

ISSUED OCTOBER 1, 1998

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

RAFAEL LOPEZ	)	AB-7001
dba El Atoron)	
11119-21 Burbank Blvd.	)	File: 40-124204
North Hollywood, CA, 91601,	)	Reg: 97040335
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Ronald M. Gruen
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	August 12, 1998
	)	Los Angeles, CA
)	

Rafael Lopez, doing business as El Atoron (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked his on-sale beer license, staying revocation for a probationary period of three years, and provided that a 60-day suspension be served as a term of probation, for permitting consumption of alcoholic beverages after the prohibited time as provided by statute, permitting the wagering of money on games of cards, and delaying and obstructing a police officer in the performance of his duties, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivision (a), arising from violations of Business and

¹The decision of the Department, dated December 24, 1998, is set forth in the appendix.

Professions Code §23804, §§25631 and 25632, Penal Code §148, and Los Angeles City Ordinance No. 36,674 included in the Municipal Code of the City of Los Angeles, §43.01.

Appearances on appeal include appellant Rafael Lopez, appearing through his counsel, Andreas Birgel, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on June 15, 1982. Thereafter, the Department instituted an accusation against appellant charging the above referenced violations.

An administrative hearing was held on October 22, 1997, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the alleged violations. Subsequent to the hearing, the Department issued its decision which determined that Counts 1 through 7 were true, being violations of Business and Professions Code §§25631 and 25632 which prohibit the sales and consumption of alcoholic beverages between the times of 2:00 a.m. and 6:00 a.m.; that count 8 was true, being a violation of a condition on the license which prohibited sales and consumption after 1:00 a.m.; count 9 was true being a violation of the Los Angeles City Ordinance No. 36,674 included in the Municipal Code of the City of Los Angeles §43.01, that of gaming; and Count 10 was true, being a violation of Penal Code §148, resisting or delaying a police officer in his official duties.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) there is insufficient substantial evidence to support the findings, and (2) the penalty is excessive.

DISCUSSION

I

Appellant contends there is insufficient substantial evidence to support the findings. Officer Lorenzo Barbosa, a police officer with the Los Angeles Police Department, was in plain clothes along with two other officers, and was in the area of the appellant's premises where he observed a male person urinating at the rear portion of appellant's premises. During the investigation, which was near the hour of 2:00 a.m., the officer heard conversations coming from the premises. The officer opened the rear door of the premises and, for approximately one minute, observed the activities within the premises [RT 8-13]. Appellant was within the premises, and knew Barbosa as a police officer.

The officer knew appellant by sight [RT 13, 19, 37].

A. Consumption of alcoholic beverages

As the officer viewed the interior of the premises while at the back door, he saw numerous males drinking alcoholic beverages.² The hour was about 2:00 a.m. The officer proceeded to the front of the premises and looked through a small window where the curtains were open [RT 9, 15, 67]. The officer saw a group of males drinking at a table two feet from his window and another group at the bar counter also drinking. By this time, the hour was 2:15 a.m. The officer with one of his partners entered the premises about 2:25 a.m. The bottles used in consumption were labeled Corona, Miller, and Budweiser [RT 21-27, 50-52, 64, 67], and when seized, they were cold to the touch [RT 52].

We determine that there was substantial evidence of the drinking of alcoholic

²The officer's testimony that the men were drinking alcoholic beverages was a conclusion on the part of the officer at this time of the investigation, with no explanation given for that conclusion. However, no objection was made at the administrative hearing concerning this testimony.

beverages past the time allowed by law and the condition on the license.

B. Gambling

Officer Barbosa testified that when looking into the premises from the rear door, he saw card games being played. When the officer looked into the premises from a front window, he saw one group at a table about 2 feet from the window, with another group at a bar counter. He observed appellant near the game at the table [RT 12, 14, 16, 67].

The officer saw currency stacked between the players at both locations. He watched the games for about five minutes. The officer observed, at the table game, the shuffling of cards, saw one game completed, and one of the group taking money from each player [RT 17-19, 66]. There appeared to be a different kind of game at the bar counter, as the officer testified that money was being taken by one person in the game from the others, but later, under cross-examination, the officer testified that there was no exchange of money. The money was lying beside each player, and the officer did not see a shuffle of the cards [RT 19-20, 69]. However, one of the players, Fidel Diaz, told the officer that the group he was in was playing for \$2 [RT 53].

Appellant argues that the games were innocent card games among friends, and not for money. However, players had money beside them in the following seized sums, respectively: \$20, \$4, \$77, 15, \$29, and \$33 [RT 48-49].

Notwithstanding the arguments of appellant, the record shows that one shuffle of cards was seen by the officer, each player had a hand of cards, and that at the time of the seizure, three decks of regular playing cards were taken [RT 44-46]. Also, each player had a stack of money beside him in some varying amounts, with testimony that at the table game, money was being paid or taken by one from the three players [RT 19, 48-49].

The City Municipal Code, states in pertinent part:

“It shall be unlawful for any person to ... keep, conduct, maintain ...any game ... played ... with cards ... for money”

The games observed, the money seized, all appear to come within the prohibition of the Municipal Code, and, played with the acquiescence of appellant [RT 14, 19]

C. Resisting a police officer

Appellant knew officer Barbosa as a police officer. The officer with his police partner behind him, entered the premises at approximately 2:25 a.m. at the same time a patron was leaving through the front door. Upon entry, the officer had his badge in his left hand, announced he was a police officer, told everyone to stop their activities and the officer wanted to see their hands [RT 23, 27-29, 33-35, 37].

Appellant approached the officer and told him that the officer could not come in, and pushed the officer back across the threshold of the front door of the premises [RT 29-35, 38-40, 61].

Penal Code §148 states:

“Every person who willfully resists, delays, or obstructs a[n] ... peace officer ... in the discharge or attempt to discharge of any duty of his or her office or employment [is subject to jail or fine].”

The Appeals Board in the case of Blundel (1998) AB-6821, concluded that abusive language toward a peace officer, and refusal to respond to after-arrest interrogations in a misdemeanor crime, were not violations of the Penal Code. There must be some overt act which impinges on the authority of the officer, where such act or acts are knowingly done to appreciably slow the processes of the officer.

In the present matter, the pushing of the officer out of the door when appellant knew the officer was a policeman, comes clearly within the grasp of the law and the conduct of

appellant cannot be condoned.

II

Appellant contends the penalty is 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 has suffered only one prior 1995 violation, that of a sale and service to an intoxicated person.

CONCLUSION

We conclude that under the circumstances of the multiple violations which appellant, in his presence and therefore with his consent, allowed to occur, shows a total disregard of the law, the conditions imposed on his license, and the impact that his allowing the conduct, and at such late hours, would have on the nearby residents who are the protected class of persons for which the conditions, herein violated, were crafted. We cannot say that the penalty is unreasonably excessive.

The decision of the Department is affirmed.³

RAY T. BLAIR, JR., CHAIRMAN

³This 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 in §23090.7 of said code.

Any party, before this final decision becomes effective, may 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.

JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD