ISSUED DECEMBER 22, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

DANIEL LELLHAME dba Geno's Pizza 307 Cressey Street Livingston, California 95334, Appellant/Licensee, v. DEPARTMENT OF ALCOHOL BEVERAGE CONTROL, Respondent.	)	AB-6748 File: 41-263173 Reg: 96035683 Administrative Law Judge at the Dept. Hearing: Michael B. Dorais Date and Place of the Appeals Board Hearing: September 3, 1997 Sacramento, CA

Daniel Lellhame, doing business as Geno's Pizza (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered his on-sale beer and wine public eating place license revoked, with revocation stayed for a probationary period of five years, together with a suspension for 180 days, for his having been convicted, on his plea of nolo contendere, of the crimes of annoying or molesting children, battery, and sexual battery, violations of Penal Code §§242, 243.4,

[1] The decision of the Department dated October 10, 1996, is set forth in the appendix.

subdivision (d), and 647.6, all crimes involving moral turpitude, by reason of which continuance of appellant's license would be contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and in violation of Business and Professions Code §24200, subdivisions (a) and (d).

Appearances on appeal include appellant Daniel Lellhame, appearing through his counsel, Ronald Sarhad; and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Murphy.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on September 17, 1991.[2] Thereafter, on March 28, 1996, the Department instituted an accusation alleging that appellant had entered pleas of nolo contendere to charges of annoying and molesting children, sexual battery and battery, as a consequence of which continuance of appellant's license would be contrary to public welfare and morals under the California Constitution.

An administrative hearing was held on July 31, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented by appellant concerning the circumstances surrounding the charges to which he had pleaded nolo contendere, and the sentencing following the entry of the pleas.[3]

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[2] Appellant testified that he had been licensed since 1979 at a different location, and free of prior discipline [RT 5].

[3] Appellant was sentenced to three years probation, 50 hours of community service, a fine, required to register as a sex offender under Penal Code §290, and

Appellant, who represented himself at the hearing, did not deny committing the acts for which he had been charged, but sought to explain what to his mind were mitigating circumstances warranting a lesser penalty than the stayed revocation and 10-day suspension proposed by the Department.

At the conclusion of the hearing, counsel for the Department recommended that appellant's license be revoked, revocation to be stayed for a probationary period of three years, to be reimposed upon the commission of a similar offense, and an actual suspension of ten days. A colloquy then occurred [at RT 25-27] in which the Administrative Law Judge (ALJ) appeared to have misgivings about the Department's recommendations, and sought to explore the reasons for them. Counsel for the Department explained that the recommendations reflected the policy of the District Administrator to recommend penalties based upon the circumstances in each case.

In his proposed decision issued subsequent to the hearing, the ALJ departed significantly from the Department's recommendations, ordering appellant's license revoked, staying revocation for a probationary period of five years, and imposing an actual suspension of 180 days. The Department adopted the proposed decision

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ordered to undergo continuous counseling for issues surrounding sexual harassment in the work place. The ALJ stated, in error, that appellant had served 50 days of community service, but there is no indication this had any influence on his ultimate decision.

without change.

Appellant thereafter filed his timely notice of appeal, and contends that the penalty is excessive.

DISCUSSION

This case presents a situation where the ALJ, dissatisfied with the penalty recommendation of the Department because, in his mind, it is too lenient, recommends a more severe penalty, which is then adopted by the Department. The Department's initial recommendation of a ten-day suspension (which, appellant's brief suggests (App.Br., p. 6) was offered to him prior to his decision to request a hearing) became, as a result of the hearing, the near equivalent of a revocation of appellant's license.

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].)

When reviewing the exercise by the Department of its discretion, the Appeals Board must consider the entire record. This includes the hearing proceedings, prior disciplinary actions, the Department's guidelines, relevant decisions in similar cases, and the "best thinking" of the Department as shown in its recommendations to the ALJ.

The Department's recommendation of proposed discipline, in this case a relatively short suspension and a lengthy period of probation[4] presumably reflected the Department's analysis and judgment as to an appropriate penalty prior to the hearing. While there are no specific guidelines for a violation of this type in the Department's procedures manual, the remarks of counsel at the hearing indicate that the Department looked to cases involving violations of Penal Code §313.1, subdivision (e) (display of videotapes containing harmful matter without "adults only" sign), for guidance, an approach the ALJ apparently did not think sound.

A 10-day suspension, as the ALJ and Department counsel acknowledged in their colloquy, is on the low side of the Department's recommendations. The ALJ contrasted the proposed suspension to the Department's "routine" recommendation of 20 to 25 days suspension in the harmful matter cases and pointedly suggested that the Department reconsider its recommendations in cases involving more serious conduct such as the type present in this case:

> "The present case involves actual criminal touching of minors employed at the licensed premises. That the law regards such actions as more serious criminal offenses than a violation of Penal Code Section 313.1 (e) is shown by the significantly different criminal penalties in the Penal Code for these different illegal acts."

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[4] Most of the cases which come to the Appeals Board involve a probationary period of one year. In this case, the Department recommended a three-year probationary period; the ALJ enlarged it to five years.

