

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

AB-7991

File: 21-296043 Reg: 01051902

SALIM PUTRUS TALIA, dba Mission Bay Market
4135 Mission Boulevard, San Diego, CA 92109,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: July 3, 2003
Los Angeles, CA

ISSUED SEPTEMBER 2, 2003

Salim Putrus Talia, doing business as Mission Bay Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his license for 10 days, with five days thereof stayed for a probationary period of one year, for appellant's clerk selling an alcoholic beverage to a person under the age of 21, in violation of Business and Professions Code² section 25658, subdivision (a).

Appearances on appeal include appellant Salim Putrus Talia, appearing through his counsel, John J. McCabe, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

¹The decision of the Department, dated June 20, 2002, is set forth in the appendix.

²Unless otherwise indicated, statutory references in this opinion are to the Business and Professions Code.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on May 18, 1994. Thereafter, the Department instituted an accusation against appellant charging that, on September 15, 2001, appellant's clerk, Hikmat Aziz Awadis (the clerk), sold an alcoholic beverage to 18-year-old Braden King Mann.

An administrative hearing was held on April 9, 2002, at which time documentary evidence was received and testimony concerning the transaction was presented by Mann, a Department investigator, the store manager, and the clerk.

The investigator was watching the premises with binoculars from across the street. He saw Mann inside the store get a case of beer and take it to the counter, where he handed the clerk his wallet. The clerk looked at the wallet and returned it, and Mann paid for the beer and left the store with it. The investigator confronted Mann outside the store and discovered false identification (someone else's California driver's license) as well as Mann's true identification, which showed him to be 18 years of age.

Subsequent to the hearing, the Department issued its decision which determined that the violation occurred as charged and that appellant did not establish a defense under Business and Professions Code section 25660.

Appellant filed a timely appeal in which he raises the following issues: (1) The findings are insufficient; (2) a defense was established under Business and Professions Code section 25660; and (3) the penalty is excessive.

DISCUSSION

I

Appellant contends that the findings do not "disclose . . . the precise reasons" for the decision, but are merely "a series of conclusionary statements, with no recitation to

the facts or the law to uphold them." The decision, therefore, according to appellant, is arbitrary and an abuse of discretion.

Appellant does not point out to this Board any specifics of the deficiencies he alleges, and we have found none. The Appeals Board is not required to make an independent search of the record for error not pointed out by appellant. It was appellant's responsibility to show the Appeals Board that the claimed error existed. Without such assistance by appellant, we may deem the general contentions waived or abandoned. (*Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 139 [144 Cal.Rptr. 710] and *Sutter v. Gamel* (1962) 210 Cal.App.2d 529, 531 [26 Cal.Rptr. 880, 881].)

II

Appellant contends that he established a defense under Business and Professions Code section 25660, which provides a defense to a sale-to-minor charge when the licensee or his agent "demanded, was shown and acted in reliance upon . . . bona fide evidence" that the person attempting to buy was at least 21 years of age. 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 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.

There is an affirmative duty on a licensee to maintain and operate his or her premises in accordance with law, and section 25660, as an exception to the general prohibition against sales to minors, must be narrowly construed. (*Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal. App. 2d 181, 189 [67 Cal. Rptr. 734] (*Lacabanne*).) The statute provides an affirmative defense, and "[t]he licensee has the burden of proving . . . that evidence of majority and identity was

demanded, shown and acted on as prescribed by . . . section 25660." (*Ibid.*)

To provide a defense, reliance on the document must be reasonable, that is, the result of an exercise of due diligence. (See, e.g., *Lacabanne, supra*; *5501 Hollywood, Inc. v. Dept. of Alcoholic Bev. Control* (1957) 155 Cal.App.2d 748, 753 [318 P.2d 820].) Reasonable reliance 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. (*5501 Hollywood, Inc. v. Dept. of Alcoholic Bev. Control* (1957) 155 Cal. App. 2d 748, 753-754 [318 P.2d 820].) A licensee, or a licensee's agent or employee, must exercise the caution which would be shown by a reasonable and prudent person in the same or similar circumstances. (*Lacabanne, supra*; *Farah v. Alcoholic Bev. Control Appeals Bd* (1958) 159 Cal.App.2d 335, 339 [324 P.2d 98]; *5501 Hollywood, Inc. v. Dept. of Alcoholic Bev. Control, supra*, 155 Cal. App. 2d at 753.)

Appellant's argument in this regard depends upon accepting the testimony of the clerk as credible. The credibility of a witness's testimony is a matter left to the reasonable discretion of the trier of fact. (*Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.2d 315 [314 P.2d 807]; *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640].) The clerk's testimony contradicted that of Mann, which the ALJ said specifically was credible, and that of the officer. We cannot say that the ALJ's rejection of the clerk's testimony was an abuse of discretion.

The clerk testified that he thought the minor looked like the picture on the driver's license. The ALJ, who saw the minor in person as well as a photograph of him taken on the night of the sale, "found very little if any resemblance between Mann and the

photograph" on the driver's license. (Finding IV.E.) Comparing Mann's photograph with that on the driver's license, this Board agrees with the ALJ's assessment.

The ALJ found that the clerk did not use "reasonable caution" when he examined the driver's license proffered by Mann. He based this on "the youthful appearance of Mann, the fact that Mann does not look like he is twenty-three years old, the fact that there is little if any resemblance between the appearance of Mann and the photograph [on the driver's license] and . . . upon the three or four inch height difference" between Mann and the height listed on the driver's license. (Finding IV.F.)

The ALJ based his conclusion about the clerk's lack of due diligence in inspecting Mann's identification on the same factors that the courts have specified as appropriate in making this determination. (See, e.g., *Lacabanne, supra*; 5501 *Hollywood, Inc. v. Dept. of Alcoholic Bev. Control, supra*.) His conclusion was reasonable and we find no reason to disagree with his determination that appellant did not establish a defense under section 25660.

Appellant contends that the ALJ should have considered "the effect of the cross-cultural implications" on the clerk's belief that Mann looked like the picture on the driver's license, citing *People v. Cardenas* (1982) 31 Cal.3d 897, and *People v. Palmer* (1984) 154 Cal.App.3d 79. This criminal law concept has to do with eyewitness identification of individuals in a line-up or in court. It has no application to the present circumstance of comparing a person and the picture he offers as his own, both the person and picture being present at the same time in front of the viewer.

III

Appellant contends that the ALJ abused his discretion in imposing a penalty of 10 days' suspension with five days stayed for a one-year probationary period, because

he did not mention the mitigation factors he took into consideration and because the penalty is "draconian."

The Appeals Board may examine the question of an excessive penalty (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183]), but 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].)

At the conclusion of the hearing, the Department recommended a 15-day suspension with 10 days stayed for one year. The ALJ noted, in Finding V., that appellant had been licensed since 1994 with no record of discipline, and stated that a 10-day penalty with five days stayed was appropriate under the circumstances. This is certainly a sufficient statement regarding mitigation.

In light of the Department's recommendation, and its typical recommendation of a straight 15-day suspension, the penalty imposed is anything but draconian.

ORDER

The decision of the Department is affirmed.³

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

³This 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.