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

AB-9588
File: 20-284726 Reg: 15083532

CIRCLE K STORES, INC.,
dba Circle K Store #3036
885 Glenneyre Street, Laguna Beach, CA 92651,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: D. Huebel

Appeals Board Hearing: April 6, 2017
Sacramento, CA

ISSUED AUGUST 21, 2017

Appearances: *Appellant:* Saranya Kalai and Melissa H. Gelbart, of Solomon Saltsman & Jamieson, as counsel for Circle K Stores, Inc., doing business as Circle K Store #3036.
Respondent: Jonathan Nguyen as counsel for the Department of Alcoholic Beverage Control.

OPINION

Circle K Stores, Inc., doing business as Circle K Store #3036 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for ten days, with five days conditionally stayed, because its clerk sold an alcoholic beverage to a non-decoy minor, a violation of Business and Professions Code section 25658, subdivision (a).

1. The decision of the Department, dated April 21, 2016, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on July 22, 1993. On December 30, 2015, the Department filed an accusation charging that appellant's clerk, Andi Yulianto (the clerk), sold an alcoholic beverage to Zakary K., a non-decoy minor, on August 28, 2015. Zakary was born on February 12, 1998, and was 17 years old on the date of the violation.

At the administrative hearing held on March 2, 2016, documentary evidence was received and testimony concerning the sale was presented by Zakary and by Eric Gray, a Department of Alcoholic Beverage Control agent. Appellant presented no witnesses.

Testimony established that on the date of the violation, Zakary entered the licensed premises, selected three cans of Four Loko, an alcoholic beverage, took them to the front counter for purchase, and stood in line. At the counter, he set them down in front of the clerk. The clerk asked Zakary for identification. Zakary handed the clerk a fake Florida ID. The clerk looked at the Florida ID for about five to ten seconds. There is no evidence that the clerk compared the described date of birth and photograph on the Florida ID with Zakary, who stood before him. The clerk swiped the Florida ID into the reader on the side of the register and handed it back to Zakary. The clerk did not ask Zakary any age-related questions or any questions regarding the Florida ID.

Zakary had ordered the Florida ID online. It had been manufactured for him. He had received it less than two weeks before the date in question. The Florida ID contained Zakary's correct first and last name, his actual photograph, his correct height of 5'11", a Palm Beach address, and a date of birth of February 12, 1994. Based on the

false birthdate, Zakary would have been 21 on the date of the violation. The Florida ID indicated it was issued on February 20, 2015.

During the transaction, Zakary wore the hood of his sweatshirt and a cap on his head. The hood and cap were positioned above his eyebrows. Zakary wore the hood and cap in this manner in an attempt to appear older.

The clerk told Zakary the price of the three cans of Four Loko. Zakary paid for them with a debit card. The clerk bagged the alcoholic beverages, and Zakary exited the store with them.

Department Agent Eric Gray had followed Zakary into the licensed premises and witnessed the sales transaction. Gray followed Zakary when he exited the store. Outside, Gray contacted Zakary and asked how old he was. Zakary replied that he was 17. Gray asked for Zakary's true identification. Zakary handed Gray his valid California driver's license, which Gray examined.

Agent Gray reentered the licensed premises, approached the clerk, identified himself as an officer, and explained the violation. He advised the clerk that he would continue his investigation outside and return.

After conducting a further investigation outside, Agent Gray walked to the front window of the licensed premises with Zakary. Both had an unobstructed view of the interior of the licensed premises and the clerk. Gray asked Zakary to identify the person who sold him the three cans of Four Loko. Zakary identified clerk Yulianto.

Agent Gray then asked the clerk a series of questions about the sales transaction and the Florida ID.

Zakary was successful in purchasing alcoholic beverages at the licensed premises with the same fake Florida ID two times prior to the date of this violation. There is no evidence that the appellant trains its employees concerning sales of age-related products and fake IDs, or that clerk Yulianto received any such training. Clerk Yulianto did not appear or testify at the hearing.

Following the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established. The ALJ rejected appellant's affirmative defenses, including a defense raised under section 25660 of the Business and Professions Code alleging the clerk relied on bona fide evidence of majority. The Department recommended a full fifteen days' suspension. Appellant countered that this was its first violation since issuance of its license in 1993, and recommended a five-day suspension, stayed in its entirety. The ALJ acknowledged appellant's 22 years of discipline-free operation, but also expressed concern regarding the circumstances of the sale in this case. She therefore imposed a reduced penalty of ten days' suspension, with five days conditionally stayed provided no cause for disciplinary action arise in the following year.

