

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

AB-8358

File: 20-296757 Reg: 04057187

SAEED KOHANOFF, dba Mobil Mart
37167 Sierra Highway, Palmdale, CA 93550,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: December 1, 2005
Los Angeles, CA

ISSUED: JANUARY 26, 2006

Saeed Kohanoff, doing business as Mobil Mart (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his license for 15 days for the sale by his employee of an alcoholic beverage to a person under the age of 21, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Saeed Kohanoff, appearing through his counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

¹The decision of the Department, dated October 21, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on July 5, 1994. The Department filed an accusation against appellant charging the illegal sale by appellant's employee, Murad Mohsin (the clerk), of an alcoholic beverage, Bud Ice beer, to 18-year-old Brandyn Honeycutt (the minor).

At the administrative hearing held on September 15, 2004, documentary evidence was received and testimony concerning the violation charged was presented by the minor, Honeycutt; by Department investigator Charlotte Clark; and by the clerk, Mohsin.

Investigator Clark, along with two other Department investigators, went to appellant's premises on a routine compliance check. In the parking lot, they observed a young man, later identified as Honeycutt, enter the premises and they followed him in a few seconds later. Clark observed Honeycutt remove eight 24-ounce cans of Bud Ice beer from the cooler and take them to the counter. She saw the clerk ask Honeycutt for identification and Honeycutt hand the clerk an identification card. The clerk looked at the ID for approximately 10 seconds, handed it back to Honeycutt, and proceeded with the sale.

When Honeycutt left the store, the investigators stopped him, ascertained that he was 18 years old, and obtained from him a Connecticut driver's license which he had shown to the clerk and his own valid California driver's license. The Connecticut driver's license was issued to Tyler Zottola and it had expired a month previously, on December 9, 2003. Honeycutt told Clark that he had obtained the Connecticut license from a friend.

Honeycutt confirmed the testimony of Clark as to the events in the store and his encounter with the investigators afterwards in the parking lot. He said that he was about 5 feet, 11 inches tall, both on January 9, 2004, and at the date of the hearing. He also testified that he had been to appellant's store at least twice a week for the last two years to purchase gas or snacks, that he recognized all the clerks who worked there and they seemed to recognize him when he would go in, and that he had purchased alcohol at the premises twice before using the Connecticut ID.

On cross-examination, Honeycutt identified the Connecticut driver's license he had used, which showed a height of 5 feet, 11 inches; that it was issued on December 9, 1998; and the person in the photographs on it had a goatee. He said that he had a goatee on January 9, 2004, that appeared much the same as it did at the hearing. He also testified that on one of the two occasions he purchased beer at appellant's premises previous to January 9, 2004, the same clerk (Mohsin) sold it to him, and on January 9, 2004, the clerk recognized him and said "hi" to him.

When the clerk testified, he recalled seeing Honeycutt in the store on January 9, 2004, but did not recall seeing him there before. He testified that the information on the Connecticut driver's license appeared to him to match the way the minor looked when standing before him. Although he said that he had looked at many ID's while working at appellant's premises, he could not recall seeing a Connecticut driver's license before. The clerk said that he had not received formal training in alcoholic beverage sales, but that his manager had instructed him not to sell to anyone under 21 years of age and not to sell to someone if they used an expired driver's license. When he sold to Honeycutt on January 9, 2004, he did not notice that the license was expired, apparently because the expiration date was not in the same place it is on California drivers' licenses. The

clerk said that he believed the Connecticut driver's license showed that Honeycutt was over 21, and sold the beer to him in reliance on that.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and that no defense was established pursuant to Business and Professions Code section 25660. Appellant filed an appeal contending that he had established a section 25660 defense.

DISCUSSION

Section 25660 provides a defense to a sale-to-minor charge in cases where a seller has "demanded, was shown and acted in reliance upon" "bona fide evidence of majority and identity of the person," which is defined as a governmentally issued document, such as a driver's license or a military ID, "which contains the name, date of birth, description, and picture of the person."

Appellant contends that the clerk reasonably relied on the Connecticut driver's license Honeycutt presented to him, thereby establishing a defense to the sale-to-minor charge as provided by Business and Professions Code section 25660.

Findings of Fact 7 and 8 of the Department's decision state:

7. The minor at the time of the violation was 5'11" tall and weighed 145 pounds. The vital statistics on the Connecticut license were scant as the only physical description it provided was a height of 5'11" and an eye color of green. There was no weight shown. The photograph on the license did not resemble the appearance of the minor at the hearing.

8. The clerk testified that he believed the minor to be over 21 years of age based on the date of birth shown on the Connecticut License (12-09-80) and although he had received no formal training in sale to minor transactions he was experienced in such transactions from past experience. However he had never seen a Connecticut Driver's License previously and had never received any training in dealing with out-of-state driver's licenses. The clerk testified that the only thing he focused on in examining the Connecticut License for authenticity was the date of birth and apparently nothing else.

Under the heading Determinations of Issues and Conclusions of Law, the ALJ discussed whether the clerk followed the three steps set out in *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 189 [67 Cal.Rptr. 734] (*Lacabanne*), for evaluating identification in order to establish a defense under section 25660 (¶¶ 7-10):

7. As to the first step, the argument that the clerk made a diligent inspection of the Connecticut Driver's license presented by the minor is problematic. By his own testimony, the only thing the clerk focused upon was the date of birth shown on the license. Whether the license was in fact a genuine license issued by the State of Connecticut is open to question as no evidence one way or the other was introduced on that point. The one thing that was established was that the minor came by the license from a friend, so in fact he was not the person to whom that license was issued.

There is no evidence in the record that the clerk made a diligent inspection of the license. An examination focused solely on the date of the birth and nothing else on the license, does not constitute a diligent inspection. Further the licensee cannot claim ignorance as an excuse in failing to provide its sales clerks with training with respect to out-of-state licenses. The clerk with all of his experience had never previously seen a Connecticut Driver's license.

It is incomprehensible to this writer that a licensee doing business in a metropolitan area as diverse as Los Angeles could not foresee the possibility of such out-of-state licenses being used in his store. Information on out-of-state licenses is readily available commercially or from the department. The licensee had been licensed since 1994 and had ample time and opportunity to require his clerks to undergo such training. The record is bare of any such preparation on the part of the licensee.

Had the clerk undergone such training, perhaps he would have widened his focus beyond the date of birth on the license and observed that the photograph on the license was not that of the minor in any significant way.

Except for a goatee, which the minor shared with the individual depicted in the license photograph, the minor appeared to be younger in age than the person in the photograph. Further, as the date of the issuance on the license was shown as December 1998, it is hard to imagine how the clerk failed to recognize that this 6 year old photograph

showed the countenance of an individual who appeared to be near the same age or older than the minor at the time of the transaction 6 years later. The exercise of due diligence would have taken into account this apparent discrepancy and should have raised questions in the mind of the clerk as to the apparent genuineness of the license.

8. As to the second step, in respect to the exercise of caution by a reasonable or prudent person in similar circumstances, the licensee's clerk failed to act reasonably for the same reasons set forth in determination no. 7. Failure of the clerk to compare the photograph on the Connecticut license to the countenance of the minor at the time of the sale was incautious and imprudent and demonstrated a lack of understanding on the part of the clerk of the importance of effectively vetting a sale to a minor transaction.

9. In respect to the third step requiring an inspection of the photograph on the license and an appraisal of the physical appearance of the minor, a prudent evaluation would have concluded that the minor was not the same individual as portrayed on the license. Further, the appearance of the minor did not by any reasonable standard indicate that he could have been 21 years of age at the time of the sale.

10. By reason of the evidence and case law, the licensee has failed to establish that the steps necessary for a successful defense under 25660 have been proved.

The Department is authorized by the California Constitution to exercise its discretion to deny, suspend, or revoke an alcoholic beverage license if the Department reasonably determines, for "good cause," that the granting or the continuance of the license would be contrary to public welfare or morals. In reviewing a decision of the Department, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but must determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary

hearing. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94-95 [84 Cal.Rptr. 113].)

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826] (*Masani*); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne, supra*, 261 Cal.App.2d at p. 185; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Section 25660, as an exception to the general prohibition against sales to minors, must be narrowly construed. (*Lacabanne, supra*, 261 Cal.App.2d at p. 189.) 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.*)

The case law regarding section 25660 makes clear that 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].) 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 p. 753.) 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. (*Masani, supra*, 118 Cal.App.4th at 1445; *5501 Hollywood, Inc. v. Dept. of Alcoholic Bev. Control, supra*, at pp. 753-754.) Reasonable reliance cannot be established unless the appearance of the person presenting 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, supra*, 155 Cal.App.2d at pp. 753-754.)

Although section 25660 was designed "to relieve vendors of alcoholic beverages from having in all events to determine at their peril the age of the purchaser" by allowing them to rely on certain documentary evidence of majority and identity, "*the bona fides of such documents must be ascertained if the lack of it would be disclosed by reasonable inspection, the circumstances considered.*" (*Dethlefsen v. State Bd. of Equalization* (1956) 145 Cal.App.2d 561, 567 [303 P.2d 7] (italics added).) The licensee or his agent must act in good faith and with due diligence in relying on an apparently valid but actually fraudulent ID:

[T]he defense must be asserted in good faith, that is, the licensee or the agent of the licensee must act as a reasonable and prudent [person] would have acted under the circumstances. Obviously, the appearance of one producing the card, or the description on the card, *or its nature*, may well indicate that the person in possession of it is not the person described on such card.

(*Keane v. Reilly* (1955) 130 Cal.App.2d 407, 409-410 [279 P.2d 152] (italics added).)

Appellant asserts that "Clearly, a reasonable inspection of the document was made in this case and evidence of majority was presented by one whose appearance

indicated that he could well be twenty-one years of age." (App. Br. at p. 10.) Clearly, as shown from the quoted portions of the decision, *ante*, the ALJ found exactly to the contrary.

Appellant is really asking this Board to reweigh the evidence and reach a conclusion different from that of the ALJ and the Department. That is not the role of the Appeals Board. The Board may not ignore or reject a factual finding of the Department simply because it considers a contrary finding equally, or even more, reasonable than that of the Department. (*Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control*, *supra*, 2 Cal.3d at p. 94-95; *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106, 112-114 [28 Cal.Rptr. 74].)

The ALJ's factual findings are supported by substantial evidence and the findings support the determination. Under the circumstances, we have no reason to disturb the ALJ's conclusion that appellant failed to establish a section 25660 defense.

ORDER

The decision of the Department is affirmed.²

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

²This 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.