

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

LOMA LIQUORS, INC.	)	AB-7078
dba Jones Liquor)	
2435 E. Broadway	)	File: 21-66419
Long Beach, CA 90803,	)	Reg: 97040667
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	John P. McCarthy
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	November 4, 1998
	)	Los Angeles, CA
)	

Loma Liquors, Inc., doing business as Jones Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 25 days for appellant's employee selling an alcoholic beverage to an 18-year-old police decoy, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Loma Liquors, Inc., appearing

¹The decision of the Department, dated March 26, 1998, is set forth in the appendix.

through its counsel, Stephen H. Leventhal, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on December 3, 1976. Thereafter, the Department instituted an accusation against appellant charging a violation of Business and Professions Code §25658, subdivision (a).

An administrative hearing was held on February 10, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by officer Jack Dial of the Long Beach Police Department; by Eva Lopez, the decoy; by Paisan Rangikitpho, appellant's president; and by Justino Romero, appellant's clerk who sold beer to the decoy.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as charged and that no defense under Business and Professions Code §25660 had been proven.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: 1) Appellant did not permit the violation, since he did not know of his employee's vision problem which resulted in the employee not seeing the decoy's identification clearly; and 2) the penalty is excessive.

DISCUSSION

I

Appellant contends it cannot be held to have permitted the violation because it did not know of the vision problem that caused employee Romero's inability to read the date of birth on the decoy's identification.

It is well settled by case law that a licensee is vicariously responsible for the unlawful on-premises acts of his employees. (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].)

Appellant argues that Romero's failure to alert his employer to his vision problem was the proximate cause of the violation here and, therefore, appellant should be relieved of liability for Romero's act. We strongly disagree.

It was Romero's lack of care when he could not see, not his lack of disclosure regarding a vision problem, that was the proximate cause of the illegal sale to a minor. If Romero could not see the date of birth on the decoy's license, he showed a careless disregard for the law and his responsibility under it when he sold beer to the decoy without ascertaining her age. Romero was not prevented from conforming to the law even if he could not see well. He could have asked for help reading the date or he could have refused to sell alcohol to the decoy since he could not ascertain the decoy's correct age. Romero's failure to tell appellant's president about his alleged vision problem does not relieve appellant of its imputed liability for Romero's illegal acts.

II

Appellant contends the penalty imposed is excessive in light of its many years without any disciplinary action.

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 spite of appellant's many years without discipline, this sale to a decoy was appellant's second sale to a minor in less than a month's time. Additionally, the clerk who sold the alcoholic beverage in each case was Romero. Appellant's president admonished Romero after the first violation rather than firing him, succumbing to Romero's pleas for his job. His generosity was ill-rewarded in this case, but his generosity does not mitigate the this penalty. There was no abuse of discretion on the part of the Department.

ORDER

The decision of the Department is affirmed.²

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

²This 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 order 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 of this final order in accordance with Business and Professions Code §23090 et seq.