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

AB-7703
File: 41-324991 Reg: 00048723

DAVID ALLAN COPLEY, KAREN HANEY COPLEY, and MICHAEL MATHEW O'TOOLE dba Limericks
5734 East Second Street, Long Beach, CA 90803,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,

Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: August 17, 2001
Los Angeles, CA

ISSUED OCTOBER 24, 2001

David Allan Copley, Karen Haney Copley, and Michael Mathew O'Toole, doing business as Limericks (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their on-sale beer and wine eating place license for 25 days with 10 days stayed for a probationary period of one year for violating a condition on their license, 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 a violation of Business and Professions Code §23804.

Appearances on appeal include appellants David Allan Copley, Karen Haney

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[1]The decision of the Department, dated August 31, 2000, is set forth in the appendix.

Copley, and Michael Mathew O'Toole, appearing through their counsel, Sandra O'Toole, and the Department of Alcoholic Beverage Control, appearing through its counsel, Michele Wong.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer and wine eating place license was issued on March 5, 1987. Thereafter, the Department instituted an accusation against appellants charging the violation of a condition on the license, with violations on two separate dates.

An administrative hearing was held on July 18, 2000, at which time oral and documentary evidence was received. The condition states:

> "The rear door(s) shall be kept closed at all times during the operation of the premises except in cases of emergency and to permit deliveries. Said door(s) not to consist solely of a screen or ventilated security door."

Subsequent to the hearing, the Department issued its decision which found, that on two separate dates, the door leading to the kitchen and the door leading to the restrooms were open or ajar. However, the Department concluded that the charge of the accusation concerning the door to the kitchen was ambiguous, and determined the violation applied only to the door to the restroom.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the Department failed to notify appellants of the violation so the problem of the door being ajar could be fixed, (2) the violation was de minimis, and (3) the penalty is excessive. We will consider all these issues as one under a review of the penalty.

DISCUSSION

Appellants contend the penalty is excessive, as the violations are de minimis, and appellants should have been informed of the violations so the problem could be

resolved.

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].)

Exhibit 2 (in the present matter) shows a prior decision dated December 16, 1999, a signed stipulation as to the violations, and the accusation concerned. The prior accusation concerns the same type violations as to the rear door, as in the present appeal. The ambiguity created by the present accusation, and the ambiguity created in the prior decision, as to which door caused the violation, was resolved in the present record showing the southwest door, leading to or past the restrooms, was concerned in the prior decision and the present review (Exhibits 5A, 5 B, and 5C which shows the southwest door, and RT 18, 25, 40-41). Therefore, appellants were on notice of the problems concerning the southwest door, at least to some degree, and at a time certain.

The record shows appellants, following the entry of the prior decision changed the hinges, etc, and apparently tried to fix the problem of non-closure of the southwest rear door [RT 35-36].

The prior violations occurred on April 30, May 14, and May 27, 1999. It is inferred that appellants were not notified of the violations in the present matter until November 10, 1999, when the stipulation and waiver in the prior matter was signed.

(The accusation was signed by the local office of the Department three months prior, on August 19, 1999 - a 2 ½ month period from the last violation date in that prior matter.)

The present appeal's violation occurred on October 16, 1999 (with no notice or warning to appellants (RT 12, 20)),[2] and at a time prior to the signing of the stipulation on the prior matter which was signed November 10. This is not true as to the present matter's December 20 violation. It appears to have occurred after appellants knew of the rear door problem, having signed the stipulation to that problem on November 10. Again, the investigators did not inform appellants of the door problem (RT 30, 33).

The present matter speaks of dilatory practices by the Department - the present appeal's accusation was filed on April 20, 2000, a very long time after the present matter's violations of October and December of the previous year.

The issue of de minimis is rejected, especially as to the second violation. A violation of a condition, for a second time, is a violation of appellants' responsibility to the community, and a legal obligation.

Without any notice to appellants, the Department is creating excessive penalties. These violations are essentially divided into two categories, the prior matter's April-May violations, and the present matter's October and December violations, and imposing

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[2]The statement by the investigator to the question of why the investigator didn't tell appellants of the present matter's violation on October 16, is a dichotomy and at best ambiguous: "To maintain undercover capacity and I already had contact with the licensee on a previous violation [the prior violation]." If appellants knew the investigator from other contacts, the statement of maintaining the undercover status is fallacious. It would appear this is another example of the Department's time-honored attitude that timely warning to correct a condition is almost never given, even though an accusation can still be filed, warning given, or not.

two separate 25/10 penalties, which in reality, is excessive.

ORDER

The present matter's violation in October occurred before appellants were realistically, or officially, on notice of the problem, by being informed of the prior April/May violations. This being true, the only viable and fair imposition of a penalty should only be for the present matter's December violation. The decision of the Department as to the November violation is reversed, the December violation is affirmed, and the penalty reversed and remanded for reconsideration of a fair and reasonable penalty.[3]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[3]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.