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

**AB-9594**
File: 20-329830 Reg: 15083083

WOODLAND CHEVRON LIMITED PARTNERSHIP,
dba Woodland Chevron
190 Niblick Road, Paso Robles, CA 93446,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: May 4, 2017
Los Angeles, CA

**ISSUED JUNE 12, 2017**

Appearances: *Appellant:* John W. Edwards II, of Hinman & Carmichael, as counsel for appellant.
*Respondent:* John P. Newton as counsel for the Department of Alcoholic Beverage Control.

OPINION

Woodland Chevron Limited Partnership, doing business as Woodland Chevron (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] revoking its license because its clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a). This was appellant's third sale-to-minor violation in 14 months.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on July 1, 1997. On March 4, 2016, the Department filed an accusation charging that appellant's clerk, Ramon Yanez (the clerk), sold an alcoholic beverage to 18-year-old Austin Azarvand on June 6,

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1. The decision of the Department, dated June 10, 2016, is set forth in the appendix.

2015. Although not noted in the accusation, Azarvand was working as a minor decoy for the Paso Robles Police Department at the time.

At the administrative hearing held on March 16, 2016, documentary evidence was received, and testimony concerning the sale was presented by Austin Azarvand (the decoy), by Detective Eric Azarvand[2] of the Paso Robles Police Department, and by Daniel Larrison, appellant's general manager.

Testimony established that on the date of the operation, the decoy entered the licensed premises, and Detective Azarvand followed a short time later. Azarvand went to the alcoholic beverage section and selected a 12-pack of Bud Light beer. He took the beer to the register and set it down on the counter.

Two clerks were behind the counter. One of the clerks, Ramon Yanez, asked to see his ID. The decoy handed his California identification card to the clerk, who scanned it. The clerk handed the ID back to the decoy, then completed the sale. The decoy paid for the beer, the clerk gave him some change, and the decoy then exited with the beer. Detective Azarvand exited as well.

The decoy reentered the licensed premises, accompanied by Detective Azarvand and two other officers. The officers contacted the clerk and identified themselves. Detective Azarvand asked the decoy to identify the person who sold him the beer. At a distance of approximately 10 feet, the decoy pointed to Yanez and said that he had. A photo of the two of them was taken, after which the decoy exited.

The clerk told the officer that he had checked the decoy's ID. After looking at the ID, he looked at a sticker on the counter which indicated that alcohol sales were

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2. Detective Azarvand is the minor decoy's father. To avoid confusion, Austin Azarvand will be referred to herein as "the decoy" and his father will be referred to as Detective Azarvand.

permitted to people born in 1997 or earlier. Detective Azarvand looked at the stickers on the counter and noticed that they indicated that tobacco sales were permitted to people born in 1997 or before and that alcohol sales were permitted to people born in 1994 and before.

Larrison, appellant's general manager, testified that employees are instructed to card patrons buying alcohol unless they are "gray and wrinkled." He described the circumstances relating to the August 2014 violation. Appellant did not terminate the employee involved because no such penalty was set forth in the employee manual. As a result of the violation, appellant amended its employee manual to permit it to terminate employees for selling alcohol to minors. Appellant enrolled all of its employees in LEAD training after the incident.

Larrison also described the circumstances surrounding the October 2014 violation. He indicated that it was the result of a vindictive employee who was about to be fired. Appellant suspended the clerk immediately following the violation and fired him a short time later. After this incident, appellant sent all of its employees to TIPS training.

Also after the October 2014 violation, appellant had a scanner installed, which is linked to the register. The employees are now required to take IDs in hand and run them through the scanner (as the clerk did in this case). After the sale in this case, appellant spoke to Chevron to have the override feature removed.

The clerk was a new employee who was undergoing training. He was not authorized to work the register yet, other than to give his coworkers their required breaks. The clerk was suspended, then fired.

After the sale at issue here, appellant once again sent all of its employees to TIPS training. Appellant also hired a mystery shopper service to test its employees.

The decoy learned of the decoy program through his father. June 6, 2015 was not his first time acting as a decoy, although he did not recall how many times he had been a decoy before this operation. On June 6, 2015, the licensed premises was the only location that sold alcohol to him out of 14 locations visited.

After the hearing, the Department issued its decision, which determined that the violation charged was proved and no defense was established. Appellant had two prior sale-to-minor violations within the previous 14 months. (See Reg. No. 14081362 [the October 2014 violation] and Reg No. 14081039 [the August 2014 violation].) Accordingly, the ALJ imposed a penalty of outright revocation.

Appellant filed this appeal contending the penalty constitutes an abuse of discretion.

