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<p>COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203</p>	<p>DAVID P. BOERNER COURT OF APPEALS</p>
<p>District Court, City and County of Denver County Honorable Stephen Phillips, Judge Case No. 06 CV 12325</p>	
<p>KEVIN MINH LE D/B/A MARINA POINTE LIQUORS,</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Plaintiff-Appellant, v.</p>	<p>Case No.: 07 CA 927</p>
<p>COLORADO DEPARTMENT OF REVENUE LIQUOR ENFORCEMENT DIVISION, Defendant -Appellee.</p>	
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<p style="text-align: center;">ANSWER BRIEF</p>	

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Defendant, Colorado Department of Revenue Liquor Enforcement Division (“Department” or “State”), by and through Attorney General of Colorado, files this answer brief pursuant to C.A.R. 31(a).

ISSUES PRESENTED

1. The district court concluded that plaintiff-appellant sold alcohol twice in one night to a minor in violation of the Colorado Liquor Code. Did the district court correctly determine that plaintiff-appellant could not assert that the expired driver’s license presented by the minor was a “fraudulent” identification constituting an affirmative defense to the illegal sale of alcohol to a minor?
2. Did the district court correctly hold that the revocation of plaintiff-appellant’s liquor license was a lawful sanction for sale of alcohol to a minor after considering the aggravating and mitigating factors presented at the hearing?

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition Below

The Department is the state agency authorized to regulate alcohol beverage licensees in Colorado and to administer the Colorado Liquor Code. This case began when the Department brought administrative charges against Plaintiff-Appellant, Kevin M. Le, d/ba/ Marina Pointe Liquors (“Marina Pointe” or

“Licensee”) in an August 25, 2006 Order to Show Cause. (Rec., Vol. II, pp. 1-3).¹

The Department charged Marina Pointe with violating section 12-47-

901(1)(a.5)(I), C.R.S. (2007) by selling two, one-liter bottles of Bacardi Limón

Rum brand spirituous liquor to Paul Ondrish, a minor, who was twenty years old at

the time of the sale. (Rec., Vol. II, p. 1). On October 2, 2006, the Department

notified Marina Pointe of a hearing set for November 2, 2006. (Rec., Vol. II, pp.

4-6). Marina Pointe’s counsel entered an appearance on October 24, 2006. (Rec.,

Vol. II, p. 7). The Department issued subpoenas to potential witnesses at the

hearing. (Rec., Vol. II, pp. 9-10). A Department hearing officer heard the

evidence on November 2, 2006. In the Findings, Conclusions and

Recommendations for Sanction dated November 18, 2006, (Rec., Vol. II, pp. 11-

17), the hearing officer found that Marina Pointe, through its agent, violated

section 12-47-901(1)(a.5)(I), C.R.S. by selling alcohol on two separate occasions

the night of July 12, 2006. (Rec., Vol. II, p. 15). The hearing officer concluded

that Marina Pointe did not have an affirmative defense for the display of an expired

driver’s license by the minor. (Rec., Vol. II, p. 15).

¹ The record on appeal contains Volume 1; a large envelope containing administrative record (referred to here as Volume 2); and the hearing transcript.

Acting on the hearing officer's recommendation, the state licensing authority (M. Michael Cooke, Executive Director of the Colorado Department of Revenue) signed an Order on November 27, 2006 revoking Marina Pointe's liquor license (Rec., Vol. II, p. 18) pursuant to section 12-47-202(1)(a), C.R.S. (2007). The Department's Findings, Conclusions, Recommendations for Sanction and Order were duly served upon Marina Pointe on November 28, 2006. (Rec., Vol. II, p. 19). Marina Pointe appealed to the district court on November 29, 2006, and the district court granted a stay of the liquor license revocation pending judicial review. (Rec., Vol. I, pp. 12-13). The Department submitted the agency record on appeal on December 13, 2006. (Rec., Vol. 1, pp. 24-26). Marina Pointe filed its opening brief on January 17, 2007. (Rec., Vol. 1, pp. 27-47). The Department filed its answer brief on February 20, 2007. (Rec., Vol. 1, pp. 48-80). Marina Pointe filed its reply brief on March 1, 2007 (Rec., Vol. 1, pp. 81-82) (remaining pages missing from the record). On April 20, 2007, the district court issued an order affirming the Department's revocation of licensee's liquor license, finding that the licensee did not have an affirmative defense against its illegal sales of alcohol to a minor. (Rec., Vol. 1, pp. 87-88). On May 15, 2007, the district court granted an order staying the revocation of the liquor license pending the conclusion

of judicial review by all applicable appellate courts. (Rec., Vol. 1, p. 93). This appeal followed.

II. Statement of Facts

Kevin Minh Le is the sole proprietor of Marina Pointe, a retail liquor store located at 7444 West Chatfield Avenue in Littleton, Colorado. Marina Pointe has been in business since March 2002. On two separate occasions the evening of July 12, 2006, Loc Quang Truon, an employee of Marina Pointe, sold alcohol to Paul Ondrish, age 20.

The first sale occurred at approximately 6:00 or 7:00. Mr. Truon testified that Paul Ondrish walked in the store and grabbed a bottle of "Bacardi Limón." (Rec., Hr'g Tr., p. 88). Mr. Truon testified that he asked for identification (ID), checked it for "date of birth" then "made the sale." (Rec., Hr'g Tr., pp. 88-90). However, he failed to check to see if the ID was still valid.

The face of the driver's license had a white background and most of the printing was in black and blue ink. The license had a picture of Joseph Ondrish, Paul Ondrish's older brother. Above the picture, it said in red ink "Under 21 Until 7-21-2004." The top right corner said "Expires 7-21-2004" also in red ink. (Rec., Vol. 1, p. 73) (exhibit attached, adhering, Rec., Vol. I, p. 73.) Even though expired

by almost two years, Mr. Truon by his own admission accepted the ID as proof of age.

Mr. Truon testified that the second time he sold Bacardi Limón Rum to Paul Ondrish occurred at approximately 10:50 that same evening, when Paul Ondrish returned to Marina Pointe. (Rec., Hr'g Tr., p. 92). The record reflects that the store was about to close but Mr. Ondrish was let in (Rec., Hr'g Tr., pp. 92-94). Mr. Truon testified that he "quickly glanced" at Paul Ondrish's ID and "the sale was made" (Rec., Hr'g Tr., p. 94). The hearing officer found that the Department's evidence of the sale of both one-liter bottles of Bacardi Limón Rum to Mr. Ondrish was unrebutted. (Rec., Vol. II, p. 14).

While not denying that the sales took place, Marina Pointe argued that the use of an obviously expired driver's license constituted an affirmative defense under section 12-47-901(5)(a)(1), C.R.S. (2007) and Colo. Reg. § 47-912. The hearing officer disagreed, concluding that the presentation of a license, issued by another state, clearly and obviously expired by nearly two years, is not a fraudulent document for the purposes of granting an affirmative defense. (Rec., Vol. II, p. 15) (emphasis added).

After finding that the sales occurred and that the affirmative defense was not shown by Marina Pointe, the hearing officer considered evidence in aggravation

and mitigation. Pursuant to Colo. Reg. 47-604, Part E, the aggravating factors considered by the hearing officer were the licensee's failure to notice that the license presented by Paul Ondrish was expired, the licensee's prior sale to a minor in 2002, and as a consequence of driving while intoxicated, the tragic death of Paul Ondrish and Brandon Nichols that evening and injury to three passengers. (Rec. Vol. II, pp. 16-17). The hearing officer recommended revocation of the liquor license. The state licensing authority concurred and entered the order revoking Marina Pointe's liquor license on November 27, 2006. (Rec., Vol. II, p. 18).

SUMMARY OF ARGUMENT

A genuine driver's license of another person, clearly and obviously expired by nearly two years, is neither a "fraudulent identification" or a "fraudulent proof of age" constituting an affirmative defense to the illegal sale of alcohol to a minor, since the driver's license itself was genuine. Under Colorado law, the seller of alcohol has the duty to check an ID and reject expired IDs. Two people died and three people were injured as a result of Marina Pointe's failure to properly check the ID of Paul Ondrish. The prevention of such tragedies is exactly why the laws and regulations are in place. The sanction of revocation is the only appropriate sanction under the circumstances.

ARGUMENT

I. Standard of Review

Appellate review of a district court's decision in an administrative proceeding is *de novo*, applying the same deferential standards to the administrative decision as the district court is required to apply. Section 24-4-106(11)(e), C.R.S. (2007); Thomas v. Colo. Dep't of Corr., 117 P.3d 7, 8 (Colo. App. 2004). A review of purely legal questions is *de novo*.

A reviewing court may reverse a hearing officer's decision to revoke a license only where "the agency action is arbitrary or capricious, a denial of statutory right, contrary to constitutional right, power, privilege or immunity, in excess of statutory jurisdiction, authority, purposes, or limitations...or otherwise contrary to law." § 24-4-106(7), C.R.S. (2007). *See also* Ohlson v. Weil, 953 P.2d 939 (Colo. App. 1997).

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether a reasonable person, considering all the evidence in the record, would fairly and honestly be compelled to reach a different conclusion. Ramseyer v. Colo. Dep't of Soc. Serv., 895 P.2d 1188, 1192 (Colo. App. 1995). If not, no abuse of discretion has occurred and the agency decision must be upheld. *Id.* (citations omitted). *See also* WCC v. Umetco Minerals, 919 P.2d 887 (Colo.

App. 1996). Under section 24-4-106(7), C.R.S. (2007), the “court shall determine all questions of law and interpret the statutory and constitutional provisions involved and shall apply such interpretation to the facts duly found or established.”

Judicial review of an administrative agency action is limited to the record before the agency. Poe v. Dep’t of Revenue Motor Vehicle Div., 859 P.2d 906, 909 (Colo. App. 1993), *citing* Hancock v. State, 758 P.2d 1372 (Colo. 1988). Under section § 24-4-106(7), C.R.S. (2007), the “court shall review the whole record or such portions thereof as may be cited by any party.” “If a hearing transcript is ordered, paid for, and made part of the record on appeal, the reviewing court is required to consider it.” Loesch v. Dep’t of Revenue, 194 Colo. 169, 570 P.2d 530 (1977).

II. A Driver’s License, Expired By Nearly Two Years, Was Neither A Fraudulent Identification Nor A Fraudulent Proof Of Age Constituting An Affirmative Defense To The Illegal Sale Of Alcohol To A Minor.

A. Colorado law requires that identification be valid.

The hearing officer correctly found that a “fraudulent proof of age” means a document purporting to be a valid document, and that expired documents do not purport to be valid documents. (Rec., Vol. II, p. 14).

Colo. Reg. 47-912. Identification. (Rec., Vol. I, p. 74).

- A. Licensees may refuse to sell alcohol beverages to any person unable to produce adequate, currently valid identification of age.” (emphasis added). The kind and type of ID deemed adequate shall be limited to the following:
1. An operator’s, chauffeur’s or similar type driver’s license containing a picture, and date of birth, issued by any state, Canada, Mexico or U.S. territory.
 2. An ID card containing a picture, issued by any state for the purpose of proof of age as in accordance with C.R.S. 42-2-402.
 3. A military ID card.
 4. A passport.
 5. An alien registration card.
 6. A valid employment authorization card containing a picture and date of birth issued by the U.S. Department of Justice, Immigration and Naturalization Service.
- B. It shall be an affirmative defense to any administrative action brought against a licensee for alleged sale to a minor if the minor presented fraudulent ID of the type established above and the licensee possessed an ID book issued within the past three years which contained a sample of the kind of ID presented for compliance purposes. As an affirmative defense, the burden of proof is on the licensee to establish by a preponderance of the evidence the minor presented fraudulent ID.

The above regulation limits the type of adequate ID. It also places the burden on Marina Pointe to prove that Ondrish presented a fraudulent ID. Marina Pointe asserts that it relied on the “Anheuser Busch 2004 Driver License Booklet”

(Rec., Vol. II, pp. 32-77) to verify the minor's ID. (Op. Br., pp. 12-13). Thus, Marina Pointe claims to have satisfied the second element required under Part B of the above regulation because the booklet was issued within the past three years and contained a sample of the kind of ID presented for compliance purposes. (Op. Br., p. 13). However, as the hearing officer noted, the back cover of that booklet offers "Tips for Checking I.D." These tips specifically state that the card's expiration date should be checked. "Do not accept the license if the date is expired." (Rec., Vol. II, p. 77). (emphasis added). Therefore, Marina Pointe's own evidence contradicts its claim. Marina Pointe should have, but negligently failed to check the expiration date of Ondrish's ID.

Also, the hearing officer found that the licensee acknowledged the combined intent of the law and regulation by posting on the door of his liquor store:

**"MUST HAVE VALID DRIVER'S LICENSE AND BE 21
TO PURCHASE ANY ALCOHOLIC BEVERAGE."**

(Rec., Vol. II, p. 22, B-6; Rec., Hr'g Tr., p. 187). The posted warning shows that the meaning and intent of the legislature and the Department were clear to Marina Pointe. Marina Pointe failed to meet its burden of proving that Ondrish presented a fraudulent ID. The expired Michigan license is not a fraudulent ID under Colo. Reg. 47-912. Neither is an expired license a fraudulent proof of age as

contemplated in section 12-47-901(5)(a)(1), C.R.S. (2007) because the document itself was genuine. The hearing officer correctly so found (Rec., Hr'g Tr., p. 187) and the district court agreed. (Rec., Vol. 1, pp. 87-88). Their findings should not be disturbed on appeal.

B. Marina Pointe's own testimony proves that its employee should have looked at the identification and would do so today.

Marina Pointe argues that Ondrish misrepresented his identity to Marina Pointe to induce Marina Pointe to sell the alcohol. (Op. Br., pp. 11-12). That is irrelevant—so does every minor attempting to buy alcohol. It would be an affirmative defense only if the seller reasonably relied on an apparently valid document that identified the buyer as being twenty-one years of age.

Marina Pointe's reliance here on an expired driver's license was unreasonable. Marina Pointe essentially admitted this. The clerk, Mr. Truon, testified at the hearing that the main thing he looked for was the date of birth and not the expiration date. (Rec., Vol. 1, p. 75, lns. 7-8; Rec., Hr'g Tr., p. 101, lns. 7-8). When asked if he would accept Ondrish's ID today, he answered no "because of the expiration date on there." (Rec., Vol. 1, p. 75, lns. 23-25 and p. 76, lns. 1-3; Rec., Hr'g Tr., p. 101, lns. 23-25 and p. 102, lns. 1-3). A simple check of the expiration date would have prevented these sales to Paul Ondrish on July 12, 2006.

C. Marina Pointe's argument that Ondrish's ID was a "fraudulent" document is unsupported by legal authority.

Marina Pointe asks the court to ignore the plain language of the law requiring currently valid identification of age. (Op. Br., pp. 9-11) (emphasis added). Instead, Marina Pointe would conveniently give effect only to part of the law accepting as valid ID a "...similar type driver's license containing a picture and date of birth, issued by any state..." and ignore that it must be "currently valid." This would lead to the absurd result that a licensee can make a sale based on an obviously invalid ID. Statutes and regulations should be construed as a whole to give effect. Martinez v. Cont'l Enters., 730 P.2d 308 (Colo. 1986). In addition, every word should be given effect. Blue River Def. Comm. v. Town of Silverthorne, 33 Colo. App. 10, 516 P.2d 452 (1973).

The above regulation states: "Licensees *may* refuse to sell alcohol to any person unable to produce adequate, *currently valid identification of age*." Marina Pointe claims that the Department erroneously interpreted the word "may" as an absolute requirement. That is incorrect. The regulation does not absolve licensees from their duty not to sell to minors. Although licensees would not be sanctioned for the refusal to sell to persons without adequate, currently valid ID of age, that

does not mean they must sell to anyone with an expired ID. (Op. Br., pp. 13-14).

In such cases, licensees would sell at their own peril and risk violating the law.

