

ISSUED MARCH 21, 2001

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

SALAM S. KALASHO	)	AB-7612
dba Pine Palace Liquor)	
11 Third Avenue, Extension, Suite C	)	File: 21-324096
Chula Vista, CA 91910,	)	Reg: 99047384
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Rodolfo Echeverria
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	November 3, 2000
	)	Los Angeles, CA

Salam S. Kalasho, doing business as Pine Palace Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his off-sale general license for 20 days for his clerk having sold an alcoholic beverage to a minor, and for failure to have an off-sale clerk's acknowledgment on the premises, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §§25658, subdivision (a), and 25658.4.

¹The decision of the Department, dated March 9, 2000, is set forth in the appendix.

Appearances on appeal include appellant Salam S. Kalasho, appearing through his counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on October 9, 1996. Thereafter, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor (count 1), the failure on two occasions to have an off-sale clerk's acknowledgment on the premises (counts 2 and 3), and the employment of a person 14 years of age for the sale of alcoholic beverages while not under the continuous supervision of a person 21 years of age or older (count 4).

An administrative hearing was held on January 21, 2000, at which time oral and documentary evidence was received. Following the hearing, the Department issued its decision which sustained the charge of a sale of an alcoholic beverage to a minor, and one of the counts (count 3) regarding the off-sale clerk's acknowledgment.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) the count charging a violation of the clerk's acknowledgment statute should not have been sustained; and (2) appellant was denied his right to discovery and to a transcript of the hearing on his motion to

compel discovery.²

I

Goria Zied, a 14-year-old minor, and nephew of the licensee, sold an alcoholic beverage to a Department investigator.³ The Administrative Law Judge found that “although the evidence did not establish that Zied was an employee of the premises ... Zied performed duties on that date consistent with those of a premises employee,” and the failure to have a clerk acknowledgment executed by him violated the retail off-sale acknowledgment section of the Act (Business and Professions Code §25658.4.)⁴

Appellant, citing the definitional section (subdivision (c)) of §25658.4, contends that the finding Zied was not an employee precludes a finding that the section was violated.

The Department contends that, despite the finding by the Administrative Law Judge (ALJ) that Zied was not an employee, the licensee was obligated, under Business and Professions Code §25658.4, to have on the premises a retail off-sale

² The discovery request relates to the charge involving the sale by appellant's clerk, Chester Lindsay, to Mike Mejia, a minor decoy working with the Chula Vista Police Department, and is the only issue relating to that charge raised by appellant.

³ According to appellant, Zied's mother is deceased, and his father was missing in action in the Iran-Iraq war in 1987. Zied now resides with appellant, his uncle. According to appellant, Zied spends time in the store rather than be with appellant's elderly parents who also reside with appellant.

⁴ This section provides that “no clerk shall make an off sale of alcoholic beverage unless the clerk executes under penalty of perjury on the first day he or she makes that sale an application and acknowledgment” in a form understandable to the clerk provided by the Department.

clerk acknowledgment for Zied.

Section 25658.4, subdivision (c) defines an “off-sale seller” and a “clerk” as used in §25658.4:

“(c) As used in this section:

“(1) ‘Off-sale seller’ means any person holding a retail off-sale license issued by the department and any person employed by that licensee who in the course of that employment sells alcoholic beverages.

“(2) ‘Clerk’ means an off-sale seller who is not a licensee.”

Appellant argues that subdivisions (c) (1) and (c) (2) must be read together, and that resort must be had to subdivision (c) (1) to determine who is an “off sale seller” as that term is used to define the term “clerk” in subdivision (c) (2).

The Department appears to contend that the two subdivisions must be read separately, and, since Zied was acting as a clerk, the statute is satisfied.

We are of the view that the finding that Zied was not an employee precludes a finding that the statute was violated. Any meaningful reading of §25658.4, subdivision (c), compels the conclusion that employment is an essential element of the statute.

There is no doubt that appellant was responsible for the conduct of Zied. If, for example, the sale had been to a minor, Zied would be deemed the agent of appellant under the theory of ostensible agency. As found by the ALJ, “Zied performed duties ... consistent with those of a premises employee.”

