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

AB-9494
File: 20-515662 Reg: 14080418

CIRCLE K STORES, INC., dba Circle K #9469
27706 McBean Parkway, Santa Clarita, CA 91354,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: September 3, 2015
Los Angeles, CA

ISSUED SEPTEMBER 29, 2015

Appearances: Ralph Barat Saltsman of the law firm Solomon, Saltsman & Jamieson for appellant Circle K Stores, Inc., dba Circle K # 9469. Kerry K. Winters for respondent Department of Alcoholic Beverage Control.

OPINION

This appeal is from a decision of the Department of Alcoholic Beverage Control[1] suspending appellant's license for 15 days because its employee sold an alcoholic beverage to a non-decoy minor, a violation of Business and Professions Code section 25658, subdivision (a).

[1]The decision of the Department, dated February 19, 2015, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on March 1, 2012. On May 1, 2014, the Department filed an accusation against appellant charging that, on February 28, 2014, appellant's clerk, Thana Suwan (the clerk), sold an alcoholic beverage to 19-year old Carson Lega.

At the administrative hearing held on August 5 and December 22, 2014, documentary evidence was received and testimony concerning the violation charged was presented by Lega (the minor), and by Charlotte Clark and David Duran, agents for the Department. Also, appellant presented the testimony of the clerk.

Testimony established that on February 28, 2014, the minor entered the licensed premises, selected two Bud Ice Lagers, and took them to the sales counter. He set the beers on the counter, and the clerk rang them up without asking to see any identification. The minor paid for the beers and exited.

Once outside the licensed premises, the minor was contacted by Agents Clark and Duran. The agents asked the minor how old he was, and he replied that he was 19. Clark verified the minor's age by examining his valid California driver's license. Duran asked the minor if he had any fake identification on him, and the minor handed Duran two fake Arizona driver's licenses. The fake Arizona IDs were duplicates of each other and had been manufactured for the minor. They contained his actual photograph, his correct first and last name, and an accurate physical description with, however, some variation in the eye color. The other information on the Arizona IDs was false.

After the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established. The Department imposed a penalty of 15 days' suspension.

Appellant filed a timely appeal raising the following issues: (1) the Department erred in sustaining the violation because appellant established an affirmative defense under Business and Professions Code section 25660; (2) the administrative law judge (ALJ) wrongfully foreclosed appellant's right to present its defense under section 25660; and (3) the Department's penalty is excessive and an abuse of discretion. Issues (1) and (2) will be discussed together.

DISCUSSION

I

Appellant contends that it presented a full affirmative defense under Business and Professions Code section 25660 by establishing that the clerk had previously and reasonably relied on the minor's fake identification. (App.Br. at p. 5.) Appellant further claims that it was error for the ALJ to dismiss its defense without examining the ID or the reasonableness of the clerk's reliance on it. (*Ibid*.)

Certain principles guide our review of the Department's decision. The standard of review is as follows:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] 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. [Citations.] 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.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

Appellant maintains that a defense to the charge of the accusation was

established under Business and Professions Code section 25660, which provides:

> (a) Bona fide evidence of majority and identity of the person is any of the following:
>
> (1) A document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a valid motor vehicle operator's license that contains the name, date of birth, description, and picture of the person.
>
> (2) A valid passport issued by the United States or by a foreign government.
>
> (3) A valid identification card issued to a member of the Armed Forces that includes a date of birth and a picture of the person.
>
> (b) Proof that the defendant-licensee, or his or her employee or agent, demanded, was shown, and acted in reliance upon bona fide evidence in any transaction, employment, use, or permission forbidden by Section 25658, 25663, or 25665 shall be a defense to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon.

Section 25660 establishes an affirmative defense, and the burden of proof is on the party asserting it. (*Farah v. Alcoholic Bev. Control Appeals Bd.* (1958) 159 Cal.App.2d 335, 338-339 [324 P.2d 98] ["The defense [under section 25660] is affirmative and the burden is therefore upon the licensee to show that he is entitled to the benefits of such a defense."].)

