

ISSUED NOVEMBER 30, 2000

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

MOHAMED S. MOHAMED and	)	AB-7593
AHMED M. MURCHED)	
dba Aiban Market	)	File: 20-255297
701 - 60 th Street	)	Reg: 98044555
Oakland, CA 94609,)	
Appellants/Licensees,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	Jeevan S. Ahuja
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	September 21, 2000
	)	San Francisco, CA

Mohamed S. Mohamed and Ahmed M. Murched, doing business as Aiban Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked appellants' off-sale beer and wine license for their clerk selling an alcoholic beverage to a person under the age of 21 years, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivisions (a) and (b), arising from a violation of Business and

¹The Department's Decision Pursuant to Government Code §11517(c), dated February 7, 2000, and the proposed decision, dated August 31, 1999, are set forth in the appendix.

Professions Code §25658, subdivision (a).

Appearances on appeal include appellants Mohamed S. Mohamed and Ahmed M. Murched, appearing through their counsel, Beth Aboulafia, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on December 20, 1990. Thereafter, the Department instituted an accusation against appellants charging the violation of selling an alcoholic beverage to a person under the age of 21 years (minor). Additionally, the accusation alleged that two prior accusations had been filed in 1995 and 1997, both concerning sales to minors – each having been finalized.

An administrative hearing was held on June 29, 1999, at which time oral and documentary evidence was received. Thereafter, the administrative law judge issued his proposed decision which was subsequently rejected by the Department which issued its own decision. The major difference between the two decisions is that the proposed decision called for conditional revocation of the license thus allowing appellants to sell their license, with the Department's decision being unconditional revocation.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) Rule 141(b)(2), concerning the appearance of the minor, was not adhered to by the police; (2) Rule 141(b)(5), concerning a face to face identification of the seller, was not adhered to by the

police; (3) appellants were prejudiced in their defense by the loss of a photo of the minor; and (4) the penalty is excessive. Issues 1 and 3 will be considered together.

DISCUSSION

I

Appellants contend Rule 141(b)(2), concerning the appearance of the minor, was not adhered to by the police. Appellants argue that by the interjection of the statement that a reasonable person would request identification, the Administrative Law Judge (ALJ) failed to apply the correct standard; and the Department must explain in some detail the basis for the conclusion as to the minor's appearance at the time of the sale.

The ALJ stated concerning his impression of the minor:

"... It is found that on the date of this incident [the minor's] demeanor and appearance were such that he presented the appearance of a person under 21 years of age"

Appellants without foundation, other than citing Board cases that do not support their argument, appear to state that the ALJ must go into great detail in explaining why he concluded the way he did. This is not called for by statute or case law. Appellants argue that by stating that a reasonable person would ask for identification, the ALJ in some manner is setting forth an incorrect standard. Prior cases of the Board have called these statements merely surplusage, and of no legal significance.

Appellants also argue that because Exhibit 4 was lost, the case must be

reversed. Exhibit 4 is a photo taken at the time of the incident, in the premises, with the minor and the seller. All parties and witnesses were fully examined while the exhibit was in the hearing room. At the conclusion of the hearing it was found that the Exhibit was missing [RT 185-186]. The seller told the ALJ the last police officer took the photo. The ALJ made a footnote in his proposed decision that he is not satisfied that the Department is responsible for the disappearance of the photo and questioned just when the exhibit disappeared, and how. The ALJ, however, stated that he saw the minor and considered him to under the age of 21 years.

In most, or at least many cases, a photo is not produced for the hearing. While in some cases the Board has commented on this inept and poorly executed investigation, it is the basis of the record on which the Board's decision must be founded. The record as it stands, notwithstanding the objections of appellants, is sufficient to support the Department's decision.

II

Appellants contend that Rule 141(b)(5), concerning a face to face identification of the seller, was not adhered to by the police.

The ALJ found that there was a proper face to face identification of the seller [Finding III-4]. The record shows that the minor pointed out the seller to the police while the minor was about two feet from the counter where the seller was standing [RT 13, 28, 44-45]. The seller testified that there was no valid identification [RT 112]. The record, if the testimony of the minor and the police

officer are believed, support the conclusion of the ALJ. This, then, is a credibility question which only the ALJ can resolve.

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

Also, Exhibit 4, while lost, purportedly shows the minor and the clerk side by side which raises the interesting point as to the knowledge of the seller that he was the seller of the beer to this minor [RT 46].

III

Appellants contend the penalty 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].)

The decision of the Department rejected the proposed decision of the ALJ, copied the ALJ's proposed decision almost in total, excising only that portion of the Penalty Consideration (second paragraph only), which set forth the statute commonly called the "3-strike" rule, with the ALJ noting the Department "may" revoke the license, but is not required to do so.

The weakness of the Department's penalty is that there are no findings which would explain the reasoning of the Department to take away the license on only the third violation, which absence of explanations are contrary to the holding in Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 516-517 [113 Cal.Rptr. 836]. This Board has oft cited Topanga for the proposition that the Department must give valid reasons for its rulings, or appellate tribunals are "held captive" - (not from the case), robbing appellate tribunals of the reasons supporting the decisions. The Department continually ignores Topanga, and the Board's multiple requests for clarity of its decisions.

ORDER

The decision of the Department is affirmed, except as to penalty and that is reversed and remanded in accordance with the views of the Board that the Department owes a duty to explain its actions especially when the "supreme penalty" is inflicted, to allow appellate tribunals the opportunity to understand and effectively consider Department decisions: clear and fair discretion, or, just arbitrary action.²

TED HUNT, CHAIRMAN

²This 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.

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