

Professions Code §25658, subdivision (a).

Appearances on appeal include appellants Chao F. Hsia Chang and Shou H. Chang, appearing through Shou H. Chang, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert M. Murphy.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on January 19, 1994. Thereafter, the Department instituted an accusation against appellants charging an unlawful sale of beer to a minor.

An administrative hearing was held on October 16, 1997. At that hearing, Mark Johnston testified that, accompanied by two friends, he purchased a twelve-pack and a six-pack of beer after displaying to the cashier a false ID (Exhibit 2) which showed his age to be 21. Johnston testified that he had purchased the identification in Berkeley, and had used it at appellants' store at other times before the incident in question. The transaction was witnessed by Karen Nielsen, a Department investigator who had followed Johnston into the premises.

Nielsen testified that she overheard the cashier, who was Mrs. Chang, ask Johnston if the ID said "76," and he answered "yes, it is 1976" [RT 20]. When she confronted Mrs. Chang with the fact that the false identification was expressly denoted "NON-GOVERNMENT," Mrs. Chang simply kept insisting she had checked the ID [RT 22].

Shou H. Chang, who appeared at the hearing without counsel, blamed Mrs.

Chang's difficulties with the English language for her reliance upon the false ID, stating that he would not have accepted it had he been at the store.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation, concluding that appellants had failed to establish a defense under Business and Professions Code §25660.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) Mrs. Chang not only checked Johnston's identification, she asked for verbal confirmation; (2) Mrs. Chang did not act in bad faith or without due diligence, but was deceived by the false ID because of her English language limitations; (3) the purchaser appeared to be the age reflected on the false ID; (4) Mrs. Chang was acquitted in a criminal proceeding arising from the transaction; (5) the credibility of Johnston and Nielsen is in question; and (6) the penalty is unreasonable. The issues involving Mrs. Chang's reliance upon the false identification, Johnston's physical appearance, and his and Nielsen's credibility, all turn on the false identification presented to her, and will be discussed together.

DISCUSSION

I

Appellants contend that Mrs. Chang's reliance upon the false identification which was presented to her must be excused, because she attempted to confirm Johnston's age verbally because her English language limitations prevented her from knowing the identification was unreliable and not identification issued by a

governmental agency, and because the testimony of Johnston and Nielsen was in conflict with regard to the conversation that ensued between Johnston and Mrs. Chang.

The identification which Johnston presented to Mrs. Chang expressly disclaims any relationship to a governmental agency. Although it does contain the words "STATE OF CALIFORNIA" at the top, partially obscured because the photo is pasted over them, the words "NON-GOVERNMENT" appear directly below the photo. It is difficult to believe that a reasonable person, acting prudently and with due diligence, could believe the ID to be a governmentally-issued document. Consequently, her reliance upon it does not provide her with a defense under Business and Professions Code §25660, which expressly requires that the document relied upon be one issued by a governmental agency. Any person examining the false identification was put on express notice it was not such a document.

Does it make any difference that Mrs. Chang was fooled because of her limited English language skills? We think it should not, certainly as to whether or not there has been a violation, and perhaps marginally with respect to penalty.

A licensee has a duty to operate within the law. If that licensee delegates, or, as in this case, assumes the responsibility for determining whether or not a sale is to be made, the person entrusted with that responsibility must be capable of performing it responsibly. A person who is unable to recognize patently

unacceptable forms of identification lacks that capability.²

Given the large number of licensees to whom English is not a primary language, acceptance of a language limitation as an excuse for a sale to a minor can only lead to mischief. In such circumstances, it is incumbent upon licensees to take appropriate steps to ensure that those youthful appearing persons who are attempting to purchase alcoholic beverages are permitted to do so only after proving they are of lawful age. In this case, Mrs. Chang failed to do so.

The supposed conflict in testimony between the investigator and the minor is irrelevant. There is no dispute that the transaction occurred, and that the identification did not meet the threshold requirement that it be a governmentally-issued document.

The claim that Johnston appeared older is also unpersuasive. His appearance was such that Mrs. Chang believed she should ask for identification. Having made such a request, she had a duty to exercise care in examining the identification offered her.

II

Appellants contend that the dismissal of the criminal proceeding against Mrs. Chang is a bar to the proceeding.

This argument lacks merit. The fact that an appellant is acquitted of criminal

² Appellants concede in their brief (at paragraph 2, page 2), and in oral argument, that the fake ID could have been “easily checked out by any experienced or knowledgeable person.”

charges has been held not to preclude a license disciplinary proceeding based upon the same facts. (Cornell v. Reilly (1954) 127 Cal.App.2d 178 [273 P.2d 572, 578; see also Gikas v. Zolin (1993) 6 Cal.4th 841, 851 (fn. 3), 853 [25 Cal.Rptr.2d 500].)

III

Appellants urge the Board, in the event it concludes there should be a penalty, to let them accept a monetary penalty.

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].)

The penalty is the second imposed upon appellants for a sale-to-minor violation since their licensure in 1994. In the case of the first violation, also committed by Mrs. Chang, the penalty was 10 days, all stayed.

Given appellants' prior disciplinary history, it cannot be said that the penalty is an abuse of discretion. It is also of some significance that the investigators were at the scene in response to complaints about sales to minors, as is the fact that Johnston had made purchases there on previous occasions.

ORDER

The decision of the Department is affirmed.³

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

JOHN B. TSU, MEMBER, abstains.

³ This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of its filing, 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, in accordance with Business and Professions Code §23090 et seq.