ISSUED MAY 22, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

DOLOR G. NAEMI dba Danny's Liquor 470 South Meadowbrook Drive San Diego, CA 92114, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	AB-6566 File: 21-222341 Reg: 95032625 Administrative Law Judge at the Dept. Hearing: Frank Britt Date and Place of the Appeals Board Hearing: October 2, 1996 Los Angeles, CA

Dolor G. Naemi, doing business as Danny's Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended appellant's off-sale general license for 30 days, with 20 days stayed for a one-year probationary period, for appellant's clerk having sold a single 22-ounce bottle of malt liquor in violation of a condition on the license, being contrary to the universal and generic public welfare and morals provisions of the California Constitution,

[1] The decision of the Department, dated September 7, 1995, is set forth in the appendix.

article XX, §22, arising from a violation of Business and Professions Code §23804.[2]

Appearances on appeal include Dolor G. Naemi, appearing through his counsel, John J. McCabe, Jr.; and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on November 2, 1989. Thereafter, the Department instituted an accusation against appellant on May 11, 1995.

An administrative hearing was held on August 10, 1995, at which time oral and documentary evidence was received. At that hearing, it was determined that appellant's clerk sold a single 22-ounce bottle of malt liquor, an alcoholic beverage, to an undercover Department investigator, in violation of a condition on the license. The condition found to have been violated states: "No malt beverage products shall be sold in less than six-pack quantities."

The condition originally arose out of the City of San Diego's conditional use permit (CUP) decision dated March 10, 1989, which imposed six conditions on appellant's premises (exhibit A). On April 18, 1989, the Department imposed these same conditions on the newly issued license to appellant (exhibit 1).

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[2] All further references to code sections will be to the Business and Professions Code unless otherwise indicated.

At the administrative hearing, appellant testified that he had for five years prior to the violation interpreted the condition to mean that he was not to break into six-packs and sell 12-ounce or 16-ounce containers as single units. He further testified that the Department's investigator, Kenneth Clark, told him at the time of the issuance of the license, that appellant's interpretation was correct [RT 34, 37-41, 44-45]. Thereafter, as verified by records of deliveries from his wholesale suppliers, appellant stocked his coolers with six-packs and single containers of 32, 40, and 64 ounces (since 1989), adding 22-ounce containers in 1993 [RT 37-38].

Investigator Kenneth Clark testified that he had no recollection as to what he had told appellant concerning the single container condition. However, the investigator testified that the condition was usually imposed by the Department to eliminate the evils of public drinking by transients [RT 51].

Department investigator Brent Bowser testified that he had been at the premises one year prior to the violation date of February 10, 1995, and had considered then (one year prior to the violation), that the offering for sale of 22-ounce containers violated the condition on the license. Bowser did not warn appellant of his first opinion, formed over one year prior, until the violation of February 10, 1995 [RT 22-24, 26, 28].

Subsequent to the hearing, the Department issued its decision which suspended appellant's license for 30 days, with 20 days thereof stayed for a one-year probationary period. Appellant filed a timely notice of appeal.

In his appeal, appellant raises the following issues: (1) there was no finding and no evidence was received to support the determination that continuing the license without discipline would be contrary to public welfare and morals; (2) no substantial evidence was admitted to support a finding that a sale of a 22-ounce bottle of malt liquor violated the condition on the license or that appellant's interpretation of that condition was unreasonable and contrary to its plain language; and (3) the penalty is excessive.

DISCUSSION

I

Appellant contends that the decision of the Administrative Law Judge (ALJ) lacks a finding and evidence that the continuation of the license without discipline would be contrary to the public welfare and morals.

The Department's duty, imposed by constitutional mandate, is to protect the "public welfare and morals" by enforcing the law for the good and civil order of the community. When a statute or rule of the Department has been violated, the Department will protect the public welfare of Californians by using its police powers to ensure future compliance with the law. (Cal. Const., art. XX, §22.) Thus, the public welfare and morals are usually implicated in any violation of law, be it statute, rule or condition. (Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85, 99, n.22 [84 Cal.Rptr.113].) That the violation involved is deemed by the Department to be contrary to the public welfare

and morals is implicit in the Department's decision that discipline should be imposed.

II

Appellant contends, in substance, that the language of the condition is vague, and cannot be reasonably interpreted to bar the sale of a single 22-ounce container.

