

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

AB-7755

File: 20-214957 Reg: 00048111

7-ELEVEN, INC., MOHAMMAD J. CHAUDHRY, and REHANA Y. CHAUDHRY
dba 7-Eleven Store #21036
55277 29 Palms Highway, Yucca Valley, CA 92284,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 6, 2001
Los Angeles, CA

ISSUED FEBRUARY 21, 2002

7-Eleven, Inc., Mohammad J. Chaudhry, and Rehana Y. Chaudhry, doing business as 7-Eleven Store #21036 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for appellants' clerk selling an alcoholic beverage to a person under the age of 21, 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).

Appearances on appeal include appellants, 7-Eleven, Inc., Mohammad J. Chaudhry, and Rehana Y. Chaudhry, appearing through their counsel, Ralph B.

¹The decision of the Department, dated December 21, 2000, is set forth in the appendix.

Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988.

Thereafter, the Department instituted an accusation against appellants charging a sale of an alcoholic beverage by appellant's clerk, Mohammad Saleem ("the clerk") to 18-year-old Irene Allen ("the minor").

An administrative hearing was held on November 9, 2000, at which time documentary evidence was received, and testimony was presented by the minor, by CHP officer Daniel Kelley, and by co-appellant Mohammad Chaudhry. The testimony established that, on the evening of September 5, 1999, Kelley observed Allen at the counter of Shawn's Market with a case of beer on the counter in front of her. After Allen left without the beer, Kelley asked the sales clerk if she had tried to buy the beer, and the clerk told him "No ID." Allen left in a vehicle and Kelley next saw her a short time later come out of appellants' premises, get in her car, and drive off. Kelley stopped Allen a few minutes later and ascertained that she was 18 years old. She stated that she had purchased the case of beer that was in the car at appellants' premises. Kelley and Allen returned to the premises, where Allen pointed out the clerk who sold to her. Kelley testified that when questioned, the clerk said he had sold to Allen without checking her identification because she had shown him identification about a week before that indicated she was over 21.

Allen told Kelley that she had not been asked for her identification. Kelley confiscated a false ID issued by Quick Cash (Exhibit 3). This card stated that it was not

a governmentally issued identification. The birthdate on the card was false, showing that Allen was over 21. Allen testified that this was the only false ID she had ever possessed and that she had shown it to a clerk at appellant's premises at some time before the transaction at issue here.

Subsequent to the hearing, the Department issued its decision which determined that the sale had occurred as alleged and that no defense had been established pursuant to Business and Professions Code §25660.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) appellants established a defense under Business and Professions Code §25660, and (2) the ALJ erred in his credibility findings.

DISCUSSION

I

Appellants contend that the ALJ erred in finding (Finding IV) that the evidence did not establish a §25660 defense. They contend that sufficient evidence exists in the clerk's statement, testified to by officer Kelley,² that the clerk did not ask for the minor's identification prior to selling her the beer because the minor had shown an identification card to the clerk a week before the sale at issue here, and the identification showed that she was 21. Although the clerk's statement was admitted only as administrative hearsay, appellants argue that it can form the basis for a finding that the clerk's prior reliance on the identification card constitutes a defense under §25660, because it is corroborated by the minor's testimony and by item 24 in her "Minor Affidavit" (Exhibit B) where she states "I have possessed fake identification."

²The clerk, although present at the hearing, did not testify.

Business and Professions Code §25660 provides:

"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. 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."

We note first that, although the ALJ addressed the question of a §25660 defense, the issue was not explicitly argued by appellants at the hearing.³ The only direct mention of §25660 was by Department counsel in closing argument, where he said, "There has been absolutely no evidence, none whatsoever, of the only defense that is plausible in any of these cases and that's 25660, no evidence that she has presented any type of false identification in the past to this particular clerk. If they had it, I'm sure they would have presented it, but they didn't." [RT 93.]

Appellants state that under Lacabanne Properties, Inc. v. Alcoholic Beverage

³At one point in cross-examination of the minor by appellants' counsel regarding whether the identification allegedly shown to the clerk showed the minor's correct birth date, the ALJ interrupted to ask [RT 34-35],

"THE COURT: Are you alleging, Mr. Budesky, that it is a bonafide identification?"

