

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

AB-8766

File: 21-440879 Reg: 07064751

CIRRUS INVESTMENTS, INC., dba Liquor King
141 East Imperial Highway, La Habra, CA 90631,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: November 6, 2008
Los Angeles, CA

ISSUED MARCH 12, 2009

Cirrus Investments, Inc., doing business as Liquor King (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for appellant's clerk selling 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 Cirrus Investments, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Lori W. Brogin, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

¹The decision of the Department, dated October 22, 2007, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on August 15, 2006. On January 4, 2007, the Department filed an accusation against appellant charging that, on December 7, 2006, appellant's clerk, Onkar Singh (the clerk), sold an alcoholic beverage to 19-year-old Elijah Villegas.

At the administrative hearing held on April 19 and August 8, 2007, documentary evidence was received, and testimony concerning the sale was presented by Villegas, by Department district administrator Beth Goldberg,² and by the clerk.

Goldberg testified that she observed a young-looking person, later identified as Villegas, enter the premises, pick out two six-packs of beer, and take them to the counter. There he obtained a bottle of rum, the clerk told him the total cost, he paid for the alcoholic beverages, and exited the store with them. Outside, the investigators stopped Villegas, determined that he was under the age of 21, and searched Villegas and his vehicle for a fake identification, but none was found. When Goldberg re-entered the premises and informed the clerk that he had sold to a minor, the clerk stated that he had checked Villegas' ID in the past.

Villegas testified that he had never possessed a fake ID. During the preceding three years, he said, he had gone to the premises approximately 10 times and had purchased alcoholic beverages on most of those occasions. He had not shown an ID on any of those occasions.

The clerk testified that Villegas had shown him a California ID card showing him to be over 21 on several prior occasions, so he did not ask for identification on December 7, 2006. He did not remember the date of birth, name, or description on that ID.

²Goldberg was one of the investigating officers present at the time of the sale to Villegas.

Following the hearing, the Department issued its decision that determined the violation charged was proved and no defense was established. Appellant filed an appeal contending: (1) The Department engaged in improper ex parte communications; (2) the Department did not have effective procedures in place to prevent its attorneys from acting as both prosecutors and advisors to the decision maker or to prevent ex parte communication with the decision maker; (3) appellant established a defense pursuant to Business and Professions Code³ section 25660; and (4) the administrative law judge (ALJ) erred in not allowing appellant to question the Department's district administrator regarding her penalty recommendation. Appellant has also moved to augment the record with any report of hearing, General Order No. 2007-09, and related documents. The first two issues are related and will be discussed together.

DISCUSSION

I and II

Appellant contends the Department violated the Administrative Procedure Act⁴ and due process by engaging in ex parte communication with the Department's decision maker, and by its failure to maintain effective screening procedures within the legal staff to prohibit its prosecutors from engaging in ex parte communications with the decision maker or his advisors. The Department denies that an ex parte communication was made. A declaration by the staff attorney who represented the Department at the administrative hearing asserts that at no time did the attorney prepare a report of hearing or other document, or speak to any person, regarding this case.

³Unless otherwise indicated, statutory references in this opinion are to the Business and Professions Code.

⁴Government Code sections 11340-11529.

In a number of appeals recently, this Board has addressed the same arguments made by the parties here. In those appeals, the Board noted that several recent court decisions had described the Department's practice of ex parte communication with its decision maker or the decision maker's advisors as "standard procedure" in that agency. The Board concluded that, "without evidence of an agency-wide change of policy and practice [by the Department], we would be exceedingly reluctant to affirm or reverse on the basis of a single declaration, especially where there has been no opportunity for cross-examination." Since a factual question still exists in this case, as it did in the earlier appeals just mentioned, we believe the only appropriate resolution is to remand the matter to the Department for an evidentiary hearing.

As did the California Supreme Court in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1 [145 P.3d 462, 50 Cal.Rptr.3d 585], we decline to address appellants' due process argument.

