ISSUED OCTOBER 31, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

CHANTHAN and JORN VAN KEMMARA dba California Minimart 17228 Downey Avenue Bellflower, CA 90706, Appellants/Licensees,	)	AB-7575 File: 20-271765 Reg: 99047366
v.	)	Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	Date and Place of the Appeals Board Hearing: September 7, 2000 Los Angeles, CA

Chanthan and Jorn Van Kemmara, doing business as California Minimart (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license for appellants' agent selling an alcoholic beverage to person under the age of 21, 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).

Appearances on appeal include appellants Chanthan and Jorn Van Kemmara, appearing through their counsel, Michael Cohen, and the Department of Alcoholic

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[1]The decision of the Department, dated January 27, 2000, is set forth in the appendix.

Beverage Control, appearing through its counsel, Michelle Wong and Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 12, 1992. Thereafter, the Department instituted an accusation against appellants charging that, on July 14, 1999, appellants' agent, Richard Hour, sold an alcoholic beverage to Ian Greer, who was then 18 years of age. Greer was working as a police decoy at the time.

An administrative hearing was held on December 8, 1999, at which time the parties stipulated to the following: 1) the facts of the violation as stated in the accusation; 2) appellants' disciplinary history; 3) that the requirements of Rule 141 were complied with and were not at issue; and 4) appellants' brief (Exhibit A) and the Department's incident report (Exhibit 1) should be admitted into evidence on the issue of mitigation. No witnesses were called, although the ALJ asked appellant Jorn Van Kemmara a few questions about his familiarity with the Department's training for licensees, and both counsel presented oral argument.

The evidence presented showed two prior disciplinary actions against appellants for sales to minors. The prior violations were on December 5, 1996, and October 24, 1997, both within three years of the present violation, which occurred on July 14, 1999. In all three instances, the sales of alcoholic beverages to minors were made by friends of appellants, who were helping out in their store, without pay. In all three instances, the friends were unsupervised at the times the sales were made. No evidence was presented of any training given to the friends regarding sales of alcoholic beverages.

Subsequent to the hearing, the Department issued its decision which determined that grounds existed for discipline.

Appellants thereafter filed a timely notice of appeal in which they raise the following issues: (1) the findings were not supported by the evidence; (2) the Department's rebuttal evidence is irrelevant and misleading; and (3) the Department violated Business and Professions Code §25658.1 by its policy of always seeking revocation when there are three sale-to-minor violations within three years. The first two issues will be considered together.

DISCUSSION

I

Appellants contend the evidence does not support the ALJ's conclusions that all three of appellants' sale-to-minor violations were similar, that the individuals making the sales were not "trustworthy or properly trained," that appellants did not learn a lesson from the prior violations, that appellants "assumed the risk with their eyes wide open," and that appellants' license should be revoked. They also argue that the incident report, admitted into evidence as the Department's Exhibit 1, does not "rebut any of the mitigating circumstances" and is misleading.

Only the penalty is being contested in this appeal, since appellants stipulated to the correctness of the charge in the accusation. 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].)

Appellants argue that the evidence does not support the findings. However, the real question to be addressed is whether the penalty imposed was an abuse of the

Department's discretion. The ALJ's conclusions were all reasonable given the circumstances of this case, as described in appellants' Exhibit A.

Appellants allowed untrained and unsupervised "friends" to sell alcoholic beverages. Not once, but three times, these friends made illegal sales of alcoholic beverages to minors. Under the circumstances, it was not unreasonable for the ALJ to find that the three incidents involved similar conduct by individuals who were not properly trained. Since the same situation arose twice more after the first violation in late 1996, the ALJ was also justified in concluding that appellants had not learned a lesson from the first (or the second) violation and that they knowingly assumed the risk of illegal sales occurring when they persisted in allowing untrained and unsupervised friends to sell alcoholic beverages.

Appellants contend the police incident report submitted by the Department does not rebut "any of the mitigating circumstances." The short answer is that there are no mitigating circumstances to rebut. That the sellers were simply friends of appellants rather than trained clerks does not mitigate the violation; if anything, the lack of prudence shown by allowing untrained individuals to sell alcoholic beverages aggravates the violation. Appellants' lack of knowledge or direct involvement in the sales also fails as mitigation. They are responsible for the acts of their agents and certainly after the first violation occurred they were on notice and under a duty to prevent further illegal sales. (Laube v. Stroh (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779].) The suggestion that the photographs were somehow misleading is nonsense.

In any case, the penalty of revocation in this case appears to be well within the discretion of the Department based on the evidence presented. It meets the criteria of three sales in three years. Additionally, appellants' practice of letting untrained

individuals sell alcoholic beverages is hardly a prudent business practice and the illegal sales that took place because of that practice show that it is appropriate to revoke this license in the interests of protecting the welfare of the citizens of California.

II

Appellants contend the Department impermissibly failed to exercise its discretion under Business and Professions Code §25658.1 when it applied its policy of invariably recommending revocation in a "third strike" case.

Under Business and Professions Code §25658.1, the Department has been granted the authority to revoke a license when there are three sales to minors within a 36-month period. This was such a case. Appellants are correct that the statute did not make revocation mandatory, but left it to the Department's discretion, as in other penalty matters.

Appellants argue that the Department's policy is to automatically seek revocation in a "third strike" case. They base this contention on the colloquy between counsel for the Department and the ALJ in which one of the Department attorneys, when asked if the Department considered §25658.1 "to be a direct [directory?] provision," said, "We seek uniformity in penalty in a case. We would seek revocation. We don't want to pick up on one licensee and not the other." [RT 12-13.] The other Department attorney, when asked if there were any exceptions to proposing revocation in a three strikes case, replied, "There currently is not . . . and it is the Director's directive that if it qualifies as 25658.1 the Department recommends revocation. . . ." [RT 13.]

Appellants treat these statements as admissions by the Department. It is not clear, however, whether the attorneys were authorized to speak for the Department regarding its policies or whether they accurately portrayed the Department's position.

In any case, the ALJ did not simply rely on this being a "third strike." The last two paragraphs of his Findings set out his reasons for revoking the license:

> "It is not easy to impose the severe penalty of revocation on licensees, such as the [appellants]. However, all three of the sale to minor violations are remarkable for having a similar pattern of conduct. In each case, a friend of the licensees was left in charge of the cash register when the violation was committed. Obviously, none of these individuals were trustworthy or properly trained, and the [appellants] never learned a lesson from each of the prior violations. And, there is no evidence in the record that Mr. Hour, the clerk in the instant case, had any training in this regard.
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> "In the light of their prior record, the [appellants] were put on notice as to the risks associated with having untrained personnel acting as clerks, and thus now assumed the risk with their eyes wide open, in the case at bar. They cannot now be heard to complain. Revocation of the license is justified."

Regardless of what the policy of the Department might be with regard to third strike cases, the ALJ obviously considered the particular situation of these appellants in making his order of revocation, which was adopted, without change by the Department. Under the circumstances, it cannot be said that the order of revocation was an abuse of discretion by the Department.

ORDER

The decision of the Department is affirmed.[2]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[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.