

ISSUED SEPTEMBER 28, 1998

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

SYED MOHAMMAD HOSSAIN	)	AB-6942
dba Commerce Market)	
10055 Commerce Avenue	)	File: 20-298779
Tujunga, California 91042,	)	Reg: 97039514
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Ronald M. Gruen
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	August 12, 1998
	)	Los Angeles, CA
)	

Syed Mohammad Hossain, doing business as Commerce Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his off-sale beer and wine license for 20 days, with 10 days thereof stayed for a probationary period of one year, for licensee's clerk, Angelica Roxana Arciniega, having sold an alcoholic beverage (a 32-ounce bottle of Miller Highlife beer) to Gilardo Pena, who was then 17 years of age, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions

¹The decision of the Department, dated August 28, 1997, is set forth in the appendix.

Code §25658, subdivision (a).

Appearances on appeal include appellant Syed Mohammad Hossain, appearing through his counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on January 9, 1995. On April 7, 1997, the Department instituted an accusation against appellant charging the sale described above.

An administrative hearing was held on June 19, 1997. At that hearing, testimony was presented by Los Angeles police officer Kevin Whelchel, who issued the sale-to-minor citation, and by Gilardo Pena, the minor who purchased the beer. Appellant also testified, and denied that Arciniega was an employee, contending she had come to the store only to pick up an employment application form.

Subsequent to the hearing, the Department issued its decision which determined that the violation had been proved, and ordered the suspension now being appealed.

Appellant's timely appeal raises the following issues: (1) appellant's request for a continuance was improperly denied; (2) the decision and the findings are not supported by substantial evidence in that the beverage which was purchased was not shown to be an alcoholic beverage, and Arciniega was not shown to be an employee; (3) the penalty was excessive; and (4) appellant was denied due process by virtue of the unconstitutionality of Business and Professions Code §24210.

DISCUSSION

Appellant contends he was deprived of due process of law when his request for a continuance, first made on the day of the hearing, was denied. Appellant contends he was compelled to go forward without counsel, who he had hired the previous week, and without a crucial witness, Arciniega, who he said was then in El Salvador. Appellant's counsel stresses appellant's alleged inability to represent himself, pointing to appellant's disclaimer to that effect.

Appellant's arguments are unpersuasive. Appellant waited until only one week before the hearing to retain counsel, explaining his failure to have done so earlier on not having had time. Whether he actually retained an attorney is itself questionable, since appellant was unable even to provide the Administrative Law Judge (ALJ) with the name of the attorney to whom he supposedly paid \$300 as a retainer.

Appellant was on notice from his receipt of the accusation, mailed April 9, 1997, some two months prior to the administrative hearing, of his right to retain counsel. He was clearly negligent in waiting until only one week before the hearing to retain an attorney, and then failing to ensure that his attorney would be able to attend the hearing. The granting or denial of a continuance is a matter within the sound discretion of the ALJ. Having waited until the day of the hearing to request the continuance, and then with questionable proof to support the request, appellant is not in a position to say that the ALJ abused his discretion by denying the request.

Nor do we believe the alleged unavailability of Arciniega constitutes a valid

ground for a continuance. Once again, appellant's belated request rendered it impossible to determine whether, even if it was true she was in El Salvador, she would return to California at any time in the foreseeable future, or at all.

Additionally, appellant's position was that Arciniega was never legally employed. His testimony on that point was contradicted by officer Whelchel's testimony that Arciniega took Pena's money for the beer and placed the beer in a sack [RT 16, 23], conduct consistent with employment as a clerk.

II

Appellant contends the decision and findings are not supported by substantial evidence, arguing that there was no evidence that the beverage sold was an "alcoholic" beverage under Business and Professions Code §23004, or that Arciniega was an employee of appellant. Appellant suggests that the empty bottle introduced into evidence as Exhibit 1 had contained some beverage other than beer.

Officer Whelchel testified that the product Pena purchased was a 32-ounce bottle of Miller Highlife beer [RT 16]. Exhibit 1, the bottle itself, had been emptied in accordance with police procedure [RT 20].

The ALJ was entitled to find that Arciniega was employed as a clerk on the basis of the testimony of both Whelchel and Pena that she acted in that capacity in connection with the transaction in question.

III

Appellant contends that the penalty, a suspension of 20 days, with 10 days stayed, is excessive.

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].)

It can be inferred that the ALJ carefully considered what an appropriate penalty should be, based upon his criticism of the Department's initial recommendation and the colloquy which took place concerning the factors to be considered if a violation were to be found [RT 42-45].²

² The Department's position, as expressed by counsel, suggests the Department placed weight on what would seem to be other disciplinary proceedings which have not become final, or, it seems, not even having been to hearing, or even charged. If this true, we suggest the Department review its decisional process when it comes to its penalty recommendations generally.

"Mr. Ainley: ... And in this case we are asking a penalty of 30 days suspension with 15 days stayed.

"The Court: This is the first minor violation, isn't it?

"Mr. Ainley: Yes, that's true, your honor.

"The Court: Isn't that rather out of line of what you would normally recommend?

"Mr. Ainley: Yes, it is, your Honor.

The original penalty was actually much harsher. We had at that point expected to have both priors resolved. As it stands, we don't have either one resolved. Although one we do have a decision. But the decision is not yet final because the time for appeal has not elapsed.

"The Court: Let me ask you this: What would be your recommendation if those priors did not exist?

(continued...)

It is difficult to say that the penalty, a net 10-day suspension, is so excessive as to amount to an abuse of discretion, particularly when the youthful age of Pena is taken into account.

IV

Appellant contends that the entire proceedings are constitutionally flawed because Business and Professions Code §24210, which authorizes the director to appoint the administrative law judge, is unconstitutional.

The Appeals Board lacks the power to declare an act of the Legislature unconstitutional (see Cal.Const., art. 3, §3.5), and, for that reason, customarily declines to consider the issue, as it does in this case.

Appellant has not claimed of the existence of any specific bias on the part of the ALJ who heard the case and issued the proposed decision.

CONCLUSION

²(...continued)

"Mr. Ainley: Given the problems we have had with this store and the police have had, we would certainly recommend 30-15. The original recommendation was revocation.

"The Court: On a first?

"Mr. Ainley: Had the other priors been established, we would have been asking revocation. We have come down from that to 30-15, given the fact that the priors haven't been finalized yet. But given the problems we have had with this store --" [RT 42-43.]

When the Department's penalty recommendation appears to be premised on improper considerations, and cannot be determined either from the record or from the decision, the case comes to this Board under a cloud of suspicion. In this case, the ALJ's probing questions provide support for his ultimate decision, which the Department accepted, but also highlight the need for a more-reasoned approach to penalty recommendation than revealed in this case.

The decision of the Department is affirmed.³

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³ 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 decision as provided by §23090.7 of said code.

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