

ISSUED JUNE 30, 1997

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

THE JOLLY SAILOR PUB	)	AB-6754
dba The Jolly Sailor Pub)	
18146 Sherman Way, #7	)	File No. 42-297174
Reseda, CA 91335,	)	Reg. No. 96036618
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Department Hearing
	)	John P. McCarthy
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing
	)	May 7, 1997
	)	Los Angeles, CA
_____)	

The Jolly Sailor Pub, doing business as the Jolly Sailor Pub (appellant), appeals from a decision¹ of the Department of Alcoholic Beverage Control which ordered appellant's on-sale beer and wine public premises license suspended for 15 days for appellant's bartender having sold an alcoholic beverage (beer) to two persons who were obviously intoxicated, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25602,

¹ The decision of the Department, dated October 24, 1996, is set forth in the appendix.

subdivision (a).

Appearances on appeal include The Jolly Sailor Pub, appearing through Clive Morris, its sole shareholder; and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued August 21, 1991. Thereafter, the Department instituted an accusation alleging that on April 10, 1996, appellant's bartender sold alcoholic beverages (beer) to two persons who were obviously intoxicated, in violation of Business and Professions Code §25602, subdivision (a). An administrative hearing was held on September 17, 1996, at which time appellant conceded that the violation had occurred, but argued that in light of his previously unblemished record, the fact that the bartender's actions were contrary to his announced policy, and that after investigating the incident he fired the bartender, the Department's recommended penalty was excessive. The Administrative Law Judge (ALJ) concluded that these were proper matters in mitigation, and ordered a 15-day suspension. The Department adopted the ALJ's proposed decision, and appellant thereafter filed a timely notice of appeal.

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

DISCUSSION

Appellant candidly concedes that the violations occurred, but argues, as it

did in the administrative hearing, that the penalty is too severe, and will cause undue hardship. Appellant's owner urges the Appeals Board to alter the penalty to a warning, on the basis of its previous record and because the violations were an isolated incident directly contrary to his specific instructions to the bartender and contrary to the philosophy by which he has operated the business.

Appellant's owner stresses his respect for the law, and his efforts to create a safer and healthier environment in the area surrounding his premises. Indeed, some of the steps appellant says he has taken, and which we have no reason to doubt, such as closing earlier on "party" nights so as not to encourage irresponsible drinking, are indeed commendable. Nonetheless, the Appeals Board is unable to grant appellant the relief it seeks.

The Appeals Board may 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].) The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing a Department decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to

determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.²

In this matter the Department initially recommended a suspension of 20 days, its standard penalty for a violation of §25602, subdivision (a). The ALJ's proposed decision called for a suspension of only 15 days. The ALJ found that the fact that appellant's employee violated instructions and company policy, and was immediately disciplined, combined with appellant's unquestioning acceptance of responsibility for the violation, warranted mitigation. (See Finding of Fact IV). By adopting the proposed decision, the Department acceded to the ALJ's recommended penalty.

This Board recognizes a licensee's vigilant efforts to comply with the law can sometimes be undermined by an employee's carelessness or lapse of judgment. By the same token, we recognize that the Department must exercise its own good judgment, within the bounds of discretion, as to the appropriate discipline which may be required to discourage or prevent similar violations in the future by appellant and other licensees, and to encourage responsible supervision of the activities of employees. And, as the Department points out, there is nothing inherently

²The California Constitution, article XX, § 22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

excessive in a 15-day suspension.³ The ALJ did lessen the penalty in light of the mitigating factors presented by appellant.

For all these reasons, this Board is satisfied that the Department has not abused its discretion in imposing the penalty it did.

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

³ A consequence of the ALJ's determination that mitigation of the standard penalty was appropriate is that appellant is eligible to petition the Department to accept an offer in compromise, pursuant to Business and Professions Code §23095, which it could not do under a 20-day suspension.

We might also note that reference was made during the hearing to the possibility of payment of a fine in installments. This, of course, is also a matter subject to the discretion of the Department, which, we assume, will accord due consideration to any recommendations of its counsel to that end..

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.