The law is clear that a fake or spurious identification can support a defense under this section if the apparent authenticity of the identification is such that reliance upon it can be said to be reasonable. (See *Masani*, *supra*, at p. 1445 ["The licensee should not be penalized for accepting a credible fake that has been reasonably examined for authenticity and compared with the person depicted."]; see also *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 189 [67 Cal.Rptr. 735] ["the licensee who makes a diligent inspection of the documentary evidence of majority and identity offered by the customer at or about the

time of the sale is entitled to rely upon its apparent genuineness."]; *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1968) 267 Cal.App.2d 895, 897 [73 Cal.Rptr. 352] ["It is well established that reliance in good faith upon a document issued by one of the governmental entities enumerated in section 25660 constitutes a defense to a license suspension proceeding even though the document is altered, forged or otherwise spurious."].)

In this case, it is undisputed that the minor had fake ID — indeed, two fake IDs — in his possession on the evening in question, both of which falsely showed that he was of the appropriate age to purchase alcohol. It is also undisputed that the minor has at *some* point in time shown *some* form of identification to the clerk in order to purchase *some* product which can categorically be described as an age-restricted product. Lastly, it is undisputed that the clerk did not request proof of majority from the minor on the evening in question prior to selling him the alcoholic beverage. These facts aside, there is little by the way of undisputed witness testimony to fill any of the remaining evidentiary voids in this case.

On the subject of whether he had previously shown fake ID to the clerk, the minor testified as follows on cross examination:

> [MS. CARR:]
>
> Q. And prior to this date, February 28th, 2014, had you ever been to this Circle K?
>
> [THE MINOR:] Yes.
>
> Q. Approximately how many times had you been to the Circle K?
>
> A. 15.
>
> Q. And if you could take a look at what's been marked as Exhibit 5, which I believe is right in front of you.

You testified earlier that that's the clerk that sold you the alcohol on this night; is that right?

A. Yes.

Q. In any of your prior approximate 15 visits to the location, had you seen this clerk?

A. Yes.

Q. And about, of those approximate 15 visits to the store, how many times have you seen this clerk?

A. I can't give an estimate.

THE COURT: A few? Many?

THE WITNESS: A few.

BY MS. CARR:

Q. Maybe three to four times?

A. I can't say for sure.

Q. Prior to this date of February 28th, 2014, had you purchased alcohol at the store?

A. No.

Q. This was the first time you purchased alcohol at the store?

A. That I can recall, yes.

Q. That you can recall?

A. Yes.

Q. So in your prior 15 approximate visits to this location, had you ever produced the Arizona driver license?

A. I told David before that, maybe two years ago or a range when I first got them, I had shown my I.D. to buy tobacco — that I.D.

Q. The Arizona I.D.?

A. Yes.

Q. And you showed the Arizona I.D. to buy tobacco at that time because you weren't, in fact, 18 yet?

A. Yeah.

Q. Do you recall who you showed — or strike that.

When you showed the Arizona I.D. to buy tobacco at this location, was it to this same clerk?

A. I think so. Yes.

Q. But you had never shown the Arizona I.D. in conjunction with purchasing alcohol?

A. No.

(RT, Vol. I., at pp. 57-59.) The minor's testimony — that he had never shown a fake ID at the subject licensed premises to purchase alcohol — was consistent with what he told the Department agents on the evening in question (RT, Vol. I., at p. 20) as well as the Minor Affidavit he completed that night. (Exhibit 9; RT, Vol. II., at pp. 108-110.)

On the other hand, the clerk testified as follows regarding his various interactions with the minor prior to the evening in question:

[BY MS. CARR:]

Q. [¶ . . . ¶]

On February 28, 2014, do you recall [the minor] coming into the store?

[THE CLERK:] Yes.

Q. Had you seen him before —

A. Yes.

Q. — February 28, 2014?

A. Yes. I see him [*sic*] before.

Q. How many times prior to February 28, 2014, had you seen that individual?

A. Five, six times. I can't remember exactly.

Q. And those five or six times, was that all at the Circle K?

A. Yes. Circle K.

Q. Do you know his name?

A. No.

[¶ . . . ¶]

Q. And prior to February 28, 2014, had that individual purchased beer from you before?

A. Yes.

Q. Approximately how many times had he purchased beer from you before February 28, 2014?

A. Five, six times.

Q. And prior — strike that.

On February 28, 2014, did you ask him for his identification?

