

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

**AB-9893**

File: 21-454081; Reg: 20089892

PEN AN LONG,  
dba BL 2 Liquor  
41958 50th Street West, Suite 1  
Quartz Hill, CA 93536-2900,  
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

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

Appeals Board Hearing: April 9, 2021  
Telephonic

**ISSUED APRIL 9, 2021**

*Appearances:*      *Appellant:* Jojo Caro, of Law Office of Jojo Caro, as counsel for Pen An Long,

*Respondent:* Lisa Wong, as counsel for the Department of Alcoholic Beverage Control.

**OPINION**

Pen An Long, doing business as BL 2 Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> suspending its license for 20 days because his clerk sold an alcoholic beverage to an individual under the age of 21, in violation of Business and Professions Code section 25658(a).<sup>2</sup>

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<sup>1</sup> The decision of the Department, dated October 6, 2020, is set forth in the appendix.

<sup>2</sup> All statutory references are to the California Business and Professions Code unless otherwise stated.

## FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on August 9, 2007. There is one prior record of departmental discipline against the license from 2016.

On March 5, 2020, the Department filed a single-count accusation against appellant charging that, on November 15, 2019, appellant sold alcoholic beverages to 20-year-old Rodrigo Martinez (the minor).

At the administrative hearing held on June 23, 2020, documentary evidence was received, and testimony was presented by the minor and Department Agent Andrew Wong. Appellant testified on his own behalf. The evidence established that the minor entered the licensed premises with the younger sister of one of his friends. Agent Wong noticed the minor and the female enter the licensed premises. Agent Wong stood behind the minor while he purchased a bottle of vodka and a bottle of sangria from appellant.

Before making the sale, appellant asked to see the minor's identification (ID). The minor showed appellant an ID card purportedly issued by the Republic of El Salvador. (Exhs. 2 and 6.) Appellant looked at the ID card for a few seconds, then completed the sale. Appellant did not ask any questions about the ID. The minor exited the licensed premises with the two bottles of alcohol. Agent Wong followed the minor and contacted him outside.

Agent Wong determined that the minor was only 20 years old, which he confirmed by examining his valid California driver's license. Agent Wong obtained the fake ID from the minor while questioning him. The minor obtained the fake ID approximately five years earlier, when he was 15 years old. The fake ID has his name and photo, but does not have any physical descriptors (e.g. height, weight, hair color, etc.). It has an

expiration date of June 8, 2018. Agent Wong seized the bottles of alcohol, cited the minor, and photographed him. (Exh. 3.)

Agent Wong then re-entered the licensed premises and contacted appellant. Appellant indicated that he checked the minor's ID. When asked how he determined that foreign IDs were valid, he indicated that he was not entirely sure how to verify their validity. At the hearing, appellant testified that he checks IDs by comparing the photos to the bearer's face and that he evaluates whether the person looks to be the age indicated by the ID.

The administrative law judge (ALJ) issued a proposed decision on July 22, 2020, sustaining the accusation and recommending a 20-day suspension. The Department adopted the proposed decision on September 23, 2020 and issued a certificate of decision on October 6, 2020. Appellant filed a timely appeal contending that the Department's findings regarding the minor's fake identification is not supported by substantial evidence, and that the penalty is excessive in that it was improperly based upon appellant's 2016 disciplinary action.

## DISCUSSION

### I

#### SECTION 25660

Appellant contends the Department erred in rejecting their section 25660 defense. (AOB, at p. 2.) Specifically, appellant argues that the evidence does not support the Department's findings that the minor's El Salvador ID was fake. (*Ibid.*)

Section 25660(c) provides:

Proof that the defendant-licensee, or his or her employee or agent, demanded, was shown, and acted in reliance upon [a government-issued

identification or identification purporting to be government-issued<sup>3</sup>] shall be a defense to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon.

*(Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*

(2004) 118 Cal.App.4th 1429, 1444-1445 [13 Cal.Rptr.3d 826, 837] (*Masani*).<sup>4</sup> However, section 25660 must be narrowly construed and the licensee has the burden of establishing the defense. (*Lacabanne Properties, Inc. v. Alcoholic Beverage etc. Appeals Board* (1968) 261 Cal.App.2d 181, 189-190 [67 Cal.Rptr. 734] (*Lacabanne*).)

One of the requirements of section 25660 is that a licensee must show that reliance on the false identification was *reasonable*. (*Lacabanne, supra*, at p. 189; *5501 Hollywood v. Dept. of Alcoholic Bev. Control* (1957) 155 Cal.App.2d 748, 753-754 [318 P.2d 820] (*5501 Hollywood*).) In other words, a licensee (or employee) must exercise the caution that a reasonable and prudent person would show in the same or similar circumstances. (*Lacabanne, supra*, at p. 189; *Farah v. Alcoholic Bev. Control Appeals Bd.* (1958) 159 Cal.App.2d 335, 339 [324 P.2d 98]; *5501 Hollywood, supra*, at p. 753.) Further, reasonable reliance cannot be established if the appearance of the person

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<sup>3</sup> It is immaterial whether the identification used was actually government-issued.

<sup>4</sup> In *Masani*, the court said:

The licensee should not be penalized for accepting a credible fake that has been reasonably examined for authenticity and compared with the person depicted. A brilliant forgery should not ipso facto lead to licensee sanctions. In other words, fake government ID's cannot be categorically excluded from the purview of section 25660. The real issue when a seemingly bona fide ID is presented is the same as when actual governmental ID's are presented: reasonable reliance that includes careful scrutiny by the licensee.

(*Masani, supra* at p. 1445.)

presenting the identification is “too young in appearance to be 21.” (*5501 Hollywood, supra*, at p. 754.)

Finally, the Department’s findings regarding a section 25660 defense will be upheld so long as those findings are supported by substantial evidence. (*Masani, supra*, at p. 1437; *Kirby v. Alcoholic Beverage Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628] [“In considering the sufficiency of the evidence issue the court is governed by the substantial evidence rule[;] any conflict in the evidence is resolved in favor of the decision; and every reasonably deducible inference in support thereof will be indulged. [Citations.]”.) Substantial evidence is “evidence of ponderable legal significance, which is ‘reasonable in nature, credible and of solid value.’ ” (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 814 [38 Cal.Rptr.2d 304, 307–308], internal citations omitted.)

As a preliminary matter, the Department determined that the minor was 20 years old on November 15, 2019, which Agent Wong confirmed by examining the minor’s valid California driver’s license outside the licensed premises. (Findings of Fact, ¶ 7.) Further, the minor himself testified at the hearing that he was only 20 years old at the time he purchased alcoholic beverages from appellant. (RT at p. 11:9-11.) This constitutes substantial evidence to establish that appellant sold alcoholic beverages to an individual under the age of 21 years old. Appellant, therefore, had the burden of establishing a defense under section 25660 at the hearing.

In the instant case, the Department rejected appellant’s section 25660 defense because: 1) “[appellant] did not present any evidence about IDs issued by the Republic of El Salvador, much less any evidence that the fake Salvadoran ID relied upon by

[appellant] resembled an actual Salvadoran ID"; 2) "the fake ID did not contain any physical descriptors as required by section 25660 [and thus] does not meet the requirements of that section and cannot be relied upon to establish a defense," and; 3) "the information on the fake ID indicated that it had expired 17 months earlier [which] is an indication that it is fake." (Conclusions of Law, ¶¶ 7-10.) The Board cannot say that the Department erred in any of its conclusions.

The Department established that the minor was under the age of 21 at the time he purchased alcoholic beverages from appellant. It was appellant's burden to show that he reasonably relied on a fake ID when making the sale. However, as the Department found, appellant did not introduce any evidence regarding the minor's fake ID, or IDs from El Salvador in general. Further, this particular ID did not meet the requirements of an ID under section 25660, given that it lacked physical descriptors and was expired. Therefore, the Department's findings must stand. The Board cannot second guess the Department where substantial evidence supports its findings and where appellant fails to meet its burden.

## II

### PENALTY

Appellant claims his prior suspension from 2016 was improperly used as an aggravating factor. (AOB, at pp. 2-3.) Specifically, appellant claims the prior suspension is a "mistake of fact," since he could not have sold alcohol to a minor in 2016 because he was in another country at the time. (*Id.* at p. 3.) However, appellant admits his license was suspended in 2016 for selling alcoholic beverages to a minor as part of a "settlement offer given to him by the Department." (*Ibid.*)

There are numerous issues with appellant's arguments. Most notably, appellant misunderstands the mechanics of rule 144. Rule 144 expressly allows the Department to deviate from the standard penalty when, "*in its sole discretion*[, it] determines that the facts of the particular case warrant such deviation — such as where facts in aggravation or mitigation exist." (Cal. Code Regs., tit. 4, § 144, emphasis added.)

Factors in aggravation include prior disciplinary history, prior warning letters, licensee involvement, premises located in high crime area, lack of cooperation by the licensee in investigation, appearance and actual age of minor, and continuing course or pattern of conduct. (Cal. Code Regs., tit. 4, § 144.) Factors in mitigation include the length of licensure at the subject premises without prior discipline or problems, positive action by the licensee to correct the problem, documented training of the licensee and the employees, and cooperation by the licensee in the investigation. However, neither list of factors is exhaustive; the Department may use its discretion to determine whether other aggravating or mitigating circumstances exist. (*Ibid.*)

Here, appellant disputes the merits of his 2016 suspension, and therefore, believes the Department cannot use it as an aggravating factor. However, in its decision, the Department makes it clear that it is using the suspension itself, not the underlying conduct, as a factor in aggravation. Rule 144 expressly allows the Department to do this. Thus, the Department did not error in using the fact of appellant's 2016 prior disciplinary record as an aggravating factor. Especially where it is undisputed that appellant's license was suspended in 2016 for a sale to a minor, which appellant admits in its brief. (AOB, at p. 3.)

