ISSUED JANUARY 6, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

VIRGEEN YACOB TONY and WILSON S. TONY dba 7-Q Liquor 7401 El Cajon Blvd. La Mesa, CA 91941, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7161 File: 21-275470 Reg: 97038935 Re-Imposition of Stayed Suspension Date and Place of the Appeals Board Hearing: October 7, 1998 Los Angeles, CA

Virgeen Yacob Tony and Wilson S. Tony, doing business as 7-Q Liquor (appellants), appeal from an order of the Department of Alcoholic Beverage Control[1] which re-imposed a previously stayed ten-day suspension of their off-sale general license, under authority of 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).

Appearances on appeal include appellants Virgeen Yacob Tony and Wilson S. Tony, appearing through their counsel, John J. McCabe, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel,

[1] *The order of the Department, dated June 17, 1998, and the decision dated February 27, 1997, are set forth in the appendix.*

Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on July 1, 1993.

The historical record shows that the Department instituted an accusation against appellants charging that appellants sold an alcoholic beverage to a person who exhibited obvious signs of intoxication. Appellants agreed to a fine and a decision was entered (1997 decision). Ten of the ordered 15 days of suspension were stayed for a period of one year.

Thereafter, within the one-year probationary period, the Department charged appellants with two violations concerning conditions on their license: (1) failure to remove graffiti within a mandated period of time, and (2) allowing litter to remain on the premises. These violations were considered in an administrative hearing on February 23, 1998. A decision dated April 16, 1998, was entered (1998 decision) ordering a 10-day suspension, and appellants requested, and subsequently paid, a fine.

On June 17, 1998, the Department ordered appellants' license suspended for ten days which was the stayed penalty under the 1997 decision, on the ground the 1998 decision was a violation of the 1997 decision's probationary terms. The terms of that 1997 decision, in pertinent part, are as follows:

> "Wherefore, it is hereby ordered that the off-sale general license(s) issued to respondent(s) [appellants] at the above-mentioned premises be suspended for a period of 15 days and that execution of 10 days of said suspension be stayed upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within one year from the effective date of this decision; that should such determination be made the Director of the Department of Alcoholic Beverage Control may, in his discretion and without further hearing, vacate this stay order and reimpose the stayed portion of the penalty ...." (Underline in the original).

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the issue that the Department acted in an arbitrary manner in re-imposing the stayed suspension from a dissimilar violation.

DISCUSSION

Appellants contend the Department acted in an arbitrary manner in re-imposing the stayed suspension from the 1997 decision, due to a dissimilar violation found in the 1998 decision. Appellants phrase their argument that there is "no factual basis connecting" the 1997 decision's sale to an obviously intoxicated patron, with the 1998 decision's condition concerning violations of graffiti and litter. Appellants also argue that the "trigger" decision, the 1998 decision, did not mention the prior 1997 decision's probationary terms or the decision itself, as a basis for the imposition of the 1997's stayed penalty.

The Department sets more narrow limits to the differences of the two types of violation under review, by phrasing the differences as "not identical," rather than the "no factual basis connecting" as argued by appellants. The Department also argues that there is a nexus between the two different violations involved, that of litter and graffiti, and sales to an intoxicated person.

Appellants' apparent argument is that the Department's broad wording in the probationary terms of "no cause for disciplinary action occurs within the stayed period," is a very arbitrary "net" which allows the Department extremely broad powers of discretion in evaluating whether a violation of the probationary terms should be implemented.

In the case of KDM, Inc. (1997) AB-6647, the Appeals Board stated:

> "Although the Department's brief did not address this issue, it is the Department's standard practice to frame an order staying revocation broadly, and not to attempt to characterize the kind of future violation which would warrant a lifting of the stay order. A requirement would unduly tie the Department's hands. The better course is for the Board to review such action consistent with an abuse of discretion standard when and if the situation arises."

The 1997 decision concerned the sale of a bottle of alcohol to an intoxicated patron. The triggering 1998 decision concerned litter and graffiti. On two different days, May 27, and June 2, 1997, an investigator observed graffiti on the premises' walls. At the same time, he observed overgrown weeds behind the premises (apparently the parking lot), along with a piece of a broken couch, large debris, a broken street sign, and broken alcoholic beverage bottles.

Mitigation was presented in the 1998 decision that the graffiti had been removed on several occasions since June 1997, and apparently the parking lot cleaned, at least once a week. As in the KDM case, supra, the Appeals Board should determine if there was a pattern of conduct from the stayed revocation case to the new case. We do not believe there was a sufficient showing in that regard.

Additionally, we are perplexed after a review of the 1998 decision concerning an ambiguity as to control or ownership of the adjacent parking area. Finding III states that the investigator pulled [drove] into the premises parking lot. However, Finding V states the parking lot adjacent to the premises is a commonly used area, with another nearby business establishment. No finding was made as to the ownership or control by appellants of the parking area. With such doubt unresolved in the Department's 1988 decision, we conclude that the imposition of the stayed penalty is arbitrary.

Notwithstanding the confusing 1998 decision, we do not believe the intent of a vacation of the probationary terms is a "catch-all" process. That process is best used to

command conformity of a licensee to a course of conduct which is proper, thus allowing for an orderly alcoholic beverage distribution system. Vacation of a probation becomes arbitrary, and therefore improper, when the use thereof has minimal nexus to the original scheme of conduct. There must be some community of improper conduct connecting the original violation with the new violation. No such connection has been shown in this case.

ORDER

The decision of the Department is reversed.[2]

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

JOHN B. TSU, MEMBER, did not participate in the oral argument or decision in this matter.

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[2] *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.