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

AB-9810
File: 21-285768; Reg: 18087175

IN DUCK LEE and JOHN S. LEE,
dba M & P Liquor
2200 South Pacific Avenue,
San Pedro, CA 90731,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 5, 2019
Sacramento, CA

ISSUED DECEMBER 17, 2019

Appearances: *Appellants:* Dean R. Lueders, of ACTlegally, as counsel for In Duck Lee and John S. Lee,

Respondent: Joseph J. Scoleri III, as counsel for the Department of Alcoholic Beverage Control.

OPINION

In Duck Lee and John S. Lee, doing business as M & P Liquor, appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 25 days because their clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

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[1]The decision of the Department under Government Code section 11517(c), dated April 25, 2019, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on August 18, 1993. There is one prior instance of departmental discipline against the license.

On July 17, 2018, the Department filed a single-count accusation against appellants charging that, on April 22, 2018, appellants' clerk, Emanuel Rodriguez (the clerk), sold an alcoholic beverage to 18-year-old Jorge Hernandez (the decoy). Although not noted in the accusation, the decoy was working for the Los Angeles Police Department (LAPD) at the time.

At the administrative hearing held on September 12, 2018, documentary evidence was received and testimony concerning the sale was presented by the decoy; Department Supervising Agent-in-Charge, Bradley Beach; and LAPD Officers Brad Bautista and Romarico Macapagal. Appellants presented no witnesses.

Testimony established that on April 22, 2018, Ofcr. Macapagal entered the licensed premises, followed shortly thereafter by the decoy. The decoy went to the cooler where he selected a 16-oz. bottle of Bud Light beer. He took the beer to the counter and set it down. The clerk asked for the decoy's identification. The decoy handed him his California identification card which had a portrait orientation, contained his correct date of birth — showing him to be 18 years old — and a red stripe indicating "AGE 21 IN 2020." (Exh. 7.)

The clerk looked at the ID and then completed the sale. The decoy exited the premises and notified the officers about what had occurred. The decoy re-entered the premises with the officers who identified themselves to the clerk. One of the officers asked the decoy who sold him the beer and the decoy pointed to the clerk and said that

he had. A photo of the clerk and decoy was taken (exh. 6) and the clerk was cited.

The administrative law judge (ALJ) issued his proposed decision on October 6, 2018, sustaining the accusation and recommending a 15-day suspension. The Department declined to adopt the proposed decision on November 28, 2018. The parties were advised that the Department had considered but rejected the proposed decision and would decide the matter itself pursuant to Government Code section 11517(c).

The parties were invited to submit written arguments including, *inter alia*, what mitigating or aggravating factors should affect the penalty to be imposed, and what penalty would be appropriate for the violations found in the ALJ's proposed decision. Both appellants and counsel for the Department submitted comments.

On April 25, 2019, the Department issued its Decision Under Government Code section 11517(c), sustaining the accusation and imposing a 25-day suspension.

Appellants then filed a timely appeal contending the penalty is unreasonable and that the Department abused its discretion by considering improper factors in aggravation.

DISCUSSION

Appellants contend the penalty is unreasonable and that the Department abused its discretion by considering a letter of warning and a non-final matter as factors in aggravation. (AOB at pp. 2-4.)

The Board will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) "'Abuse of discretion' in the legal sense is defined as

discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.]" (*Brown v. Gordon*, 240 Cal.App.2d 659, 666-667 (1966) [49 Cal.Rptr. 901].)

Rule 144 provides:

> In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act (Bus. and Prof. Code Sections 23000, *et seq*.), and the Administrative Procedures Act (Govt. Code Sections 11400, *et seq*.), the Department shall consider the disciplinary guidelines entitled "Penalty Guidelines" (dated 12/17/2003) which are hereby incorporated by reference. Deviation from these guidelines is appropriate where the Department in its sole discretion determines that the facts of the particular case warrant such a deviation - such as where facts in aggravation or mitigation exist.

(Cal. Code Regs., tit. 4, § 144.)

Mitigating factors provided by the rule include, but are not limited to: the length of licensure without prior discipline, positive actions taken by the licensee to correct the problem, cooperation by the licensee in the investigation, and documented training of the licensee and employees. Aggravating factors include, but are not limited to: prior disciplinary history, prior warning letters, licensee involvement, premises located in high crime area, lack of cooperation by the licensee in the investigation, appearance and actual age of minor, and a continuing course or pattern of conduct. (*Ibid*.)

