ISSUED OCTOBER 1, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

DANIEL J. and LYNNE K. BUSBY dba Pioneer Market & Liquor 6085 Minaret Road Mammoth Lakes, California 93546, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6959 File: 21-238372 Reg: 97039983 Administrative Law Judge at the Dept. Hearing: Michael B. Dorais Date and Place of the Appeals Board Hearing: August 12, 1998 Los Angeles, CA

Daniel J. and Lynne K. Busby, doing business as Pioneer Market & Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 25 days, with 5 days thereof stayed for a probationary period of two years, for appellant's clerk, Erin Kelly Patterson, having sold alcoholic beverages (a six-pack of Full Sail Amber Ale and two cans of Murphy's Irish Stout) to Scott Stephen Meyerson, a 16-year-old minor, being contrary to the universal and generic public welfare and morals provisions of the

[1]The decision of the Department, dated November 6, 1997, is set forth in the appendix.

California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Daniel J. and Lynne Busby, appearing through their counsel, Michael C. Cho, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon M. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on October 23, 1989.[2] On May 27, 1997, the Department instituted an accusation against appellant charging an illegal sale of an alcoholic beverage to a minor.

An administrative hearing was held on September 18, 1997. At that hearing, Department investigators Dawn Jean testified that she saw Scott Meyerson purchase the six-pack of ale and the two cans of stout, displaying what appeared to be a driver's license to Patterson, the clerk. After receiving a hand signal from Jean, Eric Froeschner, another Department investigator, accosted Meyerson when he left the store. When asked his age, Meyerson claimed he was 21. When asked for identification, Meyerson produced an expired driver's license issued to a person named Dean. Upon examining the license, Froeschner noted several discrepancies, in particular, the weight, since Meyerson appeared to weigh more than the 145 pounds shown as the weight of the person depicted on the license. After further questioning, Meyerson admitted he was 16 [RT 25-26].

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[2] Appellants represented that Daniel Busby had been licensed since 1975, and had never been the object of discipline until this case. That fact was considered by the Administrative Law Judge in assessing the penalty. (See Finding VI).

The clerk did not testify, but the testimony of other witnesses indicated that she looked or glanced at the expired license before making the sale [RT 12, 33].

Subsequent to the hearing, the Department issued its decision which determined that the violation had been established, concluding that the clerk's reliance upon the expired license was unreasonable, and did not establish a defense under Business and Professions Code §25660.

Appellant thereafter filed a timely notice of appeal. In their appeal, appellants contend that the penalty is so excessive as to amount to an abuse of discretion.

DISCUSSION

Appellants conceded at the administrative hearing that their clerk had made the sale to the minor, but argued that, because of the resemblance between Meyerson and the person pictured on the expired license, her mistaken reliance on the expired driver's license should be considered a mitigating factor, as should the fact that Daniel Busby had been licensed continuously since 1975 without any prior discipline. Appellants contend that by imposing a penalty even greater than recommended by Department counsel, the ALJ, and ultimately the Department, abused the discretion accorded them.

The Appeals Board 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].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

In recommending a suspension of 20 days, with 10 days stayed, Department counsel explained [RT 61-63]:

> "Mr. Logan: Your Honor, the department takes into consideration several factors in arriving at a penalty recommendation. That recommendation is generated from the local district office that has been reviewed by the, both by the legal staff, the deputy division Chief M. Robbins in Southern Division. Mr. Faletta also in Southern Division before it even makes its way up to headquarters. What the Department operates by is a set of guidelines for standard types of penalties. On the standard penalty on a regular minor sale, that is as opposed to a decoy operation, the standard penalty is 15 days. And in this case, there were several aggravating factors, the first one being the presentation of a false identification. In those circumstances where the clerk doesn't even ask for identification, we don't even consider that aggravating, that's almost normal course. Since there was a request to present identification and there was an insufficient comparison or insufficient checking of that document, that is a circumstance in aggravation.
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> "The Department also increases the penalty for the age of the individual who makes the purchase. In this case, the minor, although maybe a little bit large for not being quite 17, was nonetheless 16 years of age. The standard penalty being 15, and the aggravating factors at five to [sic] days would make a standard recommendation of 25 days license suspension.
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> "What Mr. Wagaman did in this case is he considered the mitigating factor of the licensee's history, and there is no dispute. It's right there in the accusation as filed by the department that there has been no previous license discipline at this location. In view of the good record of the location, instead of 25 days license suspension, Mr. Wagaman indicated a 20 day license suspension. He further reduced that by staying ten days, so the department's recommendation is a 20 day license suspension with ten days stayed. The minor being 16 years old when he walked into the location presenting the identification, first off, the license is expired. It could be argued that maybe it looks like him, maybe it doesn't, but in any event you have to look at the date of birth, what the date of birth on that document indicates the minors [sic] age is, and then see if the minor is representative of that age group. And a clerk who is 27 years old should certainly be able to recognize someone who is ten years younger, as this court made its own inquiry, the expired drivers license would not be acceptable identification for cashing a check.
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> "The drivers license in this case was insufficient. It wasn't checked thoroughly and the sale was made. The department stands by their

> recommendation made by Mr. Wagaman of 20 days license suspension with ten days stay."

We have quoted Mr. Logan's comments at length, because, despite his careful explanation of how the Department arrived at its penalty recommendation, the ALJ elected to impose a more severe penalty, and the Department thereafter adopted his proposed decision without comment. We think that both the Department and the ALJ were wrong in their recommendations, each relying on an unwarranted assumption.

What appears to be the principal factor contributing to the ALJ's error is his erroneous finding (Finding VI) that "[c]ounsel for the Department recommended a twenty-five (25) day suspension." In fact, Department counsel stated three different times that the Department's recommendation was a suspension of twenty days, with 10 days stayed [RT 63, 65].[3] As a result, even though he ostensibly credited appellants' 22-year history of no prior discipline as an element of mitigation, the end result was a penalty even more severe than the Department recommended.

The Department's error is less obvious, but equally troublesome. The Department's premise that reliance upon an expired driver's license is an aggravating factor when it comes to assessing an appropriate penalty flies in the face of logic and reason. It would seem apparent, in the absence of some evidence to the contrary, that when a sale is made to a minor after reliance upon false

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[3] It appears that the ALJ focused on what Department counsel said [RT 62] would have been the standard recommendation, but for the element of mitigation, and not upon the actual recommendation.

identification - in this case, an expired driver's license, the photo on which bore a facial resemblance to the minor - what occurred was more than likely a mistake that resulted from negligence rather than malfeasance.[4]

Business and Professions Code §25660 provides a complete defense to a seller who has, in good faith, acted in reliance upon bona fide identification issued by a governmental agency. The cases have injected a further requirement that the reliance be reasonable. (See Keane v. Reilly (1955) 130 Cal.App. 2d 407 [279 P.2d 152]; 5501 Hollywood, Inc. v. Department of Alcoholic Beverage Control (1957) 155 Cal.App.2d 748 [318 P.2d 820,823].) While the ALJ found that a reasonable person would not have been satisfied if presented with the license Meyerson used, and, thus, correctly concluded that the §25660 defense had not been established, we find nothing in his proposed decision suggesting, in addition, that appellants' clerk had acted in bad faith, so as to warrant even a larger penalty than the loss of the §25660 defense entailed.

This is not to say that the opposite is true, that is, that the failure to request any identification must be an aggravating factor. In either case, it seems to us, the

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[4] The ALJ's observation that "[although some facial resemblance exists between Meyerson and the photograph on the drivers license, there are significant differences in appearance, including height and weight" fails to take into account the distinct possibility that the holder of the license had grown in both height and weight in the four years following its issuance. Had the minor weighed 45 pounds less than the weight shown on the license, and several inches shorter in height, signal flags certainly should have been raised. Here, the opposite was true, indicating no obvious inconsistency with the resemblance in facial appearance.

While we cannot question the ALJ's conclusion that Meyerson appeared well below the age of majority at the time of the hearing, it does seem that his emphasis on the height and weight factors may have tipped the scale against the licensee when he arrived at the bottom line decision as to penalty.

question is whether the actor acted negligently or in bad faith, and the two are not the same.[5] While it is conceivable that the appearance of the minor, or some other aspect of the transaction may be such as to warrant the conclusion that the seller must have known he or she was selling an alcoholic beverage to a minor, the absence of any finding to that effect suggests that it would be inappropriate to aggravate the otherwise "standard" penalty.

CONCLUSION

That portion of the Department's decision finding a violation of Business and Professions Code §25658, subdivision (a), is affirmed. The penalty is reversed, and the case is remanded to the Department for reconsideration of the penalty in light of the Board's comments herein.[6]

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[5] The ALJ was influenced by the minor's testimony that the examination of the license was treated casually, since it was brief, and since the clerk's comments centered on the brand of alcoholic beverage displayed on the minor's shirt. Had the clerk been more careful, perhaps she would not have been fooled by the false identification. Nevertheless, in the absence of any evidence of bad faith or collusion, all that we have here is a mistake.

[6] This 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 decision as provided by §23090.7 of said code.

Any party, before this final decision becomes effective, may apply to the appropriate 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.