

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

AB-8856

File: 20-319096 Reg: 06063551

HAMID M. HOUWEIDI, dba Telegraph Market
2552 Telegraph Avenue, Berkeley, CA 94704,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Robert R. Coffman

Appeals Board Hearing: January 15, 2009
San Francisco, CA

ISSUED JUNE 2, 2009

Hamid M. Houweidi, doing business as Telegraph Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked his license, but conditionally stayed its order of revocation subject to service of a 45-day suspension and a probationary period of two years, for having sold beer, an alcoholic beverage, to Scott Kinder, an 18-year-old non-decoy minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Hamid M. Houweidi, representing himself, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

¹The decision of the Department, dated March 21, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on July 2, 1996. On July 27, 2006, the Department instituted an accusation against appellant charging that, on May 5, 2006, appellant sold beer, an alcoholic beverage, to Scott Kinder, an 18-year-old non-decoy minor.

An administrative hearing was held on January 29, 2008. Documentary evidence was received and testimony concerning the violation charged was presented by Scott Kinder and Justin Gebb, a Department investigator. The investigator testified that he encountered Kinder carrying large paper bags which had the size and shape consistent with 12-packs of beer. His attention was drawn to Kinder's youthful appearance. He questioned Kinder, and determined he was a minor. He did not believe the driver's license Kinder produced belonged to him, both because Kinder did not resemble the person pictured on the license, and did not appear to be as old as that person. Kinder described the store where he purchased the beer, and the investigator took Kinder with him to identify the person who sold him the beer. Kinder identified appellant. Appellant admitted making the sale, but claimed he had relied on identification showing Kinder to be of legal age.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and appellant had failed to establish a defense under Business and Professions Code section 25660 because he had not given the driver's license the scrutiny the law requires. Had he done so, he would have realized from the difference in facial appearance and apparent age that Kinder was not the person pictured on the license.

Appellant filed a timely notice of appeal in which he contends that the

conditionally-stayed revocation and 45-day suspension is excessive and will work an economic hardship.

DISCUSSION

Appellant contends the penalty is excessive and will work an economic hardship. He says that he has a family of four and parents overseas, and being closed 45 days will cause him to lose customers and income.

This is a rare third strike case that resulted in a penalty more lenient than outright license revocation. Appellant was able to demonstrate that he had survived seven decoy visits from the Berkeley and University of California Police Departments, three of which followed the sale in this case, and that he had no violations in the two years that elapsed since the violation in this case.

There is really nothing the Board can do for appellant. The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.²

²The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

Appellant was indeed fortunate to escape with his license, tattered but intact, given the hard line often taken by the Department in third strike cases. It can hardly be said that the penalty constituted an abuse of discretion, the only basis for any remedial action by the Board. (See *Martin v. Alcoholic Beverage Control Appeals Board & Haley* (1959) 52 Cal.2d 287 [341 P.2d 296].)

In any event, appellant is not required to close his market. He simply must cease selling alcoholic beverages for the period of the suspension.

ORDER

The decision of the Department is affirmed.³

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

³ This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

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