The Penalty Policy Guidelines further address the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

> **Penalty Policy Guidelines:**
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> 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.

(*Ibid*.)

In the decision, the Director addresses the issue of penalty, and his consideration of factors in aggravation and mitigation, at length:

PENALTY

> The Department requested that the Respondents' license be suspended for a period of 30 days, arguing that an aggravated penalty was appropriate based on the 2000 sale-to-minor violation, the warning letter, and the pending sale-to-minor violation from 2017. The Respondents argued that their 24 years of operation with only one violation 17 years ago warranted a mitigated penalty. Accordingly, the Respondents recommended a 10-day suspension, all stayed.
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> A letter of warning is expressly listed as an aggravating factor in Rule 144. In the present case, the Department presented evidence that it sent, and Respondents received, a letter of warning in 2014. (Exhibits 4 and 5.) As observed by Respondents, a warning letter does **not** establish that a violation occurred. However, it does place the recipient on notice that a potential problem may exist and that remedial action may be necessary. In this case, the Department advised the Respondents that it had received information about an alleged sale of alcoholic beverages to a minor at the Licensed Premises.
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> During the hearing, the Department introduced a certified copy of a proposed decision concerning an alleged sale-to-minor violation from 2017. At the time of the hearing, this proposed decision had **not** been adopted by the Department. (Exhibit 3.) As indicated above, the Department then attempted to "prove up" the 2017 incident (either in whole or in part) by asking questions about it in this case. Since the prior case is not final, it cannot be considered a second strike under section 25858.1. However, the Department argued that elements of the violation should be used as aggravating factors in this case. For the reasons

stated above, the underlying evidence relating to the alleged prior sale will not be considered in formulating the penalty in this case.

The existence of the prior accusation and the Respondents' awareness of it are, however, properly considered for purposes of notice of a problem. The alleged violation in that prior matter occurred on November 11, 2017. The accusation was registered on March 28, 2018 (Exhibit 9), and it was served on Respondents on that same date (Exhibit 10). A Notice of Defense was returned on April 2, 2018, and received by the Department on April 10, 2018 (Exhibit 11). The violation in the instant matter occurred on April 22, 2018. The record is clear that Respondents received notice of the November 11, 2017, alleged violation well-prior to the date of the current alleged violation.

Respondents argue that consideration of the prior accusation would be improper because that matter is not final. As such, it is asserted, the allegations in that accusation are merely allegations. To be clear, the allegation of a sale of alcohol to a minor in registration number 18086708 is not being considered as having been proven. Nor is that accusation being accepted or considered at this time for purposes of whether or not the Department may order revocation of the license under section 26858.1(b).

Rule 144 does not expressly provide that an accusation filed alleging a prior violation is an aggravating factor for purposes of penalty consideration. However, the list of factors in the rule (for aggravation and mitigation) is not exhaustive. Similar to a warning letter, the service of an accusation alleging a violation of law places the recipient on notice that a potential problem may exist and that remedial action may be necessary to address the issue. Indeed, the fact that the Department has determined that the alleged violation rises to the level of formal disciplinary action, rather than simply a letter of warning, indicates that an accusation should be of even greater significance to the recipient in terms of notice of a potential problem and the need to take appropriate corrective measures. As such, exhibits 9, 10, and 11 are being considered here for purposes of notice. As the Department recently stated in *7-Eleven and Yi* (precedential decision19-03-E; designated on April 18, 2019), "Nothing in section 25858.1, or elsewhere, precludes the use of prior actual notice of an alleged violation of section 25658(a), whether by way of verbal or written warning, or of a pending accusation, as an aggravating factor in determining the appropriate level of discipline following a determination that the licensee has subsequently violated the same law." (*Id.* at page 5.)

Within a relatively short period of time prior to the instant alleged

> violation, Respondents have twice been placed on express notice of problems with respect to selling alcoholic beverages to minors. Moreover, the accusation relating to the 2017 alleged violation identifies the very same clerk who made the sale in the instant matter. Respondents presented no evidence that they made any effort to address the identified potential problem following either the 2014 letter of warning or the filing of the accusation with respect to the 2017 alleged violation.
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> By way of mitigation, the Respondents emphasize their disciplinary history—only one violation in 25 years and no violations for the past 17 years. In looking at the totality of the circumstances, the aggravation warranted based on the letter of warning and the prior accusation substantially outweigh the mitigation warranted based on the Respondents' disciplinary history. The discipline ordered below is consistent with Rule 144 and is appropriate in this case.

