ISSUED JULY 13, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

NANCY and STEVE CHO dba Hope's Market 687 South Hoover Street Los Angeles, CA 90005, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)))))))))))))	AB-7371 File: 21-85691 Reg: 98044807 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: June 6, 2000 Los Angeles, CA

Nancy and Steve Cho,[1] doing business as Hope's Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[2] which revoked their license for their clerk having sold an alcoholic beverage to an 18-year-old minor acting as a decoy with the Los Angeles Police Department, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Steve Cho, appearing through his

[1] Although her name appears in the caption, Nancy Cho is deceased.

[2] The decision of the Department, dated February 18, 1999, is set forth in the appendix.

counsel, Rick A. Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on January 21, 1980. Thereafter, the Department instituted an accusation against them charging the sale of an alcoholic beverage to a minor.

An administrative hearing was held on January 14, 1999, at which time oral and documentary evidence was received. At that hearing, the Department presented two witnesses, Los Angeles police officer Lewis Alvarado and Jose Alvarado, the minor decoy, who testified about the circumstances of the transaction. James Mindt, the clerk who made the sale testified on behalf of appellants, as did Steve Cho himself. In addition, appellants presented the testimony of two character witnesses, and offered a number of testimonial letters, which were received as administrative hearsay.

Subsequent to the hearing, the Department issued its decision which determined that the transaction had occurred as alleged, and ordered appellants' license revoked.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) the findings are not supported by substantial evidence in light of the whole record; and (2) the Department has proceeded in excess of its jurisdiction by assessing an excessive penalty. Since

both issues turn on the penalty which was assessed, they will be discussed together.

DISCUSSION

The Department's order of revocation was premised upon its finding that appellants had incurred a total of three sale-to-minor violations within a 36-month period, and its determination that Business and Professions Code §25658.1, subdivision (b) "does strongly suggest that a licensee's third violation within a 36-month period shall result in revocation of that licensee's licensee. Otherwise, the statute would have no meaning." ("Legal Basis For Decision" II-B.) Appellant contends the Department erred in concluding that the three violations occurred during a 36-month period, and erred further in mechanically applying a supposed legislative policy that is not to be found within the statute.

Appellant contends that there is no evidence in the record to show when the two previous violations charged to appellant occurred. Appellants assert that the decision relies on the most recent accusation for the finding (Finding I-A) regarding the dates of the previous violations. Those dates are the dates of the decisions (see Exhibit 2), not the date of the violation.

The Department contends that the dates of the two prior violations were established through the testimony of appellant Steven Cho. The Department cites his affirmative responses to leading questions posed to him which sought the identity of the clerk who made the prior sales [RT 69]. The questions used the dates of the prior sales as points of reference, while the focus of the question was on the identity of the clerk

who sold the alcoholic beverages to the minor.

Business and Professions Code §25658.1, subdivision (b) provides:

> "Notwithstanding Section 24200, the department may revoke a license for a third violation of Section 25658 *that occurs within any 36-month period*. This provision shall not be construed to limit the department's authority and discretion to revoke a license prior to a third violation when the circumstances warrant that penalty." (Emphasis added.)

The focus of the "three strikes" statute is on the dates the violations occurred, as the italicized language demonstrates, and not the dates when the Department determines (by its decision) that there have been violations. Thus, the dates of the violations are critical to the application of §25658.1. In the present case, except for what the Department would have the Board treat as admissions, we have only the dates of the Department's decisions. By themselves, these dates do not satisfy the proof requirement of the statute. Unless we can be satisfied that Cho's responses to leading questions are substantial evidence, the requirements of §25658.1 have not been met. And we are not. The manner in which Cho's responses were elicited detracts from what weight they might otherwise be accorded. While we are not faulting counsel, we suggest that the Department has much more reliable ways in which it might establish the dates upon which it relies to take away this licensee's livelihood.

The one-year statute of limitations that applies to sale-to-minor violations[3] is a means of determining, at least presumptively, that a violation occurred no earlier that one year from the date an accusation was registered. However, the prior accusations are not in evidence.

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[3] See Business and Professions Code §24206.

The dates of the decisions, on the other hand, do not lend themselves to a similar analysis, since there is no necessary relationship between their dates and the dates of the violations.

The current violation (which is not contested) occurred on October 14, 1998. Thus, for an earlier violation to be within the 36-month period, it would have to have occurred no earlier than October 13, 1995. Yet, with the one-year statute of limitations as a factor, it appears that the earliest of the two prior violations could have occurred as early as June 10, 1995, a date outside the 36-month period.[4]

For these reasons, we believe the Department's reliance upon the "three strikes" statute for its order of revocation, was improper.

It may well be, that upon remand, the Department will be able to fill the void in its evidence, and enter a new order of revocation. Since that is a possibility, it may be appropriate for this Board to comment on the ALJ's approach to the application of this statute, as well as the Department's adoption of his proposed decision and its implicit approval of his reasoning.

In the course of the hearing, when counsel for appellants offered the testimonial letters referred to earlier Judge Lo, referring to a "legislative policy about three strikes," expressed virtually controlling deference to the Department's penalty recommendation, stating that "if the Department insists on a revocation without the

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[4] We agree with appellants that Mr. Cho's testimony "I think the first one in April [of 1996]" is too vague to support a finding that any violation occurred during that month. As noted in appellants' brief, he could have been referring to a number of possible occurrences.

possibility of transfer, I really don't know what the character of Mr. Cho has to do with this case." [RT 88.] This suggests, we think erroneously, that once the Department recommends revocation, an ALJ is without discretion to recommend a penalty short of revocation.

That being said, Judge Lo did acknowledge that §25658.1 does not mandate revocation after a third violation, but went on to state ("Legal Basis For Decision" II-B):

> "Nevertheless, the statute does strongly suggest a legislative policy that a licensee's third violation within a 36-month period shall result in revocation of that licensee's license. Otherwise, the statute would have no meaning."[5]

Appellants contend that this analysis "has been picked out of thin air" (App.Br., page 8), asserting there is nothing within the statute which suggests what the legislative policy may be. Appellants assert that the ALJ has taken it upon himself to construe the statute as a virtual mandate, and the Department, by adopting his proposed decision, has exceeded its jurisdiction and authority.

Despite our belief that there may be some merit to appellants' argument, we cannot go behind the Department's assessment that the undisputed facts - the same clerk was the seller on four different occasions[6] - demonstrated bad judgment on the part of appellants in permitting the clerk's continued employment as a clerk, given the

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[5] We do not agree with the Department that §25658.1 "does strongly suggest" a legislative policy that a third violation "shall result in revocation of that licensee's license." Had the Legislature so intended, it would undoubtedly have made revocation mandatory, by use of the word "shall" instead of "may," as it has elsewhere in the Alcoholic Beverage Control Act. (See Business and Professions Code §24200.5). It is just as likely that the Legislature wished to assure the Department that it had the discretion to revoke in such circumstances.

[6] There was another violation at some time in 1990 or earlier.

known risk of further sales to minors.

ORDER

The decision of the Department is reversed and the case is remanded to the Department for such further proceedings as may be appropriate and necessary in light of the comments herein.[7]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[7] 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.