As the Board has said many times over the years, the extent to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion. Rule 144 provides a standard 15-day suspension for a section 25658(a) violation. However, rule 144 also allows the Department to exercise discretion to consider aggravation and mitigation. In this case, the fact that the Department decided to suspend appellant's license for twenty days, instead of fifteen, based on this being appellant's second violation and suspension within three and a half years was reasonable and not an abuse of discretion. Therefore, the penalty must stand.

#### ORDER

The decision of the Department is affirmed.<sup>5</sup>

SUSAN BONILLA, CHAIR  
MEGAN McGUINNESS, MEMBER  
SHARLYNE PALACIO, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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<sup>5</sup> 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.

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:

Pen An Long	}	File: 21-454081
dba BL 2 Liquor	}	
41958 50 <sup>th</sup> St. W., Ste. 1	}	Reg.: 20089892
Quartz Hill, California 93536-2900	}	
	}	License Type: 21
Respondent	}	
	}	Word Count: 11,000
	}	
	}	Reporter:
	}	Justyne Johnson
	}	Kennedy Court Reporters
	}	
<u>Off-Sale General License</u>	}	<b><u>PROPOSED DECISION</u></b>

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Van Nuys, California, on June 23, 2020.

Lisa Wong, Attorney, represented the Department of Alcoholic Beverage Control.

Jojo Caro, attorney-at-law, represented respondent Pen An Long, who was present.

The Department seeks to discipline the Respondent's license on the grounds that, on or about November 15, 2019, the Respondent sold, furnished, or gave alcoholic beverages to Rodrigo Martinez-Oliva, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).<sup>1</sup> (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 June 23, 2020.

**FINDINGS OF FACT**

1. The Department filed the accusation on March 5, 2020. It moved to amend the accusation at the hearing to allege that the prior disciplinary matter should be considered as aggravation. This motion was granted.

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<sup>1</sup> All statutory references are to the Business and Professions Code unless otherwise noted.

2. The Department issued a type 21, off-sale general license to the Respondent for the above-described location on August 9, 2007 (the Licensed Premises).

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

<u>Date Filed</u>	<u>Reg. No.</u>	<u>Violation</u>	<u>Penalty</u>
8/31/2016	16084653	BP §§ 25658(a) & 25612.5(c)(3)	10-day susp.

The foregoing disciplinary matter is final. (Exhibit 5.)

4. Rodrigo Martinez was born on August 11, 1999. On November 15, 2019 he was 20 years old.

5. On November 15, 2019, Martinez entered the Licensed Premises with the younger sister of one of his friends. He purchased a bottle of vodka and a bottle of sangria from Pen Long. Before making the sale, Long asked to see Martinez's ID. Martinez showed Long an ID card purportedly issued by the Republic of El Salvador. (Exhibits 2 & 6.) Long looked at the ID for a few seconds, then completed the sale. (Exhibit B.) He did not ask any questions about the ID.

6. The El Salvador ID was a fake which Martinez obtained approximately five years earlier, when he was 15 years old. It has his name and photo. It does not have any physical descriptors (e.g., height, weight, hair color, eye color). It has an expiration date of June 8, 2018.<sup>2</sup>

7. Agent A. Wong noticed Martinez and the female enter the Licensed Premises. He entered and stood behind Martinez during the sale. When Martinez exited with the two bottles of alcohol, he followed and contacted him. Agent Wong determined that Martinez was only 20 years old, which he confirmed by examining Martinez's valid California driver license. Agent Wong obtained the fake ID from Martinez while questioning him.

8. Agent Wong cited Martinez and photographed him. (Exhibit 3.) Agent Wong also seized both bottles of alcohol and photographed them. (Exhibit 4.)

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<sup>2</sup> The expiration date is listed as "08/06/2018." Under the standard method of listing dates in the United States, the month is normally listed first, followed by the day, followed by the year. Internationally, the reverse is true, with the day listed first, the month second, and the year last. Since the date of issuance on the ID is listed as "14/04/2015," it is clear that the fake ID is using the international standard.

9. Agent Wong re-entered the Licensed Premises and contacted Long. Long indicated that he checked Martinez's ID. When asked how he determined that foreign IDs were valid, he indicated that he was not entirely sure how to verify their validity.

10. Long testified that he is aware that it is illegal to sell alcohol to minors. He checks IDs by comparing the photos to the bearer's face. He also evaluates whether the person looks to be the age indicated by the ID.

