

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

AB-8236

File: 48-382147 Reg: 03055241

CARL'S CORNER POCKET, INC. dba Carl's Corner Pocket
3102 Portola Drive, Santa Cruz, CA 95062,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Arnold Greenberg

Appeals Board Hearing: January 6, 2005
San Francisco, CA

ISSUED FEBRUARY 11, 2005

Carl's Corner Pocket, Inc., doing business as Carl's Corner Pocket (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 45 days for having permitted persons to remain in the premises in an intoxicated condition, such that they were unable to care for their own safety or that of others, in violation of Business and Professions Code section 24200, subdivision (a),² and Penal Code section 647, subdivision (f).³

¹The decision of the Department, dated December 31, 2003, is set forth in the appendix.

² Business and Professions Code section 24200, subdivision (a), provides, as a ground for suspension or revocation of an alcoholic beverage license: "When the continuance of a license would be contrary to public welfare and morals." The section also provides that proceedings under this subdivision are not a limitation upon the Department's authority to proceed under section 22 of article XX of the California Constitution.

³ Penal Code section 647, subdivision (f), provides that a person who is found "in

(continued...)

Appearances on appeal include appellant Carl's Corner Pocket, Inc., appearing through its counsel, Victor M. Campos, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general license was issued on January 13, 2003. Thereafter, the Department instituted an accusation against appellant charging, in four counts, that on March 21, 2003, it permitted three persons, Richard Joseph ("Joseph"), Prairie Skye ("Skye"), and Lori Kerr ("Lori") to remain in the premises in an intoxicated condition, each unable to care for his or her own safety or that of others, and permitted one of those three persons (Lori) again to remain in the premises in such condition on April 18, 2003.

An administrative hearing was held on October 23, 2003, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that each of the four counts of the accusation was sustained by the evidence, and ordered the suspension from which this timely appeal has been taken.

In its appeal, appellant raises the following issues: (1) the Department acted arbitrarily and without sufficient evidence; (2) the incidents in question do not warrant suspension.

³(...continued)

any public place under the influence of intoxicating liquor ... in such condition that he or she is unable to exercise care for his or her own safety, or the safety of others" is guilty of disorderly conduct, a misdemeanor.

DISCUSSION

I

Appellant, in its brief, has not challenged any of the findings that the four persons involved were in an intoxicated condition unable to care for their own safety or that of others, or that the three other than Joseph were permitted to remain in the premises while in that condition. Appellant's argument that the Department acted arbitrarily and without sufficient evidence is directed only at the findings relating to count I of the accusation, involving a patron, Joseph. The Administrative Law Judge (ALJ) found, as to that count (Findings of Fact III):

(A.) Count I of the Accusation asserts that on or about March 21, 2003, a patron, Richard W. Joseph (hereinafter "Joseph"), was permitted to remain on the premises while in an intoxicated condition, unable to exercise care for his own safety, or the safety of others, in violation of Penal Code Section 647(f).

(B) Daren Kerr (hereinafter "Daren"), Deputy Sheriff for Santa Cruz County, responded to a radio call reporting that Prairie L. Skye (hereinafter "Skye") had called the Sheriff's Office to report that she, the Respondent's bartender, had been verbally assaulted in the parking lot by unidentified persons.

(C) While speaking with Skye in the premises parking lot, Daren was able to see through the glass front door of the Respondent's premises. Daren saw Joseph seated at the bar with his head lying on the bar's soft cushion. Other patrons located on either side of Joseph were helping support Joseph by holding him underneath his shoulders. Even with that support, Joseph slipped off the barstool.

(D) When Daren entered the premises and encountered Joseph, he noticed that Joseph had a strong, alcoholic breath, and red and watery eyes, as well as an extremely unsteady balance. Unless supported by others, Joseph was unable to care for his safety. Daren questioned Skye about Joseph's obviously intoxicated condition. Skye refused to answer Daren's questions as to whether Skye had served Joseph alcoholic beverages. Daren took Joseph into custody to his patrol car. Joseph required support going to the car because of his unsteady balance. His speech was so slurred as to be incomprehensible.

