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

**AB-7593b**
File: 20-255297 Reg: 98044555

MOHAMED S. MOHAMED and AHMED M. MURCHED dba Aiban Market
701 - 60th Street, Oakland, CA 94609,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Department Official issuing the Decision: Matthew D. Botting, Chief Counsel

Appeals Board Hearing: October 24, 2002
San Francisco, CA
**ISSUED MARCH 20, 2003**

Mohamed S. Mohamed and Ahmed M. Murched, doing business as Aiban Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license with revocation stayed for 180 days to permit transfer of the license, with a conditional 60-day suspension, for appellants' clerk selling an alcoholic beverage to a person under the age of 21 years, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Mohamed S. Mohamed and Ahmed M. Murched, appearing through their counsel, Beth Aboulafia, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas Allen.

FACTS AND PROCEDURAL HISTORY

This is the third appeal. The original appeal (AB-7593) concerned the sale of the alcoholic beverage to a person under the age of 21 years of age.

---

[1]The decision of the Department, dated October 29, 2001, is set forth in the appendix.

The sale to the minor was on August 4, 1998. Thereafter, the Department held a hearing on June 29, 1999, with a proposed decision being issued on August 31, 1999, which called for a penalty of revocation stayed for 180 days to permit transfer of the license, presumably through a sale of the business, on condition that a 60-day suspension be served. On February 7, 2000, the Department rejected the proposed decision and entered its own decision of outright revocation.

The Appeals Board following an appeal to it, issued its Order on November 30, 2000, affirming the finding that an illegal sale had been made, but reversing the penalty, stating:

> "The decision of the Department rejected the proposed decision of the ALJ, copied the ALJ's [Administrative Law Judge] proposed decision almost in total, excising only that portion of the Penalty Consideration (second paragraph only), which set forth the statute commonly called the '3-strike' rule, with the ALJ noting the Department 'may' revoke the license, but is not required to do so.
>
> "The weakness of the Department's penalty is that there are no findings which would explain the reasoning of the Department to take away the license on only the third violation, which absence of explanations are contrary to the holding in Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 516-517 [113 Cal.Rptr. 836]. This Board has oft cited Topanga for the proposition that the Department must give valid reasons for its rulings, or appellate tribunals are 'held captive'- (not from the case), robbing appellate tribunals of the reasons supporting the decisions. The Department continually ignores Topanga and the Board's multiple requests for clarity of its decisions.
>
> "ORDER (¶) The decision of the Department is affirmed, except as to penalty and that is reversed and remanded in accordance with the views of the Board that the Department owes a duty to explain its actions especially when the 'supreme penalty' is inflicted, to allow appellate tribunals the opportunity to understand and effectively consider Department decisions: clear and fair discretion, or, just arbitrary action."

The Department subsequently issued its Decision Following Appeals Board Decision dated January 11, 2001, again ordering unconditional revocation. A timely appeal followed. The Appeals Board issued its Order dated October 12, 2001, reversing the penalty of the Department. In its Order (AB-7593a), the Board stated:

"Business and Professions Code §25658.1, became effective on January 1, 1995. The statute in pertinent part states: (¶) "Notwithstanding Section 24200, the department may revoke a license for a third violation of Section 25658 that occurs within any 36-month period. This provision shall not be construed to limit the department's authority and discretion to revoke a license prior to a third violation when the circumstances warrant that penalty."

"The statute says 'may revoke.' The right conferred by the statute is not a valid reason to revoke. It is only the power given to revoke (the powers of discretion). (¶) Prior to enactment of the statute, the Appeals Board found in review of many cases over the years, the Department most often used a graduated and increasing onerous levels of discipline under authority of §24200, generally following somewhat the following progression: 15-day suspension, 25-day suspension, 45-day suspension, revocation stayed with a suspension, and finally, revocation. [footnote omitted] That progression has almost disappeared in sales-to-minor cases with the advent of the statute referenced above, with a graduation up to the third violation within the period stated, causing revocation.

