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

AB-9158
File: 47-438036 Reg: 10073020

RA SUSHI TORRANCE CORP., dba Ra Sushi
3525 Carson Street, Suite 161, Torrance, CA 90503,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley.

Appeals Board Hearing: February 2, 2012
Los Angeles, CA

ISSUED FEBRUARY 28, 2012

Ra Sushi Torrance Corp., doing business as Ra Sushi (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked its on-sale general eating place license, and conditionally stayed the order subject to a three-year probationary period and service of a 30-day suspension, for an employee having sold alcoholic beverages to a 20-year-old non-decoy minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Ra Sushi Torrance Corp., appearing through its counsel, Ralph B. Saltsman and Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on August 3, 2006.

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[1]The decision of the Department, dated February 16, 2011, is set forth in the appendix.

An accusation was filed against appellant on May 3, 2010, charging that Jennifer Bowman, an employee of appellant, sold alcoholic beverages consisting of beer, wine, and distilled spirits to Paul Kim, a 20-year-old minor, on July 2, 2009. The accusation further charged, for purposes of imposition of penalty, if any, that after consuming some or all of those alcoholic beverages, Kim was involved in a traffic accident resulting in another person's death. On July 29, 2010, Kim entered a plea of nolo contendere to, and was convicted of, a charge of having violated Penal Code section 191.5, subdivision (a) (gross vehicular manslaughter while intoxicated), and sentenced to four years in prison.

An administrative hearing was held on September 21 and 22, 2010, and November 18, 2010, at which time documentary evidence was received and testimony concerning the sale-to-minor violation was presented.

Subsequent to the hearing, the Department issued its decision which determined that the sale-to-minor violation had occurred as alleged, rejected appellant's claim of a defense under Business and Professions Code section 25660, ordered appellant's on-sale general public eating place license revoked, stayed execution of the order of revocation during a three-year probationary period, and ordered a 45-day suspension.[2] Appellant filed a timely notice of appeal in which it raises the following issues: (1) the Department abused its discretion in considering a post-transaction event as an aggravating factor in determining the penalty; (2) appellant established a defense under Business and Professions Code section 25660; (3) the administrative law judge (ALJ)

[2] The Department adopted the proposed decision of the administrative law judge as written, but ordered the suspension reduced to 30 days.

abused his discretion by admitting unsubstantiated evidence of the minor's blood alcohol level; and (4) the Department erred by failing to mitigate the penalty. We will discuss each of these issues, though not in the order raised in the notice of appeal.

DISCUSSION

Our review is limited to a determination of whether the Department has proceeded without or in excess of its jurisdiction; whether the Department has proceeded in the manner required by law; whether the Department's decision is supported by its findings; whether those findings are supported by substantial evidence; or whether there is relevant evidence which, in the exercise of reasonable diligence could not have been produced or was improperly excluded at the hearing before the Department. (Bus. & Prof. Code, § 23084.)

> Certain principles guide our review. ... We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor this court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citation.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826 (*Masani*)).

I

Appellant contends that the Department erred in determining that appellant failed to establish a defense under Business and Professions Code section 25660.

Section 25660 provides:

> (a) 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, an identification issued to a member of the Armed Forces that contains the name, date of birth, description, and picture of the person, or a valid passport issued by the United States or by a foreign government.
>
> [¶] . . . [¶]
>
> (c) Proof that the defendant-licensee, or his or her employee or agent, demanded, was shown, and acted in reliance upon bona fide evidence in any transaction, employment, use, or permission forbidden by Section 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 statute creates an affirmative defense; the burden of proving it is on the party asserting it.

The question before this Board is whether appellant failed to meet its burden under section 25660 of reasonable inspection and reasonable reliance on the fake identification. Appellant argues that it was an abuse of discretion to define reasonable reliance as requiring detection of an aggregate of subtle, subjective, and technical defects relied upon by the administrative law judge.

