

ISSUED APRIL 24, 1998

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

| | | |
|----------------------------|---|--------------------------|
| ABDELKARIM A. SHEHADEH |) | AB-6869 |
| dba Select Wine & Spirits |) | |
| 7485 Rush River, Suite 730 |) | File: 21-280283 |
| Sacramento, CA 95831, |) | Reg: 96036896 |
| Appellant/Licensee, |) | |
| |) | Administrative Law Judge |
| v. |) | at the Dept. Hearing: |
| |) | Jeevan S. Ahuja |
| |) | |
| DEPARTMENT OF ALCOHOLIC |) | Date and Place of the |
| BEVERAGE CONTROL, |) | Appeals Board Hearing: |
| Respondent. |) | December 3, 1997 |
| |) | San Francisco, CA |
| |) | |

Abdelkarim A. Shehadeh, doing business as Select Wine & Spirits (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his license for 20 days, with 15 days stayed for a probationary period of one year for selling a bottle of port wine with an alcoholic content of 18.5 percent, in violation of a condition on his license, 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 §23804.

¹The decision of the Department under Government Code 11517, subdivision (c), dated May 5, 1997, and the Proposed Decision of the Administrative Law Judge, dated November 1, 1996, are set forth in the appendix.

Appearances on appeal include appellant Abdelkarim A. Shehadeh, appearing through his counsel, Richard D. Warren, and the Department of Alcoholic Beverage Control, appearing through its counsel, John R. Peirce.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on July 1, 1993. Thereafter, the Department instituted an accusation against appellant charging that he had violated a condition of his license by selling wine with an alcohol content of greater than 15 percent.

An administrative hearing was held on October 2, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the condition on appellant's license that prohibited the sale of wine with an alcoholic content greater than 15 percent by volume.

Subsequent to the hearing, the Administrative Law Judge (ALJ) submitted his Proposed Decision recommending a suspension of 15 days with 5 days stayed for one year, which the Department declined to adopt. On May 5, 1997, the Department issued its decision pursuant to Government Code §111517, subdivision (c), adopting the ALJ's Findings of Fact I through VI and the ALJ's Determination of Issues, but ordering that the license be suspended for 20 days with 15 days stayed for a one-year probationary period.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant contends the Department exceeded its jurisdiction and abused its discretion by interpreting the condition in question as banning the sale of any wine with an

alcohol content of greater than 15 percent.

DISCUSSION

Appellant operates an “upscale” liquor store where he sells “expensive wines, beer, and distilled spirits, along with cheeses and other specialty foods.” (App. Opening Br. at 1-2.) The Sacramento City Planning Commission issued a permit for appellant’s store with several conditions. One of the conditions was: “The business shall not sell fortified wines.”

Appellant’s ABC license was also issued with conditions. The Petition for Conditional License stated, in part: “WHEREAS, the City of Sacramento Planning Commission, on October 8, 1992, approved a Special Permit Number P92-216 limiting the petitioner’s licensed operation;” and imposed as one of the conditions: “2. No wine shall be sold with an alcoholic content greater than 15% by volume.”

Appellant contends the condition in question was designed to impose on the license the same restriction against “fortified wine” that the Planning Commission had imposed, that the condition as imposed by the Department is far more restrictive than that of the Planning Commission, and that the condition, therefore, is unreasonable and an abuse of the Department’s discretion.

Appellant argues that by “fortified wines,” the Planning Commission meant only the inexpensive, high-alcohol wines that might be purchased by people who would tend to loiter about the premises and abuse alcohol, such as “chronic street inebriates.” (App. Opening Br. at 5.) Appellant did not understand the term “fortified wines” to include such wines as port and dessert wines, which often have

an alcohol content above 15 percent, especially the more expensive products that he carried in his store. The Department argues there is no evidence that “fortified wines” meant only the very cheap, high-alcohol wines and that it used the specific percentage to make the prohibition very clear and unambiguous.

The Department also points out that appellant was sent a letter on October 20, 1994, warning appellant that he was violating condition 2 of his license and that he could be subject to discipline if he continued to violate the conditions on his license. On April 5, 1996, a Department investigator purchased a bottle of 1992 Shenandoah Crusting Port having an alcohol content of 18.5 percent. On July 25, 1996, the Department filed the accusation against appellant which is the subject of this appeal.

Appellant argues that the condition is unreasonable. However, he did not challenge the condition when it was imposed in 1992, and the time has passed for him to do so. In some sense, appellant’s appeal could be considered a request for modification of the condition. However, there is a statutory procedure for petitioning for modification (see Bus. & Prof. Code §23805) that must be followed; an appeal to this Board is not the proper method for initiating such a request.

Appellant signed the Petition for Conditional License which contains a prohibition against selling wines that contain more than 15 percent alcohol and appellant sold a bottle of port with an alcohol content of 18.5 percent. There is no question that appellant violated the condition as it is written.

While this Board cannot eliminate or modify this condition, we can consider

whether the Department has proceeded in the manner required by law or has abused its discretion in interpreting and enforcing this condition. The Department may impose "reasonable conditions" on a license under the authority of Business and Professions Code §23800, subdivision (a). This section provides that "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" the Department may grant the license subject to those conditions. Section 23801 states that the conditions "may cover any matter . . . which will protect the public welfare and morals"

We interpret "reasonable conditions" in §23800 to mean those reasonably related to resolution of the problem for which the condition was designed. In other words, there must be a reasonable connection between the problem sought to be eliminated and the condition designed to eliminate the problem. In addition, as with all other discretionary acts of the Department, the imposition of "reasonable conditions" must be the result of a reasonable exercise of the Department's discretion; that is, the decision to impose conditions and the determination of the conditions to be imposed must not be arbitrary or capricious.

The condition at issue, by its terms, prohibits the sale of most, if not all, ports, sherries, and dessert wines, regardless of quality or cost, since those wines almost always have an alcohol content greater than 15 percent. A wine and spirits store that purports to be "upscale" and that sells "expensive wines, beer, and

distilled spirits, along with cheeses and other specialty foods” (App. Opening Br. at 1-2) would necessarily carry ports, sherries, and dessert wines of relatively higher quality and cost, such as those listed in appellant’s Exhibit B, many of which are imported and which range in price from a \$7.29 New York sherry to a \$109.99 vintage port from Oporto, Portugal.² All of the wines on the list contain more than 15 percent alcohol. The condition imposed by the Department thus prohibits appellant from selling an entire group of products that are an ordinary part of the inventory of stores such as appellant’s and that are sold throughout Sacramento and California in other “upscale wine and spirits” stores with which appellant competes. On its face, this condition appears to be unreasonable when imposed literally on a premises such as appellant's.

The process used in imposing this condition merely serves to make the Department's literal enforcement of the condition appear even more unreasonable. This broad prohibition against sale of a whole class of wines was imposed with no investigation that we are aware of and no findings other than one stating that the Planning Commission had approved a special permit “limiting the petitioner’s licensed operation.” It appears that the Department unreasonably surrendered its discretion to the Sacramento Planning Commission, a body without the Department’s experience and expertise in matters regarding the alcoholic beverage

²Although the sizes of the bottles are not listed in Exhibit B, the port that was purchased by the Department investigator for \$7 was in a small, 375 ml. bottle [RT 27], and the pictures of the premises show a number of the ports, sherries, and dessert wines to be in similar small bottles (Resp. Ex. C-3, C-4, C-17), making some of these wines very expensive indeed.

industry and the laws governing it. The Department then took the Planning Commission condition against sale of “fortified wine,” a term that has no statutory definition,³ and rewrote the condition using the Department's arbitrary interpretation of that term: wines with an alcohol content of greater than 15 percent.

The Planning Commission staff added conditions prohibiting the sale of fortified wine and the sale or display of adult magazines “to address the concerns of the neighbors” [Resp. Ex. E at 2]. Bill Shehadeh, appellant’s manager, told the Planning Commission at the hearing: “fortified wines [will not be carried] to keep the undesirables from coming into that area in general, and we will be also advertising only in local newspapers just so that we can attract local people from the area and no one else” [Resp. Ex. E, 7-8, emphasis added]. The concerns of the neighbors were expressed by Nancy Spirko, who spoke at the Planning Commission meeting:

“We are having a different clientele I feel that patronize a liquor store versus a grocery store.

“Increase in the calls for police service are to be anticipated as well as the problem of loitering and the creation of social areas as people consume alcohol onsite. Loiterers intimidate people and customers reducing patronage.

“Increases in litter and noise can be expected. Crimes of violence also accompany such socializing with alcohol consumption. . . .” [Resp. Ex. E at

³ Unfortunately, the term “fortified wine” is not defined in Alcoholic Beverage Control law by statute or regulation. Webster's Third New International Dictionary (Unabridged) 1986, defines “fortified wine” as: “a wine (as most dessert wines) to which alcohol usu. in the form of grape brandy has been added during or after fermentation -- used descriptively but not permitted in labeling or advertising in the U.S.”

10-11.]

In response to Ms. Spirko's comments, Bill Shehadeh said:

"As to her comment as far as what that type of store would bring into the neighborhood for the product that we are going to carry, there is more of a chance that Bel Air or Thrifty would bring in that sort of , you know, undesirables that she is thinking of than we would.

"Our target as far as these customers that are going to come in, we are targeting middle to high class people. As far as our pricing and as far as our selection, we will not carry fortified wines. We will not carry forty ounces of beer. We will not carry most -- I could say almost all items that would bring in such people into the area,

"There will be no loitering, there will be no hanging out," [Resp. Ex. E, 14-15.]

The problem identified by the Planning Commission was the attraction of "undesirables" to liquor stores that sold cheap, high alcohol wines. The Planning Commission addressed this problem by its prohibition against the sale of "fortified wines," which, reasonably interpreted in the context of the Planning Commission hearing and its staff report, meant inexpensive, high-alcohol wines that would tend to attract transients and other "undesirables" who are perceived as abusers of alcohol and who would be looking for the highest alcohol content at the lowest cost. Given the statements made at the Planning Commission hearing, we find it incredible that the Department can seriously state that "There is not one shred of evidence that 'fortified wine' was used at the Planning Commission hearing as a 'shorthand term to identify very cheap, high alcol [sic] wine... ."

The Department did not do its own investigation, nor, apparently, did it examine and evaluate the Planning Commission's findings and conditions in order to use its expertise to design conditions to appropriately address the concerns

expressed by the Planning Commission. While the Department did change the inexpertly crafted "fortified wine" condition of the Planning Commission, the resulting Department language did not address the concern behind the Planning Commission condition: the sale of cheap, high-alcohol alcoholic beverages. Instead, it prohibited entirely the sale of an entire class of wine, defined by an arbitrarily chosen alcohol content percentage, without regard to whether all the wines in this broad class would be attractive to those who might disturb the neighborhood.

The condition imposed by the Department, which prohibits all high alcohol wines, is not reasonably related to the problem identified by the Planning Commission and the Department has not shown that there is any other situation injurious to the public welfare and morals that the condition is designed to address. The condition is so overbroad, it not only prevents appellant from selling wines that the Planning Commission wished to prohibit, but prevents appellant from selling wines that the Planning Commission clearly never intended to prohibit and which his competitors (other "upscale" wine and liquor retailers) are able to sell without interference. The Department is charged with "ensur[ing] a strict, honest, impartial, and uniform administration and enforcement of the liquor laws throughout the State." (Bus. & Prof. Code §23049.) The position taken by the Department in this matter does not seem to comport with the Department's statutory mandate.

Clearly, appellant is not without fault in this situation. He did violate the literal language of the condition. In addition, appellant helped bring this problem on

himself by failing to ensure that the condition he accepted meant what he thought it did and by failing to act on the notice he received from the Department.

However, appellant was not alone in culpability here; the Department did not meet its responsibility of designing a reasonable condition that addressed a particular problem in a reasonable way.⁴ The condition imposed by the Department was unreasonable as written, and it is not surprising that appellant interpreted the condition to be in accord with his reasonable understanding of the problem that the condition was supposed to address. Under the circumstances, we believe the penalty imposed by the Department was too harsh.

⁴It appears to this Board that a modification of this condition to make it address the problem identified by the Planning Commission would be reasonable in this situation. Although it may be difficult to craft appropriately narrow language, the Department's expertise and experience should be more than adequate to accomplish the task.

CONCLUSION

The decision of the Department is affirmed, but the penalty is reversed and remanded for reconsideration in accordance with the views expressed herein.⁵

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

⁵This 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.