(Decision at pp. 6-8.)

As extensively explained in the Department's decision, the receipt of a letter of warning or notice of a pending accusation should put a licensee on notice that: (1) the complained-of behavior is reasonably foreseeable in the premises, and (2) a responsible licensee has a duty to prevent that behavior. Failure to take adequate preventive measures, or allowing the continuation of the behavior, shows a continuing course or pattern of conduct — which is a factor in aggravation. As stated in the precedential decision cited in the Department's decision:

> The complete failure to take any reasonable steps to prevent alcoholic beverages being sold to minors, despite having actual notice of a problem, is an aggravating factor that counter-balances any mitigation that may be had from a lengthy history of licensure without discipline.

(*7-Eleven and Yi* (April 18, 2019) precedential decision19-03-E, at p. 5.) We agree with the Department's analysis and see no error in the Department's application of factors in aggravation.

The Board may not disturb a penalty order unless it is so clearly excessive that

any reasonable person would find it to be an abuse of discretion in light of all the circumstances. "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 its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Appellants' disagreement with the penalty imposed does not mean the Department abused its discretion. This Board's review of a penalty looks only to see whether it can be considered reasonable, and, if it is reasonable, the Board's inquiry ends there. The penalty here, and the consideration of factors in aggravation and mitigation in the decision, are within the bounds of the Department's discretion and supported by precedent. "[T]he 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. [Citations.]" (*Rice v. Alcoholic Bev. Control Appeals Bd.* (1979) 89 Cal.App.3d 30, 39 [152 Cal.Rptr. 285].)

The Board is simply not empowered to reach a contrary conclusion from that of the Department — and substitute its own judgment — when, as here, the penalty determination is reasonable and the underlying decision is supported by substantial evidence.

ORDER

The decision of the Department is affirmed.[2]

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[2]This 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.

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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.

APPENDIX

BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE ACCUSATION AGAINST:	File No.: 21-285768
	Reg. No.: 18087175
In Duck Lee, John S. Lee Dba M & P Liquor 2200 S. Pacific Ave San Pedro, CA 90731	
Licensee(s).	

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department on April 25, 2019, for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held on September 12, 2018, before Administrative Law Judge Matthew G. Ainley, the written argument of the parties, and additional evidence considered pursuant to Government Code section 11517(c)(2)(E), and good cause appearing, the following decision is hereby adopted:

The Department seeks to discipline the Respondents' license on the grounds that, on or about April 22, 2018, the Respondents, through their agent or employee, sold, furnished, or gave alcoholic beverages to Jorge Hernandez, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).[1] (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on September 12, 2018. On November 30, 2018, the Director of the Department rejected the proposed decision of the Administrative Law Judge.

FINDINGS OF FACT

1. The Department filed the accusation on July 17, 2018.

2. The Department issued a type 21, off-sale general license to the Respondents for the above-described location on August 18, 1993 (the Licensed Premises).

[1] All statutory references are to the Business and Professions Code unless otherwise noted.

3. The Respondents' license has been the subject of the following discipline:

Date Filed	Reg. No.	Violation	Penalty
05/31/2000	00048944	BP § 25658(a)	15-day susp.

The foregoing disciplinary matter is final. (Exhibit 2.)

4. Jorge Hernandez was born on September 14, 1999. He served as a minor decoy during an operation conducted by LAPD on April 22, 2018. On that date he was 18 years old.

5. Hernandez appeared and testified at the hearing. On April 22, 2018, he was 6'2" tall and weighed 195 pounds. He wore a t-shirt, jeans, and tennis shoes. His hair was short and parted on one side. (Exhibits 6 and 8.) At the hearing he was one inch taller and his hair was cut with a fade on the sides.

6. On April 22, 2018, Ofcr. Macapagal entered the Licensed Premises. Hernandez entered a few moments later, located the refrigerator containing the beer, and selected a 16-oz. bottle of Bud Light beer. Hernandez took the beer to the counter and set it down. The clerk, Emanuel Rodriguez, asked to see his identification. Hernandez showed his identification, still inside the wallet, to Rodriguez. Rodriguez looked at the identification and then proceeded with the sale. Hernandez paid for the beer, after which he exited the store. Ofcr. Macapagal also exited the store to make sure that Hernandez made it safely to the car.

