BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

DAVID ERICKSON, Appellant, v. LIQUOR CONTROL BOARD, Respondent.	)	Case No. DISM-04-0069 ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

1.1 **Consideration of Motion.** This matter came before the Personnel Appeals Board, BUSSE NUTLEY, Vice Chair, and GERALD L. MORGEN, Member, for consideration of Respondent's Motion for Summary Judgment. This matter was considered on written documents without oral argument.

1.2 **Representation.** Appellant David Erickson was represented by Mark E. Brennan, of Rinehart & Robblee, P.L.L.P. Valerie Petrie, Assistant Attorney General, represented Respondent Liquor Control Board.

1.3 **Documents Considered.** The Board considered the files and documents in this matter, including:

- Respondent's Motion for Summary Judgment, with attachments, filed April 15, 2005;
- Appellant's Response to Respondent's Summary Judgment Motion, with attachment, filed April 27, 2005; and
- Respondent's Reply to Appellant's Response to Motion for Summary Judgment, filed May 4, 2005.

II. BACKGROUND

2.1 Appellant was a liquor store clerk at Store #76 in Kent, Washington, for Respondent Liquor Control Board (LCB). In June 2004, Appellant was dismissed from his position for selling alcohol to a minor in violation of state law and agency policy. Appellant filed a timely appeal to the Personnel Appeals Board on June 25, 2004.

2.2 Appellant began working as a liquor control store clerk for the LCB on March 16, 2001. In May 2001, Appellant's two-month evaluation identified an area of concern regarding Appellant's need to check identification (ID) for young looking customers, despite having received training on checking IDs.

2.3 Appellant received the following prior discipline:

> On September 25, 2002, Appellant received a reduction in salary for selling alcohol to a minor operative under the age of 21. At that time, the department attached a copy of LCB's policy prohibiting the sale of liquor to persons under 21 years of age and the requirement to check IDs for anyone who does not look at least 30 years of age to the disciplinary letter. Further, the disciplinary letter warned Appellant that future incidents of misconduct could result in further disciplinary action, up to and including his dismissal.

2.4 The LCB Store's Policy Manual, Chapter 1, Section 12 prohibits liquor sales to "persons under 21 years of age." Further, the policy manual requires that employees "exercise extreme care to avoid sales to underage persons" and "check Ids for anyone who does not look at least 30 years of age." In addition, the policy informs employees that anyone "who sells liquor to persons under 21 is in violation of state law."

2.5 On March 20, 2004, a liquor sale compliance check was conducted at Store #76, using an 18 year-old underage operative of the Enforcement Division. Appellant sold a 375 ml bottle of Bailey's Irish Cream to the underage operative without asking her age or requesting to see her ID.

2.6 On April 30, 2004, Appellant attended a pre-disciplinary meeting and did not deny making the sale to a minor, but explained the he believed the minor operative looked over 30 years of age and that medication for a sinus problem may have contributed to his poor judgment.

2.7 By letter dated June 3, 2004, Appellant was immediately suspended without pay followed by dismissal, effective June 18, 2004, for selling alcohol to a minor in violation of state law, agency policy, and in violation of previous directives to follow the department's policy on regularly checking the identification of young looking customers. Appellant has admitted to the allegations outlined in the disciplinary letter.

2.8 On April 15, 2005, Respondent filed a motion for summary judgment.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent asserts there are no genuine issues of material fact regarding Appellant's misconduct. Respondent argues it is undisputed Appellant received training and was aware of the LCB's policies and the requirement to check proper identification. Respondent further argues Appellant blatantly disregarded his training, his superiors' admonitions regarding his duty to properly check customers for identification, and the warning provided in his previous reduction in salary that future incidents could lead to further disciplinary action, including dismissal. Respondent argues Appellant concedes he previously sold liquor to a minor and also admits he sold liquor to a minor and committed misconduct on March 20, 2004. Respondent contends Appellant's claim he returned to work on March 20, 2004, after being on sick leave and due to the manager's inability to fill his shift is inaccurate and asserts that even if Appellant was ill or impaired by medication, it was incumbent upon him to appear fit for duty and to refrain from being under the influence of drugs while in work status. Respondent argues Appellant has demonstrated he cannot be trusted to follow and enforce LCB policies and the law

regarding sales to minors and argues he has disregarded the agency's interest in preventing the misuse of alcohol and keeping alcohol out of the hands of minors. Therefore, Respondent argues termination is the appropriate sanction.

