

ISSUED JULY 13, 2000

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

ALEJANDRO and REMIGIA LORESCO	)	AB-7310a
dba 7-Eleven Store #13591)	
275 E Street	)	File: 21-152493
Chula Vista, CA 91910,	)	Reg: 98044097
Appellants/Licensees,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Rodolfo Echeverria
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	June 6, 2000
	)	Los Angeles, CA

Alejandro and Remigia Loresco, doing business as 7-Eleven Store #13591 (appellants), appeal from a Decision Following Appeals Board Decision of the Department of Alcoholic Beverage Control¹ which reduced the suspension of their license to 15 days from 25 days, following the Appeals Board's decision in AB-7310, which affirmed the decision of the Department (that appellants' clerk sold an alcoholic beverage to a person under the age of 21) except as to the finding that a

¹The Decision Following Appeals Board Decision of the Department, dated January 27, 2000, is set forth in the appendix.

prior disciplinary action had been proved, reversed the penalty, and remanded the matter to the Department for reconsideration of the penalty.

Appearances on appeal include appellants Alejandro and Remigia Loresco, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on March 26, 1984. Thereafter, the Department instituted an accusation against appellants charging that appellants' clerk sold beer to a minor. An administrative hearing was held on October 19, 1998, and subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as charged and suspended the license for 25 days.

Appellants filed an appeal (AB-7310), in which the Appeals Board issued a decision affirming the decision of the Department except as to the finding that a prior disciplinary action had been proved, and reversing and remanding the penalty to the Department for reconsideration.

The Department subsequently issued a Decision Following Appeals Board Decision which ordered appellant's license suspended for 15 days. Appellants then filed the present appeal, contending that the Department's Decision Following Appeals Board Decision, although reducing the penalty, failed to acknowledge "that the 'prior' violation has not been proved and may not be used as a basis for a penalty entailing a mandatory suspension." (App.Br. at 2.)

DISCUSSION

Appellants contend that the Department's Decision Following Appeals Board Decision is defective in that it only reduced the penalty without making a finding "that the accusation in Reg. 98044097 was not to be considered a second offense."

Appellants are making the age-old attempt to turn lead into gold, that is, they are attempting to take the Department's failure of proof in the earlier appeal and turn it into an expungement of a "first strike" sale-to-minor violation.

In AB-7310, the ALJ imposed a 25-day suspension based on his finding that appellants had a prior sale-to-minor violation that occurred within 36 months of the violation at issue in AB-7310. The Department, however, failed to prove the date of that violation, a crucial factor in the imposition of a penalty under §25658.1, the "three-strikes" statute. The Appeals Board found that the Department had abused its discretion in imposing a "second-strike" penalty without proving that the prior violation had occurred within 36 months of the violation at issue.

Appellants quote from the Appeals Board's decision in AB-7310 (adding their own emphasis): "The Department exceeded its authority and acted without jurisdiction in finding there was a prior violation that made this violation a second strike." They then go on to argue that "Absent a new and different finding that Reg. 98044097 is not a 'second violation' within the meaning of Business and Professions Code section 25658.1, the decision of this Board dated January 6, 2000 will be rendered without meaning." (App. Opening Br. at 4.)

It appears that appellants are trying to get the Department to issue an order that will recognize the violation in AB-7310 as a "first strike" for all purposes, including any subsequent disciplinary action. This would essentially give them a new starting point for counting the 36-month period of §25658.1 in any subsequent sale-to-minor disciplinary action. Their next sale-to-minor violation (if they have one) could then be no more than a "second strike" rather than a possible basis for revocation under §25658.1.

We reject appellant's argument. The decision in AB-7310 said nothing more than that the Department could not use the prior violation for purposes of enhancing the penalty for the present violation under §25658.1. It did not say, or mean, that the prior violation did not exist, only that the date of the violation had not been proven in this case. The Department's failure to properly prove the date of the prior violation does not prevent it, in a later disciplinary action, from proving the date by appropriate documentation. In a disciplinary action for a future sale-to-minor violation, the Department could prove the date of the prior violation at issue here, as well as the present violation in AB-7310, and if all three occurred within 36 months of the date of that prior violation, appellants would have "three strikes" and would be subject to revocation under §25658.1. The failure in this case to prove the date of the prior violation simply does not affect the Department's ability to prove it as a "strike" in another case.

For purposes of penalty impositions under §25658.1, the date of the prior violation is crucial, since it must be within 36 months of the subsequent violation to come under the provisions of the statute. For a penalty *not* pursuant to

§25658.1, the exact date is not necessary, only proof that the prior violation occurred recently enough to be a valid factor in aggravation. If there had been sufficient admissible evidence to show that the prior violation had occurred within a relatively short time before the AB-7310 violation, the Department may well have been able to leave the penalty at 25 days even without proving the exact date of the violation.

The Department's Decision Following Appeals Board Decision reduced the penalty in AB-7310 from 25 days to 15 days. It was not required to make additional findings and certainly not required to find that the AB-7310 violation was absolutely and irrevocably a "first strike."

ORDER

The decision of the Department is affirmed.²

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This 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 order as provided by §23090.7 of said code.

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 §23090 et seq.