On March 23, 2016, following the submission of the proposed decision, the Department's Administrative Hearing Office sent a letter to appellant and to Department counsel purportedly offering both parties the opportunity to comment on the proposed decision. That letter stated:

> Administrative Records Secretary and Concerned Parties:
>
> Enclosed is the Proposed Decision resulting from the hearing before Department of Alcoholic Beverage Control, Administrative Hearing Office in the above entitled matter.

> All concerned parties and their attorneys of record are being sent a copy of this Proposed Decision. All concerned parties and attorneys of record are hereby informed that you may submit comments regarding this Proposed Decision to the Director for consideration prior to any action being taken by the Director. Comments to the Director regarding this Proposed Decision shall be mailed to the Administrative Records Secretary. Additional comments submitted for review by the Director, if any, must also be submitted to all parties and their attorneys. For the convenience of all concerned, a list of those parties and their addresses is attached.
>
> Pursuant to General Order 2016-02, the Administrative Records Secretary will hold this Proposed Decision until 14 days after the date of this letter. After that the Administrative Records Secretary will submit this Proposed Decision along with any comments received from concerned parties to the Director for consideration.

(Letter from John W. Lewis, Chief Admin. Law Judge, Dept. of Alcoholic Bev. Control, Mar. 23, 2016 [hereinafter "Comment Letter"].) As suggested in the final paragraph, the Comment Letter reflected a comment procedure adopted by the Department pursuant to its General Order 2016-02. (Dept. of Alcoholic Bev. Control, "GO-Ex Parte and Decision Review," Gen. Order 2016-02, at § 3, ¶¶ 5-6 (eff. Mar. 1, 2016) [hereinafter "General Order"].)

Nine days after the date of the Comment Letter, on April 1, 2016, appellant, through its attorney, submitted a document entitled "Comments to the Director re Proposed Decision" to the Department as instructed. (See generally Comments to the Director re Proposed Decision [hereinafter "Appellant's comment"].) In it, appellant argued that the Department had no authority to request comments on a proposed decision; that the Department's comment procedure outlined in the General Order violated California's Administrative Procedure Act (APA); and that the comment procedure constituted a regulation and was not properly adopted as such pursuant to the APA. (*Ibid.*)

On April 6, 2016—the fourteenth day after the date of the Comment Letter—counsel for the Department submitted a letter to then-Director Timothy Gorsuch contesting the ALJ's recommended penalty. (See Letter from Jonathan Nguyen, Attorney, Dept. of Alcoholic Bev. Control, to Timothy Gorsuch, Director, Dept. of Alcoholic Bev. Control, Apr. 6, 2016 [hereinafter "Department's comment"].) Department counsel argued there was "no evidence of mitigation" to support the reduced ten-day penalty. (*Id.* at p. 1.) Instead, counsel argued "[t]here was evidence of aggravation with regard to the sales transaction, the minor's age and appearance, and the minor's previous alcohol purchases at the premises." (*Ibid.*) The Department again recommended a full fifteen days' suspension. (*Id.* at p. 2.)

Neither the Appellant's comment nor the Department's comment were initially included in the administrative record. On January 11, 2017, counsel for appellant submitted to this Board a Motion to Augment the Record on Appeal. The Motion included copies of both parties' comments. On January 18, this Board sent a letter to the Department giving it a deadline of February 17, 2017, to respond to appellant's Motion to Augment. The same day, the Department responded with an "Amended record," which included both the Proposed Decision and both parties' comments.

On appeal, appellant contends (1) the ALJ abused her discretion by excluding relevant video surveillance evidence; (2) the ALJ omitted and failed to consider several key pieces of evidence relevant to appellant's section 25660 defense; (3) the ALJ applied an incorrect standard in determining appellant failed to meet its burden of proof under section 25560; and (4) the Department's comment procedure violates the APA because it is contrary to the legislature's intent, constitutes an underground regulation,

and encourages illegal ex parte communications. The second and third issues will be addressed together.

In response, the Department contends this Board lacks jurisdiction to review Department procedures, including those outlined in the Comment Letter and General Order.

We will resolve the jurisdictional issue and the comment procedure issue together before moving on to appellant's other substantive arguments.