3.2 Appellant argues he was a very hard working liquor store clerk and was well liked by many of the mangers he worked for. Appellant admits he sold liquor to a minor on March 20, 2004, but contends it was his first day back to work after taking sick leave for a serious sinus disease. Appellant also admits to previously selling liquor to a minor during a sting operation and argues he accepted the discipline imposed. Appellant contends he was on heavy doses of medication on March 20, 2004, but argues he agreed to return to work because his manager was having trouble filling his shifts. Appellant further contends his illness and medication interfered with his judgment and asserts he reasonably believed the purchaser was over thirty years of age. Appellant asserts the circumstances of his working while on medication will not reoccur and asserts he is extremely unlikely to re-offend. Appellant argues there are genuine issues of material fact on whether discipline is appropriate and whether the level of discharge is appropriate.

IV. DISCUSSION

4.1 The Board may decide an appeal by motion if the documents on file, depositions and affidavits show there is no genuine issue as to any material fact and the appeal should be dismissed as a matter of law. WAC 358-30-060(1). All facts and reasonable inferences therefrom are to be determined in favor of the nonmoving party. See Hall v. University of Washington, PAB No. 3863-V2 (1995).

4.2 There are no issues of material fact that must be resolved to decide this issue or to decide Respondent's Motion for Summary Judgment. The issue before the Board is whether Appellant's actions warrant dismissal. We are able to make this determination based on the uncontroverted facts presented here.

4.3 It is undisputed that Appellant was knowledgeable about the agency's policies regarding alcohol sales to young looking individuals and that he understood selling alcohol to a minor was also a violation of state law. Further, it is undisputed that Appellant sold alcohol to an underage operative on March 20, 2004. Although Appellant claims he lacked proper judgment due to being on medication for a sinus illness, he had a responsibility to be aware of the side effects of his medication. Appellant's failure to do so does not mitigate the seriousness of his actions.

4.4 Appellant argues that his medication adversely affected his ability to determine that the minor operative was under age 21. In a similar argument, the Board rejected the contention that the use of prescription drugs adversely affected an employee's judgment and concluded the employee had a duty to act responsibly in taking the medication. Bonny v. Dep't of Social and Health Services, PAB No. DISM-02-0017 (2004).

4.5 Appellant's use of medication is not a valid defense for his misconduct. In 1994, the Board considered and rejected a similar argument in Maxwell v. Dept. of Corrections, PAB No. D93-157 (1994), affirmed Thurston Co. Super. Ct. No. 94-2-03037-7. In 1998, the Washington Court of Appeals affirmed the judgment and stated that, "[a]n employee should not be allowed to claim ignorance in order to avoid the consequences of [a medication's] side effects, especially when the effects are easily discoverable." Maxwell v. Dept. of Corrections, 91 Wn. App. 171 (1998).

4.6 Appellant neglected his duty to responsibly check the identification of a young looking person, and as a result, he sold a bottle of liquor to a person under the age of 21. In light of Appellant's previous discipline for selling alcohol to a minor, he should have exercised even greater caution to check identification. Appellant's actions clearly violated agency policy and state law. Furthermore, Appellant's alcohol sale to a minor rises to the level of gross misconduct because he detrimentally

impacted the agency's ability to control the distribution of alcohol, prevent alcohol misuse, and promote public trust and safety by ensuring compliance with state liquor laws.

4.7 Based on the undisputed facts, we conclude that Respondent's Motion for Summary Judgment should be granted and the appeal should be denied.

Having reviewed the file and record in this matter and being fully advised in the premises, the Board enters the following:

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that Respondent's Motion for Summary Judgment is granted, and the appeal of David Erickson is denied.

DATED this _____ day of _____, 2005.

WASHINGTON STATE PERSONNEL APPEALS BOARD

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Busse Nutley, Vice Chair

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Gerald L. Morgen, Member