Thus, the ALJ spelled out the reasons for his rejection of appellant's plea for leniency and for his significant departure from the Department's recommendations. He attributed his action to what he perceived to be appellant's unwillingness or inability to fully recognize his own responsibility for serious criminal conduct. Although he did not directly so state, the ALJ's comments suggest that appellant's explanation that he pleaded nolo contendere rather than face trial before a female judge and a female prosecutor, and his suggestion that the behavior of the minors was a catalyst for his problems, may have contributed to the ALJ's conclusion that appellant was still unprepared to accept full responsibility for his actions. In disagreement with the view of Department counsel that appellant had greatly mitigated the penalty which might have been suggested, the ALJ found that no mitigating factors were present. Instead, the ALJ found circumstances in aggravation: "In this case, the Respondent's three victims were employees of his licensed establishment, and the unlawful acts took place at the licensed premises."[5]

Appellant's brief argues that appellant's inept self-representation at the administrative hearing was the major cause for his faring so much worse than had he not sought a hearing, and contends, nonetheless, that the record does not support the ALJ's statement that appellant is unprepared to accept full responsibility for his

[5] Under Penal Code §243.4, subdivision (d), where the perpetrator is an employer and the victims are employees, the fine for a misdemeanor conviction is increased from $2000 to $3000.

actions. Thus, it attempts to explain appellant's attempt to shift some of the blame to the teenage girls involved [RT 14-15] as simply an example of a foreign-born citizen's need to tell authorities he is a good person and not a malfeasant. The brief states that appellant has made peace with the Department of Fair Employment and Housing (settling with the DFEH for a $3,500 fine), and explains appellant's criticism of the kind of community service (in a battered women's shelter) he was ordered to perform by the sentencing judge [RT 22] as reflecting merely a suggestion on how to improve the quality of community service a court might wish to compel.

During the hearing before this Board, appellant's counsel again asserted his belief that appellant had learned the error of his ways, and, therefore, a lengthy suspension was unnecessary. Department counsel countered with the view that, but for the lengthy suspension, appellant's attitude would not have changed, and he would continue to view his conduct as the fault of his victims rather than his own.

Appellant's brief suggests the ALJ's determination that appellant was not accepting responsibility was influenced by the fact that appellant requested a hearing rather than accept a 10-day suspension so as to avoid negative publicity which would harm his business, and defends that action as a legitimate business decision consistent with a motive to make a profit.

We do not see anything in the transcript of the administrative hearing, or in the ALJ's proposed decision, that would indicate appellant was being punished for requesting a hearing. To us, the record indicates that the ALJ's thinking was

influenced mostly by appellant's attempt to rationalize his conduct as trivial, misunderstood, or as much the fault of his victims as his own, a theme to some extent pursued in the brief on appeal, and even in the argument before this Board.

The issue of the Department's ability to impose a penalty after a hearing greater than it had offered prior to the hearing was addressed long ago in Kirby v. Alcoholic Beverage Control Appeals Board (1971) 17 Cal.App.3d 255 [94 Cal.Rptr. 514]. Viewing the initial proposal as in the nature of a settlement proposal, the court stated (17 Cal.App. 3d at 260-261):

> "Even in cases strictly criminal, there is a public policy in favor of negotiations for compromise ...; a fortiori there is an equal policy in cases such as this. The department, acting on the basis of written reports, secures a prompt determination, at little administrative cost; the licensee avoids the risks that testimony at a formal hearing may paint him in a worse light than the reports and, also, avoids the costs and delay of a hearing. The licensee who rejects a proffered settlement hopes that the hearing will clear - or at least partially excuse - him and he hopes that even if he is not found innocent, he will be dealt with less harshly than the department proposes. But if the department can never, no matter what a hearing may develop, assess a penalty greater than that proposed in its offer, a licensee has little to lose by rejection. Only the cost of a hearing is risked; he could not otherwise be harmed. In that situation, licensees would be induced to gamble on the chance of prevailing at the trial, while the department would lose much of its inducement to attempt settlement. The law should not permit that kind of tactic by an accused.
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> "It follows that the mere fact - if it be a fact - that the department had once offered a settlement more favorable than the discipline ultimately imposed is not, in and of itself, a ground for setting aside the penalty ultimately adopted."

In the last analysis, the question is whether there is a rational basis in the record for the ALJ's determination of what he believed was an appropriate level of discipline. Although the gulf between the Department's initial recommendation and the discipline

ordered in the decision it adopted is large, this Board is of the view that the Department did not abuse its discretion in adopting the decision.

The transcript of the administrative hearing is only 32 pages, 14 of which contain statements by appellant [RT 13-24, 29-31]. It is not difficult to empathize with the ALJ's comments and impressions, and his apparent belief that appellant needed both a firm hand and a solid reminder to guide him toward accepting full responsibility for his conduct and ensuring acceptable future behavior.

The Board appreciates the sincerity of appellant's counsel's appeal that his client has now learned the error of his ways. However, it is not the function of the Board to decide whether that is true. Where the penalty imposed by the Department is not clearly excessive, and we cannot say that it is in this case, the Board lacks the power to set it aside simply because it may disagree with the penalty.

CONCLUSION

The decision of the Department is affirmed.[6]

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

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[6] 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 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.