

ISSUED JUNE 30, 1998

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

HOMETOWN CONCEPTS, INC.)	AB-6659a
dba Huntington Beach Beer Company)	
201 East Main Street)	
Huntington Beach, CA 92648,)	File: 23-272787
Appellant/Licensee,)	Reg: 95033438
)	
v.)	
)	Date and Place of the
DEPARTMENT OF ALCOHOLIC)	Appeals Board Hearing:
BEVERAGE CONTROL,)	May 6, 1998
Respondent.)	Los Angeles, CA
)	
)	

Hometown Concepts, Inc., doing business as Huntington Beach Beer Company (appellant), appeals from a Decision Following Appeals Board Decision of the Department of Alcoholic Beverage Control¹ which suspended appellant's small beer manufacturer's license for 20 days, with 10 days stayed for a one-year probationary period, for appellant's employees having delayed two Department investigators in an investigation at the premises, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Penal Code section 148, subdivision (a).

Appearances on appeal include appellant Hometown Concepts, Inc., appearing through its counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, David Sakamoto.

¹The Decision Following Appeals Board Decision, dated November 12, 1997, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued in October 1992. Thereafter, the Department instituted an accusation against appellant on August 3, 1995. An administrative hearing was held on October 23, 1995, at which time oral and documentary evidence was received.

At that hearing, it was determined that during the late evening or early morning hours of June 2-3, 1995, two Department investigators entered appellant's premises to investigate whether a customer who had been served a beer was a minor. They learned that the suspected minor's identification was outside, and the two investigators accompanied her to get it. One of the investigators had "seized" the beer as evidence and had it in her hand as she left the pub. The security guard refused to allow them to exit the premises with the beer until the manager appeared.

Subsequent to the hearing, the Administrative Law Judge (ALJ) issued his proposed decision, which suspended appellant's license for five days. The Department rejected the proposed decision and, in a decision issued under Government Code §11517, subdivision (c), suspended the license for 30 days, with 15 days stayed for a one-year probationary period.² Appellant filed a timely appeal.

The Appeals Board issued its decision on April 30, 1997, affirming the decision of the Department except as to the penalty order, which was reversed and

² The decision of the Department under Government Code §11517, subdivision (c), dated April 26, 1996, and the Administrative Law Judge's proposed decision dated October 26, 1995, are set forth in the appendix.

remanded for reconsideration of the penalty.

On November 12, 1997, the Department issued its Decision Following Appeals Board Decision in which it ordered appellant's license suspended for 20 days, with 10 days stayed for a probationary period of one year. Appellant then filed this appeal.

In this appeal, appellant contends that the penalty is excessive and an abuse of the Department's discretion.

DISCUSSION

Appellant contends that the penalty imposed in the Department's Decision Following Appeals Board Decision is excessive and an abuse of the Department's discretion. Appellant points out that the penalty imposed, while somewhat less than the original one, still precludes the opportunity for appellant to petition for permission to pay a fine in lieu of serving a suspension ("petition for offer in compromise" [POIC]) (Bus. & Prof. Code §23095) and argues that this revised penalty is still an abuse of discretion for the same reasons enumerated by this Board in its April 30, 1997, decision.

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].)

In our prior decision, we found that the penalty imposed (30 days' suspension, with 15 days stayed), in light of the clear mitigating circumstances, was an abuse of the Department's discretion:

"The record in this case does show a violation of Penal Code §148, but it was certainly not an egregious one. The security guards simply stopped patrons, who were dressed in jeans, as the patrons were carrying a beer out of the premises, because a condition on appellant's alcoholic beverage license prohibited taking beer out of the premises. The guards were acting in the regular course of their duties, attempting to prevent the violation of the condition on the license. The security guards did not take at face value the assertion of special authority and the brief display of badges by the Department's agents, since others had attempted to circumvent rules in this manner on other occasions. If the person carrying the beer out had not been a Department investigator, the security guards would have been derelict in their duties had they not challenged that person's right to remove the beer from the premises. The delay caused by the security guards in this situation was, although technically a violation of the statute, at least understandable.