7. Hernandez walked over to the car in which Sgt. Manlove was waiting. He told Sgt. Manlove what had happened, then re-entered the Licensed Premises with various officers. The officers contacted Rodriguez and identified themselves. One of the officers asked Hernandez to identify the person who sold him the beer. Hernandez pointed to Rodriguez and said that he had. A photo of the two of them was taken, after which Ofcr. Macapagal cited Rodriguez.

8. Hernandez had been a decoy approximately 20 times prior to April 22, 2018. Each time, he visited between six and eight locations. He was not nervous while inside the Licensed Premises. All four of the locations Hernandez visited on April 22, 2018 asked to see his identification; the Licensed Premises was the only one that sold alcohol to him.

9. Hernandez appeared his age—18—at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in the Licensed Premises on April 22, 2018, Hernandez displayed the appearance that could generally be expected of a person under 21 years of age under the actual circumstances presented to Rodriguez.

10. Upon review of the proposed decision, counsel for Respondents submitted a letter brief (dated March 15, 2019) arguing that the Department should dismiss the accusation because Hernandez "lied" during the hearing. Specifically, it is alleged that "there is evidence to prove that the minor decoy lied during his testimony. The minor decoy testified that he was not wearing his sunglasses while insider the store and at the time of the alleged transaction. The enclosed video proves that his testimony, which was made under oath, was and is false." (Respondents' March 15, 2019, letter brief.) The video referenced was provided on a DVD, which apparently was not viewable. A second, viewable, copy was provided by letter dated April 5, 2019. The DVD provided on March 15, 2019, is identified as Respondents' Exhibit A; the DVD provided on April 5, 2019, is identified as Respondents' Exhibit B.

11. Supv. Agent-in-Charge Beach identified two documents from the Respondents' base file. The first was an August 19, 2014, letter addressed to the Respondents concerning a purported sale of alcohol to a minor. (Exhibit 4.) The second was an August 14, 2014, acknowledgment of an unidentified letter. (Exhibit 5.) Based on his review of the file and the Department's internal computer system, he testified that the acknowledgment, even though dated before the letter, referred to the letter. The Department's computer system indicated that changes had been made to the letter after it was first prepared, which resulted in a different date being printed on the letter.

12. The Department presented evidence of a second prior accusation filed against Respondents. Exhibit 3 is the proposed decision issued in that matter on August 24, 2018 (registration number 18086708). That matter remains pending as of the date of this decision. At hearing, the Department sought to introduce evidence of the facts underlying the alleged violation in that proceeding. Upon review of this matter pursuant to Government Code section 11517(c)(2)(E), additional documents related to Exhibit 3 were requested. Department counsel provided certified copies of the accusation, the proof of service, and the notice of defense. (Exhibits 9, 10, and 11, respectively.) Respondents objected to these documents being admitted into evidence without the opportunity to present oral testimony or to cross examine Supv. Agent-in-Charge Beach concerning them.

13. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.

4. Cause for suspension or revocation of the Respondents' license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that, on April 22, 2018, the Respondents' clerk, Emanuel Rodriguez, inside the Licensed Premises, sold an alcoholic beverage to Jorge Hernandez, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-9.)

5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with Rule 141(b)(2)[2] and, therefore, the accusation should be dismissed pursuant to Rule 141(c). With respect to Rule 141(b)(2), the Respondents argued that Hernandez's physical appearance and demeanor was that of a person over the age of 21 based on his experience as a decoy, his lack of nervousness, and the fact that all four clerks who saw him that day asked to see identification. This argument is rejected. As noted above, Hernandez's appearance was consistent with his actual age, 18, and, therefore, he displayed the appearance which could generally be expected of a person under 21 years of age. (Finding of Fact ¶ 9.)

6. With respect to Respondents' claim that minor decoy Hernandez "lied" under oath, thus necessitating the dismissal of the accusation, Respondents' contentions are without merit. First, the DVD provided to the Department as "evidence" of this has not been authenticated.[3] While it appears to show Hernandez and the transaction in question, no effort has been made to validate the source or accuracy of the video footage contained on the DVD. Second, this appears to be an effort by Respondents to unfairly disadvantage the Department. If this video footage is indeed from Respondents' store surveillance system, it was wholly within their custody and control at all times. It does not appear that a copy was provided to the Department during discovery and

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[2] All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

[3] "DVD" here refers to both DVDs submitted by Respondents.