The accusation filed by the Department against appellant concerned the sale of a single 22-ounce bottle of malt liquor to a Department investigator, which the Department charged as a violation of a condition attached to appellant's type-21 off-sale general license. The condition in question states: "No malt beverage products shall be sold in less than six-pack quantities."

In Hawamdeh (1996) AB-6518, the Board considered a condition, similar to the one at issue in the present appeal, that stated: "Malt beverages shall not be sold in units less than a six-pack." The Board held that this condition was too vague to be enforced against the sale of a single 22-ounce container. The Board concluded that this language could not be read as extending to the sale of containers not customarily sold in six-packs:

> "If the department wished to exclude such containers, from kegs to containers not marketed in six-pack groupings, the department needed to specifically state that variation from reasonable interpretation. There is no statement in the condition that in order to conform, only six or more containers could be sold at any one time. To this extent, the condition is ambiguous and thus defective."

In the present case, the Department urges the Appeals Board to reconsider its decision in AB-6518, contending that the rationale of the decision is "faulty," that it makes "an unreasonable leap of logic," and that the "result was poor, if not erroneous." (Dept. Brief, p. 6.) The Department argues:

> "Single sales of malt beverage products (beer and malt liquor) are these days indeed major contributors to problems of loitering, drunk in public and other neighborhood problems. There is no convenient cut-off between 12-ounce cans or bottles of malt beverage products (beer and malt liquor) and 40-ounce or even 64-ounce bottles. People who desire to make such a purchase and drink it immediately upon leaving the selling premises will buy as large a single container as they can afford. It is that purchase which the Department is attempting to control with conditions such as the one involved in this case [this present case] and in the Hawamdeh case."[3]

(Dept. Brief, p. 6.)

The record and the findings of the Department in Hawamdeh were silent as to any transient or public-drinking evil in that particular case. The same is true of the present appeal. Therefore, it was not this Board, but the Department, that

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[3] Investigator Clark, who conducted the original licensing investigation, testified in the present case about the reasons for similar conditions, but did not state whether such reasons existed at appellant's premises, either at the inception of the license or at the time of the violation:

> "That's a condition that was designed to prevent the sale of beer in single cans. When we have a transient population, we want to make sure we are not allowing a licensee to be able to sell in just a single-can mode. Normally in high crime areas, you have a lot of transients that like to go in and purchase just one can or one container only" [RT 51].

Clark also testified he had no idea why the condition was imposed by the city and copied by the Department [RT 54, 57].

made "an unreasonable leap of logic" in analyzing Hawamdeh, and the present appeal, on the basis of a "need" that was undocumented with regard to the particular premises. The argument of the Department is irrelevant in any case, since in neither Hawamdeh nor in the present appeal are we examining the six-pack condition to see if it accomplishes the purported purpose for its imposition; we are examining the condition to see if it can reasonably be interpreted to preclude the sale of any containers of malt beverages, regardless of size, "in less than six-pack quantities."

Conditions affecting the sale of single containers are not uncommon, and a number of appeals have been made to this Board contesting the Department's wording or interpretation of such conditions. The factual situations have been many and varied, and the Department's wording of single-container conditions has varied in clarity and specificity. Examples of appeals concerning single-container conditions are:

> (a) Boonjaluska (1995) AB-6453--the Board sustained a decision of the Department that the sale of a 22-oz. bottle of beer violated a condition which provided that "no beer or malt beverage under one quart shall be sold in less than six pack quantities."
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> (b) Grace Kim (1994) AB-6383--the Board sustained the addition, after an appeal from an order conditioning the transfer of a license, of conditions limiting the sale of certain sizes of alcoholic beverages:
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> > "6. Beer and malt beverages shall not be sold in containers under one quart or less than six-packs."

(c) Hill v. Boys Market, Inc. (1992) AB-6204--the Board rejected protestants' appeal from the Department's issuance of a license subject to a large number of conditions, one of which stated:

"8. No beer or malt beverages in containers under one (1) quart shall be sold in less than six-pack quantities."

The lesson we learn from these previous appeals is that the Department, when it deems it necessary, is clear and specific about the containers that are restricted by the condition.[4] The question for this Board then becomes whether the Department may attach a condition that is "container-specific," (referring specifically to six-packs) and later interpret it to be "container-general" (referring to all possible containers).

