ISSUED JULY 18, 1996

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

JIRAYIR SENOCAK and	)	AB-6583
LINDA SENOCAK	)	
dba Linda's Liquor & Deli	)	File: 21-185671
1026 Taraval Street	)	Reg: 94031288
San Francisco, CA 94116	)	Reg: 95032551
Appellants/Licensees,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	Ruth S. Astle
	)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	June 5, 1996
______________________________________	)	Sacramento, CA

Jirayir Senocak and Linda Senocak, doing business as Linda's Liquor & Deli (appellants), appealed from two decisions of the Department of Alcoholic Beverage Control[1] which unconditionally revoked appellants' off-sale general license for appellants' employee and co-appellant Linda Senocak having sold and permitted the sale of alcoholic beverages to persons under age 21, 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,

[1]The two decisions of the department were both dated September 21, 1995, and are set forth in the appendix. The two matters were consolidated for hearing before the administrative law judge. The appeals board also has consolidated the decisions for review.

subdivision (a).

Appearances on appeal included appellants Jirayir Senocak and Linda Senocak, appearing through their counsel, Dale V. Thomas; and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on April 21, 1986. Thereafter, the department instituted an accusation against appellants on October 14, 1994 (Reg. 94031288). The department instituted another accusation against appellants on April 21, 1995 (Reg. 95032551). Both accusations arose from alleged violations of selling alcoholic beverages to persons under the age of 21 years.

An administrative hearing with regard to both accusations was held on August 8, 1995, at which time oral and documentary evidence was received. At that hearing, it was established that co-appellant Linda Senocak,[2] and on a different occasion, her employee, had sold alcoholic beverages to minors on four occasions in 1994 and once in 1995; that appellant had pleaded nolo contendere to, and thereby was convicted of, a violation of Business and Professions Code §25658, subdivision (a)--sales to minors; and that appellant had paid a fine in lieu of serving a 15-day suspension following an accusation of sales to a minor (decoy) in 1986.

---

[2]Apparently co-licensee Jirayir Senocak died approximately five years previously. However, the license remains in his name and that of Linda Senocak as co-licensees. For convenience, the singular use of the term "co-appellants" will be used in this review.

Subsequent to the hearing, the department issued its decisions determining that appellant had permitted, and personally sold, alcoholic beverages to persons under the age of 21. The department's decision imposed a penalty of revocation of appellant's license. On October 18, 1995, appellant filed a Petition for Reconsideration with the department pursuant to Government Code §11521 and Business and Professions Code §24211, which was denied on October 23, 1995. Appellants thereafter filed a timely notice of appeal.

In their appeal, appellants raised the following issues: (1) Count I of the accusation for Reg. 94031288 was subject to the defense of Business and Professions Code §25660, in that the minor in that case provided identification showing he was over 21, on which appellant reasonably relied; and (2) imposition of the penalty of revocation was an abuse of the department's discretion, being too harsh a penalty where a reasonable alternative remedy was available: allowing appellant to sell her license.

DISCUSSION

I

Appellant contended that she reasonably relied on the identification offered by one of the minors in response to appellant's request for proof of age.

The only statutory defense to a violation of Business and Professions Code §25658, subdivision (a)--sales of alcoholic beverages to minors--is §25660, which states as follows:

"Bona fide evidence of majority and identity of the person is a document

> issued by a federal, state, county, or municipal government, or subdivision or agency thereof, . . . which contains the name, date of birth, description, and picture of the person. Proof that the defendant-licensee, or his employee or agent, demanded, was shown and acted in reliance upon such bona fide evidence in any transaction forbidden by §25658 . . . shall be a defense to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon."

The licensee bears the burden of proving this defense (Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 739]), and must show not only that the identification was asked for, but also inspected and a good faith determination made that it identified the person offering it. (5501 Hollywood v. Department of Alcoholic Beverage Control (1957) 155 Cal.App.2d. 748 [318 P.2d 820,823]).

There was no testimony indicating what appellant looked for when shown the identification in this instance; appellant indicated merely that she saw both the photograph and the date of birth [R.T. 79]. Appellant did say that she "did not know it [the identification]] was forged because this I.D. was right. It was not my problem before, you know" [R.T. 80]. The administrative law judge, who observed the minor involved in this issue, found that "The description on the license did not match. Nadler [the minor] is shorter, lighter in weight and does not have hazel eyes" [finding I in Reg. 9412192]. The finding regarding the defense is supported by substantial evidence and appellant's contention is rejected.

//

//

//

//

//

II

Appellant argued that revocation of the license is an abuse of the department's discretion. Appellant contended that the case of Raab v. Department of Alcoholic Beverage Control (1960) 177 Cal.App.2d 333 [2 Cal.Rptr. 26], is "virtually indistinguishable from" appellant's case, but that the penalty in Raab was much less severe; therefore, according to appellant, the penalty in the present case appears to be an abuse of discretion. Appellant places too much reliance on the similarity between her case and that of Raab. While it would be reasonable to assume that penalties in similar cases should be similar, the result in one case would certainly not dictate the same result in another case. Penalties in similar cases are factors to consider in examining whether the department's discretion has been abused, but the failure to apply the same penalty in this case as that applied in another case does not amount to proof of an abuse of discretion.

In addition, appellant argues that revocation of an off-sale license is analogous to the revocation by a city of a licensee's conditional use permit that would have the effect of putting the licensee out of business, citing Korean American Legal Advocacy Foundation v. City of Los Angeles (1994) 23 Cal.App.4th 376, 382 [28 Cal.Rptr.2d 530]. Appellant quotes the Korean American court: "revocation of a use permit could have the effect of putting the licensee completely out of business. It is consequently a very harsh remedy which requires the strictest adherence to principles of due process. Whenever alternate remedies can achieve the same goal, such as the imposition of additional conditions or controls, these avenues ought to be pursued if feasible."

