ISSUED JUNE 24, 1996

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

AMIN A. JADALLAH dba Breed's Market & Liquor 21381 Cajalco Drive Perris, CA 92370 Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6498 File: 21-226153 Reg: 94029798 Administrative Law Judge at the Dept. Hearing: James Ahler Date and Place of the Appeals Board Hearing: October 5, 1995 Los Angeles, CA

Amin A. Jadallah, doing business as Breed's Market & Liquor (appellant), appealed from a decision of the Department of Alcoholic Beverage Control[1] which revoked appellant's off-sale general license for permitting the premises to be used as a disorderly house or a place to which people resort to the disturbance of the neighborhood; for permitting the premises to be used in a manner which created a law enforcement problem; for failure to take logical steps to correct objectionable

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[1] The decision of the department dated December 29, 1994, is set forth in the appendix.

conditions within a reasonable time after receipt of notice to make such corrections; for permitting the premises to be operated in a manner which created a public nuisance; and for running an establishment in a manner contrary to the universal and generic public welfare and morals provisions of the California Constitution, Article XX, §22, in violation of Business and Professions Code §§24200(a) and (e) and 25601, and Penal Code §370.

Appearances on appeal included appellant Amin A. Jadallah, appearing through his counsel, Rick A. Blake; and the Department of Alcoholic Beverage Control, appearing through its counsel, John P. McCarthy.

FACTS AND PROCEDURAL HISTORY

Appellant was issued an off-sale general license on December 16, 1988. An accusation was thereafter initiated by the department on April 4, 1994, alleging multiple incidents at or about the premises dating from April 20, 1992 through December 13, 1993, which included loitering, selling controlled substances, consumption of alcoholic beverages in public, and other criminal conduct which included burglaries, assaults and batteries, and public disturbances.

Appellant, sheriff's officers, and department investigators described the area surrounding appellant's business (a five-square-mile area) as deteriorated. Appellant's premises had experienced the same or similar problems as the greater area. The sheriff's department "targeted" this five-mile radius which included a feed store, an abandoned tire shop, an apartment complex, a liquor store, and appellant's premises. The sheriff's department determined the entire five-mile radius was a "hangout" for narcotic activity and undesirable individuals [R.T. V1,

39, 40, 42, 60]. Referring specifically to appellant's premises, one sheriff's deputy testified at the administrative hearing that "... there is usually always other people gathered in that parking lot. I don't know if it is any fault of the owners it is just a place there" [R.T. V2, 130].

On November 23, 1992, appellant sent a letter to a Riverside County supervisor (Exhibit 24) with an attached petition signed by numerous residents requesting suggestions and assistance by the sheriff's department to resolve the problems in front of his premises. The letter was referred to the sheriff's department (Exhibit 23), and increased patrol of the area reduced problems for several months. When the increased patrol terminated, the problems resumed.

On February 17, 1994, appellant sent a letter to the department advising he had hired an armed security service (Exhibit 4). Appellant retained the security service for several months; however, he found the cost of the service to be too expensive to maintain. Appellant then reduced his hours of operation from 7:00 a.m. to 8:00 p.m. daily and dismissed the security guard.

When arrests were made for controlled substances, loitering, or solicitation of prostitution on appellant's premises (usually in the parking lot area), neither the sheriff's department nor the department investigators advised appellant of the arrests [R.T. V1, 12; V2, 106].

Although appellant and his employees testified to frequently asking persons to leave the parking lot, appellant's premises had limited windows and visibility to the parking lot area [R.T. V1,59]. Appellant's parking lot was approximately twenty feet long and fifty feet in depth [R.T. V1, 42]. There was no

access to the sides or the rear of the premises because a fence enclosed these areas [R.T. V1, 42].

An administrative hearing was held in October 1994, wherein testimony and other evidence was introduced. Thereafter, the department issued its decision which revoked appellant's license. Appellant filed a timely notice of appeal.

In his appeal, appellant raised three contentions: (1) the crucial findings were not supported by substantial evidence; (2) the penalty was an abuse of discretion; and (3) there is newly-discovered evidence which the department should consider.

DISCUSSION

I

Appellant contended the crucial findings were not supported by substantial evidence.

The accusation was divided into four counts: count I alleged a disorderly house problem; count II alleged a law enforcement problem; count III alleged a failure to correct adverse conditions after demand was made to correct; and count IV alleged a public nuisance problem. For convenience, we shall proceed with this review by citing the accusation's count numbers rather than the finding of fact numbers.