It is undisputed that the server, Jennifer Bowman, demanded from Paul Kim, and was shown, what purported to be a California driver's license which showed Kim to be 22 years of age. [II RT 97-98.] Ms. Bowman took possession of the document, examined it, returned it to Kim, and accepted his drink order. That document, later discovered in Kim's wallet following his arrest, was counterfeit, purchased by Kim at an undisclosed location in downtown Los Angeles. The Department has never claimed that Ms. Bowman acted in bad faith; instead, it found that appellant failed to sustain its

burden of proving that Ms. Bowman's reliance on the counterfeit license was reasonable. The apparent rationale of the Department's decision was that, given the large number of defects identified by Department witnesses, it was unreasonable for Ms. Bowman to rely on it as proof that Kim was of legal age.

The critical elements of the Department's decision are stated in Finding of Fact 14 and Conclusions of Law 6 and 7 (italics added):

> FF 14:
> Various witnesses testified about the fake ID. Kim testified that, in his opinion, it was a bad fake – it was smaller than an actual ID, it was lighter in color than an actual ID, it was flimsier than an actual ID, it was falling apart (the front and back were separating from each other along the left edge), and, based on the purported issue date, it was missing the red stripe.
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> Department investigator Victoria Brown testified that, when she first viewed the ID, she noticed that the ID was splitting along the left side, that the colors were wrong in relation to an actual ID, that the main photo was the wrong size, that the fake ID was a different size than an actual ID, and that the magnetic strip on the back was not raised as it would be on an actual ID.
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> Ofcr. Mayday [*sic*] testified that, when he saw the fake ID at the station, he noticed that it was dull and that it was peeling apart at some of the corners. It took him less than one minute to determine that it was fake, which he verified by calling dispatch. Ofcr. Partridge testified that the fake ID was not properly reflective, that the color was not as vibrant, and that the edge was coming apart. Ofcr. Partridge determined that the ID was false within a few seconds of viewing it.
>
> Bowman testified that she did not recall seeing Kim on July 2, 2009, nor did she recall seeing the fake ID before the hearing. Upon examining the fake during the hearing, she noticed that the bar code was not elevated and that the magnetic strip did not wrap around.
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> CL 6:
> Although Kim showed Bowman a false ID in connection with the sale, no section 25660 defense was established. The ID in question was not a government-issued ID; rather, it had been manufactured specifically for

> Kim by a third party. As such, it contained an actual photo of Kim and set forth the correct physical description. However, it had numerous problems which were obvious to a number of people – five witnesses identified a total of ten different problems with the ID. Some of the problems were apparent to more than one of the witnesses.
>
> Moreover, the fake ID was not even internally consistent. On the one hand it indicated that Kim was born on June 17, 1987, on the other hand it indicated that it was issued on April 26, 2007. If both of these dates are accepted as a given, then Kim was 19 years old when the ID was "issued." Accordingly, not only should it have had a red stripe on it (as noted by Kim), it also should have had the other indicia of an identification issued to a minor (e.g., the main photo should have been on the right, the smaller photo should have been immediately next to main photo. (Findings of Fact ¶¶ 6-8 & 14-15.)

No single witness identified all of the indicia of falsity listed in the ALJ's findings. Instead, the findings consist of a recitation of observations and opinions concerning such indicia culled from the testimony of the four Department witnesses (Kim, the minor; Department investigator Victoria Brown; and California Highway Patrol officers Robert Maday and Nathaniel Partridge), all of whom knew the license was fake before examining it, were able to examine it at their leisure, and, except for Ms. Bowman, compare notes on their observations.

Kim, of course, was able to compare the fake to his true California driver's license when he first purchased it, and, despite what he supposedly thought of its quality as a fake, carried and used it for several months. Kim admitted that he took steps to conceal the "splitting" problem before using it at Ra Sushi.

