ISSUED SEPTEMBER 11, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

MAJESTIC NIGHT CLUB, INC. dba Majestic Night Club 17021 Roscoe Boulevard Northridge, CA 91325, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6764 File: 48-314007 Reg: 96036132 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: July 2, 1997 Los Angeles, CA

Majestic Night Club, Inc., doing business as Majestic Night Club (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered its license suspended for 30 days, with enforcement of 10 days of said suspension stayed for a three-year probationary period, for appellant's sole shareholder and president, Eduardo Silva, having misrepresented a material fact with respect to his criminal record, 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 §24200, subdivision (c).

[1] The decision of the Department dated October 24, 1996, is set forth in the appendix.

Appearances on appeal include appellant Majestic Night Club, Inc., appearing through its counsel, Andreas Birgel, Jr.; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on December 28, 1995. Thereafter, on May 13, 1996, the Department instituted an accusation alleging that corporate officer Eduardo Silva misrepresented a material fact in connection with his application for appellant's license by stating that he had no record of bail forfeitures, convictions, fines or placements on probation for violations of law. In fact, Silva had pleaded guilty in 1985 to a charge that he violated Penal Code §647, subdivision (f) (disorderly conduct - public intoxication), and in 1987 pleaded nolo contendere to a felony charge that he violated Penal Code §245, subdivision (a) (2) (assault with a firearm on a person).

An administrative hearing was held on August 27, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the circumstances surrounding the completion of the application form which contained the alleged misrepresentations, and the Department's discovery of Silva's criminal record.

A Department investigator testified that the information regarding Silva's prior convictions was obtained in response to the normal background checks with law enforcement agencies when an applicant has applied for a license [RT 10-11]. The

check was run on Silva because he was listed on the application as "sole owner." Silva was in the process of buying the corporation which owned the night club and applying for a transfer of the existing license [RT 26].

Silva testified that the application was completed near the end of the business day, under rushed conditions, and that he merely signed the document after another person had filled it out or helped him fill it out [RT 36]..

Subsequent to the hearing, the Administrative Law Judge (ALJ) issued his proposed decision in which he found that there was a material misrepresentation of fact and, because it was that of an officer of the corporation, was imputable to the corporation. The ALJ also found that the misrepresentation was the result of Silva's not reviewing the application form before he signed it (Finding V), which he characterized as "careless" (Determination III), and an "unintended incorrect answer" (Determination IV). The ALJ rejected the Department's recommendation that appellant's license be revoked, with revocation stayed subject to an actual suspension of 30 days, as too harsh, stating that the "unintended incorrect answer" was not the kind of violation deserving such a penalty, and proposed instead a 30-day suspension with 10 of those days stayed. The Department adopted the proposed decision as its own.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) whether there is sufficient evidence to support the determination that Silva had misrepresented a material fact; (2) whether there is

sufficient evidence to support the determination that the misrepresentation is imputable to appellant corporation; and (3) whether the penalty is excessive.

DISCUSSION

I

Appellant contends that when he signed the license application he had no intention of deceiving the Department. He blames the misstatement on the fact that he was assisted in filling out the form, and was in a hurry to get it completed before the end of the business day. Thus, he claims, he did not know the representation was false, so lacked the requisite intent to deceive.

Appellant cites the standard jury instruction (BAJI 12.31 (8th ed.)) with the traditional elements for common law fraud and deceit: knowing and intentional falsity with resulting detriment to one who reasonably relied thereon.

There is substantial evidence from which the ALJ and the Department could have drawn an inference of an intentional misrepresentation. Silva signed the form, and ordinarily it is presumed that a person reads a document before signing it. He had a reason to conceal the conviction, since its disclosure might have prevented him from buying the business. (The ALJ's statement that the corporation did not benefit since there was no reason for Silva to answer questions about himself (Determination IV) is not completely correct - it stood to gain a new owner, Silva.) That Silva was reluctant to disclose the full story of his past is also seen in the statement he gave the Department investigator, where he finally acknowledged the prior conviction, but did

not disclose that it was a felony, or that the three years of probation included imprisonment in the county jail the first year.

In spite of this, the ALJ accepted Silva's testimony that he did not intend to make the misrepresentation. The ALJ was confronted with conflicting evidence and competing inferences, and chose to believe Silva's explanation of events. The Board is not in a position to second-guess the ALJ in such circumstances.

The issue is whether a negligent misrepresentation of a material fact constitutes good cause for the revocation or suspension of a license. Must the Department, as appellant contends, satisfy the traditional requirements for proof of common law fraud and deceit before it can impose discipline for a misrepresentation of material fact? [2] We do not believe so. The fact that the public welfare is involved requires a different conclusion, particularly because the Department must make a decision, on the information it has been given, whether or not it is in the interest of the public welfare for it to issue a license to sell or dispense alcoholic beverages. It is this last consideration that must control. The focus of the inquiry should be on the materiality of the misrepresentation, not necessarily whether it was intended to be so.

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[2] While the ALJ determined that the fact misrepresented was material, ordinarily a question for the finder of fact, he did not explain why he thought it so. However, since what was not disclosed was a felony conviction, it would seem that no explanation was necessary.

