ISSUED JANUARY 3, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

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| BILL BAXTER<br>dba Kahuna's Coral Inn<br>873 Turquoise Street<br>San Diego, CA 92109,<br>Appellant/Licensee,<br><br>v.<br><br>DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,<br>Respondent. | ) | AB-6617<br><br>File: 48/58-198788<br>Reg: 95031785<br><br>Administrative Law Judge<br>at the Dept. Hearing:<br>James Ahler<br><br>Date and Place of the<br>Appeals Board Hearing:<br>October 2, 1996<br>Los Angeles, CA |

Bill Baxter, doing business as Kahuna's Coral Inn (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his on-sale general public premises license and caterer's permit for 60 days, with 30 days thereof stayed for a three-year probationary period, for appellant's employee having sold alcoholic beverages to a person under age 21 and for allowing the consumption by a minor of the alcoholic beverages in the licensed premises, being contrary to the

[1]The decision of the Department, dated December 21, 1995, is set forth in the appendix.

universal and generic public welfare and morals provisions of the California Constitution, Article XX, §22, arising from violations of Business and Professions Code §§ 25665 and 25658, subdivision (b).

Appearances on appeal include appellant Bill Baxter, appearing through his counsel, John B. Barriage; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued March 6, 1987. Thereafter, the Department instituted an accusation against appellant on February 23, 1995. Appellant requested a hearing.

An administrative hearing was held on November 3 and 6, 1995, at which time oral and documentary evidence was received. At that hearing, it was determined that appellant's bartender, Michael Ogami, sold alcoholic beverages (beer) to two persons under age 21, and permitted the minors to consume the alcoholic beverages in the licensed premises. Ogami asked both minors for identification; one produced a fraudulent California identification card, and the other a fraudulent Washington State identification card. Ogami accepted both ID's as genuine and subsequently sold the minors a pitcher of beer. While the minors were consuming the beer, two undercover vice detectives from the San Diego Police Department entered the premises and asked them for identification. The two minors produced the same identification cards shown earlier to Ogami. Both police officers determined very quickly after examining the two ID cards that they were false. The police officers then escorted both minors out of the

premises, took custody of the fraudulent ID cards, took photographs of the two minors' faces, and released the minors.

Subsequent to the hearing, the Department issued its decision which suspended appellant's license for 60 days, with 30 days thereof stayed for a three-year probationary period, based upon a finding of a violation as to one of the two minors involved. Appellant filed a timely notice of appeal.

Appellant raised the following issues: (1) appellant's reliance on identification presented upon demand was a complete defense under Business and Professions Code §25660; (2) the Administrative Law Judge improperly relied upon, and violated Government Code §11347.5 by adopting as a standard, an I.D. Checking Guide; and (3) the penalty was excessive.

DISCUSSION

I

Appellant contends that his bartender's reliance in good faith on identification which was presented to him by both minors is a complete defense under Business and Professions Code §25660.[2] The Administrative Law Judge (ALJ) concluded that appellant had established a good faith defense under §25660 with respect to one of the two minors, but had failed to establish such a defense as to the other.

Section 25660 provides:

> 25660. Documentary evidence of age and identity. Bona fide evidence of majority and identity of the person is a document issued by a federal, state,

[2] All statutory citations are to the Business and Professions Code unless otherwise specifically identified.

> 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 and description of the person. 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.

Neither of the two documents presented for identification were in fact documents issued by the States of California or Washington. Nevertheless, as to one of the two minors, Wheeler, who was two months short of 21, and appeared older, the ALJ accepted appellant's argument, based on Kirby v. Alcoholic Beverage Control Appeals Board (1968) 267 Cal.App.2d 895 [73 Cal.Rptr.352], that appellant had relied in good faith on a document which qualified under §25660. Wheeler had presented a counterfeit California driver's license which appeared to be authentic. As to the other minor, Girand, who was only 18 and appeared youthful, the ALJ concluded that appellant had not met his burden of good faith reliance. Girand had presented identification purporting to have been issued by the State of Washington. The ALJ found that Girand "appeared to be much less than twenty-one years old" at the time he testified, and would have appeared even younger one year earlier, when the incident took place. Appellant's reliance was determined to be unreasonable in light of the minor's extremely youthful appearance and the failure of the bartender to compare the form of identification proffered by the minor with forms of identification issued by the State of Washington contained in an I.D. Checking Guide maintained on the premises. Had he made such a comparison, the fraudulent nature of the false identification would

have been even more apparent. (Finding of Fact X; Determination of Issue II, IV.)

There is substantial evidence in support of the ALJ's conclusion that the good faith defense had not been established as to Girand: (1) his extremely youthful appearance, as evident when he testified, one year after the event (Finding of Fact VIII); (2) the apparent falsity of the identification upon cursory examination and comparison to the genuine article as displayed in the I.D. Guide (Findings of Fact VIII and IX; RT 95-96, 106-107); and (3) the failure of the bartender to act in a reasonable and prudent manner by conducting further inquiry using means readily available to him, i.e., consulting the I.D. Guide [RT 29, 41-42, 103-104].

The Department contends that neither form of identification presented by the two minors was of the kind upon which appellant could have relied by virtue of §25660. We do not reach this contention. The Department adopted the decision of the ALJ, which upheld the good faith defense with respect to Wheeler, and which interpreted the decision in Kirby v. Alcoholic Beverage Control Appeals Board in a manner contrary to the interpretation now urged by the Department. As to Girand, the ALJ found appellant had for other reasons failed to establish the statutory defense. Thus, in either case, the question whether the forms of identification were of the kind contemplated by §25660 is moot.

II

Appellant contends that the ALJ abused his discretion when he concluded that appellant's failure to consult an I.D. Checking Guide which was readily available on the premises demonstrated a lack of diligence. Appellant also contends that the ALJ's

determination, that the failure of appellant's employee to consult the Guide precludes a successful defense based on the statute, violated Government Code §11347.5, since it was an adoption of a new standard of general application.

The ALJ ruled that in the circumstances of this case the bartender's failure to double-check an identification with an I.D. Checking Guide when the person presenting the identification presented an extremely youthful appearance was a failure to exercise due diligence:

> "Where an I.D. Checking Guide is on the premises, it should be consulted if an unfamiliar form of identification is presented by an extremely youthful appearing person. The presence of such a publication on the premises does not provide a defense if it is not consulted.
>
> If a licensee chooses not to have an I.D. Checking Guide or similar publication on the premises to assist in detecting altered or forged identifications presented by extremely youthful persons, the licensee is at greater peril and must engage in a more sophisticated inquiry to demonstrate due diligence."

(Determination of Issues I.)

In Dethlefsen v. State Board of Equalization (1956) 145 Cal.App.2d 561, 566-567 [303 P.2d 7, 12], a case cited by the ALJ, the court cautioned that "the bona fides of such documents must be ascertained if the lack of it would be disclosed by reasonable inspection, the circumstances considered." (Emphasis supplied.)

The ALJ concluded that had appellant consulted the I.D. Checking Guide which, according to the record [RT Vol.II, 29], was at the front door of the establishment, he would have been alerted to the falsity of the age-identification presented by Girand. Girand's "extremely youthful appearance" should have put appellant on notice that greater scrutiny was required. Instead, appellant elected not to consult the Guide.

We are not prepared to say that the ALJ abused his discretion in finding this failure to conduct a more extensive inquiry into the validity of the proof of age offered by Girand. The Dethlefsen decision mandates greater scrutiny when there is doubt, and the circumstances in the present case, especially the extremely youthful appearance of Girand, justify the conclusion that a reasonable person would have entertained such a doubt.

Appellant also argues that the ALJ's reference to appellant's failure to consult the I.D. Checking Guide violates Government Code §11347.5,[3] in that it imposes a "new standard of general application" upon the class of licensees. Appellant relies on Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622 [167 Cal.Rptr. 552], where the appellate court explained that a rule could be of general application if it applied to all members of a class, kind or order.

Appellant also cites Bendix Forest Products Corp. v. Division of Occupational Saf. & Health (1979) 25 Cal.3d 465, 472 [158 Cal.Rptr. 882], for the proposition that an administrative law judge cannot make interpretations which are quasi-legislative creations of new regulations or standards. The Supreme Court ruled in Bendix that an

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[3] Government Code §11347.5, repealed in 1994 and reenacted as Government Code § 11340.5, provides, in pertinent part:

> (a) No state agency shall utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (g) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

order by the Division of Occupational Safety and Health of the Department of Industrial Relations that Bendix supply protective clothing at company expense was not a quasi-legislative judgment promulgating a new regulation or standard. It was "rather a specific application of laws and existing regulations." Bendix Forest Products Corp., supra, 25 Cal.3d at 471.