DISCUSSION

I

The Department asserts the Appeals Board has no jurisdiction to review its comment procedure. (Dept. Br., at pp. 11-12.) It argues the Appeals Board may only review the decision itself, and not the procedures that led to that decision. (*Ibid.*) It contends "[t]he plain language of the constitution, statutes, and supporting case law make clear that the Board is confined to reviewing the Department's decision." (*Id.* at p. 11.) The Department paraphrases the California Constitution:

> The Board's power is limited to reviewing whether the Department has proceeded outside of its jurisdiction, in a manner proscribed by law, *the decision* is supported by the findings, and whether the findings are supported by substantial evidence in light of the record as a whole.

(*Ibid.*, emphasis in original.) The Department interprets the phrase it italicized—*the decision*—as a wholesale restriction on the Board's scope of review. (See *ibid.*) In other words, according to the Department, the Board may *only* review the words of the decision itself, and has no authority to review the procedures through which the decision was made.

The Department further contends this Board may not review or even examine the Department's General Order because the document is not part of the administrative record. (*Id.* at p. 10.) The Department argues that by submitting a copy of the General Order, appellant has presented new evidence in violation of Business and Professions Code section 23083(a). (*Ibid.*) According to the Department, this Board must disregard the General Order. (*Ibid.*)

We recently addressed an identical argument in *7-Eleven, Inc./Gupta* (2017) AB-9583. In that case, we reviewed the California Supreme Court's decision in *Quintanar*, and found that this Board does indeed have jurisdiction to review the Department's comment procedure as part of its authority to determine whether the Department "proceeded in the manner required by law." (*Gupta*, *supra*, at pp. 6-11.) We observed:

> In *Quintanar*, the Court reviewed and rejected internal Department procedures through which Department counsel routinely submitted secret ex parte hearing reports—including a recommended outcome—to the Department Director in his decision-making capacity. (*Quintanar, supra*, at pp. 6-7.) The Supreme Court concluded the ex parte hearing reports violated the administrative adjudication bill of rights provisions of the APA. (*Id.* at p. 8.) The court's decision turned on *exactly the same scope of review* constitutionally granted to the Appeals Board: "whether the Department proceeded in the manner required by law." (*Id.* at p. 7, citing Cal. Const., art. XX, § 22 and Bus. & Prof. Code, § 23090.2(b)].)
>
> More importantly, the Supreme Court explicitly observed that the Board does indeed have jurisdiction to review procedural issues for compliance with applicable law:
>
> > The Board is authorized to determine "whether the [D]epartment has proceeded in the manner required by law" (Cal. Const., art. XX, § 22, subd. (d); Bus. & Prof. Code, § 23084, subd. (b)); as such, it has jurisdiction to determine whether the Department has complied with statutes such as the APA.
>
> (*Quintanar*, *supra*, at p. 15 [overruling a pre-APA case that held the Board could not examine decision makers' reasoning].) Indeed, according to

> *Quintanar*, the Board may even review documents outside the record in order to ascertain compliance with applicable law. (*Id.* at p. 15, fn. 11.)

(*Id.* at pp. 9-10.) While we acknowledged that the holding in *Quintanar* is dicta, we also noted that subsequent cases have followed suit. (*Id.* at p. 10.) We held,

> *Quintanar* therefore affirms the Board's authority to review the Department's comment procedure and whether it complies with applicable law including, but not limited to, the APA. In so doing, the Board has the authority to review documents establishing the Department's comment procedure, including the General Order.

(*Id.* at p. 11.) We adopt that holding here.

In *Gupta*, we also concluded the Department's comment procedure, as outlined in the General Order, constitutes an unenforceable underground regulation. The comment procedure was identical in this case. We therefore reach the same legal conclusion here, and refer the parties to *Gupta* for our complete reasoning. (*Id.* at pp. 12-25.)

Finally, as in *Gupta*, we find that the comments submitted by the parties had no effect on the outcome of the case, and therefore, that the comment procedure did not materially undermine appellant's due process rights. In this case, the Department's comment argued against the mitigated penalty contained in the Proposed Decision and urged the Director to either decide the case on the record or remand for reconsideration of the penalty. (Department's comment, at p. 1.) The Proposed Decision was approved with the penalty unchanged. (See Proposed Decision.) We therefore see no grounds to reverse.

