

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

JUDY L. and JULES A. DUVAL	)	AB-7162
dba Pizza Chalet)	
13408 Lincoln Way East	)	File: 41-278574
Auburn, CA 95603,	)	Reg: 97041533
Appellants/Licensees,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	E. Manders
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	March 4, 1999
	)	Sacramento, CA
)	

Judy L. and Jules A. Duval, doing business as Pizza Chalet (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 days, with 5 days of the suspension stayed for a probationary period of 2 years, for appellants' employee selling an alcoholic beverage to a person under the age of 21 and permitting that person to consume the alcoholic beverage in the premises, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22,

¹The decision of the Department, dated June 5, 1998, is set forth in the appendix.

arising from violations of Business and Professions Code §25658, subdivisions (a) and (b).

Appearances on appeal include appellants Judy L. and Jules A. Duval, appearing through their counsel, Benjamin D. Harvey, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Murphy.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public eating place license was issued on November 30, 1992. Thereafter, the Department instituted a two-count accusation against appellant charging that appellants' bartender sold beer to Sandra Kay Larson (Larson), who was then approximately 20 years old, and that appellants' bartender permitted Larson to consume the beer in the premises.

An administrative hearing was held on March 3, 1998. Documentary evidence was received and testimony was presented by appellants. Appellants stipulated that the facts alleged in counts 1 and 2 of the Department's accusation were true and correct. Their testimony concerned mitigation of the penalty.

Subsequent to the hearing, the Department issued its decision which determined that appellants violated Business and Professions Code §25658, subdivisions (a) and (b) and that there was a basis for some mitigation of the penalty.

Appellants thereafter filed a timely notice of appeal in which they argue that they should have received a letter of warning instead of a suspension or fine.

DISCUSSION

Appellants contend that appellant Judy Duval and one of appellants' employees, Janeen Neu, attended the Department's L.E.A.D. program (an educational program for licensees) and were told there that, because of their attendance, the first violation that occurred on the premises would receive only a warning letter, with suspension or revocation reserved for any subsequent violations. They believe they should have received only a warning letter, since this was the first incident that had occurred, even though two separate counts were charged in the accusation and stipulated to by appellants.

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].)

The Department does not deny that appellants were told of a Department policy to issue "warning letters" for first violations by L.E.A.D. participants. Instead, it states that the clerk who made the sale at issue here did not attend L.E.A.D. training. We do not believe that the Department can, in fairness, make representations to licensees and then refuse to honor those representations based on a restriction that was not clearly communicated, if communicated at all, to the licensees.

We agree with appellants that there was really just one incident out of which the two counts of the accusation arose. Although appellants stipulated to the two counts, the circumstances of the violation, coupled with the Department's representations as to

first violations, do not appear to merit even the relatively light penalty of five days' suspension with two years of probation.

ORDER

The decision of the Department is affirmed and remanded to the Department for reconsideration of the penalty.²

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

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.