"MR. BUDESKY: I didn't allege anything yet, Your Honor. Things just –

"THE COURT: Do you intend to?"

"MR. BUDESKY: I don't know yet.

"THE COURT: Okay.

"MR. BUDESKY: I think there's enough –

"THE COURT: If you decide, let me know."

So far as we can tell from the transcript, appellants' counsel never let the ALJ know that he had decided to allege that the identification was bona fide, as defined by §25660. In closing argument, the identification and the minor's testimony about it were referred to by appellants' counsel only as elements showing that her testimony lacked credibility.

Control Appeals Board (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734], the clerk's "prior reliance on an identification card that the cash register scanning system accepted as proof of majority should constitute [a §25660 defense]." Almost the whole of appellants' argument deals with whether the hearsay statement of the clerk regarding having seen identification on a prior occasion is sufficient to establish a defense under §25660.

This Board does not need to address appellants' contentions regarding the sufficiency or insufficiency of corroborated or uncorroborated hearsay, for the simple reason that, even if, a week earlier, Allen had shown a clerk at the premises identification showing she was at least 21, there is no legal basis for asserting that this establishes a defense under §25660.

Lacabanne Properties, supra, on which appellants rely, involved a far different factual situation than the one here. In that case, two minors gained entry to an on-sale public premises by displaying to the doorman what the hearing officer found was bona fide documentary evidence of majority under §25660. The bartender served the minors without asking to see identification, and the court held that there was no duty to make a second demand for identification before serving the minor, because the licensee had the right to rely on the original determination by the doorman that the patron had shown bona fide documentary evidence of majority.

In Lacabanne, the court was strongly influenced by the fact that the sale occurred shortly after the minor "possessed, had shown, and could have again exhibited a driver's license, which, although altered, was found to show he was over the age of 21 years." (See Lacabanne Properties, Inc., supra, 67 Cal.Rptr. at 740.) The same thought is expressed on the following page (67 Cal.Rptr. at 741):

“It may well be that the licensee and his employees act at their peril in serving a minor, but it does not follow that they may not be relieved when the requirements for a defense were not only in fact complied with on entry, but, as in this case, were also present, although unexhibited at the time the minor was served.”

The court summed up its position in what can only be described as an extremely narrow holding:

“It is concluded that where the minor patron has exhibited to one employee on entry, and at all times thereafter has on his person, what is found to be bona fide evidence of majority and identity, the licensee may assert reliance on the original demand and exhibition in selling, furnishing or permitting the consumption of an alcoholic beverage by that minor following that entry; and that such defense is not lost because a second employee pursued an inadequate inquiry before serving the minor. “

(Lacabanne Properties, Inc., supra, 67 Cal.Rptr. at 742.)

The situation in the present appeal does not involve any of the elements present in Lacabanne that caused the court to conclude that a defense had been established. Even if Allen previously presented some sort of ID to the clerk at appellants' premises, it was said to have been presented a week before, not a few minutes before as in Lacabanne, and there was not simply "inadequate inquiry" before alcohol was sold to her, but no inquiry at all.

In addition, even if the hearsay statement of the clerk were admissible, it could not support a finding that the identification purportedly shown at some previous time to the clerk qualified as "bona fide evidence of majority and identity" of the minor. The only identification Allen was found to have on September 5, 1999, has written, diagonally across the face of the card, the statement "NOT A GOVERNMENT DOCUMENT." In addition, on the back of the card it states: "This is not a state issued or officially recognized identification card. All of the information on this card was

supplied by the applicant. This information has not been verified or investigated for accuracy. . . ."

Kirby v. Alcoholic Beverage Control Appeals Board (1968) 267 Cal.App.2d 895 [73 Cal.Rptr. 352], was decided after §25660 had been amended by the Legislature to its present form. In that case, a minor had obtained employment after presenting to the licensee a birth certificate, which was her sister's, and an identification card with her photograph, which she created herself and then signed before a notary. The Appeals Board decision sustained a defense based upon §25660. The court reversed, stating (73 Cal.Rptr. at 354):

"It is well-established that reliance in good faith upon a document issued by one of the governmental entities enumerated in section 25660 constitutes a defense to a license suspension proceeding even though the document is altered, forged or otherwise spurious. (*Dethlefsen v. State Board of Equalization*, 145 Cal.App.2d 561, 303 P.2d 7.)