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In Count I, the disorderly house allegation,[2] some of the allegations were substantiated through written police reports. The record showed that appellant personally contacted the sheriff's department for assistance on twelve occasions, specifically, as found in Count I, subcounts 11, 12, 13, 15, 16, 18, 20, 24, 25, 28, 30, and 33, which subcounts concerned burglaries, tendering of fraudulent checks, violation of a restraining order, assaults, destruction of property by fire, destruction of property (graffiti and damage to an exterior metal security door), one theft from a vehicle in appellant's parking lot, and one case of loitering. These police contacts occurred between December 23, 1992 and September 27, 1993. The conduct set forth in these subcounts does not come within the express terms of the statute. While the term "suffer" as used in the statute implies a passive allowance of objectionable conduct, the criminal acts alleged were crimes against appellant's location and the business therein (11, 12, 24, 33). The remaining counts were business crime problems not directly associated with the license, but common to many small business enterprises. The sheriff's officers testified that appellant's contacts with the sheriff's office were a responsible and appropriate

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[2]Business and Professions Code §25601 states: "Every licensee, or agent or employee of a licensee, who keeps, permits to be used, or suffers to be used, in conjunction with a licensed premises, any disorderly house or place in which people abide or to which people resort, to the disturbance of the neighborhood, or in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience, or safety, is guilty of a misdemeanor."

Webster's Third New International Dictionary defines "abide" as "...to stand ready...endure...tolerate...and await..." (page 3); and the term "resort" as "...a place of frequent assembly...frequent habitual visitation...something or some one to whom help is sought...and act of seeking aid..." (page 1934).

response to these events. There was no showing of a nexus between the sale of alcoholic beverages and the crimes alleged.

Additional contacts at the premises were initiated by the sheriff's office or by department investigators and were listed as Count I, subcounts 1, 2, 3, 5, 7, 10, 17, 19, 27, 31, 32, 37 and 38, which included three cocaine sales, one homicide, one stolen vehicle, two cases of loitering, one person incapable of caring for herself, and two solicitations of prostitution. These crimes do come within the express terms of the statute.

In Count I, subcounts 4, 6, 8, 9, 14, 16, 21, 22, 23, 26, 29, 34, 35, 36, and 39, the ALJ found the allegations had not been established or the counts were dismissed by the department's counsel.

We determine that there was a sufficient showing of the alleged violations of law to come within the terms of the "disorderly house" statute, but not sufficient for revocation of the license.

In Count II, the allegations were substantiated only through computerized reports with dates and times for calls received by the sheriff's department. The actual offenses were not substantiated and no proof was offered other than the sheriff's department had received the telephone calls on the dates stated on the computerized document [R.T. V4, 4-16]. The specific charges identified in Count II were not proven and no proof was available as to who made the actual calls or from where they originated.

Appellant did not dispute that he made, and encouraged his employees to make, telephone calls to the sheriff's department. Appellant testified he was

encouraged by the sheriff's department to contact the sheriff for assistance, and appellant and/or his employees made frequent contacts with the sheriff's office based on this offer of assistance.

On September 10, 1993, having been advised by the department that he was in violation of Business and Professions Code §24200, appellant consulted an attorney, made efforts to discourage persons from loitering, posted "no loitering" signs on the building, hired a security guard to patrol the premises, and reduced his hours of operation.

Since count II alleges that the calls made to the area of appellant's premises constituted a situation contrary to the public welfare and morals provisions of the California Constitution, the department must show that in some manner there was an evaluation of these charges as to the relationship of the licensed premises to the calls--conditions contrary to public welfare and morals (Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85, 99, 84 Cal.Rptr. 113). This balancing process as to the calls made is not properly supported by the facts; that is, by a showing that the continued operations at the premises would be contrary to the public welfare and morals (concerning the computer-generated police call listing). It is evident that normal operations of a store such as appellant's would generate some calls due to normal customer contact. But to revoke appellant's license upon the mere number of calls made without some criteria and evaluation of the correlation of the calls to the usual and normal police calls to businesses like appellant's would be abusive.

Notwithstanding, in count II, the allegations of count I were restated, and the proven subcounts would sustain count II.