Civil Code §2298 states: "An agency is either actual or ostensible." Civil Code §2300 defines "ostensible agency" as: "An agency is ostensible when the

principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." (See also 2 Summary of California Law, Witkin, pages 52-53 for a full discussion of ostensible agency.)

Here, however, the statute is keyed to employment status. It would be an undue reach for it to apply in the face of a specific finding of non-employment.⁵

II

Appellant claims he was prejudiced in his ability to defend against the accusation by the Department's refusal and failure to provide him discovery with respect to the identities of other licensees alleged to have sold, through employees, representatives or agents, alcoholic beverages to the decoy involved in this case, during the 30 days preceding and following the sale in this case. He also claims error in the Department's failure to provide a court reporter for the hearing on his motion to compel discovery.

The Department contends that appellant never requested the information he claims was denied him.

⁵ This is an aberrational case. The sale was made by the 14-year-old nephew of the licensee, who, according to his uncle, does not speak English. There is no evidence that Zied had made a sale on any previous occasion.

The code provision requires the execution of the acknowledgment "on the first day he or she makes that sale," and requires the Department to specify the form of the acknowledgment, in a form understandable to the clerk. Was the Department obligated to produce such a form for Zied then to execute?

Because Zied was not present at the hearing, the count of the accusation charging that appellant employed or used his services at a time he was not under the continuous supervision of a person 21 years of age or older was dismissed. It seems to us this might have been a more appropriate vehicle to address this unique situation, but for the Department's apparent failure to subpoena Zied (see RT 86).

Our reading of the ALJ's decision on appellant's motion to compel discovery leads us to conclude that the Department's position is not well taken.

In his proposed decision, the ALJ recites that appellant was allowed to amend his motion to encompass paragraphs 9 through 14 of his discovery request, thus making it consistent with his points and authorities on the motion. Paragraphs 9 through 14 of the discovery request requested the identities of other licensees alleged to have sold to the decoy in question during various periods preceding and following the sale which occurred in this case.

It would thus appear that appellant did initially request the discovery he now claims was denied him, but, for reasons unexplained by the record, failed to include those paragraphs of the request in the body of his motion to compel, although addressing those same paragraphs in his points and authorities. Since the ALJ permitted the amendment of the motion to correct the inconsistency, an act well within his discretion, there is no basis to claim the information was never requested.

The Department argues further that appellant was obligated to make an offer of proof at the hearing of what the discovery material would have shown. It does not explain how appellant is supposed to be able to do this, absent the discovery sought.

The Board has issued a number of decisions directly addressing these issues. (See, e.g., The Circle K Corporation (Jan. 2000) AB-7031a; The Southland Corporation and Mouannes (Jan.2000) AB-7077a; Circle K Stores, Inc. (Jan. 2000) AB-7091a; Prestige Stations, Inc. (Jan. 2000) AB-7248; The Southland

Corporation and Pooni (Jan. 2000) AB-7264.)

In these cases, and many others, the Board has reviewed the discovery provisions of the Civil Discovery Act (Code of Civ. Proc., §§2016-2036) and the Administrative Procedure Act (Gov. Code §§11507.5-11507.7). The Board determined that the appellants were limited to the discovery provided in Government Code §11507.6, but that “witnesses,” as used in subdivision (a) of that section was not restricted to percipient witnesses. We concluded that:

“A reasonable interpretation of the term ‘witnesses’ in §11507.6 would entitle appellant to the names and addresses of the other licensees, if any, who sold to the same decoy as in this case, in the course of the same decoy operation conducted during the same work shift as in this case. This limitation will help keep the number of intervening variables at a minimum and prevent a ‘fishing expedition’ while ensuring fairness to the parties in preparing their cases.”

The Board also held in the cases mentioned above that a court reporter was not required for the hearing on the discovery motion. We continue to adhere to that position.

ORDER

The decision of the Department is reversed as to the issue involving the retail clerk acknowledgment. Further, the Department’s ruling on discovery is reversed and that portion of the case relating to the sale to the minor is remanded to the Department for such further proceedings as may be appropriate in light of such ruling.⁶

⁶ 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.

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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.