"It is clear that there was a confrontation in which voices were raised, and that the Department investigators were delayed by this. It is also clear that both the Department personnel and the security guards, in trying to do their respective jobs, might well have handled the situation more effectively. We realize that the Department must have cooperation from licensees when conducting an investigation and that some disciplinary action is warranted in this case. However, we find that under the particular circumstances of this case, a substantial suspension is not reasonable. This is not a case of violently resisting arrest or of actively and intentionally interfering with an investigation. There are also a considerable number of mitigating factors in this instance: the security guards, just like the investigators, were acting within the scope of their duties; the security guards clearly acted with the intention of preventing a violation of a condition on the license; the investigators were conducting their investigation in plain clothes, so it was not obvious that they were peace officers; it was reasonable for the security guards to be disinclined to accept badges at face value since some patrons do try to use badges to circumvent rules; the investigation was not materially delayed and was completed shortly thereafter; and this was the first violation appellant has been charged with since opening in 1992.

"In light of the nature and circumstances of the violation in this case and the apparent disregard by the Department of the mitigating circumstances, we find that the Department abused its discretion in imposing

the penalty it did. " [AB-6659 (April 30, 1997), pp. 7-9.] The Department's position continues to be that this was an egregious violation. The

Department's brief includes the following statement on page 3:

"There is also a great public policy interest in having people not unduly interfere when dealing with law enforcement officers in the performance of their duties. In this particular context, there is a further public interest in having ABC licensee's [sic] not interfere with ABC Investigators [sic] in the performance of their duties. As such, while the original penalty was found too high, the lower, revised penalty must also further that public interest."

It continues on page 4:

"One must again note the serious nature of offense involved herein; the illegal interference/delay by the licensee employees directed against the Department's investigators while in the regular performance of their duties. While not necessarily the focus of this appeal, it would not appear that the payment of a money fine serves in the public interest or welfare."

This Board is fully committed to supporting Department investigators and other peace officers in properly enforcing the ABC laws. We strongly agree that licensees cannot be allowed to "unduly interfere" with investigators performing their duty and that the penalty in such a case should serve to discourage any further undue interference. However, in this case, the licensee's employees did not unduly interfere with the Department's investigators. Appellant's employees did stop the investigators from taking a glass of beer from the premises, causing a short delay in the completion of the investigators' inquiry into the age of a suspected minor. Nevertheless, the circumstances show that there was no intention on the part of appellant's employees to interfere with or delay the investigation of the Department's employees; indeed, the incident occurred solely

because appellant's employees did not know and did not believe that the people they stopped were Department employees engaged in an investigation.

We cannot agree with the Department's admonition to "note the serious nature of offense involved herein. . . ." The very basis for our prior decision reversing and remanding the penalty was that this technical violation of Penal Code § 148 was non-egregious and subject to a number of mitigating circumstances.

The ALJ, who actually heard the testimony of the parties, found the violation to be so mitigated in light of the circumstances involved that only a light penalty -- five days' suspension -- was appropriate. The Department rejected the ALJ's proposed findings of fact, determinations of issues, and order, issuing a decision under Business and Professions Code § 11517, subdivision (c), that ignored the mitigating circumstances and imposed a penalty of 30 days' suspension with 15 days stayed for a probationary period of one year. This Board reviewed the record on appeal and determined that the Department abused its discretion in doing so. Therefore, the Board reversed the Department's penalty order and sent the matter back to the Department to allow it to properly exercise its discretion. The Department then reduced the penalty somewhat, but still imposed a substantial suspension that is not reasonable in light of the circumstances. The penalty itself, along with the statements in the Department's brief, make clear that the Department imposed the penalty not with the appropriate motive of inducing compliance with the ABC laws, but to punish the licensee.

The penalty imposed by the Department in its Decision Following Appeals

Board Decision is, as appellant argues, still an abuse of the Department's discretion since the Department continues to disregard the obvious mitigating circumstances and the merely technical nature of the violation and has imposed a penalty that is unreasonably punitive rather than corrective. Therefore, we again reverse the penalty order of the Department and remand this matter to the Department for reconsideration of the penalty in light of this Board's decisions in this matter.³

CONCLUSION

The decision of the Department is affirmed, but the penalty order is reversed and remanded for reconsideration of the penalty in accordance with the views expressed in this decision.⁴

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

³Appellant complains that the Department did not make the penalty subject to a POIC. This Board does not have the authority to require the Department to reduce the penalty to a level where the licensee could petition to pay a fine and, even if the penalty were reduced to that level, the Department would not be required to accept the proffered petition. (Bus. & Prof. Code §23095, subd. (a).)

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.