Because limited internal separation of functions is required as a statutory matter, we need not consider whether it is also required by due process. As a prudential matter, we routinely decline to address constitutional questions when it is unnecessary to reach them. [Citations.] Consequently, we express no opinion concerning how the requirements of due process might apply here.

(40 Cal.4th at p. 17, fn. 13.)

In light of our decision to remand this matter, augmenting the record is not necessary.

III

Appellant contends that it established a defense to the accusation pursuant to section 25660. The burden in such a case is on the party asserting the defense. To establish a defense under section 25660, there must have been displayed an

identification which reasonably purports to be issued by a government agency, and there must be a demonstrated reasonable reliance upon that identification. (*Dept. of Alcoholic Bev. Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429 [13 Cal.Rptr.3d 826] (*Masani*).)

Appellant argues the defense is established by the clerk's testimony that he had seen identification showing Villegas to be over 21 and had acted in reliance on that information. The ALJ, appellant asserts, unreasonably found that Villegas was more credible than the clerk with regard to whether Villegas had ever shown an ID to the clerk.

The court in *Masani, supra*, 118 Cal.App.4th 1429, 1437, described the standards the Board must follow in reviewing a decision of the Department:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends, Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002) 100 Cal.App.4th [1250,]1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; [Bus. & Prof. Code] §§ 23090.2, 23090.3.) We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

The ALJ weighed the credibility of the witnesses, resolved the conflicts in the testimony, and made factual findings that are clearly supported by substantial evidence. The findings, in turn, fully and reasonably support his determinations. Appellants did not establish the affirmative defense of section 25660.

IV

Although Department district administrator Beth Goldberg had already testified and been cross-examined by appellant, appellant called her to testify again after the other witnesses were done. When she was under direct examination by appellant, however, the ALJ refused to let appellant question her about penalty recommendations. Appellant argued that her testimony on this subject is relevant because it was "not excluded by any section of the APA" and it might show that the Department relied on an underground regulation in making the penalty recommendation. [RT 22.]

The ALJ pointed out to appellant that the Department has an existing regulation containing guidelines for penalties. Those guidelines show a standard penalty for a first sale-to-minor violation of 15 days' suspension. Since the Department recommendation was for a 15-day suspension, the ALJ did not understand appellant's argument that an underground regulation was applied. Neither do we.

In any case, even though the district administrator may instruct the Department's litigating attorney regarding the penalty the attorney is to recommend, the ALJ is not bound by the Department's recommendation made at the hearing. The ALJ may depart even from the penalty guidelines if warranted by the evidence.

We do not see how the district administrator's view, prior to any hearing, as to what would be an appropriate penalty, has any meaningful bearing on what penalty an ALJ chooses to recommend after a hearing. The ALJ hears evidence developed in an adversary setting, where a licensee has the opportunity to argue why the evidence supports a departure from the penalty urged by Department counsel, or where the Department may argue for an aggravated penalty under the same penalty guidelines.

An ALJ relies on an objective assessment of the evidence after listening to testimony and the partisan appeals of counsel and ultimately is guided by that assessment and the penalty guidelines of rule 144, including the criteria for aggravated or mitigated penalties found in the rule.

The testimony of a district administrator regarding penalty recommendations certainly was not relevant in the present case, since the standard penalty was recommended, and would simply have served to prolong the hearing unnecessarily. As this same ALJ said in another case, involving a similar contention, heard by the Board the same day as this one (*Garfield Beach CVS* (2009) AB-8725), "Absent an unusual situation not brought to the attention of the court, Section 144 of Chapter 1, title 4, California Code of Regulations provides all the insight to which Respondent is entitled." The ALJ did not abuse his discretion in preventing inquiry regarding the district administrator's penalty recommendations.

ORDER

The decision of the Department is affirmed as to all issues raised other than those regarding allegations of ex parte communication, and the matter is remanded to the Department for further proceedings.⁵

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

⁵This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.