

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

AB-8100

File: 21-043843 Reg: 02053305

FAYE N. BECK, MERVIL D. BECK, CHARLES D. ROBISON,
and WANDA G. ROBISON
dba Seacliff Liquor
402 17th Street, Huntington Beach, CA 92648,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 2, 2003
Los Angeles, CA

ISSUED FEBRUARY 13, 2004

Faye N. Beck, Mervil D. Beck, Charles D. Robison, and Wanda G. Robison, doing business as Seacliff Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 25 days, 15 days of which were conditionally stayed for one year, for their clerk having sold an alcoholic beverage to a minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Faye N. Beck, Mervil D. Beck, Charles D. Robison, and Wanda G. Robison, appearing through their counsel, Thomas Hood, and the Department of Alcoholic Beverage Control, appearing through its counsel, Roxanne Paige.

¹The decision of the Department, dated February 6, 2003, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on July 1, 1975. Thereafter, the Department instituted an accusation against appellants charging that their agent, employee or servant, Gary deArman, sold an alcoholic beverage (malt beverages) to Lindsey Rae Shuck, a minor, then 17 years of age.

An administrative hearing was held on November 6, 2002. Appellants stipulated that there had been a sale of a six-pack of Skyy Blue malt beverage to Shuck. Shuck testified that she presented a false identification to the clerk which showed her to be 20 years of age. She also testified that she knew the clerk, that his daughter is her best friend and classmate, and that deArman knew she was not 21 years of age.

Appellants have filed a timely appeal, and argue that the Department accorded insufficient weight to mitigating factors in determining an appropriate penalty.

DISCUSSION

Appellants contend that the Department should have accorded greater weight to various mitigating factors established by the testimony of appellant Charles Robison. Specifically, appellants point to the fact that the sale by the clerk was an intentional violation of store policy, and his employment was terminated for having made the sale. They point to the length of time the premises has been licensed (since 1975), the length of time Robison has been a licensee (since 1965), the near-absence of disciplinary action against the license,² and its success in avoiding sales to minor decoys.

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*

² Appellants' license was suspended for 15 days for a sale of an alcoholic beverage to a minor in 1999. All 15 days were stayed.

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 violation in question was appellant's second within a 36-month period. Ordinarily, it would have resulted in a 25-day penalty. The administrative law judge instead stayed 15 days of the penalty, leaving only 10 days of the suspension to be served, stating (Conclusions of Law 6 and 7):

Respondents have presented a strong case for mitigating the penalty. They have been licensed at this store for over 25 years. They have suffered just one prior unlawful sale, and that was to a police decoy on the Fourth of July weekend. Multiple commendations for passing decoy tests have been received. There is no way for a licensee to prevent intentional unlawful acts of his employees. This employee was terminated. No Respondent in this case was involved in the unlawful activity. Mitigation was obviously found in determining the appropriate penalty in the 1999 case. Nevertheless, for all of the reasons specified, the Order that follows should attain the Department's objectives.

No evidence was presented to support some of the elements of mitigation claimed by Respondents, both in oral closing and in Exhibit A. No financial information as to the effect of any suspension on the business or its employees was introduced. Neither was vengeance as a motive for deArman's conduct established by evidence in the record.

We do not believe it can be said that the Department abused its discretion. It is unfortunate that deArman betrayed his employers' trust, but it is settled law that a licensee is responsible for the acts of its agents. (See *Morell v. Department of Alcoholic Beverage Control* (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; *Harris v. Alcoholic Beverage Control Appeals Board* (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; and *Mack v. Department of Alcoholic Beverage Control* (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633].)

It may well be that appellants and their employees will suffer an economic loss as a result of the suspension. However, there is nothing in the record which would permit even a guess as to what that loss would be. Appellants' estimate of a five-figure loss appears to assume the complete closure of the premises, rather than simply a cessation of the sale of alcoholic beverages for 15 days.

Appellants are mistaken in their thinking that a shorter suspension would be more equitable, since it would permit them to pay a fine. Business and Professions Code section 25658.1 precludes appellants from petitioning for an offer in compromise pursuant to Business and Professions Code section 23095 where there has been a second or subsequent violation of section 25658 within 36 months of the initial violation. That is the case here.

ORDER

The decision of the Department is affirmed.³

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

³ This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

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