A. Yes.

Q. On February 28th you asked for his ID?

A. On that day, no, I don't [*sic*].

Q. And why did you not ask for his ID on February 28, 2014?

A. I asked ID before, like, three, four times before. Then I know you.

Q. So you didn't ask for ID because you were familiar with who he was?

A. I asked him before.

Q. And you mentioned you asked him before. Would that have been in any of those five or six prior visits?

A. Three or four times.

Q. So you had asked for his identification three or four times prior to this date, February 28th?

A. Yes. Before.

Q. And when you asked for his ID, did he give you an ID?

A. Yes.

Q. What — was it a California driver's license?

[Objection; sustained.]

BY MS. CARR:

Q. When you mentioned that he did give you an ID when you asked in the past?

A. Can you say again?

Q. Sure. I just want to make sure the testimony was that you had asked previously for identification, and did he show you an identification?

A. Yes.

Q. And what type of identification did he show you?

A. Arizona ID.

(RT, Vol. II., at pp. 78-81.)

According to Agent Clark, however, the clerk offered the Department investigators an altogether different version of events on the evening in question:

[BY MR. SAKAMOTO:]

Q. Okay.

Did you have any further discussions with [the clerk]?

[AGENT CLARK:] We did.

Q. Okay.

And what did that include?

A. We explained to him the violation.

He said that he'd seen I.D. in the past.

And my partner said, well, you didn't check it tonight.

And he said, it swiped; it swiped.

And then I tried to ask him, what does the register prompt you to do for an alcohol sale? Because most registers will make you enter a date of birth. But he just said it swiped; it swiped. So I didn't think he understood what I was asking.

Q. Okay.

A. And then I asked him, what have you seen in the past, you know.

And he said, California.

(RT, Vol. I. at p. 21.) Agent Duran also testified that the clerk informed the agents on the evening in question that he had seen the minor's identification in the past. (RT, Vol. II, at pp. 109, 113-114.)

In light of the foregoing testimony, the ALJ made the following findings of fact:

9. The agents re-entered the Licensed Premises and spoke to [the clerk]. [The clerk] stated that he had seen ID in the past. He further stated that he had seen a California ID and that it had swiped. [The clerk] was subsequently cited.

10. [The minor] testified that he had not shown fake ID or purchased alcohol at the Licensed Premises in the past. He told the agents the same thing on February 28, 2014 and filled out a minor affidavit to that effect. (Exhibit 9.) On cross, he conceded that he may have shown one of the Arizona IDs two years earlier in order to buy tobacco.

11. [The clerk], on the other hand, testified that [the minor] had purchased beer from him five or six times before February 28, 2014. [The clerk] asked to see [the minor's] ID the first three or four times; he stopped asking once he began recognizing [the minor] as a regular customer. [The clerk] testified that the ID he had seen on these earlier occasions was an Arizona ID. He looked at the photo and date of birth when he examined the ID.

(Findings of Fact ¶¶ 9-11.) These findings prompted the ALJ to reach the following conclusions concerning appellant's section 25660 defense:

> 6. There is no dispute that a sale to a minor took place in the present case. The real question is whether a false ID was used in connection with the sale at issue. [The minor] and [the clerk] directly contradict each other on this point. Using the factors set forth in Evidence Code section 780, [the minor] is the more credible witness — his statements and his testimony have been consistent throughout. [The clerk], on the other hand, told the agents a different version of events on February 28, 2014 than he subsequently described in his testimony.
>
> 7. Based on this credibility determination, the Respondent failed to establish a defense under section 25660 — i.e., the Respondent failed to prove that [the minor] showed a bona fide ID in the past. In light of this finding, it is unnecessary to address the merits of the Arizona ID.

(Conclusions of Law ¶¶ 6-7.)

This case boils down to three questions: (1) were the ALJ's credibility determinations erroneous; (2) did the ALJ make improper findings regarding the minor's prior showing of his identification to the clerk; and (3), regardless of the answers to questions (1) and (2), did appellant nevertheless raise a successful section 25660 defense?

With regard to the first question, it is established law that the credibility of witness testimony is determined within the reasonable discretion accorded to the trier of fact. (*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [214 P.2d 807].) The Board will not interfere with those determinations in the absence of a clear showing of an abuse of discretion. (See *7-Eleven, Inc./Grewel (*2004) AB-8242, at p. 4.)