In count III, the department determined that appellant failed to take reasonable measures to correct the adverse conditions at the premises. Appellant was first advised by the department of violations having occurred on September 10, 1993, said violations relating to persons loitering on the premises and persons consuming alcoholic beverages in front of appellant's premises [R.T. V1, 6; V2, 14]. Appellant was instructed to hire a security guard, change his hours of operation, and limit sales of individual bottles or cans of alcoholic beverages. Appellant hired a security guard; however, the security guard quit shortly thereafter [R.T. V2, 13]. The department sent investigators to the premises throughout December 1993 to determine if appellant had made any efforts to control the problem. The allegations of which appellant was advised by the department did not include sales of controlled substances or acts of solicitation of prostitution. The allegations of which appellant was made aware included allowing patrons to loiter and consume alcoholic beverages in the parking lot immediately in front of the business premises. Following the September 10, 1993 meeting, there were no substantiated reports of persons consuming alcoholic beverages in the parking lot. The loitering persisted, and acts of solicitation for prostitution continued, but appellant was not advised of this.

In Count IV, the department found appellant's premises to be a public

nuisance.[3] The ALJ concluded on page 26 of the decision, "The Department's warnings to respondent were not effective, and revocation now appears to be the most appropriate discipline, notwithstanding respondent's lack of fault in creating the circumstances existing in the neighborhood and the unlawful activity occurring in his parking lot."

We do not view that public nuisance was proved in the present matter. The cases which have sustained a public nuisance appear to involve a different variety of violations than those in the present matter. The nuisance in the instant matter appears to be more a problem of community disintegration, abetted by people whose behavior appeared to hasten the deterioration of the community. While appellant was not an innocent bystander, it cannot be truthfully said that he appreciably contributed to the community deterioration which created the problems around the premises. The use of "public nuisance" statutes in the present matter appears to be more of a pleading of all possible avenues to a sanction, rather than a realistic charge.

II

Appellant contended that the penalty was excessive. The appeals board will not disturb the department's penalty orders in the absence of an abuse of the

[3]California Penal Code Section 370 defines public nuisance as "Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any...public park, square, street, or highway, is a public nuisance".

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 California v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785, 97 Cal.Rptr. 183).

Appellant contended he did not permit or allow patrons to drink alcoholic beverages in public, to loiter, or to cause the premises to become a public nuisance. Precedential decisions hold that appellant had an "affirmative duty" to maintain an orderly business. Givens v. Department of Alcoholic Beverage Control (1959) 176 Cal.App.2d 529, 534; 1 Cal.Rptr 445; Harris v. Alcoholic Beverage Control Appeals Board (1963) 212 Cal.App.2d 106, 119-120; 28 Cal.Rptr. 74; Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504, 514; 22 Cal.Rptr 405. The California Constitution authorizes the revocation of a license where the premises have essentially become a public nuisance. The constitutional provision holds that the existence on the licensed premises of a condition injurious to the public welfare is sufficient for revocation of the appellant's license (California Constitution, Article XX, §22).

The department had the following factors to consider: (1) appellant had no prior violations, (2) sheriff's officers' testimony indicated appellant was cooperative at all times, and inside the business premises appellant maintained a clean and safe environment; (3) there were 39 violations alleged in count I of the accusation: 12 of the contacts with the sheriff's office were made by appellant or his employees for legitimate problems, such as burglaries, thefts, fraudulent

checks, etc.; eight of the contacts were initiated by the sheriff's office or the department for sales of controlled substances and solicitation of prostitution; one of the contacts was for a homicide in the early morning hours when appellant's place of business was closed; two of the contacts were for loitering; two of the contacts included a stolen vehicle and a person unable to care for herself; and 14 of the contacts were dismissed by the ALJ or by the department for lack of evidence; (4) the department's notice of September 10, 1993, did not advise appellant of the sales of controlled substances, nor of the acts of solicitation of prostitution; (5) appellant adopted some of the department's suggestions, such as reducing his hours of operation and hiring a security guard.

We conclude that unconditional revocation of the license is not warranted.

III

Appellant contended that the tire shop was torn down in June 1995, and therefore the loitering of persons in the immediate area was reduced. Appellant stated this new evidence should be considered by the department, as it was emphasized by witnesses that the tire shop was a major contributor to the problems in the immediate area. Appellant stated this new information would affect the penalty imposed, and that revocation would now be an abuse of discretion.

The crucial question in remanding a matter for the taking of newly-discovered evidence is that the new evidence is relevant and would, if considered, more likely than not change the department's position.

While the evidence shows that there was loitering around the tire shop,

there is little evidence that the loitering created or added to the problems raised by the department. In effect, the evidence that the tire shop was once a haven for loitering and it no longer exists adds little to the record as it now stands.

CONCLUSION

The decision of the department concerning determination of issues I and II (counts I and II) is affirmed, but the decision concerning determination of issues III and IV (counts III and IV), along with the penalty order, is reversed and remanded for reconsideration of the penalty in accordance with the views expressed herein.[4]

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

[4]This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.