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

AB-8374
File: 21-260661 Reg: 04057721

MYUNG OK YOUN and SEKWON YOUN, dba Fairway Liquors & Wines
31161 Mission Boulevard, Hayward, CA 94544
Appellants/Licensees
v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: October 6, 2005
San Francisco, CA

ISSUED: DECEMBER 13, 2005

Myung Ok Youn and Sekwon Youn, doing business as Fairway Liquors & Wines (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license for co-appellant/co-licensee Myung Ok Youn having sold a 24-ounce bottle of Corona beer to Elisa Bernal, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Myung Ok Youn and Sekwon Youn, appearing through their counsel, Richard D. Warren, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on May 7, 1991. Thereafter, the Department instituted an accusation against appellants charging the sale of an

[1]The decision of the Department, dated December 23, 2004, is set forth in the appendix.

alcoholic beverage to a minor on April 25, 2004. The accusation alleged four prior instances of discipline for sales to minors on the following dates: June 7, 2003; August 23, 2001; December 26, 1996; and December 10, 1992.

An administrative hearing was held on November 3, 2004, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged.

Appellants thereafter filed a timely appeal in which they raise the following issue: the Department abused its discretion by basing the penalty on violations 12 and 8 years old.

DISCUSSION

Appellants contend that the Department abused its discretion by "reaching back ... to use violations 12 and 8 years earlier as aggravation to justify the maximum penalty." (App. Br., page 1.) They assert that the administrative law judge (ALJ) "expressly used this history of five violations to support his conclusion that revocation was warranted." (*Id.*, at page 2.)

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].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

We do not agree with appellants that the ALJ "expressly" used the history of five

violations to justify his conclusion that revocation was warranted. Although he referred to all five violations, it cannot be said that he would not have ordered revocation but for the 1992 and 1996 violations

The ALJ explained why he felt revocation was appropriate, stating (Conclusions of Law 7 and 8):

> CL7: Section 25658.1(b) authorizes the Department "to revoke a license for a third violation of Section 25658 that occurs within any 36-month period."
>
> CL8: The within violation is the second violation within about 10 months, the third such violation within about 32 months and the fifth since December 1992. All but one of the unlawful sales as [sic] made by one or the other of the co-licensees with the remaining sale made by a daughter. Respondents presented almost nothing in the way of mitigation, that is, changes made or steps taken to ensure there will be no repeat violations beyond noting that co-Respondent/co-licensee Myung Young [sic] attended Department-provided training and would be willing to do so again. No remedial action was shown and the frequency of the violations appears to be increasing. All evidence presented in mitigation was considered. Nevertheless, the sanction recommended seems compelled to adequately protect the public from future violations.

On the basis of these two legal conclusions, it would appear that the ALJ relied not only on the number of violations, but also the facts that the Department was authorized by statute to revoke a license where there had been three violations within a 36-month period, the licensees themselves were responsible for all of the violations, "almost nothing" had been presented in the way of mitigation, and no remedial action had been taken. His use of the term "increasing frequency" could apply as well to the three most recent violations as to all of them.

The 1992 and 1996 violations were not essential to an order of revocation. Therefore, any consideration given to their having existed does not give rise to an abuse of discretion. If anything, they demonstrate that this particular licensee cannot be trusted to prevent minors from gaining access to alcoholic beverages.

ORDER

The decision of the Department is affirmed.[2]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[2] 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.