Here, the ALJ found that the minor was the more credible witness after

consideration of the factors set forth in Evidence Code section 780.[2] (See Conclusions of Law ¶ 6.) The Board finds no reason to upset this determination in light of the fact that the clerk purportedly told two different versions of his story, one to investigators on the evening in question, and the second during the administrative hearing. Once the discrepancy in the clerk's stories came to light, it was well within the ALJ's discretion to discredit the clerk's version of events entirely, and to make findings in accordance with the other witnesses' testimony.

In its closing brief and at oral argument, appellant claimed that the ALJ erred by making his credibility determinations after inappropriately narrowing the scope of the minor's testimony regarding his use of his false identification at other premises. The testimony with which appellant takes issue proceeded as below:

> [MS. CARR]
>
> Q. And had you — besides using —
>
> You can place that down.
>
> Thank you.
>
> Besides using the identifications this evening, February 28th, 2014, at Circle K, had you ever used the identifications to purchase alcohol elsewhere?
>
> MR. SAKAMOTO: Objection. Not relevant.
>
> THE COURT: Overruled.

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[2]Evidence Code Section 780 lists several factors that have a tendency in reason to prove or disprove the truthfulness of a witness' testimony, including: his demeanor while testifying and the manner in which he testifies; the extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies; a statement previously made by him that is consistent with his testimony at the hearing; and a statement made by him that is inconsistent with any part of his testimony at the hearing.

You can answer the question.

THE WITNESS: Do I have to?

COURT: Let's rephrase the question.

And let me tell you that purchasing alcohol — the statute of limitation for purchasing alcohol for it being a crime is one year. So anything you say that relates to a year or more before today, nobody can do anything to you. So let's put a date limitation on the question.

At any time before July 31st of 2013, did you use one of these I.D.'s to purchase alcohol?

THE WITNESS: No.

(RT, Vol. I, at pp. 60-61.) Appellant claims that, "[w]hen the ALJ sustained the Department's objections, apparently under some Fifth Amendment concept, this was highly prejudicial, disallowed by the Courts and should lead to reversal in this instance." (App.Cl.Br. at p. 9.)

The Board is unmoved by appellant's argument for two reasons. First and foremost, as the Department noted during closing argument, appellant did not raise this specific argument until its closing brief in this appeal. "An argument raised for the first time in a reply brief need not be addressed." (*Prince v. United Nat. Ins. Co.* (2006) 142 Cal.App.4th 233, 238 [47 Cal.Rtpr.3d 727] [citations omitted].) "[A] litigant may not change his or her position on appeal and assert a new theory. To permit this change in strategy would be unfair to the . . . opposing litigant." (*Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316 [88 Cal.Rptr.2d 758] [citations omitted]; see also *American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453 [13 Cal.Rptr.2d 432] ["Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument."].) As such, consideration of this argument at this juncture would be

improper.

Secondly, even if the Board were to consider appellant's argument, we are not convinced of its merit. As discussed above, prior to the line of testimony at issue here, the minor had already testified that, before the evening in question, he had never used his fake ID to purchase alcohol at the licensed premises. (RT, Vol. I, at p. 58.) Whether he had used the fake ID at any other licensed premises is wholly irrelevant to appellant's defense. A defense under section 25660 is specific to the licensee and his or her employees. Therefore, the only error we find in the ALJ's decision regarding the testimony at issue was overruling the Department's relevancy objection to begin with. (RT, Vol. I, at p. 61.) But, because the testimony that was allowed has no practical bearing on this appeal, that error was harmless.

As to question (2), the Board shares appellant's concern about the ALJ's finding that the minor "testified that he had not shown fake ID or purchased alcohol at the Licensed Premises" (Findings of Fact ¶ 10) because it is only partially accurate. While the minor *did* testify that — obviously prior to the evening in question — he had never, to his recollection, purchased alcohol at the licensed premises (RT, Vol. I, at pp. 58, 61), we can find no basis for the ALJ's finding that the minor indicated he never used his fake ID at the Circle K. Indeed, the minor was clear that he had shown his fake ID to the clerk approximately two years prior to the evening in question in order to purchase tobacco. (RT, Vol. I., pp. 58-59.)