"In a recent court of appeal case, Kemmara v. Alcoholic Beverage Control Appeal Board, (case No. B146051, filed May 7, 2001), an unpublished opinion, the Department filed documents with the court, of which we take official notice pursuant to Evidence Code §452, subdivision (d). The documents included a Department memorandum dated December 4, 1996, from the Director of the Department, showing a policy that revocation was to be the rule, with some exceptions which the Director termed 'inappropriate' [to revoke] action, and a listing of 42 cases coming within the statute, with revocation being the penalty in all 42 cases. Apparently from the material filed and according to the Department, it could not locate any applicable cases where the penalty was less than revocation. These documents while suggestive of arbitrariness, do not necessarily negate the possibility that careful consideration was given to each case and the resolution thereof, that is, the Department exercised its discretion within the bounds of substantial justice. (¶) ... (¶)

"The reasons to revoke are those reasons which would lead a reasonable person to conclude revocation is warranted over any other resolution. If the reasons make rational sense, the exercise to revoke was not arbitrary, but a proper exercise of discretion.

"We will now consider the Department's reasoning: (¶) (1) The acting clerk was 17 years of age, and under the law, was improperly acting as the sales clerk, concerning the sale of alcoholic beverages. However, this violation was not charged and the decision does not set forth this conduct as a valid violation. This fact does go to whether the licensees were condoning a laxness as to their duties under the law. We will use a term for this possible laxness, as 'aggravation.'
(¶) (2) The acting clerk (the nephew of the manager and sole clerk) is alleged to be without proper training. This acting clerk testified that he helped after school

doing jobs, such as stocking the shelves, etc. [RT 94]. We determine that while it is not a violation to use a clerk without training – that is appellants' risk, such possible laxness would go to aggravation. (¶) (3) The Department reasons that the manager and sole clerk's actions of needing to use the restroom (for about five to six minutes), and allowing his nephew to act as clerk, was 'extremely careless' and unreasonable, and the consequences were foreseeable. We determine such statements are the essence of arrogance born of hindsight, but little to do with realities of humanness and emergencies. Such statements are not from a rational mind balancing the law and human error. Such conclusions are, at best, self serving.

"At the time the manager left the immediate area, there were no customers in the premises. We determine that created the illusion of security as the manager left the scene [RT 94-95]. Then the record shows this quiet scene is abruptly dismantled. A minor entered to use the phone next to the cash register, three separate customers enter, an elderly lady asks the acting clerk for an item not in stock, and a customer behind her exhibits impatience. The minor on the phone became heated in his words, while three additional minors, his associates, enter the store and mill about. Then the violation sale occurred [RT 95-100]. (¶) (4) The Department states there were two prior sales to minors. Whether or not the clerks, as alleged, on prior occasions failed to ask for identification (Exhibits), is mainly irrelevant as violations are violations, and the failure to request identification is not unlawful, but such proven failure does tend to show aggravation.

"We conclude the manager/sole clerk was unwise, but not extremely careless and unreasonable in his actions as concluded by the Department. If we were to agree with the Department, we would have to bury our rational senses to follow what we determine is an irrational evaluation of this matter based on the record.

"We feel the suddenness of the need for relief by the manager and sole clerk, the then quietness of the premises, but shortly to explode in front of the acting clerk, not experienced to cope, balances the aggravation, and should demand of the Department some rational and logical reasoning within its duty to protect the public welfare and morals.

"If appellants are not sufficiently concerned with the dangers of alcoholic beverage sales to minors, they will violate again and justice can, then, be administered with decency and rational consideration."

The Department issued its decision dated October 29, 2001, returning to the penalty originally proposed by the ALJ. A new appeal followed. Appellants contend that the penalty is arbitrary and capricious, arguing the penalty is an abuse of the Department's discretion.

DISCUSSION

The question before the Appeals Board is whether the Department's decision reduced to a conditional revocation to allow sale of the license is an abuse of discretion, and therefore arbitrary.

There is no question that the Department has the discretionary power to order a penalty that is reasonably fair within the parameters of discretion. To the Board, outright revocation was arbitrary, considering the facts of the sale and its surrounding problems. On the other hand, the conduct and protection of the public was compromised by the lax concerns of appellants to insure that sales of alcoholic beverages would be legally made. Adding the past record of appellants along with the present facts, we are deeply concerned that in weighing fairness to appellants, we infringe on the discretion of the Department to decide cases within the boundaries of reasonable discretion.

With the reduction of the penalty to conditional revocation, the Department has left its arbitrary and illogical perch to come within an arguable resolution. We may disagree as to what is more appropriate but that brings us within the circumference of reasonableness of the discretion presented.

ORDER

The decision of the Department is affirmed.[2]

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

---

[2]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 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.