"Thus the question narrows to whether reliance in good faith upon evidence of identity and majority other than a document emanating from sources specified in section 25660 serves to relieve a licensee from the consequences of committing acts forbidden by sections 25658, 25663, or 25665. The Department concluded that it does not; the Appeals Board ruled that it does. We agree with the Department."

Describing the Appeals Board's decision as having established a "non-statutory defense," the court cited and quoted language from Lacabanne Properties, supra, to the effect that, as an exception to the statute prohibiting sales to minors, §25660 must be narrowly construed.

"Thus a licensee charged with violating sections 25658, 25663, or 25665 has to meet a dual burden; not only must he show that he acted in good faith, free from an intent to violate the law, as the licensee did here, but he must demonstrate that he also exercised such good faith in reliance upon a document delineated by section 25660. Where all he shows is good faith in relying upon evidence other than that within the ambit of section 25660, he has failed to meet his burden of proof."

(Kirby v. Alcoholic Beverage Control Appeals, *supra*, 73 Cal.Rptr. at 355.)

The Appeals Board has previously rejected the argument that the identification relied upon may be something other than a government-issued document. (See The Circle K Corporation (2000) AB-7187.) In Athanasious (1999) AB-7052, the Appeals Board so ruled in a case involving a so-called "Texas identification card," the display of which induced a clerk to sell an alcoholic beverage to a minor. Even more recently, the Board rejected this argument where it was based on a similar identification card also issued by a check-cashing business. (7-Eleven, Inc. and Chaudhry (2001) AB-7772.)

The minor testified that the identification card entered into evidence as Exhibit 3 was the only false ID she had ever possessed [RT 40]. If that was the ID she had previously shown to the clerk, it could not establish a defense under Business and Professions Code §25660. That is essentially what the ALJ found in Finding IV-Findings re Section 25660 of the Business and Professions Code.

Appellants argue that the minor was not credible, apparently attempting to argue that Exhibit 3 was not the ID that the minor had previously shown the clerk. Rather, it seems that appellants want this Board to find that the ID previously shown to the clerk was some other identification card that had a magnetic strip on the back, and which, when swiped through the cash register's card reader, indicated that the minor was 21 years of age or older, as stated by the clerk to officer Kelley [see RT 53]. Even if the minor had shown the clerk such an ID previously, a defense under §25660 could not be established, because there would be no proof that it was a valid governmentally issued identification meeting all the requirements of that section.

II

Appellants contend the ALJ committed reversible error in not making explicit findings regarding the credibility of the minor's testimony. They base their contention on Government Code §11425.50 and provisions in other statutes and case law requiring findings in administrative adjudicatory decisions.

Government Code §11425.50 provides, in pertinent part:

"(a) The decision shall be in writing and shall include a statement of the factual and legal basis for the decision.

"(b) The statement of the factual basis for the decision may be in the language of, or by reference to, the pleadings. If the statement is no more than mere repetition or paraphrase of the relevant statute or regulation, the statement shall be accompanied by a concise and explicit statement of the underlying facts of record that support the decision. If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it.

"(c) The statement of the factual basis for the decision shall be based exclusively on the evidence of record in the proceeding and on matters officially noticed in the proceeding. The presiding officer's experience, technical competence, and specialized knowledge may be used in evaluating evidence."

Appellants do not clearly state what determination by the ALJ was "based substantially on the credibility of a witness," nor do they explain their statement that "Obviously, [the minor's] overall credibility was at issue." This Board is not required to search for or guess at what may have been meant by appellants.

In 7-Eleven and Huh (2001) AB-7680, appellants' counsel argued that a federal court of appeals case required specific findings regarding the ALJ's credibility determinations. This Board rejected the argument, and even though the basis for the present appellants' argument is different, part of what the Board said in that earlier case

applies equally well here:

"While it may be true that a statement of the factors behind a credibility determination may be of considerable assistance to a reviewing court, and is welcomed by this Board, we are not prepared to say that a decision which does not set forth such considerations is fatally flawed."

Appellants have provided no authority or argument supporting their contention that an alleged deficiency in the ALJ's credibility determination requires reversal of this decision.

ORDER

The decision of the Department is affirmed.⁴

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

⁴This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.