Respondents chose to not introduce the video at hearing. No explanation has been given as to why Respondents failed to provide a copy of the video to the Department or why they failed to introduce this evidence at hearing. Moreover, no argument has been presented that this evidence was unavailable at the time of the hearing. Third, by failing to offer this evidence at the hearing, Respondents have deprived the Department of the opportunity to examine witnesses. Finally, Respondents have not actually moved the DVD into evidence. For all of these reasons, the DVD provided by Respondents is not admitted as evidence.

7. Notwithstanding that the DVD is not accepted as evidence in this matter, even if it was properly introduced and admitted, it does not establish that decoy Hernandez "lied" under oath. While his testimony at hearing was that he recalled not wearing his sunglasses inside the store, the video certainly does appear to show him doing so (assuming that the video is a true and accurate recording of the transaction in question). However, since Respondents chose, for whatever reason, to not confront Hernandez with this discrepancy at hearing, it would be speculative to conclude that he lied under oath. It is equally reasonable to conclude that he was merely mistaken. Had he been shown the video at the time, he would have had the opportunity to correct himself, and may have done so.

8. Finally, even if accepted, the DVD does little to advance Respondents' case. Apart from the discrepancy regarding the sunglasses, the video shows that the violation occurred as testified to by the Department's witnesses. Since the selling clerk did not testify, there is no evidence that the clerk was in any way misled, distracted, or confused as to the appearance of the decoy. Respondents simply argue that the accusation must be dismissed. Considering the video supports all other aspects of the minor's testimony concerning the transaction in question, the testimony regarding whether or not he was wearing sunglasses has no bearing on the rest of his testimony.

9. Government Code section 11517(c)(2)(E) authorizes the Department to take additional evidence as part of its review of the proposed decision. Exhibits 9, 10, and 11 are official records of the Department, and official notice of them may be taken in this matter pursuant to Government Code section 11515 and Evidence Code sections 452(d)(1) and 452(c). Pursuant to these authorities, official notice is taken of the accusation (Exhibit 9), proof of service (Exhibit 10), and notice of defense (Exhibit 11) on file with the Department in registration number 18086708. By email dated April 19, 2019, counsel for Respondents objected to the admission of these documents. In the email, counsel requested "the opportunity to present oral testimony from witnesses regarding the documents, the events outlined in the documents, and circumstances surrounding the events outlined in the documents. A further request is made to cross-examine ABC's witness . . . Beach regarding the documents." If such requests were not granted, counsel for Respondents objected to the admission and consideration of the documents "on the grounds that the license [sic] was not permitted the opportunity to present such testimony or conduct cross-examination regarding the documents."

10. Respondents make no offer of proof as to what testimony might be elicited regarding the three documents in question, who the witnesses would be, or how either such testimony or cross-examination of Supv. Agent-in-Charge Beach would have any bearing on or relevance to either the admission or consideration of these official records of the Department. This is particularly so since the records are admitted for a limited purpose, as explained further below, and are not being considered for purposes of establishing the underlying facts related to the alleged violation.

11. At the hearing, counsel for the Department sought to introduce evidence of the facts that formed the basis for the accusation in registration number 18086708. The Administrative Law Judge did not allow the questioning of witnesses concerning what happened in that prior matter. The Department now requests that official notice be taken of two documents as part of the Director's review: (1) the Decoy Operation Results Log for the November 2017 minor decoy operation (Exhibit 12); and (2) the police report related to the November 2017 minor decoy operation conducted at Respondents' licensed premises (Exhibit 13). The Department asserts that these documents are relevant for consideration of the appropriate discipline in this matter as evidence of a prior violation, as showing a continuing course or pattern of conduct, and as notice of a problem at the licensed premises. Except as to the issue of notice, which will be discussed further below, because the prior action is not yet final it would be unduly prejudicial to Respondents to consider the facts of the prior matter to have been established in consideration of the current matter. That is not to say that it would never be appropriate to consider the facts of a prior action, but in light of the ultimate decision here it is unnecessary to consider this issue further. Exhibits 12 and 13 are identified for the record, but the motion to take official notice and admit them into evidence is denied.