Finally, on this issue, appellant cites Pacific Legal Foundation v. California Coastal Commission (1982) 33 Cal.3d 158, 168 [188 Cal.Rptr. 104]. That case points out the distinction between guidelines which reflect the formulation of a general policy intended to govern future decisions, which reflect quasi-legislative acts, and the application of rules to the peculiar facts of a particular case, which constitute quasi-judicial or adjudicatory acts.

In the present case, the decision of the ALJ and its adoption by the Department are clearly quasi-judicial or adjudicatory actions, and do not constitute the adoption of a standard or rule of general application. That the reasoning reflected in the ruling may have applicability in other, future cases with closely similar facts is not enough to contravene the prohibitions of Government Code §11340.5

The ALJ simply pointed out that where a licensee chooses to forego the use of a readily available and practical instrument to assist him in avoiding a sale of alcoholic beverages to an extremely youthful appearing minor, he is likely to be in greater peril and must engage in a more sophisticated inquiry in order to demonstrate due diligence. This by no means requires any licensee to consult the guide; it is an admonition - no more, no less.

III

The Department recommended revocation [RT Vol II, 135]. The ALJ imposed a 60-day suspension, with 30 days stayed.

The Appeals Board will 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].)

Appellant contends that the penalty in this case is so severe as to amount to an abuse of discretion. His counsel has cited 99 Cent Only Stores (May 12, 1993) AB-6268, where the Appeals Board undertook an extensive review of the range of penalties which had been imposed in other cases, suggesting that those cases as a whole indicate what an appropriate suspension should be, and that the norm has been exceeded here.[4]

The Department had the following factors to consider: (1) the Department initially recommended revocation, and the ALJ proposed a lesser penalty, which the Department accepted; (2) appellant's record was "less than exemplary" with grounds for discipline having been established on four separate occasions, the most recent of

[4] In the 99 Cent Only Stores case (AB- 6268) cited by appellant, Board Member John Tsu dissented, being of the belief that a 60-day suspension was unreasonable in that case in light of the licensee's previously unblemished record. In this case, the licensee's record has several blemishes.

which was the result of appellant permitting minors to enter the premises and consume alcoholic beverages.[5] In addition, consideration was given to factors in mitigation, including the ALJ's determination that the violations established in the present matter were not egregious, in that they did not reflect any effort to disregard the law or bad faith; and that appellant himself attended educational programs related to his responsibilities as a licensee, and encouraged his employees to attend such programs. Considering such factors, the appropriateness of the penalty must be left to the discretion of the Department. The Department having exercised its discretion reasonably, the Appeals Board will not disturb the penalty.[6]

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[5] It should be noted that in an appeal of an earlier Department order of revocation, with imposition of the penalty stayed during a probationary period of three years, on condition that an actual suspension of 30 days be served, the Appeals Board reversed the Department on the ground that such a penalty was excessive for what was essentially a second violation. (In the Matter of Bill Baxter (October 31, 1995) AB-6471. That matter is apparently now pending before the Department. The ALJ stated that he would consider that matter with respect to a violation having occurred, since it predated the charge in the present case, but as one where the penalty had not been established. In effect, then, the ALJ was considering an appropriate penalty for a third offense of selling to minors.

[6] It should be noted that on this appeal, the Department argues as if it prevailed with respect to all of the counts of the accusation. To the contrary, the ALJ found in favor of the licensee with respect to the sale to Wheeler. While it does not appear that the ALJ was confused as to which counts of the accusation were sustained, there appear to be typographical errors in the Department's decision: (a) Determination of Issues V refers to Findings of Fact III, VI and VII. We believe it was intended to refer to Findings of Fact III, V and VI, to correspond to Determination of Issue IV; (b) Determination of Issues V mistakenly refers to count 1 of the accusation, but should refer to count 3; (c) Determination of Issues VI mistakenly refers to count 1 of the accusation, but should refer to count 4.

None of these incorrect references would appear to have had any substantive effect on the decision and order as a whole.

CONCLUSION

The decision of the Department is affirmed.[7]

RAY T. BLAIR, JR.,CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[7]This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.