

ISSUED NOVEMBER 14, 1996

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

JIRAYIR SENOCAK and	)	AB-6583a
LINDA SENOCAK)	
dba Linda's Liquor & Deli	)	File: 21-185671
1026 Taraval Street	)	Reg: 94031288 & 95032551
San Francisco, CA 94116,)	
Appellants/Licensees,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	Ruth S. Astle
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	September 3, 1997
	)	Sacramento, CA

Linda Senocak,¹ doing business as Linda's Liquor & Deli (appellant), appeals from a decision of the Department of Alcoholic Beverage Control² which ordered appellant's off-sale general license revoked, with the revocation stayed for a 3-year probationary period and suspended for 90 days. The Department's decision was entered following a decision of the Alcoholic Beverage Control Appeals Board

¹Co-licensee Jirayir Senocak is deceased and co-licensee Linda Senocak will, therefore, be referred to as the appellant herein.

²The decision of the Department, dated January 24, 1997, is set forth in the appendix.

reversing the penalty portion of a Department decision that had found violations by appellant of the sales-to-minors provisions of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Linda Senocak, appearing through her counsel, Dale V. Thomas; and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

This is the second appeal in this matter. The Board's earlier decision (AB-6583, filed July 18, 1996), sustained the decision of the Department but remanded the matter for reconsideration of the penalty of unconditional revocation. The Department then petitioned the California First District Court of Appeal for a Writ of Review. This Board and appellant opposed issuance of the writ and, on October 23, 1996, the court denied the petition. The Department's Decision Following Appeals Board Decision, which is the subject of this appeal, was issued on January 24, 1997. On February 23, 1997, appellant filed a petition for reconsideration with the Department, requesting a shorter suspension time. That petition was denied by the Department on February 26, 1997. Appellant thereafter filed this timely appeal.

In her appeal, appellant contends that the penalty is excessive.

DISCUSSION

Appellant contends that the penalty of a 90-day suspension is excessive, arguing that imposition of the penalty was arbitrary and capricious, that the

Department appears not to have followed its own Instructions, Interpretations and Procedures Manual in this case, and that the severity of the penalty imposed on a small store such as appellant's raises concerns about violating appellant's due process rights.

Appellant correctly points out that the Department's discretion in imposing discipline is not absolute and unlimited, quoting from Harris v. Alcoholic Beverage Control Appeals Board (1965) 62 Cal.2d 589, 594-595 [43 Cal.Rptr. 633], and that the courts and this Board must examine the penalty imposed by the Department in a particular case to determine whether an abuse of discretion has occurred (Joseph's of California v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]).

This Board agrees wholeheartedly with these observations and has cited the same cases and propositions in numerous opinions. However, appellant has not pointed to any specific reasons why these general propositions are applicable in the present case.

Appellant states that "There may have been imposed an excessive penalty under the ... formula" for penalties in the Department's Instructions, Interpretations and Procedures Manual (IIP). Appellant appears to base this speculation on language from footnote 4 of this Board's earlier opinion in this matter:

"We do not stand alone in considering this unconditional revocation too severe under the circumstances of this case. The usual penalty, according to the department's own Instructions, Interpretations and Procedures Manual (IIP), is a suspension for 15 days, to be increased "For each accusation involving persons under 21

filed within twelve months" (IIP L227.1). Although there were several violations here, the department's guidelines provide for this situation by increasing the suspension, not imposing unconditional revocation.

"The department's manual, of course, does not limit the exercise of constitutional discretion by the department, but it 'constitutes evidence of the Department's policy regarding penalties and thus of the manner in which the Department's discretion has probably been exercised in other cases, and in our opinion this is an appropriate matter for us to consider in determining whether the Department acted here within the limits of its discretion.' (Harris v. Alcoholic Beverage Control Appeals Board (1965) 62 Cal.2d 589 [400 P.2d 745, 43 Cal.Rptr. 633, 638].)" (Emphasis added.)

Clearly, the Department is not bound by its IIP Manual and the Department does not automatically abuse its discretion when it does not follow the guidelines in the Manual. This Board's concern, as indicated by the italicized language above, was with the extreme penalty of unconditional revocation that the Department had originally imposed.³ In its Decision Following Appeals Board Decision, the Department addressed this concern and imposed a stayed conditional revocation with a substantial suspension, allowing appellant the opportunity to continue to operate as long as there are no further violations.

³The brief of the Department was replete with comments that were not helpful to this Board in evaluating this matter. If anything, these remarks indicate the unfortunate attitude of Department counsel that the discretion of the Department is unfettered and that the Appeals Board must ignore due process and substantial justice, and be no more than a "rubber stamp" for Department actions if the Department has found that violations have occurred. The language of the Department's brief was unfortunate, and did not accord this Board the common courtesy that is due any tribunal by any advocate before it, even if that advocate does not agree with a decision made by the tribunal.

The suggestion that the Department has exercised its powers here "in derogation of due process, for an impermissibly punitive purpose" (Rice v. Alcoholic Beverage Control Appeals Board (1979) 89 Cal.App.3d 30, 41 [152 Cal.Rptr. 285]), is not supported by the record in this second appeal. Merely stating that this is "a suspension penalty which falls disproportionately heavily upon a relatively small grocery/deli/liquor store establishment, almost to the point of being ruinous of the business" (App. Br. at 7) does not provide this Board with facts from which it could conclude that the Department abused its discretion in this instance.

A 90-day suspension is a severe penalty, but is a far cry from the unconditional revocation that was originally imposed. Appellant has been given a chance to fully redeem her license if she is vigilant for the next three years. We cannot say that the Department abused its discretion in its Decision Following Appeals Board Decision.

CONCLUSION

The decision of the Department is affirmed.⁴

BEN DAVIDIAN, CHAIRMAN
RAY T. BLAIR, JR., MEMBER

⁴This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said code.

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

JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD