

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

**AB-8626**

File: 21-423754 Reg: 06061761

STEPHEN FERNANDO and VIVINA FERNANDO dba City Liquor Market  
16119-A Foothill Boulevard, Fontana, CA 92335,  
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: November 1, 2007  
Los Angeles, CA

**ISSUED JANUARY 16, 2008**

Stephen Fernando and Vivina Fernando, doing business as City Liquor Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended their off-sale general license for 20 days, 5 days of which were conditionally stayed, subject to one year of discipline-free operation, for co-licensee Vivina Fernando having sold a 24-ounce can of Budweiser beer to Gerardo Palacios, a 14-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Stephen Fernando and Vivina Fernando, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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<sup>1</sup>The decision of the Department, dated September 28, 2006, is set forth in the appendix.

## PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 14, 2005. Thereafter, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor on September 30, 2005.

An administrative hearing was held on July 6, 2006, 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 no affirmative defense had been established.

Appellants filed a timely appeal in which they raise the following issues: (1) the Department communicated with its decision maker on an ex parte basis, in violation of the APA; (2) appellants were denied proper discovery; and (3) the administrative law judge failed to analyze or describe the basis for his conclusion that mitigation had not been shown.

## DISCUSSION

## I

The contention that the Department communicated with its decision maker on an ex parte basis, in violation of the APA, has been made many times before and has been adjudicated by the California Supreme Court in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*). This Board has followed *Quintanar* in numerous appeals, remanding the matters to the Department for evidentiary hearings to resolve the factual issues regarding ex parte communications raised in these cases. (E.g., *Dakramanji* (2007) AB-8572; *BP West Coast Products, LLC* (2007) AB-8549; *Hong*

(2007) AB-8492; *Chevron Stations, Inc.* (2007) AB-8488; *Circle K Stores, Inc.* (2006) AB-8404.) The ex parte communication contention in the present appeal is virtually identical to those made in the earlier appeals, and we decide this issue in the present appeal as we did the same issue in the earlier appeals just cited.

## II

Appellants assert in their brief that the ALJ improperly denied their pre-hearing motion to compel discovery. Their motion was brought in response to the Department's failure to comply with those parts of their discovery request that sought copies of any findings or decisions which determined that the present decoy's appearance was not that which could be generally expected of a person under the age of 21 and all decisions certified by the Department over a four-year period which determined that any decoy failed to comply with rule 141(b)(2). For all of the decisions specified, appellants also requested all photographs of the decoys in those decisions.

ALJ Gruen, who heard the motion, denied it because he concluded it would cause the Department an undue burden and consumption of time and because appellants failed to show that the requested items were relevant or would lead to admissible evidence. Appellants argue that the items requested are expressly included as discoverable matters in the APA and the ALJ used erroneous standards in denying the motion.

This Board has discussed, and rejected, this argument numerous times before. Just as appellants' arguments are the same ones made before, our response is the same as before. We see no reason to once again go over our reasons for rejecting these arguments. Should appellants wish to review those reasons, they may find

them fully set out in *7-Eleven, Inc./Virk* (2007) AB-8577, as well as many other Appeals Board opinions.

### III

Finally, appellants contend that the decision must be reversed because it fails to analyze the reasons for finding that no evidence of mitigation was presented. They argue that the decision fails to include an analytical bridge between the evidence and the conclusion reached with that evidence, citing the decision of the California Supreme Court in *Topanga Ass'n for a Scenic Community v. Los Angeles County* (1974) 11 Cal.3d 506, 516-517 [113 Cal.Rptr. 836].

The Appeals Board may 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].)

Conclusions of Law 6 and 8 contain the ALJ's discussion of the evidence relating to aggravation and mitigation:

CL 6. Complainant requested a 20-day suspension of Respondent's license, with 5 days of the suspension stayed for one year on probationary conditions. It was explained that this was a slightly aggravated sanction based on the very tender years and appearance of the decoy used. The decoy looked his age and there was not the slightest inquiry made about it. In addition, Vivina Fernando did not testify, so the record is silent on her thoughts on the subject of the sale of beer to Palacios and whatever distraction there might have been.

CL 8. The court has considered the arguments of both sides concerning an appropriate sanction.<sup>2</sup> Aggravation, according to the Rule 144 Penalty Guidelines, includes licensee involvement and the appearance and actual age of

the minor. Mitigation under the penalty guidelines has not been shown. The period of licensure is between three months and two weeks, obviously not lengthy. No positive action to correct the problem has been shown. The only training of Vivina has been given her by Stephen, whose training itself was not documented, and no documentation of the training was provided. Cooperation by the licensees in the investigation is the final element. Here, neither cooperation nor lack of it was shown. It simply was not a factor. On balance aggravation outweighs mitigation.

2 Whether payment of an offer in compromise in lieu of serving a suspension is warranted is both driven by statute and within the discretion of the Department. Administrative Law Judges do not consider such payments in fashioning their recommendations.

Appellants appear to ignore Conclusion of Law 6, in which the ALJ determined that the record lacked evidence of what physical or mental conditions may have induced Vivina to sell an alcoholic beverage to a 14-year-old customer. She did not testify, and no reason was given for her absence. Under those circumstances, the ALJ was entitled to give little or no weight to Stephen's testimony of what she may have been thinking or feeling about her daughter in Iraq.

Appellants do address Conclusion of Law 8, describing it as "a disingenuous and half hearted attempt to cloak the erroneous conclusion that 'mitigation under the Penalty Guidelines has not been shown' with a veil of legitimacy." (App.Br., at page 29.) To the contrary, we believe the ALJ was addressing the aggravating and mitigating factors as to which there was any proper evidence, and we have no quarrel with the result he reached.

The standard penalty under the Department's penalty guidelines for a first sale-to-minor violation is 15 days. The ALJ added an additional five days to reflect the aggravating factors, and then stayed those same five days conditionally even though mitigation had not been established. We cannot say he abused his discretion.

ORDER

The decision of the Department is affirmed as to the issues involving discovery and penalty findings, and the case is remanded to the Department for an evidentiary hearing on the issue involving the claimed ex parte communication.<sup>2</sup>

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

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<sup>2</sup> This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.