

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

AB-9032

File: 20-420690 Reg: 08070129

7-ELEVEN, INC., and SOHOO, INC., dba 7-Eleven Store 2133 33154B
27602 Newhall Ranch Road, Santa Clarita, CA 91355,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jonathon E. Logan

Appeals Board Hearing: December 2, 2010
Los Angeles, CA

ISSUED FEBRUARY 9, 2011

7-Eleven, Inc., and Sohoo, Inc., doing business as 7-Eleven Store 2133 33154B (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk, Davinder Kumar, selling three cans of "Dragon Joose" malt liquor and one can of "Steel Reserve" malt liquor, both alcoholic beverages, to Taylor Joel Sellnow, a 19-year-old non-decoy minor, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Sohoo, Inc., appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer Casey.

¹The decision of the Department, dated April 21, 2009, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 28, 2004. Thereafter, the Department instituted an accusation against appellants charging that, on October 11, 2008, appellants' clerk, Davinder Kumar (the clerk), sold three cans of Dragon Joose and one can of Steel Reserve, both of which are alcoholic beverages, to 19-year-old Taylor Joel Sellnow (Sellnow).

An administrative hearing was held on March 19, 2009, at which time documentary evidence was received, and testimony concerning the sale was presented by Sellnow and by Charlotte Clark, a Department investigator. David Duran, another Department investigator, also testified. Co-licensee Harneck Thiara testified on behalf of appellants, as did his son, Samreet, and Victoria Pulido, an employee. Davinder Kumar, the clerk, did not testify.

The evidence established that Kumar made the sale without asking Sellnow his age or for identification. Sellnow was stopped by investigator Clark as he left the store. He admitted to her that he was only 19, and gave her his California identification. Clark searched Sellnow's wallet, and found what appeared to be an identification card issued by the state of Iowa to a person named John Nelson. The Department also introduced an affidavit executed by Sellnow on the night of the incident in which he denied ever presenting false identification at appellants' premises, and Sellnow reaffirmed that in his testimony.

Appellants' witnesses each testified that they had made sales to Sellnow on prior occasions in which he presented a document purporting to show him to be over 21. Victoria Pulido testified that she remembered Sellnow because he looked like a

werewolf, and remembered that he had shown an identification from another state. Pulido identified Exhibit A, the Iowa identification card, as the identification presented by Sellnow. Harnek and Samreet Thiara also testified that they had made sales to Sellnow and were presented with government issued identification showing Sellnow to be over the age of 21.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellants filed an appeal making the following contentions: (1) a defense was established under Business and Professions Code section 25660; and (2) the penalty is excessive.

DISCUSSION

I

Section 25660 provides, in pertinent part:

(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 or an identification card issued to a member of the Armed Forces, which contains the name, date of birth, description, and picture of the person.

¶...¶

(c) Proof that the defendant-licensee, or his employee or agent, demanded, was shown and acted in reliance upon such bona fide evidence in any transaction, employment, use or permission forbidden by Sections 25658, 25663 or 25665 shall be a defense to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon.

The administrative law judge (ALJ) found that the defense had not been established (Conclusions of Law 8, 14, and 15):

CL 8: Samreet Thiara and Victoria Pulido testified that, because of the

appearance of Sellnow, they referred to him as a ‘werewolf’. The in-court appearance of Sellnow was of a youthful appearing male with a full head of hair descending low on the forehead. His eyebrows were thick and dark and his nose was broad at the base. The goatee was dark but sparse. No reasonable seller of alcoholic beverages would conclude that Sellnow was over 27 years of age as depicted by the date-of-birth on Exhibit A.

The photograph on the identification (Exhibit A) is that of a person over 26 years of age on the date it was taken. The hair is a lighter color brown and slightly reddish. The hairline does not descend below the crest of the forehead and the nose has a narrow base. When compared with the *in-court* appearance of Sellnow, the differences are readily apparent. Reliance on the photograph on Exhibit A to establish the age of majority by Sellnow could not have been reasonable.

It is well-settled that reliance must be reasonable if a defense under section 25660 is to be sustained. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2004) (*Masani*) 118 Cal.App.4th 1429, 1445 [13 Cal.Rptr.3d 826.]) It is equally well-settled that the question of reasonable reliance is a question of fact, and this Board may not go behind that finding:

Whether or not a licensee has made a reasonable inspection of an ID to determine that it is bona fide is a question of fact. (*Hollywood, supra*, 155 Cal.App.2d at pp. 753–754.) As we noted at the outset, the ALJ found that Salazar did not reasonably rely on the ID. The ALJ viewed the ID as it had been placed in the wallet, and made factual findings based on his observations. We are not only bound by those findings, as we noted above, but we must assume the ALJ's observations of physical evidence support his findings. (See *People v. Buttles* (1990) 223 Cal.App.3d 1631, 1639-1640 [273 Cal.Rptr. 397].) (*Id.* at pp. 1445-1446.)

Kumar was still employed by appellants at the time of the hearing but did not testify. The testimony of Harnek and Samreet Thiara and Victoria Pulido that they had many times relied on the Iowa identification, even if true and Sellnow's testimony not believed, certainly did not help their case. It was essentially a tacit admission by appellants that no one in the premises was acting diligently in avoiding sales to minors generally and to Sellnow in particular.

Appellants have failed to sustain a defense under section 25660.

II

The Appeals Board may not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (*Martin v. Alcoholic Beverage Control Appeals Board & Haley* (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

The ALJ found that appellants had not presented any evidence of positive action by the licensees to correct the problem or of documented training. This finding is enough to support the imposition of a standard 15-day suspension.

ORDER

The decision of the Department is affirmed.²

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

² This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.