We note, however, that had the Director chosen to aggravate the penalty as urged in the Department comment, we might have reached a very different conclusion. In its comment, the Department recounts only the details of the case it finds favorable to

its position, and omits mention of facts—such as the licensee's 22 years of discipline-free operation—that tend to support a mitigated penalty. (See generally Department's comment.) Moreover, the Department filed its comment on the fourteenth and final day of the comment procedure timeframe. While this did not preclude appellant from filing a response to the Department's comment after the 14-day deadline, it *did* deprive appellant of any guarantee the Director would *actually read* its response.[2]

As we noted in *Gupta*, "we shall remain particularly vigilant in future cases, and will not hesitate to reverse where the Department's improperly adopted comment procedure materially infringes on an appellant's due process rights." (*Gupta*, *supra*, at p. 29.) Had this egregiously one-sided attempt at persuasion from the Department's own prosecutor—achieved by operation of an underground regulation—actually yielded the aggravated penalty it requested, we would have grounds to reverse.

II

Appellant contends the ALJ improperly excluded relevant video surveillance evidence that would have supported its section 25660 defense. (App.Br., at pp. 10-12.) Appellant argues that a section 25660 defense requires "reasonable reliance" on bona fide evidence of majority, and reasonable reliance is "the result of an exercise of due

2. The comment procedure's 14-day timeframe offers a clear incentive to submit comments at the last possible moment, thus potentially depriving one's opponent of the opportunity to respond. The potential for such gamesmanship—and the resulting iniquities—would no doubt have come to light during the APA rulemaking process, had the Department chosen to follow it. The rulemaking process exists largely to prevent the hasty, myopic implementation of flawed procedures such as this. (See, e.g., Gov. Code, § 11340.1(a) [purpose of rulemaking in part to "improve the quality of . . . regulations"]; see also *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 569 [59 Cal.Rptr.2d 186] ["The Legislature wisely perceived that the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation."].)

diligence." (*Id*. at p. 10, citing *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 189 [67 Cal.Rptr. 734]; *5501 Hollywood, Inc. v. Dept. of Alcoholic Bev. Control* (1957) 155 Cal.App.2d 748, 753 [318 P.2d 820].) According to appellant, the video would have shown that the clerk was diligent in checking the minor's identification, and that his reliance on the fake identification was therefore reasonable. (*Id.* at p. 11.)

Appellant further argues the ALJ improperly excluded the video without stating any basis for doing so. (*Ibid*.) Appellant claims the "[e]xclusion of crucial, dispositive, relevant and material evidence denied Appellant its right to defend itself since 'the lack of evidence' was then construed as a failure of proof" weighing against appellant's section 25660 defense. (*Id.* at p. 12.)

The Department counters by contending the ALJ did not in fact exclude the video from evidence. (Dept.Br., at p. 5.)

This Board's 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. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, § 23084.)

California's APA includes an Administrative Adjudication Bill of Rights. (See Gov. Code, §§ 11425.10 through 11425.60.) Among other things, the APA guarantees that an agency bound by it "shall give the person to which the agency action is directed

notice and an opportunity to be heard, *including the opportunity to present and rebut evidence*." (Gov. Code, § 11425.10(a)(1), emphasis added.) This right, however, "is subject to reasonable control and limitation by the agency conducting the hearing, including the manner of presentation of evidence, whether oral, written, or electronic, limitation on lengthy or repetitious testimony or other evidence, and other controls or limitations appropriate to the character of the hearing." (Law Rev. Com. com., Gov. Code, § 11425.)

The Government Code further provides a framework for evidentiary standards in administrative hearings:

> (b) Each party shall have these rights: to call and examine witnesses[;] to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called him or her to testify; and to rebut the evidence against him or her. . . .
>
> (c) The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.
>
> [¶ . . . ¶]
>
> (f) The presiding officer has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time.

(Gov. Code, § 11513.)

At the hearing, counsel for the appellant attempted to enter the video surveillance tape into evidence. (RT at p. 39.) The following lengthy exchange took place, during

which the ALJ stated three times that she will not allow appellant's video surveillance evidence:

> [MR. TATONE:] Okay. I want to—if I may, I'd like to show a video of the sale of the transaction.
>
> THE COURT: What part of it?
>
> MR. TATONE: Well, I'd like to show the part of the actual transaction itself, the register, of the Four Lokos up to the point that Agent Gray ultimately returned to question the clerk.
>
> THE COURT: So partial of the video you want to show us, partial parts of the video?
>
> MR. TATONE: I can show you the entire video or the video could be sped up in various frames so as not to take up too much of the Court's time. However, I'd like to establish the clerk's review of the ID, and I would like to establish how much time passes between the sales transaction and the ultimate questioning of the ID.
>
> THE COURT: Is the clerk here today?
>
> MR. TATONE: He is not. He was temporary, and—so we weren't able to locate him.
>
> THE COURT: Mr. Nguyen, any reply or comment?
>
> MR. NGUYEN: Your Honor, we have testimony of Agent Gray's observations within the store. I believe the surveillance video will show a video from behind the counter which cannot be authenticated through Agent Gray.
>
> I believe only the clerk could verify what happened behind the counter. We would just be seeing without any foundation laid.
>
> MR. TATONE: Your Honor, as far as authentication goes, the—the viewpoint can be authenticated which Agent Gray, himself, who can testify that he was the individual in the store at the time and whether the—the purchaser was, in fact, [the minor].
>
> I also have with me waiting outside the Circle K store manager, who can authenticate the video in regards to the fact that it's a video that shows a behind perspective. That really should have no—no bearing on whether the—the video is shown, as the video itself speaks for itself, and it will establish what it needs to establish.

MR. NGUYEN: If I may, Your Honor?

THE COURT: Okay.

MR. NGUYEN: It would just be complete hearsay, though, backed up with no testimony whatsoever. I'm sure Agent Gray could positively identify him. In the video he can't identify any actions directly behind the counter that may or may not have taken place.

MR. TATONE: Your Honor, the video is not hearsay. It's an out-of-court statement of the assertion. So I don't believe a hearsay objection here is appropriate.

Also, if it for some reason were to be hearsay, I think it would come in as administrative hearsay. It corroborates Agent Gray's testimony.

THE COURT: Did your manager view the video?

THE WITNESS: He did.

THE COURT: And what it—okay. Hold on a second. You've already indicated that. Just to clarify what you're trying to prove with the showing of this video, how long is the video in its entirety?

MR. TATONE: The video?

THE COURT: Do you know?

MR. TATONE: I don't, no.

THE COURT: So you are planning to show a partial version of the video; is that correct?

MR. TATONE: That is not correct. I could show the entire video.

THE COURT: I'm saying you were planning to show a partial version of the video; is that correct?

MR. TATONE: I was planning on showing you the point of transaction, the sale transaction all the way to the point when Agent Gray ultimately left the store, which for purposes of this hearing, is the entire—is the entire relevant portion of the video.

I mean, the video could show up to two hours, is continuous regarding this, but that's neither relevant nor appropriate.

THE COURT: *I'm not going to allow it.* You can have your—it's just not—I don't want to see a partial version of it, and you don't know how

long it's going to be. If you intended [to] show the entirety of it, you would know the length of it. And your response was, "Okay."

MR. TATONE: Well, Your Honor, if I may, then the video—I know the length from the point from the sales transaction to the time that Agent Gray reentered and began questioning the clerk is 20 minutes.

THE COURT: So just to clarify, you don't have it at the time that [the minor] entered?

MR. TATONE: I do, yeah. I can show that as well. However, I want to show the sales transaction up to—

THE COURT: Okay. *I'm not going to allow up to a portion of the video to be shown*. I need it to be the entirety of the video.

MR. TATONE: Which I can show you.

MR. NGUYEN: Your Honor, my understanding is that [the] video is two hours long.

THE COURT: Okay.

MR. TATONE: Which can be sped up to whatever relevant portions.

THE COURT: If we're going to speed up anything, no. The answer is no. *I'm not going to allow it.*

MR. TATONE: Okay. Thank you, Your Honor. I have no further questions.

(RT at pp. 39-43, emphasis added.) The ALJ's repeated insistence that she will not allow the video surveillance evidence to be shown constitutes a clear rejection of appellant's proffered evidence. More importantly, she offers no explanation for her refusal to view the video—she neither sustains the Department's objections, nor provides any independent reasoning for her refusal to allow only the relevant portions of the video to be shown. (See *ibid.*)

The Department attempts to move the goalposts, arguing that the ALJ "stated she would not allow the videotape to be sped up, but would allow it to be shown its

entirety." (Dept.Br. at p. 6.) In fact, the ALJ stated "I'm not going [to] allow up to a portion of the video to be shown. I need it to be the entirety of the video," and counsel for appellant replied "Which I can show you." (RT at pp. 42-43.) At that point, however, *counsel for the Department* interjected "Your Honor, my understanding is that the video is two hours long." (RT at p. 43.) When counsel for the appellant again offered to speed up the video, the ALJ responded "If we're going to speed anything up, no. The answer is no. I'm not going to allow it." (RT at p. 43.) After that, the discussion ended. It was, if anything, the Department's interjection that cut off the possibility of showing the entire video.

