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

AB-9681
File: 47-397474; Reg: 17085432

LAKANUKIS ENTERPRISES, INC.,
dba Lakanuki
6201 Minaret Road, Suite 200,
Mammoth Lakes, CA 93546,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: September 6, 2018
Ontario, CA

ISSUED SEPTEMBER 18, 2018

Appearances Appellant: Therese M. Hankel, as counsel for Lakanukis Enterprises, Inc.,

Respondent: Joseph J. Scoleri, III, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Lakanukis Enterprises, Inc., doing business as Lakanuki, appeals from a decision of the Department of Alcoholic Beverage Control,[1] suspending its license for 20 days because its employee violated condition #12 on its license by permitting entertainment to be audible beyond the area under the control of the licensee, in violation of Business and Professions Code section 23804.

[1]The decision of the Department, dated December 18, 2017, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on April 14, 2003. There are three previous instances of discipline on the license, two of which were for violations of condition #12 on the license. That condition states:

> Entertainment provided shall not be audible beyond the area under the control of the licensee(s) as defined on the ABC-257 dated 1-21-03 and ABC-253 dated 1-21-03.

(Exh. D-5 at p. 2.)

On March 20, 2017, the Department instituted a single-count accusation against appellant charging that on December 3, 2016, appellant's employee violated condition #12 on the license by permitting entertainment to be audible beyond the area under the control of the licensee, in violation of Business and Professions Code section 23804.

At the administrative hearing held on October 4, 2017, documentary evidence was received and testimony concerning the violation charged was presented by Department Agent Isaac Garcia; by Stuart Need, owner of the licensed premises; and by Jeremy Howe, a bartender at the licensed premises.

Testimony established that Agent Garcia conducted an investigation in response to a complaint about disorderly conduct in and about the licensed premises. On December 3, 2016, at approximately 10:00 p.m., Garcia visited the premises in an undercover capacity, accompanied by three other Department agents.

As he arrived, Agent Garcia could hear music coming from what he believed to be the licensed premises, and could feel the thumping of the bass while he was still in his vehicle. Garcia parked his vehicle approximately 130 feet from the front door (see exh. D-7; RT at p. 25) and determined that the source of the music was appellant's premises. He could hear no audible music from any other establishment. Garcia also

walked to another location approximately 158 feet from the premises (see exh. D-8; RT at p. 26) and could still hear the music.

Agent Garcia entered the licensed premises with a second agent and observed a deejay playing amplified music. The agents had to yell at one another to communicate because of the volume of the music. Agent Garcia ordered a Coors Light beer to determine whether the licensee was exercising its alcoholic sales privileges. A bartender sold him the beer. (RT at pp. 30-31.)

Garcia contacted Supervising Agent Josh Porter and informed him of his observations. Porter and a fourth agent arrived to interact with appellant's employees.

Porter contacted Jeremy Howe, the head bartender in the premises, who was acting as the manager that evening. Porter informed him of the noise condition on the license, and showed him a copy of the conditional license. Howe stated that he was unaware of the condition. Howe had the volume of the music lowered substantially after this conversation. (RT at p. 34.)

Testimony established that appellant has invested in structural improvements in an effort to reduce the noise emanating from the premises. (RT at pp. 81-85.) No decibel evidence was offered by either party, however testimony established that decibel readings were regularly taken outside of the premises to ensure that appellant was not violating the village noise ordinance. (RT at pp. 82-83; 94*;* 124.) Appellant's employees were instructed to turn down the music if the measurements showed the music was exceeding the local decibel limits.

During the investigation, three employees were erroneously issued citations, at the direction of Agent Garcia, for not having State of California security guard cards.

The agent was apparently unaware that state law had been changed, and that the cards were no longer required by these security personnel. The citations were subsequently dismissed by the Superior Court of Mono County. (Exh. L-1, L-2, & L-3; RT at pp. 47-48.)

On October 24, 2017, the administrative law judge (ALJ) submitted a proposed decision, sustaining the accusation and recommending that the license be suspended for 20 days. On December 13, 2017, the proposed decision was adopted in its entirety by the Department, and on December 18, 2017 a certificate of decision was issued.

Appellant then filed a timely appeal raising the following issues: (1) the Department failed to prove that violation of the condition was contrary to public welfare and morals, (2) the condition is unreasonable and bears no relation to protecting the public, (3) the accusation was filed in retaliation against appellant, and (4) the penalty is arbitrary, capricious, and a violation of due process.

DISCUSSION

I

Appellant contends that it was insufficient for the Department to prove only that appellant violated the condition on its license in order for the accusation to be sustained. It contends that the Department was also required to prove that the violation of the condition was contrary to public welfare and morals, but that it failed to do so. (AOB at pp. 11-15.)

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are

supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[2]

Appellant maintains

> The critical question in this case is whether evidence of simply "audible" music in the Village coming from appellant's premises consititutes "good cause" for the suspension or revocation of its liquor license under article XX, section 22 and/or section 24200, subdivision (a) as conduct contrary to public welfare or morals.

(AOB at p. 14.) It maintains no evidence was produced to establish that the music exceeded the decibel levels permitted by the local municipal code — although it fails to explain how the municipal code is relevent in any way to a determination of whether appellant violated a condition on its license governed by California state statute — and contends that the violation of condition #12 on its license was not proven to be contrary to public welfare and morals. (*Ibid*.) Accordingly, it argues that the Department failed to establish good cause for suspending its license.

The ALJ reached the following conclusions in his decision:

> 1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.
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> 2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibited or regulating the sale of alcoholic beverages is also a basis for the

[2]The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

suspension or revocation of the license.

3. Section 23804 provides that the violation of a condition placed upon a license constitutes the exercise of a privilege or the performing of an act for which a license is required without the authority thereof and constitutes grounds for the suspension or revocation of the license.

4. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that, on December 3, 2016 the Respondent failed to comply with a condition attached to the license in violation of Business and Professions Code section 23804. In Count 1, the Department has established that music was audible beyond the area under the control of the licensee in violation of section 23804 because of the specific condition prohibiting entertainment from being audible beyond the area controlled by the licensee. (Finding of Fact ¶¶ 2 & 5-15)

(Conclusions of Law, ¶¶ 1-4.)

Article XX, section 22 of the California Constitution authorizes the Department to take disciplinary action to protect the public: "The department shall have the power, in its discretion, to deny, suspend, or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals." This general authority, however, does not mean that every violation must be specifically proven to be contrary to public welfare or morals. The criteria for establishing good cause for discipline has been explained as follows:

> In order to establish good cause for suspension or revocation of an alcoholic beverage license due to violations of law that do not involve moral turpitude, there must be a rational relationship between the offense and the operation of the licensed business in a manner consistent with public welfare and morals or there must be evidence that the offense had an actual effect on the conduct of the licensed business.

(*H.D. Wallace & Associates, Inc*. v. *Dept. of Alcoholic Bev. Control* (1969) 271 Cal.App.2d 589, 593-594 [76 Cal.Rptr. 749].)

Previous courts have found that specific findings need not be made on whether

conduct charged in an accusation is deleterious to public welfare and morals. In *Schieffelin,* the court found:

> To the extent that Schieffelin argues that the Department failed to make a specific finding that its conduct was injurious to public welfare or morals, we note that **both the California Supreme Court and this court have held that a finding that a licensee has violated provisions of the Alcoholic Beverage Control Act is tantamount to a finding of injury to public welfare and morals**. (*Martin v. Alcoholic Bev. etc. Appeals Bd*. (1959) 52 Cal.2d 287, 291 [341 P.2d 296]; *Mercurio v. Dept. Alcoholic etc. Control* (1956) 144 Cal. App. 2d 626, 631 [301 P.2d 474] (Mercurio).) In *Mercurio*, this court held that a finding that licensees had violated a Department rule was in effect a finding that the licensees' acts were contrary to public welfare and morals because the rule itself was an articulation of acts which the Department found to be contrary to public welfare and morals. (*Ibid*.)
>
> Similarly, the Legislature has already determined that the Alcoholic Beverage Control Act is intended "for the protection of the safety, welfare, health, peace, and morals of the people of the State" and that the act involves "in the highest degree" the "moral well-being" of the state and its people. (See Business and Professions Code Section 23001.)[3] The tied-house restrictions are part of this legislative design and are intended to promote public welfare and morals by preventing disorderly marketing conditions and fostering temperance. [Citation.] The Department's determination that Schieffelin violated the tied-house statutes is a finding that its acts were contrary to public welfare and morals. (*Mercurio, supra*.)

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Schieffelin)*

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[3]§ 23001 - Purpose of Division:

> This division is an exercise of the police powers of the State for the protection of the safety, welfare, health, peace, and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages. It is hereby declared that the subject matter of this division involves in the highest degree the economic, social, and moral well–being and the safety of the State and of all its people. All provisions of this division shall be liberally construed for the accomplishment of these purposes.

(Cal. Bus. & Prof. Code § 23001.)

(2005), 128 Cal.App.4th 1195, 1217 [27 Cal.Rptr.3d 766], emphasis added.)

Appellant relies upon *Boreta* for the proposition that the Department must establish good cause for sustaining the accusation by proving the violation was contrary to public welfare and morals. (*Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (*Boreta*)(1970) 2 Cal.3d 85, 106 [84 Cal.Rptr. 113].) In that case, the court found that the Department could not declare an otherwise legal course of conduct — in that case, the employment of topless waitresses — *per se* contrary to public welfare and morals, and thereby establish grounds for suspension under section 24200(a). The court did *not*, however, hold that in every case the Department was required to prove how each violation was contrary to public welfare and morals, it merely said the Department was required to supply evidence to support its position that something was contrary to public welfare and morals if that was the basis of the accusation.

Unlike *Boreta*, however, the instant case was not brought under the general authority provisions. Instead, the Department here alleged a violation of a specific provision of the ABC Act — section 23804 of the Business and Professions Code which states:

> A violation of a condition placed upon a license constitutes the exercise of a privilege or the performing of an act for which a license is required without the authority thereof and constitutes grounds for the suspension or revocation of the license.

Evidence presented at the administrative hearing furnished sufficient legal grounds, in and of itself, for the Department to suspend appellant's license for the violation of that statute — regardless of whether the activity was found to be contrary to public welfare and morals.

The condition in question, "[e]ntertainment provided shall not be audible beyond

the area under control of the licensee," is found in many of the licenses issued by the Department, and is no stranger to this Board. (See, e.g., *Wayde Eldon Troxell* (2017) AB-9596; Big *Billy, Inc.* (2010) AB-9006; *Pittera* (1999) AB-7170; *Fahime, Martin, etc.* (1997) AB-6650; *Wichman* (1997) AB-6637.) The condition, as written, is straightforward and unambiguous — if the sound of entertainment reaches beyond the area under the control of the premises, the condition is violated. Appellant asserts that the condition is arbitrary and capricious, and that the Department is free to charge a condition violation even if the noise that "escapes" can be heard only a few feet beyond the area under control of the licensee, or barely heard at all. But that is not this case, where the entertainment was audible from distances of 130 feet and 158 feet from the premises.

Similarly, in *Wichman*, *supra*, the licensees contended that the condition was arbitrary. The Board acknowledged that it could be abused, but held it had not been abused in that case. The Board's language in that case is instructive:

> The arguments of appellants as to the arbitrariness of the conditions are unpersuasive. The condition clearly states the noise restriction. While penalizing noise heard a few feet from the premises could be arbitrary, music and lyrics heard from 100 to 150 feet from the premises is a clear violation of the condition.
>
> [¶ . . . ¶]
>
> We are of the opinion that the condition is clear on its face and the enforcement one of extreme importance to the quiet enjoyment of the residents. Thus, appellants' contention that the condition is ambiguous and unreasonable is rejected.

(*Wichman*, *supra*, at p. 4.)

We see no error in the ALJ's finding that good cause for suspension exists in this matter for violating condition #12 on its license when entertainment was proven to be

audible from distances of 130 feet and 158 feet from the premises. Appellant should seek modification of the condition by filing a petition with the Department if it believes the grounds which necessitated the condition no longer exist.

II

Appellant contends the condition is unreasonable and bears no relation to protecting the public. (AOB at pp. 6-11.)

On April 4, 2003, Stuart Need, the owner of the licensed premises executed a petition for conditional license. The petition included twelve conditions on the operation of appellant's type 47 on-sale general eating place license, including condition #12 which provides:

> Entertainment provided shall not be audible beyond the area under the control of the licensee(s) as defined on the ABC-257 dated 1-21-03 and ABC-253 dated 1-21-03.

(Exh. D-5 at p. 2; Finding of Fact, ¶ 5.)

Appellant operated the premises from 2003 through December 2016 without seeking to modify those conditions. Section 23803 provides:

> The department, upon its own motion or upon the petition of a licensee or a transferee who has filed an application for the transfer of the license, if it is satisfied that the grounds which caused the imposition of the conditions no longer exist, shall order their removal or modification, provided written notice is given to the local governing body of the area in which the premises are located. . . .

(Bus. & Prof. Code, § 23803.) Appellant did not seek such a modification.

The Department's authority for the imposition of conditions is contained in section 23800, subdivision (a), which provides in relevant part:

> The department may place reasonable conditions upon retail licensees or upon any licensee in the exercise of retail privileges in the following situations:

> (a) If grounds exist for the denial of an application for a license or where a protest against the issuance of a license is filed and if the department finds those grounds may be removed by the imposition of those conditions.

(Bus. & Prof. Code, § 23800(a).) In addition, the Department may adopt conditions requested by the local governing body if they are supported by substantial evidence. (Bus. & Prof. Code, § 23800(e)(1).) Issues that may be addressed by the imposition of conditions are governed by section 23801, which states:

> The conditions authorized by Section 23800 may cover any matter relating to the privileges to be exercised under the license, the personal qualifications of the licensee, the conduct of the business or the condition of the premises, which will protect the public welfare and morals . . .

(Bus. & Prof. Code, § 23801.)

Section 23800 does not define "reasonable," nor has the Department adopted any regulation defining how a "reasonable condition" differs from an "unreasonable" one. The Board has, however, explained that the word "reasonable" as used in section 23800 requires a "'connection, tie, [or] link . . . between the problem sought to be eliminated and the condition designed to eliminate the problem." (*Greenwater Investments, Inc*. (1996) AB-6585 at p. 4; see also *Billy T's Olgas, Inc*. (2003) AB-7911; *Super Center Concepts, Inc.* (2001) AB-7620; and *Crenshaw* (1996) AB-6580.)

As the Department correctly points out, the reasonableness requirement only applies to the Department's *imposition* of conditions — not their enforcement. (RRB at p. 12.) Furthermore, appellant's attempt to argue to the contrary is inconsistent with the statutory scheme, which provides a clear procedure by which a licensee may petition for the modification or removal of a condition under section 23803 — after payment of a fee, presenting evidence that the grounds which necessitated the

condition no longer exist, and allowing the local governing body an opportunity to object.

Appellant's contentions must fail. As the ALJ stated, "the ship has sailed in terms of the arguments that are being presented . . . [t]he time to have objected to these as being inappropriate conditions was at the time of the application for license." (RT at p. 58.) We agree. Neither a disciplinary hearing nor an appeal of an administrative decision is the proper venue for contesting the reasonableness of a condition. Instead, the issue of reasonableness must be raised at one of two times: when a petition for conditional license is submitted, or upon submission of a petition to modify or remove a condition.

III

Appellant contends the accusation was filed in retaliation against appellant. (AOB at p. 15.) It maintains that the Department filed the accusation to retaliate against appellant after three misdemeanor citations — previously issued to appellant's employees in error — were dismissed by the district attorney. The accusation was filed the same day as the charges were dismissed.

Appellant maintains Agent Gargia's testimony is suspect because he testified that he erred when he directed his agents to cite the employees for acting as security guards without a license, and did so because he was unaware that the law had changed. He believed the law had changed a few months before the investigation, when in fact it had been longer. Business and Professions Code section 7582.2 — the section which exempts appellant's security personnel from the requirement of being licensed — was amended and became effective January 1, 2013. The erroneous citations were issued December 3, 2016. Appellant contends the "crediblity and

motivation of the Department's over-zealous, undercover sole witness in this case - - Agent Garcia - - are in question." (ACB at p. 11.)

Even though Agent Garcia had 18 years of experience in law enforcement, he had only been a Department agent for seven months at the time of this incident. (RT at p. 42.) Clearly, and admittedly, he made a mistake. While appellant may be justifiably upset that a mistake was made, and that its employees were incorrectly cited during this investigation, it fails to establish any connection between Agent Garcia's misunderstanding of the law and the impetus for the accusation in this matter.

It is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Contro*l (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) The Appeals Board will not interfere with those determinations in the absence of a clear showing of an abuse of discretion. Here, the ALJ found Agent Garcia's testimony to be credible, in spite of his error in directing his agents to cite appellant's employees, and we cannot go behind that determination to reach a contrary conclusion.

Appellant presents no meritorious argument in support of its contention that the accusation was filed as a retaliatory act. There was no evidence presented that the Department personnel who prepared the accusation were aware of the dismissals of these charges. Furthermore, even though the accusation may have been *filed* on the same day as the charges were dismissed — March 20, 2017 — an examination of the accusation shows clearly that it was prepared and signed by counsel for the Department more than a month earlier, on February 4, 2017. (Exh. D-1.)

The record simply does not support appellant's contention that the Department had a retaliatory motive for bringing this accusation.

IV

Appellant contends the penalty is arbitrary, capricious, and a violation of due process. (AOB at pp. 15-16.)

This Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) "Abuse of discretion" in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.](*Brown v. Gordon*, 240 Cal.App.2d 659, 666-667 (1966) [49 Cal.Rptr. 901].) If the penalty imposed is reasonable, the Board must uphold it even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Rule 144 provides:

> In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act (Bus. and Prof. Code Sections 23000,et seq.), and the Administrative Procedures Act (Govt. Code Sections 11400, *et seq*.), the Department shall consider the disciplinary guidelines entitled "Penalty

> Guidelines" (dated 12/17/2003) which are hereby incorporated by reference. Deviation from these guidelines is appropriate where the Department in its sole discretion determines that the facts of the particular case warrant such a deviation - such as where facts in aggravation or mitigation exist.

(Cal. Code Regs., tit. 4, § 144.)

Among the mitigating factors provided by the rule are the length of licensure without prior discipline, positive actions taken by the licensee to correct the problem, cooperation by the licensee in the investigation, and documented training of the licensee and employees. Aggravating factors include, *inter alia*, prior disciplinary history, licensee involvement, lack of cooperation by the licensee in the investigation, and a continuing course or pattern of conduct. (*Ibid*.)

The Penalty Policy Guidelines further address the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

> **Penalty Policy Guidelines:**
>
> The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.
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> In the decision, a separate section is devoted to the issue of penalty and the

factors to be weighed in favor of imposing a lesser or greater penalty than that recommended by rule 144:

> The Department requested that the Respondent's license be suspended for a period of no less than 30 days given the history of violations of the same section by the Respondent. Under rule 144,[fn.] the standard penalty for a violation of section 23804 is a 15-day suspension with 5 days stayed for one year.
>
> The Department did present significant evidence of aggravation in that the Licensed Premises was shown to have a prior disciplinary history of three prior violations. Two of those sustained accusations involved violations of the same section which show a continuing course or pattern of conduct, a separate aggravating factor as set forth in Rule 144.
>
> In mitigation is that the respondent has made some demonstrable effort to try to reduce noise emanating from the Licensed Premises in terms of structural improvements. This mitigation is blunted by the Respondent's failure to communicate effectively with employees about their duty to comply with the terms of the license. Howe, the acting manager the evening of the violation, was not even aware of the conditions when confronted by Porter. The aggravating factors outweigh the mitigation and support the imposition of the discipline under section 23804 with an upward departure from the standard penalty and no stayed time.

(Decision, at p. 7.) Following this discussion, the ALJ recommended a penalty of 20-days' suspension.

Appellant maintains the recommended suspension is arbitrary, capricious, and a violation of due process, but fails to explain *why* this is so, other than to declare that the suspension would not further the goal of protecting the public welfare and morals of the community. The evidence suggests otherwise — based on repeated violations of the same condition, factors in aggravation cited by the ALJ, and evidence of mitigation weighed against those in aggravation. (*Ibid.*) This is far from arbitrary.

Appellant's disagreement with the penalty imposed does not mean the Department abused its discretion or that the penalty is arbitrary and capricious. This Board's review of a penalty looks only to see whether it can be considered reasonable,

and, if it is reasonable, the Board's inquiry ends there. "[T]he propriety of the penalty to be imposed rests solely within the discretion of the Department whose determination may not be disturbed in the absence of a showing of palpable abuse." (*Rice v. Alcoholic Bev. Control Appeals Bd.* (1979) 89 Cal.App.3d 30, 39 [152 Cal.Rptr. 285].) In that case, the Court of Appeal annulled the decision of the Board — which had substituted its own judgment for that of the Department. The Board is simply not empowered to reach a contrary conclusion from that of the Department if the underlying decision is reasonable.

The penalty imposed here comports with the Department's penalty guidelines pursuant to rule 144, and is entirely reasonable based on the record in this case.

ORDER

The decision of the Department is affirmed.[4]

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[4]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.