An Illinois case, Gounaris and D & R Mgmt. v. City of Chicago, 747 N.E.2d 1025, 1029 (Ill. App. Ct. 2001). In Gounaris, a municipal ordinance prohibited the presence of persons under the age of 21 in night clubs. The night club's employee inspected and relied upon driver's license presented by minor then admitted minor into club. The license presented had expired 27 months earlier. The court found that evidence was sufficient to support the local liquor control commission's finding that "the night club unreasonably relied upon driver's license presented by minor and therefore the affirmative defenses available under...the Liquor Control Act...do not insulate the night club from liability." Gounaris, 747 N.E.2d at 1034 (citations omitted).

Marina Pointe contends that the Department disregarded and rendered meaningless the affirmative defense by requiring a fraudulent proof of age to be a currently valid ID. (Op. Br., p. 13). Again, Marina Pointe ignores that licensees have to show reasonable reliance on the ID presented. (emphasis added). Marina Pointe also points out that the legislature has set forth its intent to protect a licensee from the intentional fraud of a minor, especially when, as here, "the minor was twenty years old, entitled to vote and deemed an adult for prison sentencing." (Op.

Br., p. 18). What a twenty year old can and cannot do is irrelevant to a licensee's burden to prove that the minor presented a fraudulent ID.

D. Unpublished case law supports the argument that an affirmative defense is not available to a licensee who accepted an obviously invalid ID from a minor.

Romero v. Liquor and Beer Licensing Bd. of the City of Pueblo, 540 P.2d 1152 (Colo. App. 1975) (Rec., Vol. 1, pp. 77-80), although unpublished, supports the Department's arguments. When Romero was decided, minors were deemed "under age of 18." At the time, Colo. Reg. § 16 (currently Reg. 47-912, Part A) only required an "adequate" ID of age. In Romero, the ID shown by the minor to whom licensee had sold beer, was "visibly altered" in a manner "readily apparent to any person." The Court of Appeals held that since such identification "was not of type approved by state licensing authority regulations, the board was not precluded from suspending the liquor license. *Id.*, Romero at 1154. Further, the regulation approving specified types of ID was within the scope and objects of delegation of authority by legislature, was reasonable, and therefore valid." *Id.*, Romero at 1155.

Quoting Romero, Marina Pointe claims that the "fraudulent proof of age" language contained within section 12-47-901(5)(a)(1), C.R.S. (2007) must be

construed in conjunction with Colo. Reg. § 47-912, Part A, which now has “currently valid” language. (Op. Br., p. 10). The licensee in Romero took an unacceptable form of ID from a minor. Therefore, he did not have an affirmative defense. Here, Marina Pointe accepted an ID that was not currently valid, marked “Expires 7-21-2004” in red ink. Such conspicuously marked expiration date would obviously be “readily apparent” to any person. Marina Pointe chose to overlook it and it cannot now claim the affirmative defense against its illegal sales of alcohol to a minor.

III. The Department’s Revocation Of Marina Pointe’s Liquor License Was A Lawful Sanction For Selling Alcohol To A Minor After Considering The Aggravating And Mitigating Factors Presented At The Hearing.

A. The Colorado Liquor Code must be interpreted to further the legislative purpose of protecting public health, safety and welfare.

The state licensing authority in Colorado is the executive director of the Department of Revenue. § 12-47-201, C.R.S. (2007). By statute, the state licensing authority has specific duties. Primary among these is the authority to “[g]rant or refuse licenses for the manufacture, distribution, and sale of alcohol beverages as provided by law and suspend or revoke such licenses upon a violation....” § 12-47-202(1)(a), C.R.S. (2007) (emphasis added).

