ISSUED APRIL 26, 2001

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

TAREQ SULAIMAN dba J.V. Liquors 420 First Street Gilroy, CA 95020, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7619 File: 21-316334 Reg: 99046240 Administrative Law Judge at the Dept. Hearing: Stewart Judson Date and Place of the Appeals Board Hearing: February 15, 2001 San Francisco, CA

Tareq Sulaiman, doing business as J.V. Liquors (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his off-sale general license for 15 days, for his clerk, Farid Odi, having sold an alcoholic beverage (a 32-ounce bottle of Budweiser beer), to Felipe Begines, Jr., a minor, contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business

[1]The decision of the Department, dated March 23, 2000, is set forth in the appendix.

and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Tareq Sulaiman, appearing through his counsel, Robert B. Mitchell, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on April 1, 1996. Thereafter, on April 16, 1999, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor.

An administrative hearing was held on February 25, 2000. Appellant did not appear, either in person or through counsel, and the hearing was conducted as a default hearing. Testimony was presented by Begines, the minor, who made the purchase while acting as a police decoy, and by Rosa Quinones, the Gilroy police officer who conducted the decoy operation.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and ordered the 15-day suspension from which appellant has taken a timely appeal.

Appellant contends that the default hearing was the result of his failure to learn of the continued hearing date, and that grounds exist for setting the default decision aside.

DISCUSSION

Appellant asserts that he did not become aware of the notice setting the hearing for Friday, February 25, 2000, until the following day, when he returned to his home from the Sacramento area where he had been handling funeral and other

arrangements for the widow of a close friend. He contends that his appearance on several previous dates for which a hearing had been scheduled, but continued because either a prosecuting attorney or administrative law judge was unavailable, is proof that he truly intended to appear and defend against the accusation.[2] Hence, he argues in his brief:

> "There is a patent unfairness in forcing a party to make multiple appearances with no penalty (such as dismissal) when someone other than the defendant misses a date, but proceeding in default when defendant does not appear. ... Appellant's previous appearances at calendared hearings as well as his appeal herein proves that he does not take this matter lightly, that he is not negligent in his obligation to respond to the charges, and that he most vigorously does not agree with the prosecution's version of relevant events."

Appellant contends that he would present testimony at odds with that given by the Department's witnesses, and that there were elements of entrapment in the decoy operation.

The Department contends that appellant has not made a record upon which to argue that the default should be set aside. The Department cites Government Code §11520, subdivision (c), which prescribes the procedure to be followed to seek to have a decision based upon a default vacated, and to Rule 198 of the Appeals Board which sets forth the procedure for reopening a matter based upon newly discovered evidence. Appellant did not pursue either method.

If what is asserted in appellant's brief is true regarding his absence from his place of business and residence, it would seem unfair to charge him with a default,

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[2] Appellant also refers to a third date, as to which the information provided him was in error, necessitating still another setting. This may be a reference to the December 2, 1999, hearing which was the subject of the January 3, 2000, order. See text, infra.

especially after he had already appeared on two previous occasions only to have the hearing continued because the Department was not ready to go forward.

The record reveals that there were several continuances of the hearing. Originally set for June 24, 1999, the hearing was continued to September 8, 1999, then again continued to October 19, 1999, and then continued once more to December 2, 1999. Unfortunately, the record does not indicate the reason for these continuances.

An order, the nature of which is not disclosed in the record, was entered on December 2, 1999. On January 3, 2000, another order was entered, stating "good cause appearing therefore, the hearing held on December 2, 1999 is hereby set aside, and the matter will be set for a hearing de novo." Again, the record does not disclose what occurred at the hearing on December 2, 1999, although Department counsel represented that the hearing was conducted as a default hearing. See note 2, supra.

It is undisputed that appellant at least twice made appearances only to find the hearing was continued for reasons not his fault, and the Department has not contested appellant's explanation of why the notice of the February 2000 hearing escaped his attention. The Board has, in the past, set aside Department decisions which were the products of default hearings, when less persuasive reasons have been offered. While Department counsel is correct that appellant has not met the formal requirements for relief, we are, nevertheless, satisfied that fairness requires that appellant get his day in court.

ORDER

The decision of the Department is reversed and the case is remanded to the Department for reconsideration in light of the comments herein.[3]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3] 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.