

**ISSUED NOVEMBER 5, 1998**

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

WILLIAM E. SULLIVAN	)	AB-7016
dba Jokers	)	
15105 Washington Avenue	)	File: 48-303894
San Leandro, CA 94579,	)	Reg: 97041256
Appellant/Licensee,	)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Robert R. Coffman
	)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	September 2, 1998
	)	San Francisco, CA
	)	

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William E. Sullivan, doing business as Jokers (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which revoked his on-sale general public premises license with revocation stayed for a probationary period of three years, on conditions which include a 15-day suspension, for his bartender selling, or offering to sell, a controlled substance, 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, subdivisions (a) and (b), arising out of a violation of Health and Safety Code §11379.

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<sup>1</sup>The decision of the Department, dated December 31, 1997, is set forth in the appendix.

Appearances on appeal include appellant William E. Sullivan, and the Department of Alcoholic Beverage Control, appearing through its counsel, John Peirce.

#### FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on March 13, 1995. Thereafter, the Department instituted an accusation against appellant charging that his bartender had on June 3, 1997, sold or offered to sell, a controlled substance.

An administrative hearing was held on December 4, 1997, at which time oral and documentary evidence was received. At that hearing, officer A. J. Fernandez of the San Leandro Police Department, testified that he observed a person enter the premises, then exit, with appellant's bartender also exiting shortly thereafter. The person handed the bartender some money and the bartender handed the person a small object she had in her hand. The person left the area and the bartender re-entered the premises [RT 9-12].

The officer entered the premises and after a consent was obtained from the bartender, searched the premises. In the bartender's purse, the officer found three baggies which contained a substance later analyzed as methamphetamine. The bartender admitted the methamphetamine was hers and was for sale [RT 13-15].

Subsequent to the hearing, the Department issued its decision which determined that appellant's bartender had violated the law. Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the issue that the crime was committed by his bartender without his knowledge and consent.

#### DISCUSSION

Appellant contends the crime was committed by his bartender without his knowledge and consent, arguing his license should not be sanctioned for her

misconduct. However, the record shows that the crime by appellant's bartender occurred, and drugs were in the possession of the bartender, while the bartender was within the premises.

The law is well settled that a licensee is vicariously responsible for the unlawful on-premises acts of his employees. (Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; and Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633].)

The rationale of the law appears to be that the protection of the community is paramount. If such was not the state of the law, a licensee could, without the legally sanctioned vicarious obligation, engage employees or agents to act in behalf of the licensee, thereby shielding himself from the employees' or agents' illegal acts, alleging that the licensee did not do, or know of, the illegal conduct. This self-serving employment insulation by a licensee, would quickly render the civil and peaceful community a nullity, due to such mischievous non-accountability. Unfortunately, as in the present appeal, the illegal conduct was hidden from appellant, and possibly, reasonable precautions would not have warned appellant of the potential wrongdoing. This circumstance, as here, cannot totally protect appellant, but appellant may, to a degree, be protected from the full impact of the law, as in many prior cases similar to this matter, a forfeiture of the license was ordered.

Consideration of the differing responsibilities and powers of the Department and the Appeals Board may be helpful. The Department is authorized by the California Constitution to exercise its discretion whether to suspend or revoke an alcoholic

beverage license, if the Department shall reasonably determine for "good cause" that the continuance of such license would be contrary to public welfare or morals.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.<sup>2</sup>

The Department has the discretion under the law to penalize the license in a reasonable manner. Where there has been a violation of law, as in the present appeal, a licensee is protected to a degree by the Department which has the power and discretion to assess a penalty, modified to fit the particular circumstances of the matter. 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].)

We determine, considering the crime involved and the responsibility of appellant for his employee's misconduct, the penalty assessed by the Department is within the boundaries of reasonableness.

#### ORDER

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<sup>2</sup>The California Constitution, article XX, §22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

The decision of the Department is affirmed.<sup>3</sup>

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

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<sup>3</sup>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 order as provided by §23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code §23090 et seq.