

ISSUED DECEMBER 22, 1997

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

|                         |   |                          |
|-------------------------|---|--------------------------|
| GUADALUPE MORENO        | ) | AB-6795                  |
| dba El Tauro Bar        | ) |                          |
| 922 E Street            | ) | File: 42-132676          |
| Fresno, CA 93706,       | ) | Reg: 95034835            |
| Appellant/Licensee,     | ) |                          |
|                         | ) | Administrative Law Judge |
| v.                      | ) | at the Dept. Hearing:    |
|                         | ) | Rodolfo Echeverria       |
| DEPARTMENT OF ALCOHOLIC | ) |                          |
| BEVERAGE CONTROL,       | ) | Date and Place of the    |
| Respondent.             | ) | Appeals Board Hearing:   |
|                         | ) | September 3, 1997        |
|                         | ) | Sacramento, CA           |
|                         | ) |                          |

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Guadalupe Moreno, doing business as El Tauro Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which ordered her on-sale beer and wine public premises license revoked for her employees, on three occasions over a three-month period, having served alcoholic beverages to 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 violations of Business and Professions Code §25602.

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<sup>1</sup> The decision of the Department under Government Code §11517, subdivision (c), dated December 17, 1996, and the proposed decision of the Administrative Law Judge, dated June 18, 1996, are set forth in the appendix.

Appearances on appeal include appellant Guadalupe Moreno, representing herself, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

#### FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on January 24, 1983. Thereafter, the Department instituted an accusation alleging that appellant's employees on three occasions sold and/or furnished alcoholic beverages (beer) to persons obviously intoxicated: on May 7, 1995, to Tony Manteco; on June 25, 1995, to Josie Chavez; and on July 14, 1995, to Gregorio Quinones.

An administrative hearing was held on June 11, 1996, at which time oral and documentary evidence was received regarding the incidents giving rise to the accusations. At that hearing, testimony was presented by three officers from the Fresno Police Department who testified they observed appellant's bartenders furnishing beer to patrons displaying sufficient symptoms of intoxication as to indicate their obvious state of intoxication. Appellant presented the testimony of two of the bartenders and that of her son to the general effect that the conduct of the patrons was not such as to put them on notice the patrons were intoxicated, that any alcoholic beverage the patron consumed was furnished by other patrons without their knowledge, or that the intoxicated patron simply grabbed another patron's bottle of beer.

Subsequent to the hearing, the Administrative Law Judge (ALJ) issued a proposed decision in which he found the allegations of the accusation to have been established, questioned the credibility of appellant's witnesses who testified in a manner inconsistent with the testimony of the police officers, ordered appellant's license revoked, and stayed revocation for a probationary period of two years, subject to an actual 30-day suspension. Thereafter, the Department, pursuant to Government Code §11517, subdivision (c), elected not to adopt the proposed decision. Instead, it rendered its own decision, adopting the findings and determinations of the ALJ, and ordered outright revocation. In so doing, the Department cited appellant's three prior violations within a twelve-month period,<sup>2</sup> the pattern of three incidents in three months reflected in the current accusation, and the lack of credibility of appellant's witnesses in the administrative hearing.

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<sup>2</sup> These consisted of the following:

(1) March 7, 1994 - sale to minor and minor in premises - 25-day suspension with 10 days stayed;

(2) July 27, 1994 - sale to obviously intoxicated person - 20-day suspension, \$750.00 paid in compromise;

(3) February 27, 1995 - sale to minor decoy - 15-day suspension, plus reimposition of 10 days stayed under prior violation on March 7, 1994.

Curiously, the first count of the current accusation involves an incident on May 7, 1995, only 22 days after the posting of the order of suspension stemming from the February 27, 1995 incident (see Exhibit 2, certificate of investigator Blake Graham). There is no reference in the Department's order to the possibility the sale in count 1 was made while the license was suspended.

Appellant thereafter filed a timely notice of appeal. In her appeal, appellant contends the penalty is excessive and will work an undue hardship on her, her family, and her employees. Appellant seeks a reinstatement of the probation order contained in the proposed decision of the ALJ.

#### DISCUSSION

Appellant has not filed a brief. However, in her notice of appeal, submitted in letter form, and in arguments presented to this Board on her behalf by her representative, she contends that revocation is unjust, will work hardships on her, her family and her employees, and seeks instead to have reinstated the two-year probationary period proposed by the ALJ.

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 took into consideration the fact that appellant had been found to have committed a total of six violations in less than 18 months,<sup>3</sup> a pattern of conduct contrary to the public welfare and morals. The Department was also influenced by the

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<sup>3</sup> See note 2, supra, and accompanying text.

ALJ's determination that appellant had in her defense of the most recent charges presented witnesses whose testimony was less than credible. Those witnesses were the two bartenders who served the intoxicated patrons, and appellant's son, Jesus Moreno. Indeed, as her representative conceded before this Board, "she brought the wrong witnesses to court."

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.<sup>4</sup>

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals.

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<sup>4</sup>The 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].

The Board is sympathetic to appellant's plight. The loss of her son at the hands of an angry patron, as unfortunate as it is, dramatizes the Department's concern that the bar is a problem location and that drastic measures must be taken to address the problem.

Given appellant's history of violations, it is difficult to find fault with the Department's determination that four instances of furnishing alcoholic beverages to obviously intoxicated patrons and two sales to minors in less than eighteen months warrant revocation. Although the penalty is harsh, there is no basis for finding it an abuse of discretion.

#### CONCLUSION

The decision of the Department is affirmed.<sup>5</sup>

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

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<sup>5</sup> 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.