ISSUED SEPTEMBER 24, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

MIKE GARDY dba Sam's Super Foods 4111-A Home Avenue San Diego, California 92105, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6665a File: 20-282798 Reg: 95033328 Administrative Law Judge at the Dept. Hearing: John A. Willd Date and Place of the Appeals Board Hearing: July 8, 1998 Los Angeles, CA

This is an appeal from a decision of the Department of Alcoholic Beverage Control[1] which, following a partial reversal and remand of an earlier Department decision, ordered appellant Mike Gardy's off-sale beer and wine license suspended for 20 days, with 10 days thereof suspended for a probationary period of one year. The Appeals Board affirmed the Department's determinations that appellant had violated Business and Professions Code §25612.5, subdivision (c)(7) (exceeding window signage limitation), and §23573 (failing to produce records in response to Department request), but reversed the determination that appellant had violated

[1] A copy of the Department's Decision Following Appeals Board Decision, dated December 16, 1997, together with copies of the Appeals Board decision, filed June 23, 1997, and the original decision of the Department, dated May 2, 1996, is set forth in the Appendix.

Business and Professions Code §23804 by the sale of 32 ounce and 40 ounce containers of beer, in violation of condition "J" on his license, which limited the quantities in which certain sizes of malt beverages could be sold. In addition, the Board reversed the penalty, its remand order directing that the penalty be reconsidered.

Appellant now appeals the reduced penalty imposed by the Department, as well as the Department's modification of condition "J". Appellant contends that the penalty is, again, excessive, and that the Department lacked jurisdiction to modify condition "J".

Appearances on appeal include Mike Gardy, appearing through his counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

DISCUSSION

I

The Department's decision following the Appeals Board decision ordered condition "J" of appellant's license modified to read as follows:

> "J. Malt beverages shall not be sold in individual containers larger than 16 ounces capacity. Malt beverage based coolers in containers of 16 ounces or less may only be sold in four-pack quantities as pre-packaged by the manufacturer. All other malt beverages in containers of 16 ounces or less may only be sold in six-pack quantities as pre-packaged by the manufacturer. Any malt beverage sold in 'kegs' containing 3.5 gallons or more is exempt from this condition."

The condition in its original form read as follows:

> "J. That no malt beverage products shall be sold in less than six-pack quantities."

This Board said in its first decision in this matter:

> "The condition in question is identical to that involved in the recent appeal of Naemi (1997) AB-6566, where we held that the Department's application of the condition to sales of containers in sizes other than those customarily marketed in pre-packed groups of six was unreasonable and in excess of its jurisdiction. Naemi, in turn, followed our decision in Hawamdeh (1996) AB-6518, where we said, with respect to an essentially identical condition, that such an interpretation went beyond the perimeter of reason."

By modifying condition J, the Department has now attempted to broaden the scope of the condition to ban sales of the very sizes this Board said were permissible under the original condition. Yet, the Department's new decision and order is totally silent as to the existence of any problems associated with the sale by appellant of containers of the sizes in question.

We are informed by the testimony of District Administrator Gene Barnes in the administrative hearing in the original case (RT 70) that the conditions were placed in appellant's license because of the proximity of the business to a residential area, and were in some cases "verbatim to the requirements of the original use permit."
However, there is nothing in that record, and the Department has not offered anything in its new decision, to relate the sale of larger containers in single quantities to any specific, identifiable problem associated with appellant.

Business and Professions Code §23800 governs the imposition and modification of license conditions. It provides:

> "23800. Conditions. The Department may place reasonable conditions upon retail licenses or upon any licensee in the exercise of retail privileges in the following situations:
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> (a) If grounds exist for the denial of an application for a license or where a protest against the issuance of a license is filed and if the

> department finds that those grounds may be removed by the imposition of those conditions.
> (b) Where findings are made by the department which would justify a suspension or revocation of a license, and where the imposition of a condition is reasonably related to those findings. In the case of a suspension, the conditions may be in lieu of or in addition to the suspension.
> (c) Where the department issues an order suspending or revoking only a portion of the privileges to be exercised under the license.
> (d) Where findings are made by the department that the licensee has failed to correct objectionable conditions within a reasonable time after the receipt of notice to make corrections given pursuant to subdivision (e) of Section 24200."

