ISSUED OCTOBER 8, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

SHADIAH S. HADDAD dba Mobil Gas Station 290 South Arroyo Parkway Pasadena, California 91105, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6964 File: 20-31569 Reg: 97039251 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: August 12, 1998 Los Angeles, CA

Shadiah S. Haddad, doing business as Mobil Gas Station (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 20 days, for his clerk having sold an alcoholic beverage (beer) to a 17-year-old minor working as a decoy for the Pasadena Police Department, 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 Code §25658, subdivision (a).

[1]The decision of the Department, dated October 16, 1997, is set forth in the appendix.

Appearances on appeal include appellant Shadiah S. Haddad, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 18, 1978. Thereafter, the Department instituted an accusation against appellant charging a sale of beer by appellant's clerk, Marcela Morales, to Manuel Kopoushian, a minor decoy.

An administrative hearing was held on August 26, 1997.[2] The Department presented the testimony of Maria Sell, the Pasadena police officer under whose supervision the minor, who also testified, acted as a decoy. Appellant did not appear at the hearing, and the testimony concerning the transaction established that the sale (of a can of Miller Genuine Draft beer) had occurred as alleged.

Subsequent to the hearing, the Administrative Law Judge (ALJ) issued his proposed decision, which the Department adopted, sustaining the charge in the accusation, and assessing a 20-day suspension of appellant's license.

Appellant thereafter filed a timely notice of appeal. Appellant has not filed a brief, but in his notice of appeal, has raised the following issues: (1) the minor mimicked the appearance, dress and manner of speaking of an older person,

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[2] The administrative hearing was originally scheduled for May 28, 1997, but was continued to July 11, 1997, and then continued once again, to August 26, 1997, when it finally went forward. The record is silent as to the reasons for the continuances.

thereby inducing the sale; and (2) the penalty is excessive, in that it exceeds the penalty recommended by Department counsel.

Written notice of the opportunity to file briefs in support of the appellant's position was given on April 23, 1998. No brief has been filed by appellant.

The Appeals Board is not required to make an independent search of the record for error not pointed out by appellant. It was the duty of appellant to show to the Appeals Board that the claimed error existed. Without such assistance by appellant, the Appeals Board may deem general contentions waived or abandoned. (Horowitz v. Noble (1978) 79 Cal.App.3d 120, 139 [144 Cal.Rptr. 710] and Sutter v. Gamel (1962) 210 Cal.App.2d 529, 531 [26 Cal.Rptr. 880, 881].) However, we have undertaken to review the record in light of appellant's claim that the penalty is excessive, because of our own questions as to the manner in which it was determined.[3]

DISCUSSION

Appellant contends that the ALJ exceeded his jurisdiction by imposing a penalty greater than recommended by the Department. We construe this as equivalent to a contention that the adoption by the Department of a decision assessing a penalty greater than recommended by Department counsel at the

[3] We find nothing in the record to support appellant's claim regarding the decoy's dress, appearance, and manner of speaking, by which we assume appellant meant to argue that the clerk was entrapped. No discussion of the law of entrapment, as set forth in People v. Barraza (1979) 23 Cal.3d 675 [153 Cal.Rptr. 459], is necessary where, as here, the record is so devoid of any evidence that might reasonably suggest entrapment.

hearing was arbitrary, and, therefore, an abuse of discretion.

Although he filed a notice of defense and requested a hearing, appellant did not appear. The record reflects that he was given notice of the hearing, which was twice postponed for reasons not explained in the record.

Near the close of the administrative hearing, which essentially proceeded in the nature of a default prove-up, Department counsel introduced a certified copy of a prior decision involving an earlier sale-to-minor violation. In the course of receiving the exhibit in evidence, the ALJ commented [RT 25]: "These folks don't seem to learn a lesson, do they."

In our opinion, the ALJ's remark was inappropriate. While the first violation was recent - approximately two and one-half years earlier - it was, according to the accusation, the only blemish on appellant's record since he was first licensed in 1978. In addition, the sale in this instance was by a clerk, while the seller in the earlier transaction was not identified.

Next, when Department counsel recommended a 15-day suspension, the ALJ asked [RT 26]: "Why only 15 days?" Department counsel explained [RT 26]:

> "Mr. Sakamoto: I can only tell you that's what they recommended. Let's see. It looks like they have been licensed since 1978. They had only this one prior apparently which probably -- the actual date of occurrence was probably in 1994."

In a colloquy between Department counsel and the ALJ, in the course of which the ALJ asked whether the Department's penalty guidelines were published by the Office of Administrative Law, the ALJ stated [RT 27]: "I think the

Department is being awfully lenient recommending 15 days with a two-and-a half year span between the same type of violation, which, in and of itself, is serious." He followed up this comment by a series of questions inquiring under what circumstances appellant might be eligible to petition for an offer in compromise.

The ALJ ultimately suspended appellant's license for 20 days, stating:

> "In the absence of any showing of mitigation, extenuation or rehabilitation, and the respondent's apparent disregard of the opportunity to show such factors, this constitutes circumstances of aggravation. The complainant recommended a 15-day suspension as a penalty. However, the interest of justice calls for a penalty as herein set forth below [a 20-day suspension]."

We are troubled by the ALJ's reasoning, that the absence of a showing of mitigation, extenuation or rehabilitation, coupled with the absence of any attempt to show such factors, equates with aggravation.

The Department proved a simple sale to a minor decoy. There is nothing in the evidentiary record that suggests anything flagrant - other than the sale itself, which the Department usually penalizes with its "standard" 15-day suspension. We can only conclude that the ALJ was motivated by appellant's failure to appear at the administrative hearing. While it is true that appellant initially requested a hearing, the hearing was twice continued, and there is nothing in the record that indicates either of the continuances were at appellant's request. We could only speculate as to the reason for appellant's failure to attend the hearing.

Moreover, this case involved only appellant's second violation in 20 years of

licensure.[4] Such a record is, itself, some evidence in support of mitigation, the Department's suggestion to the contrary notwithstanding.

The Board is entitled to assume that the Department's initial determination that a 15-day suspension was appropriate was the product of a careful and thorough assessment of the case. In its brief to this Board, the Department now offers four factors in defense of the greater penalty: the decoy was able to purchase beer without being asked for his age or identification; appellant had a prior disciplinary action for the same offense;[5] no evidence in mitigation was presented; and, finally, the penalty was only slightly higher than the Department's recommendation. All of these considerations, except for the ALJ's equating the absence of mitigation with aggravation, would presumably have been known to the Department and implicit within its original determination as to what was a fair and appropriate penalty.

Thus, the penalty that was assessed appears to have been premised upon an improper or incorrect consideration. Appellant's absence from the hearing could have been for valid reasons. As we said earlier, we could only speculate as to those reasons. However, it is our view that appellant's unexplained absence from the hearing does not, in and of itself, constitute a circumstance which aggravates

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[4] Inexplicably, despite the discussion of a prior discipline during the course of the hearing, and the Department's introduction of a certified copy of the prior discipline, the ALJ made a specific finding that no prior disciplinary history had been established.

[5] But see footnote 4, supra.

the underlying violation, thereby warranting an enhancement of an otherwise appropriate penalty.

CONCLUSION

That portion of the decision of the Department finding a violation of Business and Professions Code §25658, subdivision (a), is affirmed. The penalty is reversed and the case is remanded to the Department for reconsideration of the penalty in light of our comments herein.[6]

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

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[6]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 may, before this final decision becomes effective, 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.