

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

AE CHA and KON CHOL PAK	)	AB-7134
dba Beverly Liquors)	
4509 Beverly Boulevard	)	File: 21-200696
Los Angeles, CA 90004,	)	Reg: 97041713
Appellants/Licensees,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Sonny Lo
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	July 1, 1999
	)	Los Angeles, CA

Ae Cha Pak and Kon Chol Pak, doing business as Beverly Liquors (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their license for Ae Cha Pak selling an alcoholic beverage to an 18-year-old police decoy, 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 appellant Ae Cha Pak and Kon Chol Pak, appearing through their counsel, Ralph B. Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon Logan.

FACTS AND PROCEDURAL HISTORY

¹The decision of the Department, dated April 30, 1998, is set forth in the appendix.

Appellants' off-sale general license was issued on April 27, 1987.

Thereafter, the Department instituted an accusation against appellants charging that, on June 13, 1997, Ae Cha Pak sold a 16-ounce Budweiser beer to Flora Perez, who was 18 years old at the time and working as a minor decoy for the Los Angeles Police Department (LAPD), in violation of Business and Professions Code §25658, subdivision (a).

An administrative hearing was held on March 20, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by the minor decoy (Perez); the police officer who accompanied her during the decoy operation, John Buckley (Buckley); and appellants, Ae Cha and Kon Chol Pak.

The decoy entered the premises, followed by Buckley in plainclothes, and went to the cooler. She took out a 16-ounce Budweiser beer and took it to the counter, where Ae Cha Pak (Mrs. Pak) was helping two young women who were purchasing items including alcoholic beverages [RT 8-9, 23-24]. Buckley heard Mrs. Pak tell the young women to "Come back later when he leaves," and saw Mrs. Pak looking in his direction. The young women left the store, Perez put the beer on the counter, gave a \$10 bill to Mrs. Pak, received changed, and left the premises with the beer [RT 9-10, 23-25]. Perez gave the beer to the officer outside, went back in the store, and identified Mrs. Pak as the person who sold her the beer [RT 10-11, 25].

Appellants' version of the events [RT 39-66] was summarized by the ALJ in Finding VII.A. as follows:

“Four or five, not two, young women were attempting to purchase approximately \$30 worth of groceries, including alcoholic beverages. When asked by Mrs. Pak about their age, some replied that they were 21, other that they were 23. They also stated that their identifications were in their car. Mrs. Pak then asked them to get their identifications, at which time they exited the store, leaving on the counter their groceries and their money. As they were leaving the store, Mrs. Pak sold the 16-ounce Budweiser beer to an old man.”

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation was proven and ordered appellants' license revoked.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) the decision does not state any basis for the order of revocation; (2) there is no competent evidence of prior violations occurring after January 1, 1995, the effective date of Business and Professions Code §25658.1; and (3) the penalty of revocation is an abuse of discretion. The issues are related and will be discussed together.

DISCUSSION

Appellants argue that there is no analysis to show how the ALJ got from the “raw evidence” to the order of revocation. The recitation of prior disciplinary history showing two previous sales to minors seems to imply application of Business and Professions Code §25658.1, which allows the Department to revoke a license after the third sale-to-minor violation occurring within a 36-month period. The Department has applied that section to violations occurring after the effective date of the statute, January 1, 1995. However, appellants argue, there is no competent evidence showing the dates of the two prior violations to be after January 1, 1995, and therefore, this violation should not be treated as a “third strike” under §25658.1. Appellants conclude that, because no

evidentiary basis is stated for the order of revocation, the order is an abuse of discretion.

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 Department has great discretion in imposing penalties. It had the power, even before enactment of §25658.1, to revoke a license after a third sale to a minor if the circumstances showed that was necessary to protect public welfare and morals. Ordinarily, however, the Department did not revoke on a third sale to minor except in very egregious circumstances. The suspension would be longer for each such sale, and a clear pattern would undoubtedly justify revocation, but three sales to minors in three years would not ordinarily result in revocation before §25658.1.

The Determinations of Issues refer to article XX, §22 of the California Constitution and §24200, subdivision (a), which provide for suspension or revocation if continuation of the license would be contrary to public welfare and morals; to §24200, subdivision (b), which provides that a licensee's violation, or causing or permitting a violation, of a law regulating the sale of alcoholic beverages is a basis for suspension or revocation; and to §25658, subdivision (a), which makes it a misdemeanor to sell to a minor. Determination of Issues III then states that this sale constituted cause for suspension or revocation of the license in accordance with the above-cited provisions.

Section 25658.1, subdivision (b) [the “three strikes” statute], is not mentioned in the decision.

It seems clear that the ALJ based his decision that discipline was appropriate on the general provisions of §24200 rather than the specific provision of §25658.1, subdivision (b). However, there is no explanation of why revocation is appropriate in these circumstances. The two priors are listed at the beginning of the decision, but there is no further reference to them. The mere existence of three sales to minors does not justify revocation unless the “three strikes” provision is applied. That provision was not applied.² Therefore, the order of revocation in this matter was arbitrary and an abuse of discretion.

²*Even if §25658.1, subdivision (b), had been stated as the justification for revocation, there was no competent evidence of the dates of the prior violations, so the “three strikes” provision could not have been applied.*

ORDER

The decision of the Department is affirmed, but the penalty order is reversed and remanded for reconsideration in accordance with this opinion.³

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³*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.