

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

AB-8310

File: 42-334477 Reg: 03056102

RAFAEL DE LA TORRE, dba Jalos Bar
144 First Street, Turlock, CA 95380,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jerry Mitchell

Appeals Board Hearing: April 7, 2005
San Francisco, CA

ISSUED JUNE 17, 2005

Rafael de la Torre, doing business as Jalos Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his license for 15 days for his bartender selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Rafael de la Torre, appearing through his counsel, David Renteria, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

¹The decision of the Department, dated June 24, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public premises license was issued on October 28, 1997. On August 1, 2003, 18-year-old Manpreet Kaur (the decoy) was working with the Turlock Police Department as a "minor" decoy. Department investigator Guadalupe Ochoa was assisting with the decoy operation.

The decoy entered appellant's premises and sat at the bar counter a few seats away from Ochoa, who had entered before the decoy. The decoy asked the bartender, Veronica Camacho Perez (the bartender), for a Budweiser beer. The bartender said something in Spanish that the decoy didn't understand, so the decoy repeated, "I want Budweiser." The bartender brought a bottle of Budweiser beer, and the decoy asked how much it cost. The bartender didn't appear to understand, so the decoy again asked, "How much?" and showed her some money. The bartender said "\$2.50" in Spanish and the decoy paid her.

Ochoa alerted the officers waiting outside that a violation had occurred, and Turlock police sergeant Aamodt came in. He asked the decoy who sold her the beer and the decoy pointed to the bartender and told her "You just sold a beer to me and I'm only 18." The bartender was standing two to three feet from the decoy, on the other side of the bar counter. Ochoa translated what the decoy said into Spanish, and the bartender said, in Spanish, something like, "Oh, I made a mistake. I didn't check her I.D." A photograph was taken of the decoy and the bartender, and a ticket was issued to the bartender.

On October 24, 2003, the Department filed an accusation against appellant charging the unlawful sale of an alcoholic beverage by the bartender to the decoy. At the administrative hearing held on April 22, 2004, documentary evidence was received

and testimony concerning the sale was presented by the decoy and by Department investigator Ochoa. Appellant also testified regarding his hiring of the bartender. After the Department issued its decision sustaining the accusation, appellant filed an appeal contending it was unfair using a decoy who spoke only English and the penalty is excessive.

DISCUSSION

I

Appellant argues in his brief that, since "this was a Spanish speaking bar for Spanish speaking patrons[, and] [t]here is . . . a great deal of deference to English speaking outsiders . . . to . . . avoid embarrassment from misunderstandings and to avoid initiating English conversations that may be impossible to follow," this was an unfair test of the bar's compliance with the law.

This argument is addressed in paragraph 2 of the decision's Legal Conclusions:

Respondent-licensee argued that the decoy operation was "not fair" because the decoy spoke English and the bartender spoke Spanish. That argument is without merit. There was no discussion of age in any language; the licensed premises was open to the public, which includes non-Spanish-speaking, as well as Spanish-speaking, customers; and there was no evidence that the bartender was misled with respect to the decoy's age because the decoy spoke English.

There is little to add to the administrative law judge's analysis of this issue.

Neither deference nor avoiding embarrassment is a defense to a sale-to-minor violation. While it might have been *more* fair to use a Spanish-speaking decoy in this situation, we cannot say that it was inherently unfair not to use a Spanish-speaking decoy.²

²We note that no evidence was presented establishing that this was a "Spanish speaking bar for Spanish speaking patrons" or that no one in the bar spoke both Spanish and English.

II

Appellant contends the 15-day suspension imposed is excessive, and that the Department did not consider the "limited nature of this offense" or the subsequent addition of a security guard to "safeguard against any continuing issue contrary to public welfare or morals." Appellant asserts that a conditionally stayed suspension would be more appropriate.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

A 15-day suspension is certainly not unusual for a sale-to-minor violation, particularly where there are no mitigating circumstances. In this case, the bartender, who had been hired about a week before, had no training regarding sales of alcoholic beverages, a factor which reasonably could be considered aggravating. Under the circumstances, the Department did not abuse its discretion in ordering this penalty.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
SOPHIE C. WONG, MEMBER
FRED ARMENDARIZ, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.