

ISSUED SEPTEMBER 18, 1997

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

BILL R. BAXTER)	AB-6274b
dba Kahuna's Coral Inn)	
873 Turquoise Street)	File: 48/58-198788
San Diego, CA 92109,)	Reg: 91023431
Appellant/Licensee,)	
)	Department Order of
v.)	Revocation
)	
DEPARTMENT OF ALCOHOLIC)	Date and Place of the
BEVERAGE CONTROL,)	Appeals Board Hearing:
Respondent.)	December 3, 1997
)	San Francisco, CA
)	

Bill R. Baxter, doing business as Kahuna's Coral Inn (appellant), appeals from an order of the Department of Alcoholic Beverage Control¹ which revoked his on-sale general public premises license and caterer's permit, for a violation of the terms of probation previously imposed, for violations contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22.

Appearances on appeal include appellant Bill R. Baxter, appearing through his

¹The Department's Order of Revocation dated February 19, 1997; a Notice dated December 29, 1993; and the Decision Following Appeals Board Decision dated August 20, 1993; are set forth in the appendix.

counsel, John B. Barriage; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license along with a caterer's permit, was issued on March 6, 1987.

The matter which is before the Appeals Board in the present appeal arose in 1990. The Department then instituted an accusation alleging the premises had been permitted to become a disorderly house in violation of Business and Professions Code §25601. The Department cited 181 instances of noise during an approximate period of nine months, which constituted disturbances to nearby residents. An administrative hearing was held during a six-day period at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which conditionally revoked the license and placed appellant on probation for a period of two years, and ordered the license suspended for 90 days.

That decision was appealed, with the Appeals Board issuing its decision in August 1993, affirming the Department's decision but remanding the matter for reconsideration of penalty -- the Board considering a 90-day suspension "tantamount to outright revocation." On August 20, 1993 (1993 decision), the Department, while retaining the stayed revocation penalty, reduced the suspension time to 60 days. Appellant again filed an appeal but the Board affirmed the 1993

decision.

The Appeals Board is unable to determine with precision, after a review of the Department's February 19, 1997 Order of revocation, what action, decision, or matter, the Department used as the "trigger" for vacating the 1993 decision's probation. But, the Board infers that a 1995 decision which concerned sales to a minor, is the triggering decision. Appellant's license history of the minor-type violations is as follows:

1. A 1989 decision suspended appellant's license for five days, for allowing a minor to remain on the premises;
2. A 1994 decision conditionally revoked appellant's license with revocation stayed for three years, for allowing minors to remain and consume alcoholic beverages on the premises. The decision was appealed, and the Appeals Board affirmed the decision but reversed the penalty, with the Board observing: "It becomes almost impossible to follow the present 'hidden trail' from fact to conclusion, leaving the [B]oard to basically surmise upon what basis the conclusion as to the penalty was founded. Without some rational basis for the justification of the penalty on what was essentially a second violation [sales to minor], the penalty is excessive." The Department thereafter by Order, reduced the penalty to a 35-day suspension with 10 of those days stayed.
3. A 1995 decision suspended appellant's license for 60 days with 30 of those days stayed, for sales and consumption by a minor on the premises. The Decision was appealed with the Board affirming the decision. The Appeals Board made the following comment: "... the Department initially recommended revocation, and the ALJ proposed a lesser penalty, which the Department accepted"

In the present appeal (1997 decision of revocation), appellant filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) the Department does not have good cause to impose revocation, and (2) the action of

the Department is retaliatory.

DISCUSSION

The Appeals Board's duty is to review any properly presented action of the Department to determine if the Department "has proceeded in the manner required by law" (Business and Professions Code §23084), that is, among other things, has adhered to the principles of due process, and substantial justice. The Board in the case of KDM, Inc. (1997) AB-6647, considered the question of the broad powers of the Department in this area of inquiry:

"Appellant contends that the condition of the stay, that 'no cause for disciplinary action occurs within the stayed period' is unreasonably broad, in that it is not limited to a violation similar in nature. It asks whether a records keeping violation, and after-hours sale, a failure to post a license, or other nominal violations, would result in the revocation of appellant's license.

"Appellant's contention does not bear directly on the penalty itself. Instead, it seeks some sort of prediction from the Appeals Board as to what kind of future violation would trigger a lifting of the stay order. The Board is not in a position to make such a prediction. Nor is the Board able to say that the Department's unwillingness to specify in advance a category of violation sufficient to induce it to seek a revocation of the stay is an abuse of discretion.

"Although the Department's brief did not address this issue, it is the Department's standard practice to frame an order staying revocation broadly, and not to attempt to characterize the kind of future violation which would warrant a lifting of the stay order. A requirement would unduly tie the Department's hands. The better course is for the Board to review such action consistent with an abuse of discretion standard when and if the situation arises."

In the present appeal, the Department in 1993 stayed the revocation of appellant's license. Where revocation is stayed for some probationary period,

essentially, the Department has determined that the ultimate penalty of revocation was not at that time, reasonable, thus allowing appellant to continue to exercise the privileges of the license. However, the Department retained the power to revoke the license under its probationary terms, if a future violation occurred, all designed, hopefully, to obtain the desired result of conformity to law.

In those occasions where a violation has occurred subsequent to the Department's stayed revocation decision, the Department has many options to enforce conformity to law short of revocation, such as extending the terms of probation for an additional period to impress upon the licensee that revocation is a clear danger to continuation of the license; impose new terms to the existing probation, which could address circumstances found in the new violation which circumstances were not known or considered at the time of the original imposition of the probation, or both. The Department chose to revoke the license. It is not for the Board to advise the Department which option the Department should chose, but to consider the choice made in relationship to the rule of abuse of discretion.

The decision of the Department which imposed the stayed revocation, states in pertinent part:

"No final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within two (2) years from the effective date of this Decision ... Should such determination be made, the Director of the Department of Alcoholic Beverage Control may, in his discretion, vacate and set aside this stay order and reimpose the stayed portion of the penalty"

We view the wording of the decision as extremely broad in its scope giving to the Department wide latitude in assessing any future course of action which may arise from some future violation.

We note that the practice of granting or revoking probation, is a useful tool in the criminal law (Penal Code §§1203, et seq.). While criminal law has many facets not applicable in administrative law, many of the objectives, such as the discretionary nature of allowing probation, and emphasizing conformity to law in future conduct, have parallels. It has been stated that probation is an act of clemency and may be withdrawn if the privilege is abused. (In re Bine (1957) 47 Cal.2d 814 [306 P.2d 445].) Also, revocation of probation is justified even though the circumstances of a new act of unlawful conduct would not justify a conviction. (People v. Calais (1974) 37 Cal.App.3d 898 [112 Cal.Rptr. 685].)

The Department by the exercise of its discretion to revoke the license under authority of the 1993 decision, in effect, has concluded that continuation of the license would be contrary to the public welfare or morals. This decision means the Department considers that either the licensee is unfit, or the premises is not eligible, any longer to hold a license -- that is, continuation of the license would be "harmful or undesirable," per Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1070) 2 Cal.3d 85, 99 [84 Cal.Rptr. 1113], for the common community good. A review of the record does not disclose evidence that location of the premises was a factor in revoking the license. Therefore, consideration as to

the vacation of probation should rise or fall on a question of appellant's fitness to continue to hold the license.

The court in Boreta, supra, stated, concerning the concept of public welfare or morals, the following:

"It seems apparent that the 'public welfare' is not a single, platonic archetypal idea, as it were, but a construct of political philosophy embracing a wide range of goals including the enhancement of majority interest in safety, health, education, the economy, and the political process, to name a few. In order intelligently to conclude that a course of conduct is 'contrary to the public welfare its effects must be canvassed, considered and evaluated as being harmful or undesirable...."

