

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

THE SOUTHLAND CORPORATION	)	AB-6985a
and ABDO MOUANNES)	
dba 7-Eleven Store #2011-13615	)	File: 20-312358
2850 Thunder Drive	)	Reg: 97040317
Oceanside, CA 92056,)	
Appellants/Licensees,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	John P. McCarthy
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	January 20, 2000
	)	Los Angeles, CA
)	

The Southland Corporation and Abdo Mouannes, doing business as 7-Eleven Store #2011-13615 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control Following Appeals Board decision¹ which suspended their license for 15 days for having sold an alcoholic beverage to a minor, contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and in violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant The Southland Corporation and Abdo Mouannes, appearing through their counsel, Ralph Barat Saltsman and

¹The Decision Following Appeals Board decision, dated July 9, 1999, is set forth in the appendix.

Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kenton P. Byers and Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

This is an appeal from a decision of the Department ordering a 15-day suspension of appellants' off-sale beer and wine license. The Department's order was entered following a decision of the Appeals Board which affirmed an earlier Department ruling which found that appellants had violated Business and Professions Code §25658, subdivision (a), but remanded the case to the Department for reconsideration of the penalty.

In directing that the case be remanded, the Board reasoned as follows:

"Appellant contends that the ALJ improperly relied on conjecture in finding aggravation.

"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 15-day suspension is the customary penalty for a first violation, absent factors of aggravation or mitigation.

"The decision expressly finds matters that would support mitigation of a standard penalty (Determination II-B, second paragraph):

'In slight mitigation is the thorough training program in place and the apparent good intentions of both respondents concerning their responsibilities and the importance of keeping alcohol out of the hands of minors. The proof of education and training programs, however, is their effectiveness. While there is little more a licensee can do than is done by these respondents, they are liable for the unlawful sales made by their clerks.'

“However, appellant was afforded no leniency in spite of these mitigating factors, because the ALJ also found aggravation. The ALJ’s reasoning (Determination II-B, first paragraph) was as follows:

‘While [the clerk] claimed confusion to the detectives on the scene, it is just as likely that he knew what he was doing. In a circumstance where a clerk asks for identification, is shown one making the presenter under the age of 21 and sells an alcoholic beverage anyway, his conduct is most suspect. That behavior will fool any observer into believing that the clerk is properly performing his duties and the only two who know to the contrary are the clerk and the purchaser. Only when the purchaser is a decoy does the plan fail.’

“This Board is troubled by the view that evidence showing no more than that a clerk asked for identification, was shown identification which showed the purchaser was under 21, but made the sale anyway, demonstrates an aggravating factor.

“Our concern is that, with nothing more than supposition, the ALJ has transformed what could simply have been the mistake of a confused or careless clerk into a “plan” to effect an illegal sale. While it is certainly conceivable a clerk could engage in such a subterfuge, we do not think the mere fact that a sale occurred supports an inference that it was part of a “plan” and, consequently, an aggravated violation.

“We believe that the combination of an overly cynical assessment of the clerk’s mistake and an insufficient acknowledgment of the mitigation efforts displayed by the licensees - “there is little more a licensee can do than is done by these respondents” -worked to deny appellants the benefit of a possible reduction in penalty.”

Appellants now contend that the Department, by once again ordering a 15-day suspension, violated the Appeals Board’s mandate that it reconsider the penalty.

DISCUSSION

The decision entered by the Department upon remand adopted the findings of fact and determinations of issues, except for Determination of Issues II-B, and

again ordered a 15-day suspension. In excluding Determination of Issues II-B from its adoption of the earlier decision's findings and determinations, the Department effectively eliminated from consideration not only that part of the Determination the Board thought unjustified (that there was aggravation), but also the portion which might have justified mitigation (that there was little more the licensee could have done to prevent a violation).

The issue which now confronts the Appeals Board is whether the Department's action was in compliance with the Board's remand order, or was it in defiance of that order. In considering this question, there are several important considerations.

First, the Board must accept at face value the Department's recital in its decision that it reviewed the entire record, including the decision of the Appeals Board.

Second, the Department is vested with considerable discretion with respect to the penalty it may impose. See (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) In the absence of an abuse of discretion, its penalty order must be upheld.

A decision to aggravate a penalty that is premised upon a mistaken view of the facts or of the law can easily be characterized as an abuse of discretion. In contrast, mitigation of a penalty is more a matter of grace than of right.

The effect of the Board's remand to the Department was to require the Department to decide whether appellants' efforts to comply with the law were such

as to justify a penalty more lenient than that ordinarily imposed for similar violations. To that extent, the Board was acting within its statutory authorization.

The Department's action, upon remand, in imposing the same penalty as before, is not, in and of itself, an abuse of discretion. In the absence of some indication that the Department was vindictive, or openly defiant of the Board's direction that it reconsider the penalty, it would seem that its action was within its discretion. It is important to keep in mind that the Board's jurisdiction is limited, and it is specifically told that its order "shall not limit or control in any way the discretion vested by law in the Department." (Business and Professions Code §23085.) It must be presumed that the Department did not believe "slight mitigation" warranted a reduction in penalty, even though sufficient to offset an aggravating factor that would invite an enhanced penalty.

Nevertheless, we are troubled by the position taken by the Department in its brief, which seems to defend the very concept this Board found objectionable - the notion that what might be a simple lapse by a clerk should be considered an aggravated violation. We can only assume that is counsel's view, and not that of the Department, and we reject it.

The penalty which has been imposed appears to be that normally imposed in similar circumstances, so we cannot assume that the Department continues to endorse the concept of aggravation in the circumstances of this case.

ORDER

The decision of the Department is affirmed.²

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, 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.