

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

**AB-8730**

File: 21-400299 Reg: 07064941

MARIA SANTANA MORENO and JOSÉ LUIS MORENOMACHADO,  
dba Paradise Liquor Market  
14156 Rosecrans Avenue, Unit A, Santa Fe Springs, CA 90670,  
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

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

Appeals Board Hearing: August 7, 2008  
Los Angeles, CA

**ISSUED DECEMBER 3, 2008**

Maria Santana Moreno and José Luis Morenomachado, doing business as Paradise Liquor Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended their license for 25 days for the sale of an alcoholic beverage to a Department minor decoy (count 1) and imposed a stayed revocation for a probationary period of three years and a 35-day suspension for the sale of alcoholic beverages to a non-decoy minor (count 3), the two suspensions to run concurrently, violations of Business and Professions Code<sup>2</sup> section 25658, subdivision (a).

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<sup>1</sup>The decision of the Department, dated September 4, 2007, is set forth in the appendix.

<sup>2</sup>Unless otherwise indicated, statutory references in this opinion are to the Business and Professions Code.

Appearances on appeal include appellants Maria Santana Moreno and José Luis Morenomachado (hereafter "Moreno"),<sup>3</sup> 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 general license was issued on July 8, 2003. On January 30, 2007, the Department filed a three-count accusation against appellants charging that, on November 9, 2006, their clerk, Jesse Foster (the clerk), sold an alcoholic beverage to 19-year-old Steven Navia, who was working as a minor decoy for the Department at the time (count 1), and co-licensee José Moreno and the clerk sold alcoholic beverages to two non-decoy minors a few minutes later (counts 2 and 3).

At the administrative hearing held on May 25, 2007, documentary evidence was received and testimony concerning the sales was presented. Evidence was presented of a prior sale-to-minor violation on February 5, 2004, 33 months before the sales at issue. The minor named in count 2 did not appear and the count was dismissed.

Subsequently, the Department issued its decision which determined that the violations charged in counts 1 and 3 were proved and no defense was established. Appellants then filed an appeal contending the penalty imposed is excessive and an abuse of the Department's discretion.

#### DISCUSSION

Appellants contend the penalty is excessive because the Department treated the violations as a second and a third violation within three years. They argue that this is not

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<sup>3</sup>Although the co-licensee's name is shown in the pleadings as "José Luis Morenomachado," he gave his last name at the hearing as "Moreno." The Department's decision uses Moreno; we do also.

permissible under the applicable statute and regulations, and it renders illusory their right to petition for an offer in compromise regarding the second violation.

Appellants contend that the accusation must be treated as a whole, constituting only the second violation for purposes of imposing penalty. Then the Department must consider the aggravating and mitigating circumstances. Appellants urge as mitigation the two years and nine months between the first and second violations and the positive action they took to correct the problem, such as installation of additional signs, a card scanner, and termination of the clerk.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

The penalty considerations are addressed in Conclusions of Law, paragraph 9:

Conclusions of Law, paragraphs 5 and 6, resulted from two separate, independent transactions. It is mere coincidence that they occurred on the same day at or about nearly the same time. Weighing elements in mitigation and in aggravation for disciplinary purposes as set forth in Section 144, Title 4, Chapter 1, California Code of Regulations, aggravating factors predominate. Against two claimed but undocumented decoy investigation successes (Findings of Fact, ¶ 21), the installation of an ID scanner that seems to provide benefits to Respondents more than

an aid for sales persons (*Id.*) and added in store signage (*Id.*), there are three unlawful sales within three years (Findings of Fact, ¶ 3), active co-licensee involvement in the unlawful sale to minor Maguire (Findings of Fact, ¶ 15) and the nearby presence of a co-licensee supervising a very young, inexperienced clerk Foster (Findings of Fact, ¶¶ 14 & 15) in the sale to decoy Navia. Due to two separate violations, two separate periods of suspension appear appropriate. In addition, since outright revocation appears authorized, though not recommended by Complainant, a long period of probation appears required to ensure loss of the license in the event of a future similar violation.

Appellants argue that the penalty violates section 25658.1 (often referred to as a "three-strikes" law) which provides:

(a) Notwithstanding any other provision of this division, no licensee may petition the department for an offer in compromise pursuant to Section 23095 for a third or any subsequent violation of Section 25658 that occurs within 36 months of the initial violation.