PENALTY

The Department requested that the Respondents' license be suspended for a period of 30 days, arguing that an aggravated penalty was appropriate based on the 2000 sale-to-minor violation, the warning letter, and the pending sale-to-minor violation from 2017. The Respondents argued that their 24 years of operation with only one violation 17 years ago warranted a mitigated penalty. Accordingly, the Respondents recommended a 10-day suspension, all stayed.

A letter of warning is expressly listed as an aggravating factor in Rule 144. In the present case, the Department presented evidence that it sent, and the Respondents received, a letter of warning in 2014. (Exhibits 4 and 5.) As observed by Respondents, a warning letter does **not** establish that a violation occurred. However, it does place the recipient on notice that a potential

problem may exist and that remedial action may be necessary. In this case, the Department advised the Respondents that it had received information about an alleged sale of alcoholic beverages to a minor at the Licensed Premises.

During the hearing, the Department introduced a certified copy of a proposed decision concerning an alleged sale-to-minor violation from 2017. At the time of the hearing, this proposed decision had **not** been adopted by the Department. (Exhibit 3.) As indicated above, the Department then attempted to "prove up" the 2017 incident (either in whole or in part) by asking questions about it in this case. Since the prior case is not final, it cannot be considered a second strike under section 25658.1. However, the Department argued that elements of the violation should be used as aggravating factors in this case. For the reasons stated above, the underlying evidence relating to the alleged prior sale will not be considered in formulating the penalty in this case.

The existence of the prior accusation and the Respondents' awareness of it are, however, properly considered for purposes of notice of a problem. The alleged violation in that prior matter occurred on November 11, 2017. The accusation was registered on March 28, 2018 (Exhibit 9), and it was served on Respondents on that same date (Exhibit 10). A Notice of Defense was returned on April 2, 2018, and received by the Department on April 10, 2018 (Exhibit 11). The violation in the instant matter occurred on April 22, 2018. The record is clear that Respondents received notice of the November 11, 2017, alleged violation well-prior to the date of the current alleged violation.

Respondents argue that consideration of the prior accusation would be improper because that matter is not final. As such, it is asserted, the allegations in that accusation are merely allegations. To be clear, the allegation of a sale of alcohol to a minor in registration number 18086708 is not being considered as having been proven. Nor is that accusation being accepted or considered at this time for purposes of whether or not the Department may order revocation of the license under section 25658.1(b).

Rule 144 does not expressly provide that an accusation filed alleging a prior violation is an aggravating factor for purposes of penalty consideration. However, the list of factors in the rule (for aggravation and mitigation) is not exhaustive. Similar to a warning letter, the service of an accusation alleging a violation of law places the recipient on notice that a potential problem may exist and that remedial action may be necessary to address the issue. Indeed, the fact that the Department has determined that the alleged violation rises to the level of formal disciplinary action, rather than simply a letter of warning, indicates that an accusation should be of even greater significance to the recipient in terms of notice of a potential problem and the need to take appropriate corrective measures. As such, exhibits 9, 10, and 11 are being considered here for purposes of notice. As the Department recently stated in *7-Eleven and Yi* (precedential decision

19-03-E; designated on April 18, 2019), "Nothing in section 25658.1, or elsewhere, precludes the use of prior actual notice of an alleged violation of section 25658(a), whether by way of verbal or written warning, or of a pending accusation, as an aggravating factor in determining the appropriate level of discipline following a determination that the licensee has subsequently violated the same law." (*Id.* at page 5.)

Within a relatively short period of time prior to the instant alleged violation, Respondents have twice been placed on express notice of problems with respect to selling alcoholic beverages to minors. Moreover, the accusation relating to the 2017 alleged violation identifies the very same clerk who made the sale in the instant matter. Respondents presented no evidence that they made any effort to address the identified potential problem following either the 2014 letter of warning or the filing of the accusation with respect to the 2017 alleged violation.

By way of mitigation, the Respondents emphasize their disciplinary history—only one violation in 25 years and no violations for the past 17 years. In looking at the totality of the circumstances, the aggravation warranted based on the letter of warning and the prior accusation substantially outweigh the mitigation warranted based on the Respondents' disciplinary history. The discipline ordered below is consistent with Rule 144 and is appropriate in this case.

ORDER

The Respondents' off-sale general license is hereby suspended for a period of 25 days.

Sacramento, California

Dated: April 25, 2019

Jacob A. Appelsmith
Director

Pursuant to Government Code section 11521(a), any party may petition for reconsideration of this decision. The Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or on the effective date of the decision, whichever is earlier.

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9, of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.