Moreover, the Department's stated objections to the video surveillance evidence—which the ALJ notably failed to address—were unavailing. The video was not hearsay; it was not "evidence of a statement" that was "offered to prove the truth of the matter asserted." (Evid. Code, § 1200.) Rather, it was offered to demonstrate the actions taken by the clerk during the transaction and the amount of time that elapsed before Agent Gray's questioning. (RT at pp. 39-40.) As noted by the courts,

> Photographs and videotapes are demonstrative evidence, depicting what the camera sees. [Citations.] They are not testimonial and they are not hearsay, that is, "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200.)

(*People v. Cooper* (2007) 148 Cal.App.4th 731, 746 [56 Cal.Rptr.3d 6].) The video surveillance footage could not be properly excluded as hearsay evidence.

Even if we assume *arguendo* that the video was hearsay evidence, the APA allows for such evidence in administrative proceedings "for the purpose of supplementing or explaining other evidence." (Gov. Code, § 11513(d).) The video was offered to supplement and explain Agent Gray's testimony. (See RT at p. 41.) Moreover,

counsel for the appellant had a witness ready to provide the evidentiary foundation for the video evidence. (RT at p. 40.) There was simply no grounds for the ALJ to exclude appellant's video surveillance evidence.

At oral argument before this Board counsel for the Department raised another objection: that admission of only a portion of the surveillance video would violate the rule of completeness. (See Evid. Code, § 356.) The rule of completeness prevents the proffer of partial evidence:

> Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, or writing which is necessary to make it understood may also be given in evidence.

(*Ibid.*) Appellant, however, sought to admit the video recording of the entire transaction at issue here. Counsel for the Department does not explain how video recordings of earlier or later transactions are in any way relevant to this case, let alone necessary to understand the context of this particular transaction. (See *ibid.*; see also Evid. Code, § 350 ["No evidence is admissible except relevant evidence."]; Evid. Code, § 210 ["'Relevant evidence" means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."].)

Regardless, completeness was not among the objections the Department raised at the administrative hearing, nor is there any indication from the record that it played into the ALJ's refusal to view the video recording. The objection was waived. (See, e.g., *Hearn Pacific Corp. v. Second Generation Roofing, Inc.* (2016) 247 Cal.App.4th 117, 131 [201 Cal.Rptr.3d 806], quoting *People v. Waidla* (2000) 22 Cal.4th 690, 717 [94

Cal.Rptr.2d 396] ["[Q]uestions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court."].)

Finally, the Department argues appellant should simply have tried harder to get the video recording admitted. We disagree. Counsel for appellant pressed repeatedly for admission of the video recording over the Department's objections. As noted above, the ALJ thrice stated she would not allow it. For purposes of the administrative hearing, the question was clearly settled. Any further or more forceful pressure from appellant's counsel would have been disrespectful and disruptive, and might have reflected unfavorably on his client. (See Bus. & Prof. Code, § 6068(b) [attorneys have duty to "maintain the respect due to the courts of justice and judicial officers"].)

The remedy for improper exclusion of evidence is prescribed by statute:

> In appeals where the board finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department, it may enter an order remanding the matter to the department for reconsideration in light of such evidence.

(Bus. & Prof. Code, § 23085.) However, in this case, the Department also failed to include the proffered video in the administrative record. The APA dictates that "the complete record includes . . . the exhibits admitted or rejected." (Gov. Code, § 11523.) The informal rejection, without grounds, of appellant's evidence and its subsequent omission from the administrative record effectively deprived appellant of the ability to appeal an evidentiary ruling. Simply put, the Department failed to proceed in the manner required by law. We therefore reverse.

III

Appellant contends the ALJ applied an improper standard in determining whether appellant had proven its defense under section 25660. According to appellant, the ALJ

focused solely on the minor's appearance, and "concluded that the defense of reasonable reliance on a bonafide [*sic*] I.D. was not established as [the minor] looked too young." (App.Br., at p. 15.) Appellant argues that "reasonable reliance under Section 25660 cannot be established unless the appearance of the person presenting the identification indicates that he or she could be 21 years of age and the seller makes a reasonable inspection of the identification offered." (*Ibid.*, citing *5501 Hollywood, Inc. supra*, at pp. 753-754.) Appellant contends the evidence does not support that conclusion that the minor's appearance raised doubts as to the validity of the identification. (*Id.* at p. 16.)

Appellant further contends that the ALJ "omitted and failed to consider several key pieces of evidence" that "were essential to Appellant's argument that the clerk reasonably relied" on the minor's fake identification. (*Id.* at p. 13.) Appellant relies on the California Supreme Court's decision in *Topanga* and argues that, "by omitting key evidence, [the ALJ] improperly failed to make an analytical bridge between the facts and her conclusions." (*Ibid.*, citing *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 510-511 [113 Cal.Rptr. 836].)

Appellant directs this Board to specific facts. First, it contends the ALJ based her conclusion that the clerk had failed to conduct a "reasonable inspection" of the identification on the fact that the clerk could not recall specific details of the fake identification when questioned by Agent Gray, but ignored the fact that twenty minutes had elapsed between the transaction and Agent Gray's questioning. (*Id.* at p. 13, citing Findings of Fact, ¶ 12.) Second, appellant contends the ALJ found the clerk failed to exercise reasonable diligence and make "his own appraisal" of the minor's age, but

ignored the fact that the clerk stated to Agent Gray that he believed the minor was 21 or 22, and that the clerk checked the minor's identification. (*Id.* at pp. 13-14.) Third, appellant contends the ALJ failed to articulate why Agent Gray was a more credible witness than the clerk, especially in light of Gray's testimony that he went to the premises "looking for 'young people.'" (*Id.* at p. 14, citing RT at p. 10.) Finally, appellant claims the ALJ failed to compare the fake ID to the guidelines in the "Checking Guide" describing Florida identification, and ignored the fact that the minor had successfully used the fake identification once before. (App.Br., at p. 14, citing RT at pp. 56, 74.)

While Business and Professions Code section 25658(a) prohibits the sale of alcohol to a minor, section 25560(b) provides a defense where the licensee demanded and relied upon bona fide documentary evidence of majority and identity issued by a government agency. (Bus. & Prof. Code, §§ 25658(a) and 25660(b); see also *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1438 [13 Cal.Rptr.3d 826].) The statute defines "[b]ona fide evidence of majority and identity of the person" as

> A document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a valid motor vehicle operator's license, that contains the name, date of birth, description, and picture of the person.

(Bus. & Prof. Code, § 25660(a)(1).) Even a fake or spurious identification can support a defense under this section if the apparent authenticity of the identification is such that reliance upon it can be said to be reasonable:

> 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.

(*Masani*, *supra*, at p. 1445.)

There is, however, 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*, *supra*, at p. 189.) The licensee or his agent must act in good faith and with due diligence in relying on an apparently valid but actually fraudulent identification:

> 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].) Moreover, reasonable reliance under section 25660 requires that the "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." (*5501 Hollywood, Inc.*, *supra*, at p. 753, emphasis added.) Thus, if the physical appearance of the individual presenting the identification is such that he could not be 21 years of age, then the defense fails, regardless of any subsequent inspection of the fake ID.

The burden for establishing such a defense rests with the licensee raising it. "The licensee has the burden of proving . . . that evidence of majority and identity was demanded, shown and acted on as prescribed by . . . section 25660. (*Lacabanne Properties*, *supra*, at p. 189.)

Whether a licensee or its agent has made a reasonable inspection of an ID to determine if it is bona fide is a question of fact. (*Masani*, *supra*, at p. 1445; *5501 Hollywood, Inc.*, *supra*, at p. 754.) This Board is bound by the Department's factual findings, provided they are supported by substantial evidence. (*Masani*, *supra*, at p. 1437.) 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. (*Ibid*.)

