounding appellant's inspection, i. e., that the inspection was done "in the marketplace," when determining whether her inspection of and reliance on the driver's license Breeana showed her was reasonable. They argued it was unreasonable for the ALJ to find appellant's examination of the license under those marketplace circumstances to be deficient solely because she did not notice that the shape of Breeana's nose was different from that of Oliver. A reasonable inspection in the marketplace, appellants appear to be saying, would not allow a seller to notice what the ALJ observed during his inspection, which was unhurried and was done already knowing that the person depicted on the driver's license was not Breeana. Appellants insist that where a licensee's defense is dependent on noticing a difference in the shapes of noses, the licensee is being held to an unreasonably high, and erroneous, standard.

We disagree. Noticing differences in important features, such as the shape of a nose or mouth, is the essence of making a reasonable examination of an ID. Appellants refer to the Board's statement in *SS Schooners* (1999) AB-7039, that when inspecting an ID, "A licensee is required to act reasonably, not perfectly." While that is true, the case law requires that the seller make "a duly diligent examination of the document and its bearer." (*Masani*, *supra*, 118 Cal.App.4th at p. 1443.) A reasonable inspection *of the document and its bearer*, therefore, does not require perfection, but it does require diligence. The defense provided by section 25660 requires diligence on

the part of the seller whether or not the transaction takes place in a busy convenience or grocery store or in the relative tranquility of a gourmet restaurant. Sales to minors ordinarily occur "in the marketplace," and the exigencies of commerce do not provide an excuse for lack of diligence .

Whether or not a licensee has made a reasonable inspection of an ID to determine that it is bona fide evidence of the bearer's identity and majority is a question of fact. (*Masani*, *supra*, 118 Cal.App.4th at p. 1445; *5501 Hollywood, Inc. v. Dept. of Alcoholic Bev. Control , supra,* 155 Cal.App.2d at pp. 753-754.) Appellant is really asking this Board to reweigh the evidence and reach a conclusion different from that of the ALJ and the Department. That is not the role of the Appeals Board. The Board may not ignore or reject a factual finding of the Department even if it considers a contrary finding equally, or even more, reasonable than that of the Department. (*Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control*, *supra*, 2 Cal.3d at p. 94; *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106, 112-114 [28 Cal.Rptr. 74].)

We disagree with appellants' opinion that this decision reaches an "absurd and unjust result." The ALJ's factual findings are supported by substantial evidence and he used the appropriate standard of reasonableness. Under the circumstances, we have no reason to disturb the ALJ's conclusion that appellants failed to establish a section 25660 defense.

II

Appellants assert the Department violated their right to procedural due process when the attorney (the advocate) representing the Department at the hearing before the ALJ provided a document called a Report of Hearing (the report) to the Department's

decision maker (or the decision maker's advisor) after the hearing, but before the Department issued its decision. Appellants also filed a Motion to Augment Record (the motion), requesting that the report provided to the Department's decision maker be made part of the record.

The Appeals Board discussed these issues at some length, and reversed the Department's decisions, in three appeals in which the appellants filed motions and alleged due process violations virtually identical to the motions and issues raised in the present case: *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]

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 the report before the Department's decision is made.

The Board's decision that a due process violation occurred was based primarily on appellate court decisions in *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575 [5 Cal.Rptr.2d 196] (*Howitt*) and *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108

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[2]The 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 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.)

Cal.App.4th 81 [133 Cal.Rptr.2d 234], which held that overlapping, or "conflating," the roles of advocate and decision maker violates due process by depriving a litigant of his or her right to an objective and unbiased decision maker, or at the very least, creating "the substantial risk that the advice given to the decision maker, 'perhaps unconsciously' . . . will be skewed." (*Howitt*, *supra*, at p. 1585.)

Although the legal issue in the present appeal is the same as that in the *Quintanar* cases, there is a factual difference that we believe requires a different result. In each of the three cases involved in *Quintanar*, the 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 the present 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 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.

Under the circumstances of this case and our disposition of the due process issue raised, appellants are not entitled to augmentation of the record. With no change in the ALJ's proposed decision upon its adoption by the Department, we see no relevant purpose that would be served by the production of any post-hearing document. Appellants' motion is denied.

ORDER

The decision of the Department is affirmed.[3]

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

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[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.