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-6718 File: 40-281410 Reg. 96035249 Administrative Law Judge at the Dept. Hearing Sonny Lo 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 Alcohol Beverage Control[1] which ordered her on-sale beer license revoked, with revocation stayed for a probationary period of three years, and suspended for 60 days, for having violated a condition on her license, 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 §§24200, subdivision (a), and 23804.

[1] The decision of the Department dated September 12, 1996, is set forth in the appendix.

Appearances on appeal include appellant Beatriz Vazquez, appearing through the office of Edwin M. Riddle; and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on April 15, 1993. Thereafter, the Department instituted an accusation alleging that appellant, on November 18, 1995, violated a condition on her license by permitting the playing of live amplified music by a band and permitting patrons to dance.

An administrative hearing was held on August 9, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented that at 11:30 p.m. on the night in question, a Department investigator visited the premises. He found a three-member band playing music, which was being broadcast through two large speakers, and also observed approximately ten patrons dancing.[2]

Subsequent to the hearing, the Administrative Law Judge (ALJ) issued his proposed decision, which found that appellant had permitted the violation of the condition to occur, and that appellant admitted she knew she was violating a condition but explained it as a one-time exception to celebrate a birthday. The ALJ

[2] Condition 4 on appellant's license provides: "There shall be no live entertainment, amplified music or dancing permitted on the premises at any time."

found additionally that in 1994 appellant had paid a fine in lieu of a suspension imposed for a similar violation. The ALJ found still another accusation pending, but stated it would not be taken into consideration because of its pending nature. He ordered appellant's license revoked, but stayed revocation for a probationary period of three years, and ordered an actual suspension of 60 days. The Department adopted the proposed decision without change, and appellant thereafter filed a timely notice of appeal.

In her appeal, appellant raises the following issues: (1) the record lacks substantial evidence to support a finding that Business and Professions Code §24200, subdivision (a), was violated; and (2) the penalty was excessive.

DISCUSSION

I

Appellant contends that the violation of a single condition, which barred live music, cannot be characterized as "harmful or undesirable," so therefore does not violate §24200, subdivision (a). Appellant argues that Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr.113], requires proof of conduct that is "so vile and its impact on society is so corruptive that it can be almost immediately repudiated as being contrary to the standards of morality generally accepted by the community." Appellant argues that if the employment of topless waitresses is not contrary to public morals, as found in

Boreta, then merely permitting a three-piece band to play live music on one occasion also is not.

The Department contends that its decision was correct, pointing out that §24200, subdivision (a), deals with public welfare as well as public morals, and that the Department decision rested the alternative grounds of public welfare or public morals. The Department also points out that its decision was also based on its finding of a violation of Business and Professions Code §23804, for violation of a license condition, based on conduct appellant admits occurred.

Section 23804 provides that the violation of a condition on a license is ground for suspension or revocation of the license. In this case, the conduct constituting the violation is essentially admitted, and was established as well by the testimony of the investigator who visited the premises. Given the clear language of the condition, and the uncontradicted evidence, the Department's finding of a violation is unassailable.

Appellant's reliance on the language quoted from Boreta is misplaced. The Court used that language in rejecting the contention in that case that the conduct was per se contrary to public morals. Here, the Department has not applied a per se test, instead establishing as a precursor the violation of §23804.

Article XX, §22, of the California Constitution confers on the Department the exclusive power to deny, revoke or suspend any license to sell alcoholic

beverages, if the Department shall determine for good cause that continuance of the license would be contrary to public welfare or morals. The Department "need not define by law or rule all the things that will put that license in jeopardy." Cornell v. Reilly (1954) 127 Cal.App.2d 178 [273 P.2d 572, 577].) In Nelson v. Department of Alcoholic Beverage Control (1959) 166 Cal.App.2d 783 [333 P.2d 771, 773], the court stated that "... conduct constituting a violation of any of the sections of the Alcoholic Beverage Control Act is a ground for the suspension or revocation of a license." (See H.D. Wallace & Associates, Inc. v. Department of Alcoholic Beverage Control (1969) 271 Cal.App.2d 589 [76 Cal.Rptr. 749, 751].

Footnote 22 of the Boreta decision sets forth the Court's assessment of the broad reach of the Department's powers:

> "We do not mean to intimate that the Department is confined to considering violations of criminal statutes or departmental directives as grounds for suspension or revocation under section 24200, subdivision (a). It is not disputed that while the Department may properly look to and consider a licensee's violation of the Alcoholic Beverage Control Act, the Penal Code, other state and federal statutes, or Department rules as constituting activities contrary to public welfare or morals, it may also act on situations contrary to the public welfare or morals in the sale or serving of alcoholic beverages regardless of legislative expressions of policy on the subject or prior departmental announcements."

The Department has not exceeded that reach in this case.

II

Appellant contends that the penalty is excessive.

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].)

Appellant contends that the suspension will deprive her of her livelihood, and will have a serious detrimental effect upon her family. These same arguments were made at the administrative hearing, where Department counsel recommended that appellant's license be revoked, and, presumably, were taken into account by the ALJ and the Department.

However, the penalty, viewed solely in the context of this proceeding, does seem harsh. The Department stresses that this was appellant's third violation of the same condition, and was done knowingly.

The Board has affirmed a Department decision in another matter (AB-6667) involving this same licensee, in which the Department imposed a 35-day suspension, with 20 days of the suspension stayed for a probationary period of two years,[3] for a violation of this same condition and one additional condition, and for having a bottle of distilled spirits on the premises. The accusation was based on

[3] The penalty which the ALJ imposed, and the Department adopted, was that originally recommended by Department counsel at the hearing.

conduct occurring July 14, 1995.

While the ALJ in the present case, expressly stated that he was not considering the pending accusation (which ripened into AB-6667), the 60-day suspension and stayed revocation for the single condition violation stands in sharp contrast to the penalty (a net suspension of 15 days) in AB-6667 for violation of two conditions and for having distilled spirits on the premises, both decisions supposedly only taking into account the earlier suspension which was resolved by a $300 fine. Is the fact that two different ALJ's heard the two matters a sufficient explanation for the wide variation in penalties? Can an inference be drawn that the Department recommendation, which the ALJ accepted, was influenced by the pendency (on appeal) of the other accusation? Unfortunately, there is insufficient explanation in the record for us to answer these questions definitively. However, the fact that counsel for the Department stressed at the hearing before this Board the fact that this was appellant's third violation leads us to believe it may have been so influenced. In any event, as the record stands, the penalty of a 60-day license suspension and stayed revocation was based on the single violation established by the evidence and a violation of the same condition one and one-half years earlier for which appellant paid a $300 fine. We can only conclude that this is excessive.

CONCLUSION

The penalty portion of the decision of the Department is reversed and remanded for reconsideration in light of the comments herein. That portion of the decision regarding the violation of the condition 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.