Thus, even though the ALJ specifically found the response to be "unintended," negating the possibility of drawing an inference of knowing intent, such a determination is no bar to discipline, albeit, perhaps, relevant to the degree of discipline.[3]

This interpretation is consistent with our reading of Martin v. Alcoholic Beverage Control Appeals Board and Chaney (1959) 52 Cal.2d 259 [341 P.2d 291] ("Chaney"), where the California Supreme Court sustained the Department, and reversed the Appeals Board, in a case in which the Department had denied a transfer of a license where the transferee had failed to disclose a prior arrest and conviction. The Appeals Board had based its reversal on the absence of any finding that the applicant had knowingly or purposely omitted the fact of arrest; therefore, reasoned the Board, the omission could have been the result of an honest mistake or negligence.

The Supreme Court concluded that the Department had made the only essential ultimate finding of fact when it found the granting of the application would be contrary to the public welfare. The Court found sufficient evidence of good cause to support the Department's finding in the "strong inference" that the applicant had knowingly and intentionally omitted an arrest and conviction more recent and more serious than an earlier arrest which he did disclose. Under the circumstances no further or more detailed findings were required.

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[3] Business and Professions Code §24200, subdivision (c), provides that the misrepresentation of a material fact by an applicant in obtaining a license is a ground for its suspension or revocation. It does not expressly require that the misrepresentation have been intentional.

The Court described as untenable the Appeals Board position, that the finding that the applicant had made a material misrepresentation on his license application was insufficient to support the Department's decision absent a finding that he had knowingly and intentionally omitted his prior conviction, a finding for which there was insufficient evidence in the record:

> "We cannot agree that either the evidence or the findings were insufficient. The burden of proof was on the applicant, and the Department was not bound to believe the applicant's weak explanation ... "

(Chaney, supra, 52 Cal.2d 379 [341 P.2d 291 at 295].)

In Martin v. Alcoholic Beverage Control Appeals Board and Haley (1959) 52 Cal.2d 289 [341 P.2d 296] ("Haley"), decided 10 days after Chaney, the Court again reversed the Appeals Board[4], and upheld the Department's revocation of a license held by a business operated as a partnership where, over a 12-year span of license renewal applications, Haley signed his name as sole owner even though the form indicated it required the signatures of each partner. Although Haley argued that the omission of his partner's signature was inadvertent, an innocent mistake based on advice he and his partner had been given years earlier, the Court nevertheless treated the omissions as a material misrepresentation, even characterizing them as a crime and technically contrary to public welfare or morals.

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[4] The Appeals Board had sustained the Department on all issues except penalty, holding that revocation was excessive.

The only real issue presented in Haley was whether the penalty was excessive. However, for the Court to find that any penalty would be justified, there had to be conduct contrary to the public welfare and morals, and it found this in the failure to disclose the partner. The Court made no clear-cut statement whether it deemed the omissions intentional or inadvertent, although it did note that the omissions began before the time they alleged they were told by someone in the Board of Equalization that both names were not necessary on the license.

The question presented, in light of Chaney and Haley is whether it makes any difference whether the misrepresentation in an application for a license is intentional or inadvertent. This Board firmly believes that, because the public welfare is involved, it should not make a difference; it should be enough if the information misrepresented is of sufficient import that it might reasonably influence the Department to act in a way other than it might have acted had it been given correct information.

When the issue is whether a material misrepresentation is made during the licensing process - the test for materiality being whether the Department might have acted differently had it known the true facts - then it should not matter whether the misrepresentation was intentional. The Department's duty is to protect the public welfare and morals, and if a license is issued to a person who would not have received one had the true facts been known, the Department ought to be able to revoke the license, or take such other reasonable action it deems necessary to fulfill that duty.

Here, without explanation, the Department acquiesced in a proposed decision which effectively suspended for 20 days a licensee who failed to disclose a prior felony conviction.

II

Appellant contends that since the Department presented no evidence of the authority of Silva to act on behalf of appellant, appellant cannot be bound by his actions.

This is a frivolous argument. Silva, the sole shareholder and president of appellant corporation, was the agent of the corporation submitting the application to the Department for transfer of a license to sell alcoholic beverages. He is the person who signed the application. There is nothing in the record to indicate that Silva, as sole shareholder and principal corporate officer, lacked authority to act for his corporation, and the inference that he had such authority seems eminently reasonable.

III

Appellant contends that the penalty is excessive, asserting that his actions were unintentional, that, despite his criminal past, he is a model citizen, with letters of support, appreciation and commendation from law enforcement authorities for his volunteer work.

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 initially sought stayed revocation and a 30-day suspension, but then acceded to the ALJ's proposed penalty of a 30-day suspension with 10 days stayed for a probationary period of three years.

The Department has legitimate reasons, even a duty, to be concerned about the integrity of an applicant for a licensee. It must be able to trust the representations made to it in the licensing process. Its action here is an expression of that concern, and is not an abuse of discretion.

CONCLUSION

The decision of the Department is affirmed.[5]

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

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[5] 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.