DISCUSSION

Appellant contends that revocation is only reasonable if one relies on a "brief synopsis of this case" in lieu of the complete facts. (App.Br., at p. 8.)

Appellant first argues that its prior sale-to-minor violations involved extenuating circumstances. (*Id.* at pp. 8-11.) Appellant claims that in its October 2014 violation, an employee deliberately sold alcohol to a minor in order to harm appellant. (*Id.* at p. 9.) Appellant concedes that it did not raise that argument in the relevant case, but contends that was due to its lack of legal counsel. (*Ibid.*) Appellant further argues that there are extenuating circumstances in the present case, because the clerk was "young" and "inexperienced." (*Ibid.*)

Second, appellant contends the ALJ ignored its mitigation efforts. (*Id.* at pp. 11-12.) Appellant argues it was an abuse of discretion for the ALJ to find these mitigation efforts were "too little, too late," and insists that "[n]o evidence supports the

Department's holding that some unspecified but more timely measures would have prevented" either the instant violation or appellant's most recent prior. (*Id.* at p. 12, quoting Penalty.)

Lastly, appellant contends that outright revocation is inconsistent with the purpose of California's alcoholic beverage laws and with the Department's own practices. (*Id.* at pp. 12-14.) Appellant argues that penalties should not be punitive, and that "[r]evocation, the ultimate 'punitive penalty' should be applied where licensees either deliberately commit serious violations or demonstrate unwillingness or inability to comply." (*Id.* at p. 13.) Appellant compares this case with other, unrelated cases as support for its assertion that the penalty is unfair. (*Id.* at pp. 13-14.) Finally, it argues that its violations were simply the result of misfortune. (*Id.* at p. 14.)

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant. (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183].) This Board, however, will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

The Department is granted broad discretion in assigning a penalty. Rule 144 states:

> In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act [citations] and the Administrative Procedures Act

> [citations], the Department shall consider the disciplinary guidelines entitled "Penalty Guidelines" . . . which are hereby incorporated by reference. Deviation from these guidelines is appropriate where the Department *in its sole discretion* determines that the facts of the particular case warrant such a deviation—such as where facts in aggravation or mitigation exist.

(Code Regs., tit. 4, § 144, emphasis added.) The rule further addresses the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

> The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

(*Ibid.*)

Rule 144 recommends a penalty of revocation for three sale-to-minor violations within 36 months. (*Ibid.*) Appellant has three sale-to-minor violations in 14 months—less than half that amount of time.

The ALJ provided detailed reasoning in support of his decision to revoke appellant's license:

> The Department requested that the Respondent's license be revoked in light of the prior discipline. The Department also noted that (1) a clerk who was still being trained should not have been left alone at the register and (2) some of the preventative measures were not put into place until after this violation. The Respondent argued that outright revocation was too harsh in light of the preventative measures it undertook (regardless of when they were implemented), particularly in light of the extenuating circumstances relating to some of the prior disciplinary matters.
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> The case at hand is the Respondent's third sale-to-a-minor violation over the course of 14 months and its fifth sale-to-a-minor violation in the last 15

> years. Section 25658.1 provides that the Department may revoke a license for a third sale-to-minor violation within 36 month, while rule 144[fn.] specifies that some form of revocation is appropriate for the third such sale.
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> Three sale-to-minor violations in 14 months clearly warrant an aggravated penalty. The other two prior violations (2000 and 2005) are too remote to constitute aggravation. All of the prior disciplinary decisions are final; it is inappropriate to re-litigate them. Any mitigation warranted by the circumstances of each case was, presumably, taken into account at that time. While it may appear careless to let a new clerk handle the register by himself with the benefit of hindsight, in fact that is the very purpose of training—to provide employees with the knowledge and experience to handle the job by themselves. No aggravation is warranted based on the clerk's level of experience. The preventative measures were a good start; unfortunately, they were too little, too late. No mitigation is warranted based on them.

(Penalty.)

As appellant acknowledges, the penalty unquestionably appears reasonable at first glance. (See App.Br., at p. 8.) A closer look at the facts, however, confirms revocation was indeed reasonable.

First, appellant contends there were "extenuating circumstances" in its October 2014 violation. (*Id.* at p. 9.) Specifically, appellant claims the employee deliberately sold alcohol to a minor in order to sabotage the appellant. (*Ibid.*) It argues that the doctrine of *respondeat superior* does not apply to such deliberate criminal acts. (*Ibid.*) As appellant concedes, however, it did not argue the issue during prosecution of that violation. (*Ibid.*) While appellant insists it is "not urging reversal of the result" of the October 2014 violation (App.Br., at p. 9), it is in fact asking something very similar: that this Board proceed as if appellant had raised and proved a valid defense to the October 2014 violation, and in so doing, make the offense vanish for purposes of penalty assignment in the present case.

This Board has neither the authority nor the means to relitigate the facts or penalty imposed in a finalized case. If appellant had evidence establishing that the

October 2014 violation was a deliberate act of sabotage, it was appellant's responsibility to raise and thoroughly litigate it at the administrative hearing in that case. It failed to do so. Appellant cannot retroactively raise a forfeited defense in a prior disciplinary action as a shield to revocation in the present case.

Appellant further argues that there were extenuating circumstances in the present case—namely, that the clerk was "young" and "inexperienced." (App.Br., at p. 9.) The ALJ considered this factor in assigning the penalty. He declined the Department's request for aggravation of the penalty based on the clerk's inexperience, noting that "that is the very purpose of training—to provide employees with the knowledge and experience to handle the job by themselves." (Penalty.) The ALJ, however did not consider the clerk's inexperience a *mitigating* factor, either. (See *ibid.*) Indeed, it is absurd to allow mitigation because a licensee chose to leave an inexperienced clerk at the register, as it would provide a clear incentive *against* adequately training new employees. The ALJ's refusal to either aggravate or mitigate the penalty based on the clerk's level of experience was within his discretion.

Appellant next argues that it was an abuse of discretion for the ALJ to find its efforts at mitigation were "too little, too late." (App.Br., at p. 12, quoting Penalty.) Appellant again argues its October 2014 was a result of sabotage, so mitigating efforts would not have prevented that sale. (*Ibid.*) Moreover, it argues the option to remove the cash register override button—used by the clerk in this case to approve the sale—did not exist before this violation.

Appellant is essentially arguing it is entitled to a mitigated penalty because certain mitigating options were allegedly either ineffective or unavailable. Even where a licensee takes active, effective steps, however, mitigation is within the discretion of the

ALJ. No licensee is *entitled* to mitigation. Here, appellant took limited steps to prevent sales to minors *after* its 2014 violations occurred. Those steps proved insufficient to prevent the present illegal sale. It was therefore reasonable for the ALJ to conclude any subsequent efforts were "too little, too late." (See Penalty.)

Finally, appellant argues that outright revocation of its license is a "punitive" gesture that is inconsistent with Department policy and practice. (App.Br., at pp. 12-13.) Appellant cites the Initial Statement of Reasons in support of the adoption of Rule 144, in which the Department stated disciplinary action is "for the protection of the public" and not to punish licensees. (*Id.* at p. 12, quoting Initial Statement of Reasons, Code Regs., tit. 4, § 144.) Appellant argues that outright revocation should be reserved for instances in which "licensees either deliberately commit serious violations or demonstrate unwillingness or inability to comply." (App.Br., at p. 13.) Appellant then compares the penalty in this case with a handful of unrelated cases, and argues the penalty of revocation is inconsistently applied. (*Id.* at pp. 13-14.)

The penalties assigned in unrelated cases are irrelevant. The facts of those cases are not before this Board, and it is not within the Board's jurisdiction to determine whether those penalties were reasonable or whether the cases are sufficiently similar to justify comparison. The only question is whether the penalty imposed here—in this case alone—is reasonable.

We agree with appellant insofar as disciplinary penalties are intended for the protection of the public. (See Code Regs., tit. 4, § 144, Penalty Policy Guidelines [the Department may revoke any license "if it shall determine for good cause that continuance of such license would be contrary to public welfare or morals"].) Moreover, revocation is indeed reserved for serious violations, or where a licensee has shown it is

either unwilling or unable to comply with the law. (See generally Code Regs., tit. 4, § 144, Penalty Schedule [recommending revocation only for severe or repeated violations of specific provisions of law].)

We also agree that where a licensee faces the ultimate penalty of revocation—and thus, the loss of income and livelihood—the ALJ as factfinder must be attentive and scrupulous in ensuring that the facts do indeed merit such an onerous result. This does not require relitigating settled facts, but rather ensuring that the assigned penalty is indeed commensurate with the facts as they were settled. While protection of the public is paramount, it should not come at the expense of fairness to the licensee.

Unfortunately, this particular appellant has accrued three sale-to-minor violations in a mere 14 months. While we might consider a lesser penalty more appropriate, we cannot say it was an abuse of discretion for the ALJ to conclude that continuation of appellant's license would be contrary to public welfare and morals. With some reluctance, we therefore affirm the penalty of revocation.

ORDER

The decision of the Department is affirmed.[3]

BAXTER RICE, CHAIRMAN
JUAN PEDRO GAFFNEY RIVERA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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3. This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.