11. 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 Respondent's license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that, on November 15, 2019, the Respondent, Pen An Long, sold alcoholic beverages to Rodrigo Martinez, a person under the age of 21, in violation of section 25658(a). (Findings of Fact ¶¶ 4-10.)

5. Section 25660 provides a defense to any person who was shown and acted in reliance upon bona fide evidence of majority in permitting a minor to enter and remain in a public premises in contravention of section 25665, in making a sale forbidden by section 25658(a), or in permitting a minor to consume in an on-sale premises in contravention of section 25658(b). This section expressly states that "[b]ona fide evidence of majority and identity of the person is any of the following: (1) A document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a valid motor vehicle operator's license, that contains the name, date of birth, description, and picture of the person. (2) A valid passport issued by the United States or by a foreign government. (3) A valid identification card issued to a member of the Armed Forces that includes a date of birth and a picture of the person."

6. The defense offered by this section is an affirmative defense. As such, the licensee has the burden of establishing all of its elements, namely, that evidence of majority and identity was demanded, shown, and acted on as prescribed.<sup>3</sup> This section applies to IDs actually issued by government agencies as well as those which purport to be.<sup>4</sup> A licensee or his or her employee is not entitled to rely upon an identification if it does not appear to be a bona fide government-issued ID or if the personal appearance of the holder of the identification demonstrates above mere suspicion that the holder is not the legal owner of the identification.<sup>5</sup> The defense offered by section 25660 is not established if the appearance of the minor does not match the description on the identification.<sup>6</sup>

7. The Respondent did not present any evidence about IDs issued by the Republic of El Salvador, much less any evidence that the fake Salvadoran ID relied upon by Long resembled an actual Salvadoran ID. Moreover, since Long was unfamiliar with Salvadoran IDs, he had no basis for relying on the fake ID Martinez presented to him.

8. Additionally, the fake ID did not contain any physical descriptors as required by section 25660. As such, it does not meet the requirements of that section and cannot be relied upon to establish a defense. It is irrelevant that passports do not contain any physical descriptors, since they are expressly included as allowable forms of ID by a different subsection of section 25660.

9. Finally, although not mentioned by the Department, the information on the fake ID indicated that it had expired 17 months earlier. A long-expired ID is an indication that it is a fake.

10. For the reasons set forth in the preceding three paragraphs, the Respondent failed to meet his burden of proof and has not established a defense under section 25660.

## PENALTY

The Department requested that the Respondent's license be suspended for a period of 20 days in light of the prior disciplinary decision. The Respondent argued that, if the

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<sup>3</sup> *Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control*, 261 Cal. App. 2d 181, 189, 67 Cal. Rptr. 734, 739 (1968); 27 Ops. Atty. Gen. 233, 236 (1956).

<sup>4</sup> *Dept. of Alcoholic Beverage Control v. Alcoholic Control Appeals Bd. (Masani)*, 118 Cal. App. 4th 1429, 1444-45, 13 Cal. Rptr. 3d 826, 837-38 (2004).

<sup>5</sup> *Masani*, 118 Cal. App. 4th at 1445-46, 13 Cal. Rptr. 3d at 838; *5501 Hollywood, Inc. v. Department of Alcoholic Beverage Control*, 155 Cal. App. 2d 748, 753, 318 P.2d 820, 823-24 (1957); *Keane v. Reilly*, 130 Cal. App. 2d 407, 411-12, 279 P.2d 152, 155 (1955); *Conti v. State Board of Equalization*, 113 Cal. App. 2d 465, 466-67, 248 P.2d 31, 32 (1952).

<sup>6</sup> *5501 Hollywood*, 155 Cal. App. 2d at 751-54, 318 P.2d at 822-24; *Keane*, 130 Cal. App. 2d at 411-12, 279 P.2d at 155 (construing section 61.2(b), the predecessor to section 25660).

accusation were sustained, a 15-day suspension was appropriate. The Respondent testified that the income from the Licensed Premises was how he supported his family and a harsher penalty would put a strain on his business.

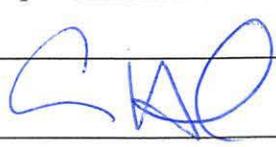
The prior discipline was for the sale of alcohol to two minors 3½ years before the sale at issue here. As such, those sales no longer are considered strikes under section 25658.1. However, 3½ years is a relatively short time between violations and an aggravated penalty is warranted. The penalty recommended herein complies with rule 144.<sup>7</sup>

### ORDER

The Respondent's off-sale general license is hereby suspended for a period of 20 days.

Dated: July 22, 2020

  
Matthew G. Ainley  
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By:  _____
Date: <u>09/23/20</u>

<sup>7</sup> All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.