The ALJ made a clear factual finding regarding the minor's apparent age:

> 13. [The minor] appeared his age[, 17 years,] at the time of the sales transaction on August 28, 2015, and at the hearing. Agent Gray testified that [the minor] "not even remotely" looked 21; in fact, "he looked so young" it caused agent Gray to become so suspicious he was under 21 that agent Gray followed after [the minor] to question him as to his true age. The minor looked his true age in the Florida ID photograph and even more so in person. His appearance was not close to the age described on the Florida ID. (Exhibits 2 and 4)

(Findings of Fact, ¶ 13.) Based on this finding, the ALJ concluded that the defense had not been proven:

> 6. In the present case, the Respondent failed to meet its burden. [The minor] did not appear to be 21 years old; rather, his appearance was consistent with his true age, 17, at the time of the sales transaction on August 28, 2015, and did not match the date of birth described on the Florida ID. In other words, he could not pass for 21. While [the minor] wore a hood and hat above his eyebrows, his face and appearance was still that of a 17 year old. Agent Gray, who witnessed the sales transaction with [the minor] wearing the hood and hat, testified that [the minor] "not even remotely" looked 21, but in fact, "looked so young" it caused agent Gray to become suspicious he was under 21. The minor looked his age in the Florida ID photograph and even more so in person. He did not appear to be the age as described on the Florida ID. (Findings of Fact ¶¶ 6, 7, 9, 13). The evidence failed to establish that clerk Yulianto exercised due diligence or the caution of a reasonable and prudent person in the same or similar circumstances. There is no evidence clerk Yulianto made his own appraisal of the physical appearance of the minor prior to the sale

> and in comparison to the date of birth described on the Florida ID. Had he done so, a reasonable conclusion would have been that that the minor appeared to look 17 years of age and no older, and that he did not match the age as described on the Florida ID. He did not make a reasonable inspection of the Florida ID only looking at it a brief five to 10 sections. He asked no age-related questions or anything about the ID. What the evidence does reveal is that clerk Yulianto grabbed the ID, held it a few seconds before quickly swiping it on the register's reader, relying on whether the register calculated the minor to be 21. (Findings of Fact ¶¶ 5, 12, 13.) Accordingly, clerk Yulianto's reliance on the Florida driver license was not reasonable. Respondent failed to establish a defense under section 25660.

(Conclusions of Law, ¶ 6.)

The ALJ applied the correct standard of law. As noted above, the burden of proof in a 25660 defense is twofold: first, the identification must be "presented by one whose appearance indicated that he or she could be 21 years of age," and second, "a reasonable inspection of the document must be made by the licensee or his agent." (*5501 Hollywood, Inc.*, *supra*, at p. 754.) The ALJ weighed both factors. She found first, based on testimony and her own observations, that the minor looked too young to believably pass for 21. She then found that the clerk failed to make a reasonable inspection—in particular, he failed to assess the minor's physical appearance and compare it with the date of birth on the Florida ID. This was the proper legal standard. Appellant's contention on this point is without merit.

Appellant goes on to contend that the ALJ ignored and omitted purportedly significant facts from the decision below. As we have noted in other cases, "[a]n ALJ is not required to provide a 'laundry list' of factors [s]he deems inconsequential." (See, e.g., *Lee* (2015) AB-9359, at p. 8; *7-Eleven, Inc./Patel* (2013) AB-9237, at p. 9; accord *Circle K Stores* (1999) AB-7080.) "An ALJ's failure to explain *all* of his reasons for a decision does not invalidate his determination or constitute an abuse of discretion."

(*Garfield Beach CVS/Longs Drug Stores Cal.* (2014) AB-9507, at p. 5, emphasis in original; see also *Garfield Beach* (2014) AB-9430.) Moreover, appellant's insistence that *Topanga* requires an "analytical bridge" is misguided. As this Board has held time and again, "[*Topanga*] does not hold that findings must be explained, only that findings must be made." (See, e.g., *Chevron Stations, Inc.* (2010) AB-9046, at p. 3, citing *Topanga Assn. for a Scenic Community*, *supra*, at p. 515.) A remedy is appropriate only where there is a total absence of findings. (*No Slo Transit v. City of Long Beach* (1987) 197 Cal.App.3d 241, 258-259 [242 Cal.Rptr. 760]; *Jacobson v. County of Los Angeles* (1977) 69 Cal.App.3d 374, 389 [137 Cal.Rptr. 909].) Here, the ALJ made detailed findings of fact—just not the findings appellant would have preferred.

This Board is bound by any reasonable inferences reached in the decision below. Setting aside the contents of the improperly excluded video surveillance recording (see Part II, *supra*), the only evidence of the minor's appearance that this Board has the authority to review is two photographs included in the administrative record. (See exh. 4.) In those photographs, the minor does appear quite young. We cannot say it was unreasonable for the ALJ to infer the minor could not pass for 21 years of age.

ORDER

For the reasons discussed in Part II, supra, the decision of the Department is reversed.[3]

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
JUAN PEDRO GAFFNEY RIVERA, 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.