(b) 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.

(c) For purposes of this section, no violation may be considered for purposes of determination of the penalty until it has become final.

Appellants also allege that the penalty violates the Department's Penalty Guidelines found in rule 144 (4 Cal. Code Regs., § 144). In the appendix to Rule 144, entitled Penalty Guidelines, there is a Penalty Schedule listing various violations and the penalties typically imposed for them. Sale-to-minor violations and their respective typical penalties are shown as follows:

Sale of alcoholic beverages to person(s) under 21 [¶ . . . ¶]	15 day suspension
2nd violation of section 25658 within 36 months	25 day suspension
3rd violation of section 25658 within 36 months	Revocation

A parenthetical note follows – "(Note: priors must be final - B & P § 25658.1)"

Relying on the language of subdivision (c) of section 25658.1, appellants argue that the first count of the accusation cannot be used to aggravate the penalty for count 3 because the decision with regard to the first count is not final. However, section 25658.1 does not restrict the Department in imposing revocation, but specifically states that it is not intended to "limit the department's authority and discretion to revoke a license prior to a third violation when the circumstances warrant that penalty." The Department clearly had the authority under section 25658.1 to order revocation in this case even if the two counts in this accusation are considered to constitute only the second violation within 36 months. In addition, the Penalty Policy Guidelines, which precede the Penalty Schedule, state:

These guidelines are not intended to . . . preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion. [¶] Higher or lower penalties from this schedule may be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances.

Neither section 25658.1 nor rule 144 have been violated by the penalty imposed here, since both acknowledge that the Department retains the discretion to impose reasonable penalties other than those specified.

Section 23095 gives a licensee the right to petition the Department to allow payment of a fine (called a Petition for Offer in Compromise, or POIC) instead of serving a period of suspension. This section provides, in pertinent part:

(a) Whenever a decision of the department suspending a license becomes final . . . , the licensee may, before the operative date of the suspension, petition the department for permission to make an offer in compromise . . . consisting of a sum of money in lieu of serving the suspension.

(b) No licensee may petition the department for an offer in compromise in any case in which the proposed suspension is for a period in excess of 15 days.

[¶]. . . [¶]

(e) Notwithstanding subdivision (b), a licensee may petition the department for an offer in compromise for a second violation of Section 25658 that occurs within 36 months of the initial violation without regard to the period of suspension. . . .

Appellants argue that the penalty renders illusory their right to petition for an offer in compromise regarding the second violation. Although section 23095, subdivision (e), allows a petition for a second violation regardless of the period of suspension, section 25658.1, subdivision (a), prohibits a POIC for a third sale-to-minor violation that occurs within 36 months of the initial violation. Since the suspensions imposed here are to run concurrently, and the suspension for the third violation is longer than that for the second violation, appellants say, it would be futile to attempt to resolve the second violation by a POIC.

Their right to petition the Department, however, is not really more illusory because of this penalty than it would be if the length of the suspensions were reversed. This is because the Department is not required to grant the petition and allow payment of a fine in lieu of serving a suspension. The Department exercises its discretion in deciding whether to allow a fine in lieu of a suspension, guided by the language of subdivision (c)(1) of section 23095, which says the Department "may grant the petition if it is satisfied that . . . [t]he public welfare and morals would not be impaired by permitting the licensee to operate during the period set for suspension and that the payment of the sum of money will achieve the desired disciplinary purposes." Given the language in Conclusion of Law 9, quoted above, it seems highly unlikely that a petition by appellants would be granted. The right to petition can be illusory in a number of instances, such as when a licensee cannot pay the amount of fine required to prevent serving a

suspension. We cannot say that the penalty for count 1 is an abuse of discretion simply because some other factor makes payment of a fine, for all practical purposes, unavailable.

There does not appear to be any statute or rule that specifies how to treat a situation such as this, where there are two unrelated sale-to-minor violations occurring at almost the same time and charged in the same accusation. The Department's discretion, however, exists for just this type of unspecified situation. If the Department exercises that discretion reasonably and not arbitrarily, this Board will affirm the Department's action. In this case, it appears the Department did not act unreasonably, since, as explained above, even if the accusation were treated as a whole, the Department was authorized to impose revocation for a second violation within 36 months under appropriate circumstances.

#### ORDER

The decision of the Department is affirmed.<sup>4</sup>

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

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<sup>4</sup>This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.