

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

AB-8402

File: 21-331502 Reg: 03055991

ZAHER SAYEGH dba 5th & Ivy Market
645 West Fifth Street, Chico, CA 95928,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: January 5, 2006
San Francisco, CA

ISSUED: MARCH 20, 2006

Zaher Sayegh, doing business as 5th & Ivy Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his license for 30 days for his clerk, Maria Luz-Huerta, having sold beer to Tavis Mason, a 19-year-old non-decoy minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Zaher Sayegh, appearing through his counsel, Richard D. Warren, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on May 27, 1997. On October 6, 2003, the Department instituted an accusation against appellant charging the sale of an

¹The decision of the Department, dated February 3, 2005, is set forth in the appendix.

alcoholic beverage to a minor on August 31, 2003.

An administrative hearing was held on October 20, 2004, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged, and appellant failed to establish a defense under Business and Professions Code section 25660. This appeal followed.

Appellant argued at the administrative hearing that his clerk relied on identification issued by a government agency which established that the person was 21 years of age or older. The license was that of the minor's older brother. The administrative law judge rejected the defense on two grounds: the minor did not resemble the person pictured on the license, and the license had expired two years earlier. The record supports both grounds.

Although appellant filed a timely notice of appeal, his brief was not filed with the Appeals Board until Friday, December 30, 2005, more than two months late. Appellant argues in that brief that it was an abuse of discretion on the part of the Department to consider as an aggravating factor the fact that the violation in question was appellant's fourth sale to a minor in the preceding four and one-half years, even though there was also evidence of mitigating factors. Thus, contends appellant, it was an abuse of discretion to add an additional five days to the standard penalty for a second violation within a 36-month period.²

The Appeals Board may not disturb the Department's penalty orders in the

² The Department's standard penalty for a second violation within a 36-month period is 25 days. (See Department Rule 144 (Title 4, Cal. Code Regs., §144.))

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].)

Appellant argues that the Department committed error by aggravating the standard penalty (by an additional five days) because it was appellant's third violation within a four and one-half year period, as well as the second within a 36-month period, even though the Department also found evidence of mitigation sufficient to reduce the penalty. He argues that the Department overemphasized the effect of the third violation to both offset the mitigation and support the aggravation - it should have been an "either aggravate or offset, but not both" situation for the Department. "While the evidence of a third violation within 52 months might properly be considered to either aggravate the standard penalty or to offset the evidence of mitigation, it cannot be used for both purposes." (App.Br., page 2.)

The problem with appellant's argument is that it assumes that the degree of mitigation and degree of aggravation are necessarily the same. We reject that assumption.

The Board would have to find an abuse of discretion on the part of the Department to reverse the penalty as excessive. In the circumstances, we do not believe there was one. The degree to which a penalty may be enhanced because of the presence of aggravating factors is a matter within the reasonable discretion of the Department. Where mitigating factors are present, the converse is true. We know of

no requirement that one must match the other.

Where, as here, the penalty cannot be said to be so unreasonable as to amount to an abuse of discretion, the Board is powerless to intervene.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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.