Regardless, while the first portion of the ALJ's finding appears to be mistaken, the ALJ expressly remedied his mistake by having subsequently found — and correctly so — that, "[o]n cross, [the minor] conceded that he may have shown one of the Arizona IDs two years earlier in order to buy tobacco." (Findings of Fact ¶ 10.) Thus,

despite his initial mistake, it appears that the ALJ considered the fact that the minor had previously shown the clerk fake ID in order to purchase tobacco in making his overall assessment and, to the extent the ALJ's mistake constitutes error, that error was harmless. The minor's story — that he had not previously shown his fake ID to purchase *alcohol* at the licensed premises — was consistent from the evening in question through his testimony on the first day of the administrative hearing. (See Exhibit 9; RT, Vol. I, at pp. 57-59.)

Next, appellant takes issue with the ALJ's assessment of what he termed the "real question" of the case — specifically, whether the minor "used a fake I.D. in connection with the February 28, 2014 sale." (App.Br. at p. 6.) As a result of the ALJ's alleged mis-classification of the pertinent issue, appellant claims, the ALJ made improper credibility determinations and findings concerning whether the minor had previously shown the clerk bona fide proof of majority. (*Ibid*.) These compounded errors, appellant asserts, negate the fact that appellant had successfully raised a section 25660 defense. (*Id*. at pp. 4-5.)

We find appellant's concerns to be only marginally valid. The Board agrees that the ALJ's statement of the issue of the case seems to focus exclusively on the presentation — or lack thereof — of proof of majority during the transaction which took place on February 28, 2014. This seemingly narrow interpretation of the question ignores the notion that "[t]he seller can claim reliance on a false governmentally issued identification purporting to show that the minor is of legal age (Bus. & Prof. Code §25660) previously displayed to the seller." (*Circle K Stores, Inc.* (2007) AB-8579, at p. 3; see also *Lacabanne*, *supra*, at p. 190 ["The Attorney General in an earlier opinion suggested that [the 1959 omission of the words 'immediately prior' from section 25660]

has restored the law to the situation where a licensee may rely upon a prior exhibition of the evidence of majority and identity.".) However, while the notion may not be evident in the ALJ's statement of the question presented, the remainder of his opinion reflects that he considered the appropriate issue surrounding appellant's section 25660 defense. Specifically, the ALJ concluded that "the Respondent failed to prove that [the minor] showed a bona fide ID *in the past*." (Conclusions of Law ¶ 7, emphasis added.) Hence, while appellant no doubt disagrees with the ALJ's conclusion, his statement of the conclusion establishes that he did consider whether the minor had shown the clerk bona fide proof of majority in the past.

We turn now to the question of whether appellant successfully raised a section 25660 defense. Put another way, is the Department's determination that appellant did *not* successfully raise the defense supported by substantial evidence? When an appellant contends that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, 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. (Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Masani*, *supra*, at p. 1437; *Lacabanne*, *supra*, at p. 185.) "Substantial evidence" is relevant evidence which reasonable minds would accept as support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474,

477 [71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Ct.* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

In this case, in light of the ALJ's credibility determinations and factual findings, the only time the clerk saw — or even could have seen[3] — the minor's false identification was when the minor produced it to falsely establish that he was eighteen years old in order to purchase tobacco[4] from the clerk approximately two years earlier. (RT, Vol. I, at pp. 58-59.) The defense provided by section 25660, as it relates to the accusation at issue in this case, applies only when a clerk has relied or previously relied on bona fide proof of majority provided in any transaction forbidden by Business and Professions Code section 25658. Section 25658 applies, quite exclusively, to the illegal sale, furnishing or giving away of alcoholic beverages to persons under 21. (Bus. & Prof. Code § 25658, subd. (a).)

The Board's task in interpreting pertinent statutes such as these is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. (*Los Angeles Unified School Dist. v. Garcia* (2013) 58 Cal.4th 175, 186 [165 Cal.Rptr.3d 460]; *Masani*, *supra*, at p. 1438.) "To determine the intent of legislation, we first consult the words themselves giving them their usual and ordinary meaning. Where the statutory wording is clear a court 'should not add or alter [it] to accomplish a purpose that does not appear on the face of the statute or from its legislative history.' " (*Masani*, s*upra*, at

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[3]We include this line because, although the ALJ curiously failed to make a finding to this effect, the minor — who the ALJ deemed to be credible — testified that he had shown *this clerk* (Suwan) his false Arizona ID to purchase tobacco approximately two years prior to the administrative hearing. (RT, Vol. I, at p. 59.)