The authority of the Department to impose conditions on a license is set forth in Business and Professions Code §23800. That section provides that "...if grounds exist for the denial of an application...and if the department finds that those grounds [the problem presented] may be removed by the imposition of those

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[4] We have seen the following examples of conditions crafted with specificity in the record of other matters on appeal:

a). The sale of beer in containers under one quart shall only be by the six-pack or case and not by single cans or bottles;

b). There shall be no individual sales of malt beverage products and shall be sold in no less than four pack or six-pack per sale as packaged by the manufacturer;

c). No malt beverage products shall be sold in less than six-pack quantities per sale, and the sale of quart, 32 ounces, or 40 ounces or similar containers is also prohibited.

conditions ...," the Department may grant the license subject to "reasonable" conditions. Section 23801 states that the conditions "... may cover any matter ... which will protect the public welfare and morals...."

We view the word "reasonable" as used in §23800 to mean reasonably related to resolution of the problem for which the condition was designed. Thus, there must be a nexus, defined as a "connection, tie, link,"[5] in other words, a reasonable connection between the problem sought to be eliminated, and the condition designed to eliminate the problem. We also view the word "reasonable" to apply to any modification or any interpretation of the wording of the conditions.

The Department in the present case has imposed a condition on this license that refers specifically to sales of six-packs. The Department has not defined the term "six-pack" in the present case, in Hawamdeh, or in any statute or regulation. Therefore, we must give the term "six-pack" its commonly understood meaning: a manufacturer's pre-grouping of six individual containers into a single package. There is no reference to sales of quarts or 22-ounce containers or 40-ounce containers or kegs, but the Department contends that limiting sales specifically to six-packs means that sales of any containers, regardless of size, may not be made in quantities less than six.

[5] See Webster's Third New International Dictionary, 1986, page 1524.

We find the Department's interpretation to be unreasonable and in excess of its jurisdiction. What the Department is really trying to do here is to reword and extend the condition simply by unilateral interpretation, without having to go through the statutory process for modifying conditions. This it cannot do. The Department has used "container-specific" language in many other cases, clearly restricting sales of various sizes of single containers. We have been given no reason, and can see none, for assuming in this case that the Department used "container-specific" language to indicate a "container-general" meaning. We must assume that, as in other cases, the Department used "six-pack" advisedly to refer to containers that come in six-packs and that the condition did not apply to other containers not specified and not customarily sold in six-packs..

The wording of the condition clearly prohibits breaking a six-pack to sell individual containers, but there is no reference to containers other than those sold in six-packs. Such wording cannot reasonably be extended by unilateral interpretation to include all other containers that might be marketed from time to time.[6] (Hawamdeh, supra.)

[6]The Department is not left without ability to control a change of marketing or area conditions. Violations can invoke the application of §23800, subdivision (b), and problems generated outside the premises by the use of the license, can be controlled by §24200, subdivision (f).

III

Appellant contends that the penalty which was imposed is excessive. In view of our disposition of this matter, we need not reach this contention.

CONCLUSION

The Department's duty of protecting public welfare and morals is severely challenged in some areas of the state by problems arising from the abuse and misuse of alcoholic beverages, and this Board is greatly concerned about the magnitude of the problems facing the Department. The Constitution grants the Department discretion in granting, denying, suspending, and revoking alcoholic beverage licenses for good cause. (Cal. Const., art. XX, §22.) The Department has also been charged by the Legislature with the "strict, honest, impartial, and uniform administration and enforcement of the liquor laws throughout the state." (Bus. & Prof. Code §23049.) The admonition found in §23001, that the alcoholic beverage control laws involve "in the highest degree the economic, social, and moral well-being and the safety of the State and of all its people, " and that those laws shall be liberally construed for the accomplishment of those purposes, adds to this weighty responsibility. At the same time, this Board is charged with ensuring that the Department does not act without or in excess of its jurisdiction by, for example, interpreting the language of a condition in an unreasonable manner, based on a faulty premise and without substantial foundation. (Cal. Const., art. XX, §22; Bus. & Prof. Code §23084.) We found that the Department had unreasonably

interpreted the "six-pack condition" in Hawemdeh, and we find that the Department has continued to unreasonably interpret the "six-pack condition" in the present case. Many conditions are worded by the Department to achieve the result it desires with regard to sales of single containers, but the condition in this instance is not worded to achieve that result.

The decision of the Department is reversed.[7]

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

[7] 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.