Investigator Brown, the Department's key witness, first learned in an interview with Kim and his girl friend that Kim had shown Ms. Bowman a fake California driver's license. Investigator Brown later examined the fake license during a visit to the California Highway Patrol office where it was being held. Investigator Brown testified

that when she first saw the false ID, during a visit to the CHP office in August 2009, she "noticed a lot of things" about it:

> A: The first thing I noticed is that it was splitting, meaning the top separating from the – or the front separating from the back.
>
> Q: Anything else you noticed about it?
>
> A: Color was wrong, the size of the photo, the size of the I.D., the backing didn't have a magnetic strip. Shall I go on?[3]

[I RT 135-136.][4]

Brown described the splitting as "noticeable," but was unable to describe the extent to which it was noticeable to her:

> THE COURT: How noticeable was it to you?
>
> A: It was noticeable.
>
> THE COURT: Very? Little? I mean, do we have some range here, other than you observed it?
>
> A: I observed it, and it was noticeable.

[I RT 136.]

Brown testified that she compared the Kim fake to her own ID, and the colors were different, "Some were brighter; some were darker." [I RT 137.] The photo on the Kim fake was slightly larger than a photo on a true ID, and the Kim fake was "either

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[3]Brown's criticism of the magnetic strip was that it was not raised. "It's not raised. As you put your thumb across the back of the I.D., you should feel a raised stripe [*sic*] or – the magnetic stripe [*sic*] is slightly raised [on a true identification]." [I RT 138.]

[4] The format for record citations is as follows: September 21, 2010: I RT ---; September 22, 2010: II RT --; November 18, 2010: III RT --.

slightly larger or slightly smaller. I don't recall. But I remember it being different." (*Ibid*.)

It was not until cross-examination that Brown revealed that she had studied the Kim fake for 20 to 30 minutes during her visit to the CHP office. [I RT 168.] Brown acknowledged that she had already learned from other sources that it was fake, and her purpose in looking at it was to see "what it was about the identification that was right and what was wrong." [I RT 155-156.] To determine the relative size of the fake ID, Brown used her own identification and held it side by side with the Kim fake, and then one on top of the other. [I RT 158.] Brown also took several photographs, including one with a thumb actively separating a corner of the Kim fake [I RT 169]; the photo is not part of the record.

Kim's true California driver's license was produced by Kim at the scene of the accident. [I RT 204-205]. CHP Officers Maday and Partridge discovered the fake when searching Kim's wallet upon their return to the CHP office, and confirmed with dispatch that it had not been issued by the DMV [I RT 209-210], after which both formed observations about its quality.

Ms. Bowman was unaware she was examining a fake when she examined the license Kim presented to her at the licensed premises. Its quality was good enough to fool her. Her later observations as to the wrap-around magnetic strip and the bar code that was not raised were made when she studied the license on the day of the hearing, long after she had learned it was a fake. It should be noted that no other witness mentioned these items, and she may or may not be correct in her observations.

In *Masani, supra,* 118 Cal.App.4th 1429 at 1445*,* the court stated:

> The licensee should not be penalized for accepting a credible fake that has been reasonably examined for authenticity and compared with the person depicted. A brilliant forgery should not ipso facto lead to licensee sanctions. In other words, fake government ID's cannot be categorically excluded from the purview of Section 25660. The real issue when a seemingly bona fide ID is presented is the same as when actual governmental ID's are presented: reasonable reliance that includes careful scrutiny by the licensee.

What the Department has done in this case flies in the teeth of the principle stated in *Masani*. The Department did not evaluate Ms. Bowman's inspection against a standard of what a reasonable server would have seen while exercising due diligence in viewing what appeared to be an authentic California driver's license. Instead, the Department's standard suggests that if enough of the document's flaws are obvious to trained law enforcement personnel and the owner of the false document, the collective total should have been obvious to Ms. Bowman.

The cases tell us that a licensee, or a licensee's agent or employee, must exercise the caution which would be shown by a reasonable person in the same or similar circumstances. (*Lacabanne Properties, Inc. v. Alcoholic Beverage etc. Appeals Board* (1968) 261 Cal.App.2d 181, 189 [67 Cal.Rptr. 734]; *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* (1957) 155 Cal.App.2d 748, 753-754 [318 P.2d820].

