

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

AB-7760

File: 21-57386 Reg: 00049602

DONNA M. ASMUS and EUGENE R. ASMUS dba Mr. A's Liquor
254 Vista Village Dr., Vista, CA 92083,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: August 17, 2001
Los Angeles, CA

ISSUED OCTOBER 30, 2001

Donna M. and Eugene R. Asmus, doing business as Mr. A's Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 25 days, with five days thereof stayed for a probationary period of one year, for appellant's clerk selling an alcoholic beverage to a person under the age of 21 (a police decoy for the San Diego County Sheriff's Department), 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 appellants Donna M. and Eugene R. Asmus and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon Logan.

¹The decision of the Department, dated January 25, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on December 11, 1978.

Thereafter, the Department instituted an accusation against appellants charging that, on May 24, 2000, their clerk, Stacy Wagner, sold an alcoholic beverage (a 32-ounce bottle of Budweiser beer) to 19-year-old Matthew Coombs.

An administrative hearing was held on December 15, 2000. Initially, appellant Eugene Asmus (Asmus), representing himself and co-licensee Donna Asmus, stipulated to the truth of the allegations in the accusation [RT 5]. Asmus also waived all defenses, the Administrative Law Judge (ALJ), before they had gone on the record, having explained to Asmus "all his defenses under Rule 141" The ALJ then stated that, "Based on Mr. Asmus's stipulation regarding Count 1, I am going to find that the Department has met its burden of proof." The Department introduced copies of the accusation and documents regarding a prior discipline, and they were received into evidence.

Thereafter, Asmus testified, reading a statement asking the ALJ to consider a penalty less than a 25-day suspension. He stated that he felt a 25-day suspension was unfair to the owner of a small business, since such a suspension would require him to lay off seven employees and he would probably have to close the business which he had run for 30 years. Asmus also pointed out that the charges against the employee had been dropped, that he consistently instructed his employees not to sell to a person who appeared to be 30 years of age or younger, and that 40 percent or more of his monthly business was made up of alcohol sales. The Department then recommended a 25-day suspension, and the ALJ closed the hearing. [RT 13.]

A few minutes later, the ALJ went back on the record to let Wagner, the clerk, testify. Asmus indicated that he wanted the clerk to explain what happened the night of the sale. Department counsel objected, stating that if Wagner testified, there would be no stipulation, and the Department would have to cross-examine Wagner and present two witnesses of its own. The ALJ, saying he wanted Asmus to have "his full day in court," allowed the clerk to testify.

Wagner testified regarding the circumstances of his admitted sale to the minor. The Department then presented the testimony of San Diego County deputy sheriff Henry Ramos in rebuttal and to authenticate the police report that it offered into evidence. The report was included in the record only as "administrative hearsay." The ALJ noted, for the record, that the minor was present at the hearing that day, although he did not testify.

Subsequent to the hearing, the Department issued its decision which determined that the sale had occurred as charged in the accusation, that appellants had waived all defenses, and that Asmus's argument presented justification for some mitigation of the 25-day penalty requested by the Department. In Determination III., the ALJ stated:

"A. Mr. Asmus' argument for mitigation of [appellants'] penalty is more persuasive [than Wagner's explanation].

"B. Since the May 24, 2000 sale was [appellants'] second violation of Business and Professions Code Section 25658(a) within 36 months, the Department was well within its discretion to recommend the customary penalty for such a violation: a 25-day suspension of [appellants'] license. However, the Department does not have any interest, or desire, to put seven of [appellants'] employees out of work for 25 days.

"C. In imposing the penalty for this case, the Administrative Law Judge has considered the Department's duty as a licensing agency to protect public welfare and morals, and the consequence that a twenty-five day suspension of [appellants'] license will have on [appellants'] employees."

The ALJ ordered the license suspended for 25 days, with five of the days stayed for one year, the five-day stay becoming permanent provided no cause for discipline occurs during that year. Appellants have filed a timely appeal in which they contend the penalty is excessive.

DISCUSSION

Appellants contend the penalty is excessive in light of the circumstances of the sale described by Wagner and the adverse effect a 20-day suspension would have on appellants' business and the seven employees of the business who would have to be laid off.

Asmus, representing appellants in this appeal without the aid of a lawyer, filed only a short letter in place of a brief, and was not able to attend the oral argument for health reasons. His letter generally reiterates the concerns he expressed at the administrative hearing and asks that the penalty be reduced.

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 ALJ did reduce the penalty recommended by the Department, but only by five days, leaving a still-substantial 20-day suspension. Curiously, though, the penalty reduction was based on the financial impact the penalty would have on the licensee's employee's, a factor the Department is ordinarily unwilling to consider. The

Department apparently did not consider appellants' relatively good record over 22 years as a factor warranting any further reduction.² We doubt whether the seven employees who will be laid off will see 20 days' suspension as appreciably better than 25 days' suspension in terms of their ability to survive without pay.

This violation was the result of a decoy operation, although nothing in the accusation or the Department decision indicate that. At the hearing, Asmus stipulated to the truth of the charge in the accusation, and then, based on ALJ Lo's explanation to him of the Rule 141 defenses, waived all defenses he might have. The broad waiver of *all* defenses by a layman after only a few minutes of explanation about Rule 141 raises some concern about whether that waiver was made knowingly and voluntarily, but there is nothing to indicate it was not.

Under the circumstances, we cannot say that the Department's penalty order was an abuse of discretion.

ORDER

The decision of the Department is affirmed.³

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

²Appellants had three other sale-to-minor violations since being licensed on December 11, 1978: on February 5, 1988, March 9, 1990, and November 12, 1997.

³This 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.