Subdivisions (a) and (d) of §23800 are clearly not applicable to this situation. Nor do we believe subdivision (c) has any application, since, as we read it, it is merely a corollary to subdivision (b). It is subdivision (b) which we think has specific application to the present case, and which we think highlights the problem we have with the Department's order of modification of condition "J". Indeed, modification is somewhat inadequate to describe a wholesale rewriting of the condition to ban what the Board said in its original decision the Department could not ban - the sale by appellant of malt beverages in single containers of 32 and 40 ounces.

What this Board said in its first decision, citing Naemi, needs to be said once again:

> "What the Department is trying to do here is to re-word the condition simply by the Department's unilateral interpretation, without having to go through the statutory process for modifying conditions. This it cannot do. The Department has used 'container specific' language in many other cases, clearly restricting sales of various sizes of single containers. We have been given no reason, and can see none, for assuming that in this case the Department used "container-specific" language to indicate a "container-general" meaning. We must assume that, as in other cases, the Department

used "six-pack" advisedly to refer to containers that come in six-packs and that the condition did not apply to other containers not specified.

"The wording of the condition prohibits breaking a six-pack to sell individual containers, but there is no reference to containers other than those sold in six-packs. Such wording cannot reasonably be extended by unilateral interpretation to include all other containers that might be marketed from time to time."[6]

[6] The Department is not left without ability to control a change of marketing or area conditions. Violations can invoke the application of §23800, subdivision (b), and problems generated outside the premises by the use of the license, can be controlled by §24200, subdivision (f)."

The Department has chosen instead to accomplish by modification what this Board said it could not do by interpretation; that is, ban the sale by appellant of single containers of malt beverages in 32-ounce and 40-ounce sizes. Its modification of condition "J" is unsupported by any findings or evidence that the sale of single containers of those sizes by appellant has contributed to any social problems of the kind that would have warranted the imposition of such a condition at the time of the licensing process, as permitted by §23800, subdivision (a).

This is not to say that condition "J', as modified by the Department, is inherently flawed. To the contrary, the modification reflects the Department's careful drafting of a condition intended to control the sale of single containers of all sizes, regardless of how they are pre-packaged, and when imposed, in accordance with §23800, will undoubtedly resolve most, if not all, problems of interpretation that have arisen with this kind of condition. However, the statutory process was not followed here, and, for that reason, in our view, this portion of the decision must be reversed.

II

The Department, in response to the Board's decision requiring reconsideration of the penalty, reduced the period of suspension from 45 days, with 20 days thereof stayed, to 20 days, with 10 days thereof stayed. It also reduced the probationary period from three years to one year. Appellant contends that, nonetheless, the penalty is still excessive.

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].)

Appellant argues that the combination of a violation of a newly-adopted code section limiting the percentage of window space which could be covered by signs (appellant informs us that Business and Professions Code §25612.5, subdivision (c)(7) did not exist prior to January 1, 1995, while the violation occurred on May 10, 1995), and a violation based upon a failure to produce records on demand, does not warrant a 20-day penalty, even with 10 of those days stayed. Appellant has not explained why this is so, other than to remind the Board that it reversed the condition violations when it first was visited by this case.

A reduction from 45 days to 20 days, and a net suspension of 10 rather than 20 days, has to be considered a substantial reduction. The Department has

indicated that it took that part of the remand order seriously, and we are not in a position to say that its order, in this respect, is an abuse of discretion.

There are factors present which make the determination of the magnitude of the penalty peculiarly one for the Department to make. While appellant was cited for the signage violation on May 10, the objectionable signs remained in place for a considerable period of time thereafter. The failure to produce records was an act of apparent defiance, which the Department may feel is not to be encouraged by a mere slap on the wrist.

Since we cannot say as a matter of law that the penalty should have been less, it must stand.

CONCLUSION

That portion of the decision of the Department which ordered the imposition of modified condition "J" is reversed. The order of suspension is affirmed.[2]

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

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[2]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate 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.