ISSUED NOVEMBER 14, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

JOHNNY LOVE'S, INC. dba Johnny Love's 1448 South Main Street Walnut Creek, CA 94596, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6805 File: 47-299334 Reg: 96036753 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: September 3, 1997 Sacramento, CA

Johnny Love's, Inc., doing business as Johnny Love's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended appellant's license for 45 days, with 30 days of the suspension stayed for a probationary period of two years, for appellant maintaining a disorderly house and creating a law enforcement problem, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §§25601 and 24200, subdivision (a).

[1]The decision of the Department, dated January 2, 1997, is set forth in the appendix.

Appearances on appeal include appellant Johnny Love's, Inc., appearing through its president, John Matheny, and its counsel, David Macpherson and John Lothrop; and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Murphy.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on July 28, 1994.[2] Thereafter, the Department instituted an accusation against appellant alleging that appellant kept a disorderly house [Count I, subcounts a through s] and had created a law enforcement problem [Count II, subcounts 1 through 80].[3]

An administrative hearing was held on November 12, 13, and 14, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the incidents leading to the accusation and appellant's efforts to correct the problems.

Subsequent to the hearing, the Department issued its decision which dismissed a number of the subcounts under each count and determined that cause for suspension of the license was established by the remaining subcounts. The Department had originally recommended revocation of the license, but the Administrative Law Judge (ALJ) proposed, and the Department adopted, a suspension of 45 days with 30 days stayed for a probationary period of 2 years.

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[2]The license was apparently withdrawn and then re-issued on November 28, 1994.

[3]The subcounts of Count I were also incorporated into Count II.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) insufficient evidence was presented "to support the finding that loud music from the licensed premises actually existed to support the 27 subcounts listed [in Finding VI. A.] of the decision," and (2) the penalty is excessive.

DISCUSSION

I

Appellant contends that "the hearsay evidence presented by the Department was insufficient to support the finding that loud music from the licensed premises actually existed to support the 27 subcounts listed on page 3 of the decision." (App. Br. at 1.)

Appellant is referring to Finding VI. A., which states:

> "Of the 80 incidents alleged in Count II of the Accusation, 27 involve complaints from [appellant's] neighbors regarding loud music from [appellant's] premises. [Subcounts listed.] In 22 of these incidents, music from [appellant's] premises was so loud that it disturbed its neighbors. [Subcounts listed.] In 4 of these incidents, the police officer assigned to the case could not verify that loud music was in fact coming from [appellant's] premises. [Subcounts listed.] On those occasions when the police notified [appellant's] management that the music was too loud, [appellant's] management was always cooperative and lowered the volume of the music."

Appellant filed a motion at the beginning of the administrative hearing before the ALJ, asking that all the police reports submitted by the Department be excluded from evidence, since they contained hearsay. The motion was denied by the ALJ, who stated that administrative hearsay was admissible and would be accepted,

although it could not, by itself, support a finding. Appellant lodged a standing objection to the use of this hearsay. [RT 14-15; Exhibit A.]

On appeal, appellant merely makes the general statement that "the hearsay evidence presented by the Department was insufficient" to support the finding of 27 noise violations.[4] Appellant has not bothered to present its argument with any greater specificity or to support it by references to the record, apparently leaving it up to this Board, rather than appellant, to make appellant's case. Although it is obvious that the Department did not call the people who had complained about the noise as witnesses, that omission does not necessarily mean that all the evidence presented was hearsay. The Appeals Board is not required to make an independent search of the record for error not pointed out by appellant. It was the duty of appellant to show to the Appeals Board that the claimed error existed. Without such assistance by appellant, the Appeals Board may deem the general contentions waived or abandoned. (Horowitz v. Noble (1978) 79 Cal.App.3d 120, 139 [144 Cal.Rptr. 710] and Sutter v. Gamel (1962) 210 Cal.App.2d 529, 531 [26 Cal.Rptr. 880, 881].)

The noise violations were alleged in support of Count II, which charged that the premises were operated in a manner contrary to public morals by causing the

[4] We note that of those 27 subcounts, one was dismissed for failure to present evidence (subcount 19; Finding VI. B.), and five more were dismissed "as the evidence regarding these counts did not show that continuation of [appellant's] license would be contrary to public welfare or morals." (Subcounts 4, 11, 24, 50, 63; Det. of Issues III.)

Walnut Creek Police Department "to make numerous calls, investigations, arrests or patrols concerning the conduct and acts occurring in or about said premises . . . ." Therefore, what is important with regard to Count II is simply the fact that the police had to respond to numerous calls and complaints regarding the premises. Whether or not there was noise, there were still calls made to the police that had to be investigated.

There is potential for abuse in such situations if all that is required is counting up the number of police calls. Appellant has suggested as much in its allegation that the noise calls were made by persons bent on getting the premises shut down. However, appellant did not convince the ALJ abuse occurred and there does not appear to be any evidence in the record to support appellant's allegation.

In any case, the determination as to the law enforcement problem is supported by 47 other subcounts besides the 21 noise violation subcounts that were established.[5] These incidents are more that ample evidence to support the determination that cause for discipline was established.

II

[5] Of the original 80 subcounts in Count II, cause for discipline was not found in 29 of the subcounts (see Determination of Issues II and III) and subcount 30 was dismissed on motion of the department (Finding of Fact II.B.), leaving extant 50 subcounts in Count II. The subcounts of Count I, except for subcount (o), were incorporated into Count II as well, adding 18 more subcounts. Subtracting the 21 noise subcounts (see ftnt. 4, supra) from the total of 68 subcounts proven leaves 47 subcounts besides the noise subcounts.

Appellant appeals both the number of days of suspension (45, with 30 days stayed) and the length of the stayed suspension (2 years), arguing that a 15-day suspension with 10 days stayed for 1 year would be more appropriate. The loss of revenue from a 45-day suspension, appellant argues, could result in the permanent closure of the premises.

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's argument in support of modification of the penalty is no more than a general statement that many counts were unproven, that many of those proven were trivial, and that appellant believes the shorter periods of suspension and stay it proposed "would be more appropriate." This Board, however, does not have the authority to modify a penalty of the Department and will only remand a penalty determination for reconsideration where there has been a showing that the Department abused its discretion in imposing the penalty, a situation that does not exist here. Abuse of discretion is not shown by a difference of opinion as to the appropriateness of the penalty.

Appellant's speculation that it might have to close because of "the current 45 day suspension" is clearly unfounded, since, as long as no further cause for disciplinary action occurs during the probationary period, the actual suspension time will be only 15 days.

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

[6]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.