

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

PHILIP R. McGOVERN	)	AB-6541
dba The Rock)	
7230 Topanga Canyon Blvd.	)	File: 48-278790
Canoga Park, CA 91303	)	Reg: 94030291
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Ralph B. Dash
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	April 3, 1996
	)	Los Angeles, CA

Philip R. McGovern, doing business as The Rock (appellant), appealed from a decision of the Department of Alcoholic Beverage Control¹ which suspended appellant's on-sale general public premises license for 15 days, with five days stayed during a probationary period of one year, for allowing a violation of the conditions on his license in that security guards were not wearing prescribed clothing indicating they were security guards and there was no security guard in the parking lot during the prescribed hours, being not in conformity to the provisions of Business and Professions Code

¹The decision of the department dated June 14, 1995 is set forth in the appendix.

§23804.

Appearances on appeal included appellant Philip R. McGovern and the Department of Alcoholic Beverage Control, through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's license was originally issued on May 23, 1992. Thereafter, the department instituted an accusation on July 1, 1994, alleging a violation of the conditions imposed on appellant's license.

An administrative hearing was held on December 19, 1994, at which time oral and documentary evidence was received. Thereafter, the administrative law judge (ALJ) issued his decision, which was subsequently rejected by the department, which then issued its own decision.² While both decisions essentially determined that a security guard was not on duty in the parking lot, and the security guards within the premises were not wearing clothing which indicated that they were security guards, the proposed decision recommended that no penalty be imposed.³ The department's decision suspended appellant's license for 15 days, with five days stayed for a probationary period of one year. Appellant then filed a timely notice of appeal.

²The department may reject a proposed decision in whole or in part (Government Code §11517(c)).

³The proposed decision is set forth in the appendix.

In his appeal, appellant raised the contention that the violations were caused by an honest mistake of circumstances which should mitigate any imposition of the penalty.

DISCUSSION

On April 28, 1994, the department sent a letter to appellant warning of a violation of the conditions which were the same violations alleged in the present matter. The violations were alleged to have occurred on March 12, 1994.

Kevin Ortega, a department investigator, testified at the administrative hearing that on May 20, 1994, at about 10 p.m., there was no security guard in the parking lot [R.T. 6, 9, 18]. Ortega entered the premises and contacted the manager. Ortega met three security guards: one wore a red T-shirt covered by another open shirt; another wore everyday clothing; and the last guard was wearing a T-shirt that had writing on it describing "The Rock" and the word "staff" [R.T. 11-12]. Ortega rechecked the parking lot at 10:30 p.m. and again found no security guard present [R.T. 13].

Appellant called a witness who was one of the security guards that particular evening. His testimony was contrary to Ortega's testimony.

Where there are conflicts in the evidence, the appeals board is bound to resolve conflicts of evidence in favor of the department's decision, and must accept all reasonable inferences which support the department's findings (Gore v. Harris (1964)

29 Cal.App.2d 821, 40 Cal.Rptr. 666). See Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181, 67 Cal.Rptr. 734, 737; Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439, 102 Cal.Rptr. 857--a case where there was substantial evidence supporting the department's as well as the license-applicant's position; and Kruse v. Bank of America (1988) 202 Cal.App.3d 38, 248 Cal.Rptr. 271.

Additionally, appellant argues that the penalty should be mitigated. The appeals board will 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).

The department had the following factors to consider: (1) appellant had been warned a short time prior to the violations concerned with in this present matter; (2) the warning concerned the same violations proven to be true in the present matter; (3) at the administrative hearing the department recommended a 30-day suspension for the violations; (4) the ALJ, while in the main finding the violations to have occurred, recommended that no suspension be imposed; and (5) the department ordered in its decision that a 15-day suspension be served, with five days being stayed.

Appellant's brief alleges a "mistake." Appellant admits that one of the security guards was not wearing the appropriate shirt, and on the issue of no one in the parking

lot, it was a "changing of the guard" problem.

Appellant had on duty three security guards who were inside the premises instead of one of them being in the parking lot. Apparently, from the record, there was a mix-up as to the clothing to be worn that night, and though there were three guards there, none of them were appropriately dressed.

While conditions and adherence to them are extremely important to the necessary orderly function of the department's licensees, some actions and condition violations are of more import than others. This present matter is one of those cases. The record shows more of a state of confusion than intentional culpability.

CONCLUSION

The decision of the department is affirmed, except that that part of the decision entitled "order" is reversed and remanded for reconsideration of the penalty.⁴

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

⁴This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.