(Korean American Legal Advocacy Foundation, ante, p. 393, fn. 5.) As the department pointed out, Korean American does not really support appellant's argument, since it involved a very different situation of land-use planning and zoning. The holder of a conditional use permit may acquire a vested property right in the permit, a situation that cannot arise with regard to the holding of an alcoholic beverage license. (See Reimel v. Alcoholic Beverage Control Appeals Board (1967) 256 Cal.App.2d 158 [64 Cal.Rptr. 26].) In any case, there was no showing made that revocation of appellant's liquor license would put her out of business.

Although we do not find persuasive appellant's application of the cases cited, we do conclude that the penalty of unconditional revocation in this case was too harsh under the circumstances and amounted to an abuse of discretion by the department. The department's decision in Reg. 94031288 states, in Finding of Fact VI that: "[Appellant] has a shoplifting problem. She believes that if she does not sell the liquor to the minors, they will steal it. Respondent clearly is not able to exercise control over her privilege to sell alcoholic beverages." These statements have no basis in the record that this board can find, other than a reference on pages 81-82 that appellant had a shoplifting problem in her store. Nowhere is there any evidence that shows, or that even allows a reasonable inference, that appellant believed that minors would steal liquor if she did not sell it to them. Nor can we find any evidence that would provide a basis for inferring that appellant "clearly is not able to exercise control over her privilege to sell alcoholic beverages." If there is any basis in the record for these inferences, the department has failed to provide in its decision any analysis of the facts

//

//

or the law that would allow us to follow the reasoning that led to these inferences.[3]

With regard to Reg. 95032551, the department said in Findings of Fact II that appellant "was involved in sales to minors once in 1986 and four times in 1994. Respondent is a danger to the public. She had absolutely no control over the sale of liquor to minors and it can only be inferred that she knows she is violating the law and does not care." We believe that the four sales to minors in 1994 should not have been used as a basis for discipline in this consolidated matter because those were the four instances that were involved in the other case consolidated with this one, Reg. 94031288. Since both cases were heard and decided at the same time, it was unfair

[3]This is a serious deficiency and one that occurs all too often, impeding the ability of this board and any subsequent reviewing court to properly evaluate the record on review. "[A] findings requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions. [Citations omitted.] In addition, findings enable the reviewing court to trace and examine the agency's mode of analysis. [Citations omitted.] ¶ Absent such roadsigns, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency. [Citations omitted.] Moreover, properly constituted findings enable the parties to the agency proceeding to determine whether and on what basis they should seek review. [Citations omitted.] They also serve a public relations function by helping to persuade the parties that administrative decision-making is careful, reasoned, and equitable." (Topanga Assn. For a Scenic Commity v. County of Los Angeles (1974) 11 C.3d 506, 516-517 [113 Cal.Rptr. 836, 522 P.2d 12].)

and improper for the department to use the non-final findings from one case as aggravation in the other.

The excoriating language used and the denunciatory inferences that the department draws are again, as in Reg. 94031288, unsupported by anything we find in the record. Again, the department has failed to provide any analysis that would indicate to any appellate body the basis the department used for arriving at its conclusion. Instead of analysis, the department has simply drawn a deprecatory picture of appellant wilfully selling alcoholic beverages to any minor who wanders into her deli, and then appears to have based its penalty on that picture, rather than on the proven violations. While the department is entitled to draw reasonable inferences from the evidence, those that the department has drawn here are not reasonably supported by the record. We are compelled to reverse this penalty and remand the matter to the department to allow it to impose a less draconian alternative.[4]

---

[4]We do not stand alone in considering this unconditional revocation too severe under the circumstances of this case. The usual penalty, according to the department's own Instructions, Interpretations and Procedures Manual (IIP), is a suspension for 15 days, to be increased "For each accusation involving persons under 21 filed within twelve months . . . ." (IIP L227.1). Although there were several violations here, the department's guidelines provide for this situation by increasing the suspension, not imposing unconditional revocation.

The department's manual, of course, does not limit the exercise of constitutional discretion by the department, but it "constitutes evidence of the Department's policy regarding penalties and thus of the manner in which the Department's discretion has probably been exercised in other cases, and in our opinion this is an appropriate matter for us to consider in determining whether the Department acted here within the limits of its discretion." (Harris v. Alcoholic Beverage Control Appeals Board (1965) 62 Cal.2d 589 [400 P.2d 745, 43 Cal.Rptr. 633, 638].)

In reversing the penalty and remanding it to the department for reconsideration, this board is well aware of its responsibility as an appellate body not to substitute its judgement for that of the department. The department's discretion, however, is not unlimited. It must be "exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." (Harris v. Alcoholic Beverage Control Appeals Board (1965) 62 Cal.2d 589 [400 P.2d 745, 43 Cal.Rptr. 633, 637].) Part of this board's responsibility is to see that the department does not abuse its discretion, but uses it to meet the "ends of substantial justice."

CONCLUSION

The decision of the department is affirmed, but the penalty is reversed and the matter is remanded to the department for reconsideration of the penalty.[5]

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

DISSENT FOLLOWS

[5]This final order is filed as provided by Business and Professions Code §23088 and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.

DISSENT OF BEN DAVIDIAN

I respectfully dissent from the opinion of the board. I would affirm the department in this matter.

BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD