

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

AB-8739

File: 21-146941 Reg: 06064319

RICHARD ALLEN GREGORY, dba Plaza Liquors & Fine Wines
19 West Napa Street, Sonoma, CA 95476,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Robert R. Coffman

Appeals Board Hearing: July 10, 2008
San Francisco, CA

ISSUED OCTOBER 8, 2008

Richard Allen Gregory, doing business as Plaza Liquors & Fine Wines

(appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked his license for his clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a). This was the third such violation within a period of less than two years.

Appearances on appeal include appellant Richard Allen Gregory, appearing through his counsel, Peter Ottenweller, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew Botting.

¹The decision of the Department, dated August 16, 2007, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on October 7, 1983. On November 22, 2006, the Department filed an accusation against appellant charging that, on September 27, 2006, appellant's clerk, Daniel Filice (the clerk), sold an alcoholic beverage to 16-year-old Barrett Duna. Although not noted in the accusation, Duna was working as a minor decoy for the Department at the time.

At the administrative hearing held on June 7, 2007, documentary evidence was received, and testimony concerning the sale was presented by Duna (the decoy), by Department investigator Sarah Waddell, and by the clerk. Appellant Richard Gregory and his son, John Gregory, who manages the premises, also testified.

The evidence presented showed that the decoy selected a six-pack of Budweiser beer from the cooler and took it to the counter. The clerk asked to see the decoy's identification and the decoy provided his valid California driver's license bearing a blue stripe stating "PROVISIONAL UNTIL AGE 18 IN 2007" and a red stripe with the words "AGE 21 IN 2010."

The clerk, who had cataracts in both eyes, used a magnifying glass to examine the license, returned the license to the decoy, and sold him the beer. After leaving the premises with the beer, the decoy returned and identified the clerk as the seller.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established. Appellant has filed an appeal making the following contentions: (1) The violation was neither willful nor intentional and (2) the Department abused its discretion in imposing a penalty of outright revocation.

DISCUSSION

I

Appellant contends that, because the clerk asked for the decoy's identification and examined it in good faith and with reasonable diligence, he falls under the protection of section 25660. That section provides:

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, including, but not limited to, a motor vehicle operator's license or an identification card issued to a member of the Armed Forces, 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, employment, use or permission forbidden by Sections 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.

Appellant relies on language from two appellate court decisions, *Keane v. Reilly* (1955) 130 Cal.App.2d 407 [279 P.2d 152] (*Keane*) and *Lacabanne Properties, Inc. v. Dept. of Alcoholic Beverage Control* (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734] (*Lacabanne*). In *Keane* the court said that a seller of alcoholic beverages was protected by section 25660 "[i]f he acts in good faith and with diligence" when inspecting identification. (*Keane*, at p. 412.) *Lacabanne* says that a seller is protected as long as he or she makes "a diligent inspection of the documentary evidence of majority and identity, at or about the time of the sale," exercising "the caution which would be shown by a reasonable and prudent person in the same or similar circumstances." (*Lacabanne*, at p. 189.)

What appellant misses, or ignores, is the requirement of section 25660 that the identification presented show the holder's "majority and identity." The decoy's driver's license, in contrast, showed clearly that he had *not* reached "majority," that is, the age at which it would be legal for him to purchase alcoholic beverages.

The cases cited by appellant confirm that the protection of the statute extends only to identification showing that the holder is at least 21. In the language preceding that relied on by appellant, the court in *Keane, supra*, 130 Cal.App.2d at p. 412, said:

Where the evidence shows that *a document apparently complying with section 61.2(b)* [the predecessor to section 25660] has been submitted to him, and he has testified that he believed it was an official identification, the board and the courts are without power to suspend the license in the absence of a supported finding that the bartender acted in bad faith and without due diligence. [Italics added.]

Lacabanne, supra, 261 Cal.App.2d at p. 189, also provides that protection exists under section 25660 only when the seller has inspected identification that shows the holder is old enough to legally purchase alcoholic beverages:

The licensee has the burden of proving the defense that *evidence of majority and identity was demanded, shown and acted on as prescribed by the provisions of section 25660*. [Italics added.]

In both *Keane* and *Lacabanne*, the underage purchasers presented identification cards showing them to be at least 21 years of age. That fact is crucial to a defense relying on section 25660 and distinguishes those cases from the present one. Here the clerk was presented with an identification showing the holder was less than 21 years old. The clerk may have examined the identification in good faith and with diligence, but his mistaken belief as to the decoy's age did not transform the identification into one that shows the decoy may legally purchase alcoholic beverages. Good faith and diligence are not enough; good faith and diligence must be applied to an identification that shows the holder to be at least 21 years old.

II

Appellant contends the Department abused its discretion in imposing the penalty of revocation because it failed to consider the evidence of mitigation presented at the hearing. The evidence alleged to have been disregarded included:

- No violations at the premises for the first 19 years of this licensee's ownership
- After a sale-to-minor violation in 1999, five years passed before there was another violation
- The clerk showed that he was trying to comply with the law by asking for and examining the decoy's identification
- The licensee, his son, and the clerk testified that neither the licensee nor his son knew the extent of the clerk's vision problem prior to this violation
- The clerk was trained and counseled by the store manager after selling to a minor in March 2006
- The licensee and the premises have an excellent reputation in the community
- The licensee wishes to transfer the license, and would attempt to do so if the revocation were stayed with a period of time allowed to effect a transfer

Appellant also asserts that the Department improperly treated his failure to transfer the license before the third violation as a factor in aggravation. Determination 4 of the Department decision states:

Respondent requests that if the proposed order provides for revocation of the license, that it be stayed so that he may transfer the license to a person or persons acceptable to the Department. The answer is that respondent has had more than ample opportunity to correct the violations occurring the past several years but has failed to take adequate steps to do so. Respondent has not been active in the business for approximately ten years. If he wanted out of the business he should have sold it long ago, rather than ignoring it while it suffered an inordinate number of violations.

Appellant argues the Department has acted arbitrarily in denying him the opportunity to sell the license because it could be said of any licensee facing revocation that he or she ought to have transferred the business before the third sale-to-minor violation.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage 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 Beverage Control Appeals Bd. & Haley* (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 Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

The decision specifically notes that "Evidence in mitigation (Findings 9 and 11) was considered in formulating the appropriate penalty in this matter." (Determination 3.) That the Department may not have considered all the evidence presented to be equally indicative of mitigation, does not mean that it did not consider the evidence.

At oral argument before this Board, appellant argued that the Department's discretion must be uniformly applied through the use of standards that differentiate between a case warranting outright revocation and one which deserves a stayed revocation to allow transfer of the license. Appellant asserted that *Harris, supra*, 62 Cal.2d 598, requires the Department to use "standards" to determine the penalty to be imposed.

In *Harris*, however, we can find no requirement for set standards the Department must use to differentiate between degrees of penalty. The only language we can find that appellant might have misconstrued as requiring such standards would be that describing how the discretion of the Department is properly circumscribed:

Although the Department's discretion with respect to the penalty is broad, it does not have absolute and unlimited power. It is bound to exercise legal discretion, which is, in the circumstances, judicial discretion. (*Martin v. Alcoholic Beverage etc. Appeals Board*, 55 Cal.2d 867, 875 [13 Cal.Rptr. 513, 362 P.2d 337].) In *Martin* this court stated, " 'The term "judicial discretion" was defined in *Bailey v. Taaffe* (1866) 29 Cal. 422, 424, as follows: "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to 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, supra*, 62 Cal.2d at pp. 594-595.)

The court's statement that the Department's discretion must be "guided and controlled in its exercise by fixed legal principles," however, cannot be interpreted to require set standards for specific penalties. That would be the antithesis of the Department exercising its discretion.

The Department does have *guidelines* for the imposition of penalties. Section 25658.1, commonly known as the "three strikes law" for alcoholic beverage licenses, provides the following guidance from the Legislature, in subdivision (b):

Notwithstanding Section 24200, the department may revoke a license for a third violation of Section 25658 that occurs within any 36-month period. This provision shall not be construed to limit the department's authority and discretion to revoke a license prior to a third violation when the circumstances warrant that penalty.

Additional guidance regarding penalties is found in the Department's Penalty Guidelines. (Dept. rule 144; 4 Cal. Code Regs., § 144.) These guidelines, however, do not set definitive, inflexible penalties to be imposed in each instance, but provide usual penalties imposed for first offenses, subject to variation to account for mitigating or aggravating circumstances. The Department exercises its discretion with regard to penalties within the confines of due process and equal protection, guided by the provisions cited.

Appellant also pointed out that transfer of a license has been allowed by the Department in cases similar to his. The fact that other licensed premises may have had penalties imposed which are different from appellant's is not relevant to our consideration of whether the Department abused its discretion in imposing the penalty in appellant's case. Each case is individual and must be decided on its own facts.

This Board is limited to determining whether the Department abused its discretion in imposing the penalty in appellant's case. "Under the relevant constitutional

and statutory provisions, the Department is expressly empowered to either suspend or revoke an issued license . . . ; the propriety of the penalty to be imposed rests solely within the discretion of the Department whose determination may not be disturbed in the absence of a showing of palpable abuse." (*Rice v. Alcoholic Beverage Control Appeals Board* (1979) 89 Cal.App.3d 30, 39 [152 Cal.Rptr. 285].)

The fact that the Department did not impose the penalty that appellants would have preferred does not make the penalty an abuse of discretion. While other penalties could also be considered reasonable, outright revocation does not appear to be unreasonable, and thus, this Board is not empowered to interfere with it.

ORDER

The decision of the Department is affirmed.²

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This final order 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 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 section 23090 et seq.