

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

AB-7830

File: 48-340125 Reg: 00048864

THREE GROUP, INC. dba Crazy Girl
1433 N. La Brea Avenue, Los Angeles, CA 90028,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: November 14, 2002
Los Angeles, CA

ISSUED FEBRUARY 3, 2003

Three Group, Inc., doing business as Crazy Girl (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 20 days, all conditionally stayed for two years, for its employee having sold an alcoholic beverage to, and permitted its consumption by, a minor who was permitted to enter and remain in the premises without lawful business therein, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, section 22, arising from violations of Business and Professions Code sections 25658, subdivisions (a) and (b), and 25665 .

Appearances on appeal include appellant Three Group, Inc., appearing through its counsel, Ralph Barat Saltsman, Stephen Warren Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated May 24, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on August 5, 1998. Thereafter, the Department instituted an accusation against appellant charging, in four separate counts, that appellant's employee, Theresa Lynn Bernard, sold, furnished, or gave an alcoholic beverage to Joey Schimmel, a minor who was obviously intoxicated, permitted him to consume an alcoholic beverage, and permitted him to enter and remain in the premises without lawful business therein, all in violation of various provisions of the Alcoholic Beverage Control Act.

An administrative hearing was held on January 5 and March 27, 2001, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charges of selling an alcoholic beverage to a minor, permitting him to consume an alcoholic beverage, and permitting him to enter and remain in the premises without lawful business therein had been established, that a defense under Business and Professions Code §25660 (reliance upon valid governmentally issued identification) had not been established, but that it had not been established that Schimmel was obviously intoxicated when he was served an alcoholic beverage.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends that the Department, while attempting to impose a penalty reflective of the strong evidence in mitigation of the violation, erred by imposing a penalty potentially more punitive than the standard penalty for a first sale-to-minor violation.

DISCUSSION

Appellant contends that Administrative Law Judge (ALJ) Sonny Lo, while attempting to impose a penalty reflective of the evidence in mitigation of the violation, ordered a penalty which is "effectively a more serious and potentially devastating

penalty than that which the Department 'normally' orders in 'first strike' cases of sales to a minor." Appellant argues that the effect of a stayed 20-day suspension is to expose appellant to a disastrous 45-day suspension if, despite its vigilant efforts at preventing such an occurrence, another sale-to-minor violation should occur within the period of the conditional stay. Instead, appellant contends, the standard 15-day penalty should have been imposed, and asks the Appeals Board to reverse the penalty as an abuse of discretion.

The Department, on the other hand, contends that the penalty which was imposed is appropriate because three separate charges against appellant were sustained - a sale to a minor in violation of Business and Professions Code section 25658, subdivision (a); permitting consumption by that minor in violation of Business and Professions Code section 25658, subdivision (b), and permitting that minor to enter and remain in the premises without lawful business therein, in violation of Business and Professions Code section 25665. Even though ALJ Lo treated the sale and consumption charges as a single violation for purposes of penalty, the Department argues, the permitting to enter and remain was in violation of a separate code section, and deserving of a separate penalty. Thus, the Department argues, the penalty as imposed accurately imposes the appropriate discipline for the violations found.

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, in essence, asked the Appeals Board to speculate upon what was

in the ALJ's mind when he determined what he thought should be an appropriate penalty. We decline to do so. Instead, we can only analyze the decision to determine whether, in the absence of obvious error, the penalty could lawfully have been imposed.

ALJ Lo wrote (Determination of Issues V-VII):

"In this case, the underlying act for the violation of Business and Professions Code Section 25658(a) and the underlying act for the violation of Business and Professions Code Section 25658(b) are considered as one continuous act. The sale of the alcoholic beverage to Mr. Schimmel almost necessarily included the act of permitting him to consume it. Therefore, for the purpose of imposing penalty, these two violations will be treated as if they were one violation.

The evidence is not clear what type of identification Mr. Schimmel showed to Carrie. And, there's no evidence what date of birth was on the identification. Therefore, there is no way to determine whether Carrie's apparent reliance on that identification as bona fide evidence of Mr. Schimmel's majority was reasonable.

"However, it is undisputed that Carrie always checks the identification of customers, including those whom she knows. And, the fact that she has checked Mr. Pinson's identification approximately fifty times is impressive. This fact suggests that when Carrie permitted Mr. Schimmel to enter Respondent's bar, after checking his identification, she did not deliberately permit an underage customer to enter. And, when Ms. Bernard sold the alcoholic beverage to Mr. Schimmel and permitted him to consume it, she reasonably believed that his majority had been verified at the door. Under these circumstances, a stay of Respondent's penalty is appropriate."

It seems clear that ALJ Lo was imposing discipline for what he elected to treat as separate violations of separate statutory provisions, where strong mitigating circumstances were shown. Appellant, by contending that a standard 15-day suspension should have been imposed, assumes that the violation of Business and Professions Code section 25665 (permitting to enter and remain without lawful business) cannot be separately disciplined. This is incorrect. The violations in this case involved two of appellant's employees, one of whom permitted the minor to enter, and the other who sold him the alcoholic beverage and permitted its consumption by

the minor. Given violations of separate code provisions by separate individuals, the imposition of a penalty greater than the standard penalty for a single violation cannot be said to be an abuse of discretion.

The penalty as imposed has not been shown to be erroneous on its face, nor an abuse of discretion on the proven facts. Consequently, we do not believe appellant is entitled to any relief.

ORDER

The decision of the Department is affirmed.²

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

² This 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 final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district 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.