

ISSUED JANUARY 22, 2001

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

CHANGIZ and REBECCA	)	AB-7592
ZOMORODIAN)	
dba Arco	)	File: 20-331797
301 South Anaheim Boulevard	)	Reg: 99046955
Anaheim, CA 92805,)	
Appellant s/Licensees,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	John P. McCarthy
)	
	)	Date and Place of the
DEPARTMENT OF ALCOHOLIC	)	Appeals Board Hearing:
BEVERAGE CONTROL,	)	November 3, 2000
Respondent.	)	Los Angeles, CA
)	

Changiz and Rebecca Zomorodian, doing business as Arco (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days, with an additional 15 days stayed, conditioned upon a one-year period of discipline-free operation, for their clerk having sold an alcoholic beverage to a minor, and for having violated a condition on their license restricting hours of sale of alcoholic beverages, being contrary to

¹The decision of the Department, dated January 27, 2000, is set forth in the appendix.

the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §§25658, subdivision (a), and 23804.

Appearances on appeal include appellants Changiz and Rebecca Zomorodian, appearing through their counsel, Rick A. Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 13, 1998. Thereafter, the Department instituted an accusation against them charging two sale-to-minor violations and two violations of a condition on the license restricting sales to certain hours, both of which occurred in connection with the sales to the two minors.

An administrative hearing was held on November 12, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by James Rodriguez ("Rodriguez") and Christian Freichler ("Freichler"), both of whom made purchases of alcoholic beverages while acting as minor decoys for the Anaheim police department; by Russell A. Sutter ("Sutter"), an Anaheim police sergeant who was in charge of the decoy operation involving Freichler; by Fanny Martinez ("Martinez"), the clerk who made the sale to Freichler; by Thomas Engel ("Engel"), an Anaheim police investigator who testified that the conditional use permit for appellants' business had been amended to permit sales of alcoholic beverages until 2:00 a.m.; by Maria Sepulveda ("Sepulveda"), the clerk who made the sale to Rodriguez after asking him his age, and thought he was kidding when he

answered “nineteen”; by Chagiz Zomorodian (one of the licensees) who testified he had seen both decoys in the station on previous occasions, and who also testified concerning his reliance on officer Engel’s assurances that once the CUP was amended, the later hours were in effect; and by Parvis Kshorvais, the manager of the station, who testified he had been told by Zomorodian that the 10:00 p.m. restriction on sales of alcoholic beverages was no longer in effect, but that he had delayed for several days removing the signs from the coolers which cited the 10:00 selling restriction.

The parties stipulated that the sales to the minors had occurred as alleged in the accusation, and at the hours there alleged. As indicated above, appellants presented evidence tending to show, among other things, that one of the decoys (Freichler), a member of the Anaheim Police Department Explorer troop had been in the premises on previous occasions, and participated in police-related activities at and associated with the premises; that the clerk (Martinez) sold to him in the belief he was a policeman, and, therefore, over the age of 21; and that the sales during the restricted hours were the result of appellants’ mistaken belief that an amendment to their conditional use permit removed the time of sale restrictions.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation involving the sale to Rodriguez, and rejected appellants’ claim that he did not present the appearance required by Rule 141(b)(2); dismissed the sale-to-minor charge involving Freichler; and sustained the charge that the sales in each case violated the condition on the license restricting the hours during which sales of alcoholic beverages were permitted. The Administrative Law

Judge (ALJ) imposed a 15-day suspension for the sale to minor violation, and a stayed 15-day suspension for the condition violations, appellants having presented substantial evidence of mitigation as to those.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants challenge the penalty as excessive and ambiguous.

DISCUSSION

Appellants contend that the penalty is excessive because it exceeds the 25-day suspension originally recommended by the Department and requested at the hearing, and is based upon only two of the three violations originally alleged, one of which was found to be a good faith mistake.²

There is a certain appeal to appellants' argument. They prevailed on one of the two minor decoy charges, because that decoy operation was unfair; the Department prevailed only as to one of the minor decoy charges, and as to the sales during restricted hours. Fairness suggests that the penalty assessed be something less than what the Department sought on the assumption it had proved all three charges.

On the other hand, it is certainly arguable, contrary to appellant's contentions, that separate suspensions of 15 days and 15 days all stayed are less severe than an unstayed 25-day suspension.

Appellants apparently believe that it would be preferable to serve an additional ten days, as a certainty, than to chance escaping the stayed 15 days by

² Appellants also say the penalty is ambiguous, but do not identify what about it is ambiguous.

managing to avoid additional disciplinary action during the ensuing year.

We are satisfied that the ALJ fairly attempted to balance the Department's penalty recommendations against what had been proven, and afford appellant a certain leniency based upon what he felt was an unintended violation of a license condition. Since the penalty does not appear to be clearly out of line, we cannot say that it is excessive, or an abuse of the wide discretion the Department possesses with respect to penalty.

The Appeals Board may 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].)

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³ This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district 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.