ISSUED MARCH 5, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

KDM ENTERTAINMENT INC. dba Kokomo's 17927 MacArthur Blvd. Irvine, CA 92714, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6683 File: 47-185953 Reg: 95033573 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: January 8, 1997 Los Angeles, CA

KDM Entertainment Inc., doing business as Kokomo's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which unconditionally revoked appellant's on-sale general public eating place license for appellant's security guard having broken into a locked car in appellant's parking lot and taken items from that car, for appellant possessing alcoholic beverages that were adulterated, and for appellant possessing bottles of distilled spirits not bearing labels showing the quantity and proof strength of the contents, being contrary to

[1]The decision of the Department dated June 6, 1996, is set forth in the appendix.

the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Penal Code §§ 459 and 484, and Business and Professions Code §25170.

Appearances on appeal include appellant KDM Entertainment, Inc., appearing through its counsel, Rick Blake; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on August 21, 1986. Thereafter, the Department instituted an accusation on July 17, 1995, later amended twice, ultimately alleging four counts: 1) burglary and theft by a security guard while on duty in appellant's parking lot; 2) possessing and holding for sale bottles of alcoholic beverages that were adulterated with insects and/or debris; 3) selling or offering to sell the adulterated beverages described in count 2; and 4) having on the premises unlabeled bottles of distilled spirits.

An administrative hearing was held on May 13 and 14, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the burglary and theft in the parking lot, the employment status of the security guard involved, and the discovery and confiscation of the bottles with insects and without labels.

Subsequent to the hearing, the Department issued its decision which determined that cause for disciplinary action was not established as to count 3 of the accusation,

but was established as to all other counts, and ordered that appellant's license be revoked. Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends that the penalty is excessive.

DISCUSSION

Appellant contends that the penalty is excessive because it is based on erroneous disciplinary history and because the violations found do not warrant revocation.

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].)

With regard to count 1, appellant contends that the elements of theft were not present, since the security guard did not take things from the car he broke into with any felonious intent. In any case, appellant argues, the acts should not be attributed to the licensee because it did not ratify them and because similar acts, committed by licensees themselves, do not result in revocation. The counts involving bottles, appellant contends, are so minor that the Department's usual recommended penalty is only a five-day suspension. Therefore, according to appellant, these counts, even if as alleged, do not justify revocation.

Count 2 and Finding of Fact 4, dealing with the adulterated bottles, both lack allegations of a statute that was actually violated. They refer to the Health and Safety Code sections that define adulteration of food, but these sections do not penalize any conduct. Technically, then, the Finding, and Determination of Issues 3, which is based on that Finding, should be disregarded. That leaves only the security guard count and the missing label count.

While appellant must bear responsibility for the on-duty conduct of the security guard, there is some mitigation in the facts that the actions of the security guard were totally unconnected with the activities of the licensed premises and that they were so far beyond the scope of his employment.

The penalty in this case must rest on the existence of some unlabeled bottles, a very minor violation, and the theft committed by the security guard in the parking lot, a violation that was unconnected with the operation of the premises. Although discipline clearly is required for these violations, they do not appear to this Board to reasonably justify revocation. The only remaining basis for such a penalty would be facts in aggravation--appellant's prior disciplinary record.

The Department's decision listed three prior disciplinary actions against appellant and stated that others were on appeal and so were not considered in this case. The third action listed, dated May 8, 1995, was actually on appeal to this Board at the time [AB-6647], and was not final at the time of the Department's hearing or its decision. Appellant contends that taking this action into consideration constituted

error requiring remand. We agree with appellant that this disciplinary action should not have been considered in aggravation of the penalty, since the action was not final. The other two disciplinary matters final at the time of the decision were from 1992 (lewd conduct; POIC in lieu of 20-day suspension) and 1994 (sale to minor; 30-day suspension). With only these two violations, which do not ordinarily justify revocation, and no demonstrated pattern of similar violations, it would be unreasonable to conclude that they would constitute sufficient aggravation to result in revocation rather than suspension.

Appellant has been before this Board a number of times recently with regard to various violations, and there is clearly cause for concern about the operation of these premises. Given the number of actions the Department has filed against appellant, it seems apparent that the Department believes that appellant's license should be revoked. The question before this Board is whether revocation is reasonable in this case.

This Board shares the Department's concern about these premises and recognizes the broad discretion accorded the Department in imposing penalties. However, given that only two counts in this appeal are sustainable, with one being extremely minor and the other totally unconnected to the operation of the premises, we find that the penalty of revocation is unreasonable on the record in this appeal and an abuse of the Department's discretion. Discipline should be imposed, but such isolated acts and insignificant violations do not reasonably warrant revocation.

CONCLUSION

The decision of the Department is affirmed, and the matter is remanded to the Department for reconsideration of the penalty.[2]

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

[2]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.