

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

NAUSHAD MOOSA	)	AB-6875
dba In-N-Out Market)	
917 North Sepulveda Boulevard	)	File: 21-291540
Manhattan Beach, California 90266,	)	Reg: 96037933
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Sonny Lo
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	January 7, 1998
	)	Los Angeles, CA

Naushad Moosa, doing business as In-N-Out Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which ordered his off-sale general license suspended for 25 days, with 10 days thereof stayed for a probationary period of one year, for appellant's clerk having sold a 12-pack of beer and a bottle of vodka to a 16-year-old minor, 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).

¹The decision of the Department, dated May 22, 1997, is set forth in the appendix.

Appearances on appeal include appellant Naushad Moosa, appearing through his counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on January 24, 1994. Thereafter, the Department instituted an accusation against appellant charging that on August 30, 1996, appellant's clerk, Azad Khan, sold alcoholic beverages (beer and distilled spirits) to Erik Magnuson, a minor who was then 16 years of age.

An administrative hearing was held on April 17, 1997, at which time oral and documentary evidence was received. At that hearing, Shawn Collins, a Department investigator, testified that he observed the transaction in which Magnuson purchased the alcoholic beverages, was asked for identification by the clerk, and said verbally and by shaking his head that he had none, after which the clerk went ahead with the sale. Collins and a fellow investigator stopped Magnuson after he left the store, and seized the beer and vodka Magnuson had purchased. Magnuson also testified, admitted making the purchase, and while he could not recall whether he had been asked for identification, stated he had none to produce. Magnuson specifically disclaimed possessing any false identification.

Appellant did not present any witnesses.

Subsequent to the hearing, the Department issued its decision which determined that the charges of the accusation had been established, and ordered appellant's license suspended.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the single issue that the penalty is an abuse of discretion as a matter of law.

DISCUSSION

Appellant contends that the penalty is an abuse of discretion as a matter of law because it is inconsistent with the findings and the facts in support thereof. The principal inconsistency, according to appellant, is the result of the Department having imposed a penalty of a magnitude which would preclude appellant from petitioning the Department to pay a fine in lieu of serving a suspension, rather than the standard 15-day penalty. Appellant argues the penalty was "aggravated from a first-time suspension," based in part upon the minor's youthful appearance. The argument that the Department enhanced its standard penalty solely to prevent appellant from petitioning for an offer in compromise is mere surmise. There is nothing in the record to support such conjecture. It is no more than coincidence that the penalty is of such magnitude as to bar an offer in compromise pursuant to Business and Professions Code §23095, the same end result as if the violation had been treated as a second strike under Business and Professions Code §25658.1, subdivision (a).

The ALJ specified three factors which led him to recommend an enhanced penalty: the minor's youthfulness, despite his size (6' 1", 175 pounds); the clerk's willingness to make the sale even though he was not given the identification he requested; and appellant's prior disciplinary history, consisting of a sale-to-minor

violation in 1994, for which appellant paid a fine in lieu of serving a 10-day suspension.

Appellant seems to suggest that it was improper to consider appellant's prior disciplinary history, but offers no persuasive reason why this should be the case. Indeed, appellant's prior disciplinary history alone would seem to justify an enhanced penalty.

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].)

The ALJ was explicit as to the reasons for an elevated penalty. The reasons are valid in themselves. That being so, we see no reason to disturb the action of the Department.

CONCLUSION

The decision of the Department is affirmed.²

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

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 decision as provided by §23090.7 of said code.

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