[4]As of the date of this opinion, the current minimum legal age to purchase tobacco products in the State of California is 18. (See, e.g, Bus. & Prof. Code § 22952, et seq.)

p. 1438, citations omitted.) This is simply because “the language is generally the most reliable indicator of legislative intent.” (*Garcia*, *supra*, at p. 186, quoting *City of Alhambra v. County of Los Angeles* (2012) 55 Cal.4th 707, 718-719 [149 Cal.Rptr.3d 247].) Moreover, "[w]here two statutes touch upon a common subject, we must construe them with reference to each other and seek to harmonize them in such a way that neither becomes surplusage." (*Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 440 [66 Cal.Rptr.3d 120], citations omitted.)

Based on a simple reading of the statutory defense provided in section 25660 in conjunction with the charge of section 25658, it is apparent that, for a clerk who sells alcohol to a minor to be able to rely upon the minor's showing of proof of majority in a previous transaction, the nature and purpose of the previous showing must have been to establish that the minor was of the appropriate age to purchase alcohol — *i.e.*, 21 years of age. Because there is no credible evidence in the record that the clerk ever checked the minor's identification to verify that the minor was 21 years old — as opposed to 18 — there is no evidence in the record to suggest that the clerk was justified in relying on the minor's prior showing of proof of majority in order to sell him alcohol on February 28, 2014. Since the clerk's reliance was unjustified in the first place, there was no reason for the ALJ to determine whether or not said reliance was reasonable. Overall, the Department's denial of appellant's section 25660 defense is supported by substantial evidence.

II

Appellant contends the Department's penalty is excessive and an abuse of discretion. Appellant alleges the ALJ failed to adequately consider the fact that appellant fired the clerk on the date of the alleged violation, and the fact that appellant

had a training program for its employees in making his penalty determination. (App.Br. at pp. 7-8.) Had the ALJ appropriately taken these factors into consideration, appellant seems to argue, he would not have imposed a penalty of 15 days' suspension.

The Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]) but will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd.* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Rule 144 sets forth the Department's penalty guidelines and provides that higher or lower penalties from the schedule may be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances. (Cal. Code Regs., tit. 4, § 144.) Mitigating factors provided by rule 144 include the length of licensure at the subject premises without prior discipline, positive action taken by the licensee to correct the problem, and documented training of the licensees and employees.

Notably, rule 144 itself addresses the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

Penalty Policy Guidelines:

The California Constitution authorizes the Department, in its

> discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

An administrative agency's decision need not include findings regarding mitigation absent a statute to the contrary. (*Vienna v. Cal. Horse Racing Bd.* (1982) 133 Cal.App.3d 387, 400 [184 Cal.Rptr. 64]; *Otash v. Bur. of Private Investigators* (1964) 230 Cal.App.2d 568, 574-575 [41 Cal.Rptr. 263].) Appellants have not identified any statute with such requirements. Findings regarding the penalty imposed are not necessary as long as specific findings are made that support the decision to impose disciplinary action. (*Williamson v. Bd. of Med. Quality Assurance* (1990) 217 Cal.App.3d 1343, 1346-47 [266 Cal.Rptr. 520].)

In the instant matter, the ALJ found as follows with regard to the penalty:

> The Department requested that the Respondent's license be suspended for a period of 15 days. The Respondent did not recommend a penalty in the event that the accusation were sustained. The penalty recommended herein complies with rule 144.[fn.]

(Penalty.)

Appellant's position that the ALJ's failure to discuss the specific mitigating factors for which they presented evidence constitutes an abuse of discretion ignores the fact that the penalty guidelines of rule 144 are nothing more than what they purport to be — guidelines. Nothing in rule 144 obliges the Department to apply a mitigated penalty

when one or even all of the mitigating factors are present. Indeed, the language of the rule is discretionary, not mandatory, and clearly anticipates that penalty determinations will be made by the Department on a case-by-case basis. In this instance, the 15-day suspension imposed by the Department coincides with the default penalty recommended by rule 144's Penalty Schedule for a first-time violation of Business and Professions Code section 25658. As such, we see no reason to upset the Department's penalty determination.

ORDER

The decision of the Department is affirmed.[5]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[5]This final decision 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 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.