The Appeals Board in its review believes that it must consider the decision of the Department within two contexts, (1) the Department's responsibility under the public welfare or morals provisions of Constitution, and (2) a pattern of misconduct by appellant as shown in the record.²

The record shows that the 1993 decision's probationary period was imposed due to multiple violations alleging noise, loud yelling, and loud music, in the late and early morning hours, often nightly, and over an approximate nine-month duration of

²We are guided by two basic principles, the first of which states that: "If the decision is without reason under the evidence, the action of the Department constitutes an abuse of discretion and may be set aside. But where the decision is subject of a choice within reason, the Department is vested with the discretion of making the selection...." (Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (1982) 133 Cal.App.3d 814, 817 [184 Cal.Rptr. 367].) The second concept is that "Review for abuse of discretion consists of two distinct inquiries: the adequacy of the factual underpinning of the discretionary decision and the rationality of the choice." (The Scope of Judicial Review of Decisions of California Administrative Agencies, Asimow, June 1995, Vol.42, No. 5, p. 1229.)

time. And the record shows that the 1993 decision appears to have accomplished the end result to which the terms of probation were crafted by the Department -- to command appellant's attention to the fact that noise and disturbance of nearby residents would not be tolerated by the Department (and should not have to be tolerated by nearby residents) and, if continued, the license would be revoked. The record shows no such outlandish conduct since the 1993 decision, forcing the conclusion that the probationary terms and period accomplished their intended objective. We determine that the record clearly demonstrates that appellant has been violation free of the violations which gave rise to the probation contained in the 1993 decision.

The question raised by appellant in the KDM case, as to whether the Department can revoke upon a dissimilar type violation, has been asked in the present appeal. The Appeals Board has time after time been advised by counsel for the Department in the oral argument hearings, in briefs filed (Acapulco Joe's (1994) AB-6420), arguments by Department counsel before administrative law judges, and in findings of fact filed by the Department (Harper (199_) AB-6894), that the Department will not vacate a probation when the "triggering" subsequent violation is of a dissimilar kind [similarity in type or adverse social impact] from the violation which caused the imposition of the stayed revocation. However, we do not believe that the Department's position, if any, as to similar or dissimilar violations, is dispositive. The Appeals Board determines that the similarity or dissimilarity of a

subsequent violation is only strong evidence of a course of improper conduct which the Department may consider in considering its course of action upon a subsequent violation after imposition and during the period of probation.

As to a showing of a pattern concerning sales to minors, the record of progressive penalties shows for the 1989 decision, five days; for the 1994 decision, 35 days with 10 days stayed, or a net of 20 days; and in the 1995 decision, 60 days, with 30 of those days stayed, or a net of 30 days. What the next progressive step would be to curb this inclination to allow minors into the premises to drink, is not for the Appeals Board to determine, but such progression does not indicate that unconditional revocation is a legitimate penalty for the violations enumerated.

There is a disquieting thread that runs through the record. In the 1994 and 1995 decisions' proceedings, the Department sought extremely high penalties where such were clearly unwarranted (see facts and procedural history, ante). It is patently clear from a review of the record that there are strong feelings between the Department and appellant. Be that as it may, appellant's duty is to obey the law or lose his license.

CONCLUSION

We can understand and fully appreciate the Department's concern for its written injunctions which form the basis of its probationary orders -- designed to obtain conformity to lawful conduct. However, as we observed in KDM, Inc.,

supra, such a question of enforcement must be on a case-by-case basis, so that the Department may protect the lofty concept of public welfare or morals, but does not, unwittingly, defeat the same. Blindness but to the written word of the probationary terms would create the very disrespect for lawful conduct that the Department has been empowered by the State Constitution and the Legislature to uphold and enforce, on a rational basis.

Revocation in the present appeal would be irrational and unreasonable, and an abuse of the Department's discretion and therefore, contrary to public welfare or morals.

The Order of the Department dated February 19, 1997, is reversed.³

BEN DAVIDIAN, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This 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.