The problem of sales to minors, and the attendant problems of underage drinking, justify strict enforcement of the sale-to-minor prohibition in section 25658, subdivision (a). Strict enforcement is not the same as strict liability for such sales. In

enacting section 25660, the Legislature created a method intended to afford protection for licensees in particular situations. While the statute should be narrowly construed, it should not be construed so nearly that it disappears.

The courts have stated that section 25660 was to be a safe harbor for licensees who inspect the appropriate types of identification in good faith and with due diligence. (*In re Jennings* (2004) 34 Cal.4th 254, 281 [17 Cal.Rptr.3d 645]. "Good faith" and "due diligence" mean that licensees and their employees are required to act reasonably, not perfectly.

It is true that the driver's license in this case is not a perfect copy of a California driver's license. On the other hand, the distinguishing features on the card are subtle and technical, especially in light of how closely the rest of the card resembles a genuine one. It is not surprising to this Board that the clerk did not question the authenticity of the license when she examined it.

II

Although we conclude that the Department's decision must be reversed because the Department used an erroneous standard in rejecting appellant's section 25660 defense, we think it beneficial to express our view on the propriety of the penalty the Department sought to impose.

ALJ Ainley relied upon subdivisions (c) and (e) of section 25658 as authority to enhance the penalty in this case. He erred in doing so.

Subdivisions (c) and (e) provide, in pertinent part:

> (c) Any person who violates subdivision (a) by purchasing any alcoholic beverage for, or furnishing, giving, or giving away any alcoholic beverage to, a person under the age of 21 years, and the person under the age of 21 years thereafter consumes the alcohol and thereby approximately

> causes great bodily injury or death to himself, herself, or any other person, is guilty of a misdemeanor.
> [¶] ... [¶]
> (e) (1) Except as otherwise provided in paragraph (2), (3), or Section 25667, any person who violates this section shall be punished by a fine of two hundred fifty dollars ($250), no part of which shall be suspended, or the person shall be required to perform not less than 24 hours or more than 32 hours of community service ... .
> [¶] ... [¶]
> (3) Any person who violates subdivision (c) shall be punished by imprisonment in a county jail for a minimum term of six months not to exceed one year, by a fine of one thousand dollars ($1,000), or by both imprisonment and fine.

These subdivisions of section 25658, as we read them, and the penalties they threaten, were not intended to apply to the typical violation involving a retail sale of alcohol to a minor, but, instead, to a situation where a person other than a retail seller is the person furnishing or giving an alcoholic beverage to a minor. (See *In re Jennings*, *supra*, 34 Cal.4th 254 at 276-281.) The conspicuous absence of the word "sell" in subdivision (c) tell us the subdivision must have been directed at other than retail sellers, and does not provide the Department an excuse to enhance an otherwise appropriate penalty in the case of a normal retail sale.

As we said in *Ralph's Grocery Company* (2011) AB-9121, an appropriate penalty is best determined in accordance with fixed legal principles, and rule 144 is premised on the factors set forth therein as they apply to the transaction in question. "It is illogical and inconsistent with a disciplinary process intended to encourage licensee compliance to consider as an aggravating factor a post-transaction event beyond the control of the licensee." (*Ralph's Grocery Company, supra*).

III

We are satisfied that the evidence of blood alcohol content was properly

admitted, based on the testimony of CHP Officer Robert Gomez. We mention this subject only to note that even given the level of blood alcohol determined to be present, it did not reflect only drinks served to Kim by Ms. Bowman; it also reflected Kim's consumption of all or a significant part of a friend's drink, one which consisted of a 22-ounce bottle of beer of unknown alcoholic content and five and one-half ounces of a 14 percent alcohol by volume sake. [I RT 29-30; II RT 115-117; Exhibit 3.] Since there is no evidence Ms. Bowman or anyone else at Ra Sushi knew this had occurred, there is no solid basis for any penalty enhancement based on over serving.

IV

Appellant has argued that the penalty should be mitigation, based upon the very high level of cooperation in the investigation provided by appellant. In light of the result we reach, we see no useful purpose in addressing this issue.

ORDER

The Department's decision is reversed for the reasons stated in Part I, *supra*.

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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