The Colorado Liquor Code gives broad discretion to the licensing authorities in carrying out these functions. “There is no inherent right to carry on the business of selling alcohol beverages.” Gem Beverage Co. v. Geer, 138 Colo. 420, 334 P.2d 744 (Colo. 1959). Further, “Liquor control is imbued with an especially strong public interest. Liquor licensing authorities need maximum leeway in carrying out their policing function.” Costiphx Enter. Inc. v. City of Lakewood, 728 P.2d 358, 360-361 (Colo. App. 1986) (citing Mr. Lucky’s Inc. v. Dolan, 591 P.2d 1021 (Colo. 1979)); *see also* People v. Sharp, 104 P.3d 252, 255 (Colo. App. 2004) (“The Liquor Code ... invokes the full extent of the state’s police powers.”). “The primary purpose of the Colorado Liquor Code is to authorize the sale and consumption of intoxicating beverages while simultaneously protecting the public’s health, safety, and welfare.” New Safari Lounge, Inc. v. City of Colo. Springs, 193 Colo. 428, 434; 567 P.2d 372,376 (Colo. 1977). The liquor code “must be read in the context of its legislative purpose.” *Id.*, at 376. Marina Pointe errs by disregarding the significance of the Department’s legislative mandate.

B. The hearing officer is authorized to consider aggravating and mitigating factors in recommending sanctions for violations of the Colorado Liquor Code.

Colorado Reg. 47-604, Part E, states: “Licensing authorities may also consider mitigating and aggravating factors when considering the imposition of the penalty. These factors may include...(emphasis added): prior violations or corrective actions and willfulness or deliberateness of the violation.” “May include” means such list is not exclusive and, therefore, the licensing authorities may consider other factors in mitigation and aggravation.

The Illinois case referenced above is again on point. “Although the findings and conclusions of the administrative agency on questions of facts shall be held to be prima facie true and correct, the appropriateness of a given sanction is not a question of fact; the matter of sanctions rests within the discretion of the administrative agency.” Gounaris, supra, 747 N.E.2d at 1029.

Before making the recommendation for sanction, the hearing officer considered the following factors:

In mitigation:

- 1) the statement of practices of Marina Pointe since its violation in 2002 for sale of alcohol to minor
- 2) the financial impact on Marina Pointe and his family

- 3) the multiple commendations from the Jefferson County Sheriff's Office for good conduct of Marina Pointe's establishment from 2000 to June 2005

In aggravation:

- 1) Twice in one night, Marina Pointe sold alcohol to a minor who displayed a conspicuously inappropriate form of ID. The license was in red type on a white background that was expired. Failing to notice such a glaring flaw or not requiring ID on each purchase is a flagrant violation.
- 2) failure of Marina Pointe to retain and provide investigators with records of sales from the evening of July 12, 2006
- 3) previous violation of sale to minor in 2002
- 4) Paul Ondrish, having purchased a total of 2 liters of rum and as a consequence of his being intoxicated, died that night as did one of his passengers. Three others were injured.
- 5) the statements from the parents, families and friends of the two deceased young men

(Rec., Vol. II, p. 16)

The previous violation of sale to minor occurred in March 2002 and did involve Kevin Le as a licensee. Mr. Le got a 45-day suspension then, serving 20 days and 25 days of that was held in abeyance for a period of one year. (Rec., Hr'g Tr., p. 190, lns. 7-11).

Regarding the letters received from parents, families and friends of the two deceased young men considered by the hearing officer, Marina Pointe alleges that such letters relied on by the Department contained pure, unsupported hearsay, and did not justify the most severe sanction of revocation. (Op. Br., p. 22).

“Administrative hearings are not bound by strict rules of evidence.” Campbell v. Dep’t of Revenue, 176 Colo. 202, 491 P.2d 1385 (1971). “A hearing officer has some flexibility in his adherence to the civil rules of evidence in order to promote the fact finding process.” Fish v. Charnes, 652 P.2d 598 (Colo. 1982). “The standard to be applied is whether the evidence possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs.” Partridge v. State, 895 P.2d 1183 (Colo. App. 1995). “Hearsay testimony may be allowed and reversal is proper only if otherwise inadmissible hearsay is sole evidence relied upon by trier of fact.” Mondragon v. Poudre Sch. Dist. R-1, 696 P.2d 831 (Colo. App. 1984).

Here, letters from the families of the two minors who died, Brandon Nichols and Paul Ondrish, (Rec., Vol. II, pp. 24-29) were only one of many factors considered by the hearing officer. (Rec., Vol. II, p. 16). Contrary to Marina Pointe’s claims of lack of evidence proving a causal connection between the sale of alcohol and the tragic single motor vehicle accident (Op. Br., p. 21), testimony was offered at the hearing by two Department witnesses, Officer Firko (Rec., Vol. II, pp. 16-23) and Paul Ladewig (Rec., Vol. II, pp. 48-50) regarding the intoxication of Paul Ondrish prior to the accident. The hearing was a civil proceeding, not a criminal one. It would have been improper for the Department to introduce

evidence regarding Paul Ondrish's blood alcohol content. Nevertheless, the accident killed Paul Ondrish and Brandon Nichols, and injured Paul Ladewig, Corey Grubich and Kenny Beers. The Department did not abuse its discretion in considering this aggravating factor alongside the letters from the victims' families.

In recommending the sanction of revocation, the hearing officer wrote that the frequency and notoriety of alcohol-related deaths and injuries makes the harm of each sale of alcohol easily foreseeable. (Rec., Vol. II, p. 16). He concluded:

The licensee sold alcohol to an underage person twice in one evening. The licensee accepted a document that should not have been used...as proof of age. The Department and the liquor industry, through Anheuser-Busch's publication on the use of identification, each warn licensees to not use expired documents. The licensee acknowledged that standard by posting it on his own front door. However, the licensee did not adequately enforce the regulation of the Department, the recommendation of the liquor industry or his own asserted policy....The revocation of Marina Pointe's liquor license is a recognition of the serious nature of the duties imposed by a liquor license and the consequence of the failure to fulfill those duties.

(Rec., Vol. II, p. 17).

C. Prior sanctions against other licensees are not relevant to the sanction for Marina Pointe.

Marina Pointe alleges that its license revocation is inconsistent with the Department's sanctions for similar matters and enumerates other liquor cases and their respective sanctions. (Op. Br., pp. 19-20). Prior sanctions for other liquor

violations are not relevant in considering the sanction for Marina Pointe because each case differs from the initial point of investigation to the final order. The violations in some cases are not as egregious as in others. Colo. Reg. 47-604, Part E allows the licensing authorities to consider aggravating and mitigating factors in determining sanctions. The judgment of the licensing authorities should be given deference. “Under section 24-4-106(7), C.R.S. (2007), a reviewing court may not reverse an administrative agency’s decision if the record as a whole contains substantial evidence to support the decision.” Inst. for Research v. Bd. Of Assessment Appeals, 748 P.2d 1346, 1348 (Colo. App. 1987). Further, “weighing evidence and resolving conflicts is the task of the administrative agency, not the reviewing court.” Bd. of Assessment Appeals v. Arlberg Club, 762 P.2d 146, 151 (Colo. 1988).

CONCLUSION

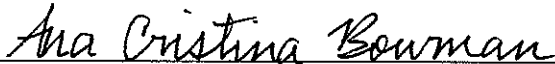
The district court correctly found that the minor’s use of a driver’s license, on its face expired by nearly two years at the time of the sale, was neither a fraudulent proof of age nor a fraudulent ID since the driver’s license itself was genuine, and, therefore, did not constitute an affirmative defense of Marina Pointe

against its illegal sales of alcohol to a minor. The district court also correctly held that the revocation of Marina Pointe's liquor license was a lawful sanction for selling alcohol to a minor.

WHEREFORE, the Department respectfully requests the Court to affirm the Denver District Court's order.

Respectfully submitted on this 22nd day of October, 2007.

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MICHIGAN

Under 21
Until 07-21-2004



See back for medical
information, anatomical gift

OPERATOR LICENSE
O 536 441 676 574

EXPIRES
07-21-2004

JOSEPH PATRICK ONDRISH
172 KINGS WAY
CANTON, MI 48188-1129

Date of birth	Sex	Height	Eyes	Type	Endorsements
07-21-1983	M	602	BLU	O	NONE

Restrictions: NONE


John Ondrish

L 152128G

CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **ANSWER BRIEF** upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, the 22nd day of October, addressed as follows:

Mr. Adam P. Stapen, Esq.
Dill Dill Carr Stonbraker & Hutchings,
PC
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Denver, Colorado 80203


Administrative Assistant

cc: Via interoffice mail

Ms. Laura Harris
Colorado Department of Revenue
Director of Liquor Enforcement Division
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