Appellant does not dispute any aspect of the above findings. Instead, appellant

argues that the findings do not support a suspension because Joseph arrived at the bar in an intoxicated condition and was not served any alcoholic beverages at the bar.

Whether Joseph was served any alcoholic beverages while at the bar, if true, is not relevant to the charge of count I. The question is whether he was permitted to enter and/or remain in the bar while intoxicated. The fact that he remained seated at the bar, supported by two other patrons, while Skye, who was outside speaking to Deputy Kerr, had made no attempt to have him removed, is, we believe, sufficient evidence that he was permitted to remain in the bar while intoxicated and unable to care for his own safety.

Carl Kleiber, appellant's owner, testified, over hearsay objection, that Joseph had come to the bar so that another patron could get him home. He was not asked, nor did he say, how long Joseph had been at the bar before the arrival of Deputy Kerr. Skye, who was present at the hearing, did not testify.

II

Appellant argues that the suspension is unwarranted.

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 asserts that the incidents in question were "highly unusual," and

resulted from extraordinary circumstances, and that the Department overlooked its primarily positive record of orderly and lawful conduct. It argues that Skye would not have been present on March 21, 2003, but for Lori's supposed miscarriage, and that Lori's intoxication on April 18, 2003 also stemmed from her ongoing emotional distress.

It is apparent that appellant delegated to Lori and Skye much of the responsibility for operation of the business. Appellant's owner was not present on either of the nights in question, and he admitted that he left the scheduling of their shifts to Lori and Skye - "I pretty much let my employees do the scheduling because they do a better job." [RT 78]. Skye was not scheduled to work on March 21, 2003, but was called in when Lori was unable to work because of her emotional trauma and intoxication. The record does not indicate whether Skye was intoxicated before she assumed her role as a substitute for Lori, but the net result that evening was that one intoxicated bartender was replaced by another intoxicated bartender.

The real issue is whether the events established by the evidence constitute good cause for the Department to order a suspension. We think they do. The evidence shows, despite appellant's claim to the contrary, an inadequately supervised operation in which the employees charged with the responsibility of operating a highly regulated business were themselves so impaired as to preclude them from performing that responsibility.

We would agree with appellants that the events were unusual - an intoxicated bartender permits an intoxicated patron to remain in the bar while she goes outside to complain to a sheriff's deputy about a verbal assault by an unidentified person; nothing

is said about an intoxicated patron in the bar, leaving that for discovery by the sheriff's deputy. Moments later, another intoxicated person, appellant's manager, is found passed out on the floor of a storeroom.

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals.⁴

The sale of alcoholic beverages is highly regulated, in large part because of their potential for abuse, and the risks excessive consumption can pose to public welfare and morals. Bartenders are a primary defense against such potential abuse, having the power, as well as the duty, to limit patrons' access to alcoholic beverages when appropriate. Here the bartenders, because of their own excessive consumption, were incapable of performing that duty.

A licensee is vicariously responsible for the unlawful on-premises acts of his employees. Such vicarious responsibility is well settled by case law. (*Morell v. Department of Alcoholic Beverage Control* (1962) 204 Cal.App.2d 504, 514 [22 Cal.Rptr. 405]; *Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 172, 180 [17 Cal.Rptr. 315]; and *Mack v. Department of Alcoholic Beverage Control* (1960) 178 Cal.App.2d 149, 153 [2 Cal.Rptr 629].)

The penalty reflects a 30-day suspension for the March 21, 2003, violations, and

⁴ The California Constitution, art. XX, section 22, provides, in pertinent part, that "[t]he department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals."

an additional 15 days for the April 18, 2003, incident. While the penalty may be harsh, we cannot say that it exceeds the discretion possessed by the Department.

ORDER

The decision of the Department is affirmed.⁵

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

⁵ 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.