ISSUED SEPTEMBER 28, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

BHIKHA G. SOLANKI dba Liquor Plus 1535 Amar Road West Covina, California 91792, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6941 File: 21-274218 Reg: 97038879 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: August 12, 1998 Los Angeles, CA

Bhikha G. Solanki, doing business as Liquor Plus (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered his license suspended for 60 days, for his clerk having sold an alcoholic beverage to a minor participating in a decoy program being conducted by the West Covina Police Department, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

[1]The decision of the Department, dated September 11, 1997, is set forth in the appendix.

Appearances on appeal include appellant Bhikha G. Solanki, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's present off-sale general license was issued on September 3, 1992. On February 5, 1997, the Department instituted an accusation against appellant charging that on October 3, 1996, appellant's clerk, Gilmar Rivera, sold beer to Celeste Ann Fuentes, who, at that time, was approximately 17 years of age.

An administrative hearing was held on July 21, 1997, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the sale to Fuentes of a 6-pack of Budweiser in cans. Appellant, represented by counsel, did not contest the fact that the sale had occurred. Appellant's manager and son, Jerry Solanki, testified that the offending clerk's employment was terminated because of the transaction, and that the store had implemented a new system to prevent future violations.

Subsequent to the hearing, the Department issued its decision which determined that the violation had been proven as alleged.

Appellant thereafter filed a timely notice of appeal. Although written notice of the opportunity to file briefs in support of his position was given to appellant on March 24, 1998, he has not filed a brief. The Appeals Board is not required to make an independent search of the record for error not pointed out by appellant. It

was the duty of appellant to show to the Appeals Board that the claimed error existed. Without such assistance by appellant, the Appeals Board may deem the general contentions waived or abandoned. (Horowitz v. Noble (1978) 79 Cal.App.3d 120, 139 [144 Cal.Rptr. 710] and Sutter v. Gamel (1962) 210 Cal.App.2d 529, 531 [26 Cal.Rptr. 880, 881].)

We have reviewed the notice of appeal, which asserts appellant's belief that the 60-day suspension is too harsh for what he describes as a second offense. We will address that issue, in keeping with our view that, while the Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296]), where an appellant raises the issue of an excessive penalty, we will examine the issue to determine whether there has been an abuse of discretion. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

Appellant's description of the offense in question as only his second violation is incorrect. The record reflects three prior instances where discipline was imposed for sale-to-minor violations: one in 1989 (sale in 1988); one in 1992 (date of sale not stated); and one in 1996 (date of sale not stated).[2] Each of the three matters was resolved by the payment of a fine in lieu of suspension.

It is not surprising that appellant feels the 60-day suspension excessive, after

[2] Two of these violations (September 27, 1988 and April 2, 1992) would have been under a previous license; as noted in the text, appellant's present license was issued on September 3, 1992.

having been able to avoid any suspension at all in the past by paying fines. At the same time, it is a significant progression from the 10-day suspension in 1996 to the current 60-day suspension.

The Department mistakenly viewed the case as a "third strike case" [RT 48], and sought mandatory revocation. It appears that the Administrative Law Judge (ALJ), while rejecting the Department's third strike contention and refusing to order revocation, did consider the three prior disciplines as demanding a serious sanction:

> "The overall record of this licensee, based upon those matters which are final and the inferred interest of the legislature in compelling more harsh discipline for sale to underage patrons, demands a serious sanction."
> (Finding of Fact VI.)

We are well aware of the Legislature's concern that the sanctions for selling to minors be stern, and have no quarrel with the ALJ's sentiments. At the same time, we must remind the Department that a progressive system of discipline must rest on a reasonably predictable course, and may not be arbitrary. That is why we think that appellant, although wrong in his count of the number of violations, is correct in his assessment of the penalty as excessive

The unique circumstances of this case require us to question the result the ALJ reached with regard to penalty.

At the time of the administrative hearing, an appeal was pending in connection with a 20-day suspension for another 1996 sale-to-minor violation by this same appellant. As it happens, that case was heard by the same ALJ who heard this case. Although that decision does not cite any instances of prior

disciplinary action against appellant, we know, of course, from the record in this case that there had been several such actions, all for sales to minors.[3] The Department's decision, and the 20-day suspension was affirmed by the Board on April 3, 1998 (AB-6861).

In the current matter, the ALJ professed not to have considered this matter (AB-6861) since, at that time, it was not final. Yet, it is difficult to reconcile the sharp difference between the two suspensions he imposed for what would appear to be identical sale-to-minor decoy violations. All things being equal, it would seem that an equivalent suspension is what would have been expected.

We are not in a position to dispute the ALJ's disclaimer of having considered the matter then pending on appeal. Nor are we in a position to fully understand how or why the ALJ saw the two seemingly identical matters so differently. Absent some explanation for such a sharp disparity in the degree of discipline chosen, we can only conclude the penalty must be set aside.

We find guidance in the decision of the California Supreme Court in Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 516-517 [113 Cal.Rptr. 836], which discussed the need for administrative agencies to explain how they arrive at their result:

> "Our ruling in this regard finds support in persuasive policy considerations ... the requirements that administrative agencies set forth findings to support their adjudicatory decisions stems primarily from judge-made law, and is 'remarkably uniform in both federal and state courts.' As stated by the United States Supreme Court, the accepted ideal ... is that the

[3] Two of these were, however, under an earlier license.

> orderly function of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.
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> "Among other functions, a findings requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions. In addition, findings enable the reviewing court to trace and examine the agency's mode of analysis.
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> "Absent such roadsigns, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of actual and legal conclusions supported the ultimate order or decision of the agency. Moreover, properly constituted findings enable the parties to the agency proceeding to determine whether and on what basis they should seek review. They also serve a public relations function by helping to persuade the parties that administrative decision-making is careful, reasoned, and equitable." (Citations omitted.)

The Court's teachings have application here. If this case stood alone, we would probably accept the decision as reflective of the Department's careful and conscientious determination that a lengthy suspension was necessary to address the recurrent violations on appellant's part. But it does not.

We do not understand the difference in magnitude between the suspension in this case, and the suspension in the case heard by this Board only months earlier, and our search of the record has provided us with no answer. Given the disparity, and the absence of any satisfactory explanation for the difference, we can only conclude that the penalty is arbitrary, and an abuse of the discretion accorded the Department.

CONCLUSION

That portion of the decision which determined that appellant had violated Business and Professions Code §25658, subdivision (a), is affirmed. The case is remanded to the Department for reconsideration of the penalty in light of our comments herein.[4]

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

Dissent of BEN DAVIDIAN, MEMBER, follows

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[4]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.

DISSENT OF BEN DAVIDIAN

I dissent. In my opinion, appellant's overall record justified the imposition of a substantial penalty, even discounting the pending disciplinary matter.[5]

BEN DAVIDIAN, MEMBER

[5] That matter was finalized while the present appeal was pending.