ISSUED JUNE 3, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

BEATRIZ VAZQUEZ dba Pixie II Cantina 347 West Anaheim Street Long Beach, CA 90813, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	))))))))))))	AB-6667 File: 40-281410 Reg: 95034884 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: April 2, 1997 Los Angeles, CA

Beatriz Vazquez, doing business as Pixie II Cantina, appellant, appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered her on-sale beer license suspended for 35 days, with 20 days stayed for a two-year probationary period, for having violated two conditions on her license and for having distilled spirits on the premises, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §§23804 and 25607.

[1]The decision of the Department, dated May 9, 1996, is set forth in the appendix.

Appearances on appeal include appellant Beatriz Vazquez, appearing through her counsel, Edwin M. Riddle; the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on April 15, 1993.

Thereafter, the Department instituted an accusation alleging that on July 14, 1995, appellant violated two conditions which had been imposed upon her license,[2] and that on that same date appellant was unlawfully in possession of a bottle of distilled spirits on the premises. Appellant requested a hearing.

An administrative hearing was held on April 2, 1996, at which time oral and documentary evidence was received. At that hearing, Jennifer Smith, a Department investigator, testified that as she approached the rear of appellant's premises she noticed that the rear door was propped open [RT 10], and that she heard extremely loud music which, she discovered upon entering the premises, was coming from a coin-operated jukebox. A bottle of Don Pedro Brandy was also found on the premises.

Subsequent to the hearing, the Department issued its decision which determined that appellant had violated conditions 4 and 11 of her license, in violation of Business

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[2] Condition 4 states: "There shall be no live entertainment, amplified music or dancing permitted on the premises at any time." Condition 11 states: "The rear door to the premises shall remain closed at all times except for emergencies and/or to permit deliveries."

and Professions Code §23804, and Business and Professions Code §25607, by reason of the presence of the distilled spirits on the premises. Appellant thereafter filed a timely notice of appeal.

In her appeal, appellant raises the following issues: (1) she was unaware she was violating conditions of the license, that she was not permitted to have brandy on the premises, or that the Department disapproved of the presence of the jukebox, so she lacked the requisite scienter; and (2) the penalty is excessive in light of the nature of the violations charged.

DISCUSSION

I

Appellant's brief asserts that she lacked the requisite scienter as to each of the violations charged in the accusation, as a result of language barriers, ignorance of the law, or because she thought she had the approval of the Department.

At the administrative hearing, appellant denied she had violated condition 11 by leaving the back door to the premises open. She testified that the door was closed but unlocked, and that is what she thought the condition to require. Investigator Smith testified that the door was propped open. The Administrative Law Judge (ALJ) chose to believe Smith rather than appellant. A review of the transcript indicates that appellant's testimony on this issue was somewhat equivocal [RT 21-22], while that of the investigator was direct and specific [RT 10, 35-36].

The ALJ did not accept appellant's testimony that she did not understand the meaning of the term "closed" as used in condition 11. The term is unambiguous, and appellant's denial at the hearing that the door was open is convincing evidence that she knew the difference between open and closed.

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].) We are unable to say that the ALJ abused his discretion in his rejection of appellant's denial.

Appellant claims that the jukebox was in the premises at the time she purchased the license, that the Department knew it, and, therefore, tacitly approved it. However, there is nothing in the record to support this claim beyond her unsupported testimony. To the contrary, appellant had been cited on a prior occasion for the same violation so she was clearly on notice that the Department did not approve. Appellant's admission [RT 28] that she understood the term "amplified music" to mean "loud music" is also inconsistent with her claim that she lacked scienter.

Appellant claims she did not know she could not have distilled spirits on the premises, and claims the brandy in question was there solely for her husband's consumption. There is no dispute that the brandy was physically located within the licensed area of the premises.

Business and Professions Code §25607 provides that:

> it is "unlawful for any person or licensee to have upon any premises for which a license has been issued any alcoholic beverages other than the alcoholic beverage which the licensee is authorized to sell at the premises under his or her license. ..."

The statute does not require proof of any intent. Appellant's professed ignorance of the law is no excuse.

II

Appellant argues that the penalty is excessive, stating that the violation of the two conditions cannot be characterized as "harmful or undesirable." Appellant cites Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [465 P.2d 1], and argues that if topless dancing is not contrary to public morals, then neither is appellant's conduct.

This is a specious argument. Appellant clearly violated two of the conditions on her license. The purpose of those conditions is to protect the quiet enjoyment of nearby residents. In Business and Professions Code §23804, the Legislature has clearly stated that the violation of a license condition subjects the license to suspension or revocation. The Appeals Board may not weigh one kind of conduct against another and make a judgment contrary to one the Legislature has chosen.

It might be argued that leaving a door open, or having a single bottle of distilled spirits in the office portion of the premises, for personal consumption, are minor infractions in the scheme of things. However, appellant was cited for both of these

items as well as for a second violation of the condition banning amplified music.[3] The penalty does not seem inappropriate.

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].)

The Department had the following factors to consider: (1) the rear door condition violation compounded the violation of the amplified music condition by permitting the loud music to escape the premises; (2) the amplified music violation was appellant's second such violation in a relatively short period of time; and (3) the distilled spirits on the premises were there in clear violation of Business and Professions Code §25607. Considering such factors, the appropriateness of the penalty must be left to the discretion of the Department. The Department having exercised its discretion reasonably, the Appeals Board will not disturb the penalty.

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[3] We were advised during the oral hearings that appellant's petition for modification of the condition regarding the door was granted in January, 1977, but the requested modification of the amplified music provision was denied.

CONCLUSION

The decision of the Department is affirmed.[4]

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

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[4] This final decision 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 district 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.