

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

AB-9073

File: 20-395425 Reg: 09070255

SALEH Q. MURSHED, dba King Food Grocery
835-839 East California Avenue, Fresno, CA 93706,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John Peirce

Appeals Board Hearing: July 1, 2010
San Francisco, CA

ISSUED AUGUST 9, 2010

Saleh Q. Murshed, doing business as King Food Grocery (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked his off-sale beer and wine license for his clerk having sold an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a). The sale-to-minor violation was appellant's third within a 31-month period.

Appearances on appeal include appellant Saleh Q. Murshed, appearing through his counsel, Roger K. Vehrs, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kelly Vent.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 30, 2002.

¹The decision of the Department, dated September 30, 2009, is set forth in the appendix.

Thereafter, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a person under 21 years of age on November 14, 2008.

An administrative hearing was held on August 11, 2009, at which time documentary evidence was received and testimony concerning the violation charged was presented. Appellant, through his attorney, stipulated that the sale to a person under the age of 21 had occurred. Evidence of two prior sales to minors, on May 21, 2007, and April 13, 2006, was admitted without objection.

The Department sought to revoke the license on the ground the violation in question was the third sale to minor within a 31-month period. Appellant's counsel argued for leniency on the ground that revocation would destroy any chance appellant might have to sell the business and recoup his \$50,000 investment.

Subsequent to the hearing, the Department issued its decision which ordered appellant's license revoked. Appellant filed a timely notice of appeal in which he asserts that the penalty was based on an underground regulation; that the hearing before an administrative law judge employed by the Department denied him due process; and that the penalty far outweighs the conduct of appellant.

DISCUSSION

I

Appellant objects to the penalty on the basis that it was made "pursuant to the Department's written policy, regulation and rule adopted by the Department and not pursuant to the Department's rulemaking [sic] authority stated in Business and Professions Code section 25750 and pursuant to the Rules and Regulations adopting procedure set forth [in] Government Code section 11342 and 11343, et seq.," and, further, "the Rule and Regulations [sic] has not been published [sic] Government Code

section 11344 and as such is [*sic*] illegal and improper.”

Appellant’s argument reveals a misunderstanding of the Department’s penalty-setting authority. Department Rule 144 (4 Cal. Code Regs., §144), with penalty guidelines which are incorporated within the rule, was adopted in 2004 pursuant to the regulatory process set forth in the Administrative Procedures Act (Gov. Code § 11340 et seq.) Nothing in appellant’s brief challenges the existence and validity of Rule 144. It is simply not an underground regulation. The statutory references in appellant’s brief have no bearing on the issue.

The penalty guidelines of Rule 144 call for revocation as the standard penalty for a third sale to minor violation within a 36-month period. The violations in this case occurred within a 31-month period. While these guidelines refer to mitigating factors which may warrant a penalty lower than the standard penalty, none of the factors argued by appellant are recognized in Rule 144.

The Legislature has made it clear that repeated sales to persons under 21 years of age warrant enhanced discipline (see Bus. & Prof. Code, § 25658.1, subdivision (b).) Department Rule 144 reflects that legislative intent.

II

Appellant contends he was denied due process because the hearing was conducted by an administrative law judge employed by the Department.

This issue was resolved in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (Vicary)* (2002) 99 Cal.App.4th 880 [121 Cal.Rptr.2d 753], certiorari denied (2003) 538 U.S. 924 [123 S.Ct.1593], where the court sustained the constitutionality of Business and Professions Code section 24210. Enacted in 1994, that section authorized the Department to delegate the power to hear

and decide to an administrative law judge appointed by the director:

We will not presume that state-employed professional ALJ's cannot, will not, or do not bring a constitutional level of impartiality to the cases they hear, even if one side is the agency that directly employs them. The procedure here was constitutionally permissible.

(99 Cal.App.4th at 886.)

ORDER

The decision of the Department is affirmed.²

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

² 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.