

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

SALMA AKHTER CHOWDHURY	)	AB-6925
dba 82 Market)	
5204 Melrose Ave.	)	File: 20-311386
Los Angeles, CA 90038,	)	Reg: 97038824
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Sonny Lo
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	April 1, 1998
	)	Los Angeles, CA
)	

Salma Akhter Chowdhury, doing business as 82 Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which conditionally revoked her off-sale beer and wine license, with revocation stayed for a probationary period of two years and a 60-day suspension, for appellant's clerk purchasing federal food stamps issued by the United States Department of Agriculture, in a manner not authorized by law, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article

¹The decision of the Department, dated July 1, 1997, is set forth in the appendix.

XX, §22, arising from a violation of Business and Professions Code §24200, subdivision (a), and Welfare and Institutions Code §10980, subdivision (g).

Appearances on appeal include appellant Salma Akhter Chowdhury, appearing through her counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on September 25, 1995. Thereafter, the Department instituted an accusation against appellant charging the illegal purchase of the federal food stamps.

An administrative hearing was held on May 15, 1997, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the two purchases. Subsequent to the hearing, the Department issued its decision which conditionally revoked the license. Appellant thereafter filed a timely notice of appeal.

In her appeal, appellant raises the issue that the 60-day suspension is an abuse of the Department's discretion. Appellant does not contest the conditional revocation of the license.

DISCUSSION

Appellant contends that the 60-day suspension is an abuse of the Department's discretion.

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 record shows that a government operative entered the premises while appellant and her husband were out of the country attending to the funeral of appellant's father [RT 47]. Appellant placed her husband's cousin in charge of the premises during her absence. The record does not show the extent of the "cousin's" on-going involvement in the premises' operation, other than he worked there occasionally [RT 37-38].

On February 29, 1996, the government operative offered to sell food stamps to the cousin. On May 1, 1996, the cousin purchased \$450 worth of stamps for \$200. The cousin used his own money on the first purchase [Finding III-A]. On May 7, 1996, the cousin purchased \$525 worth of food stamps paying \$100 with a remainder to be paid later, but the cousin was arrested before the final payment could be made [RT 13-16, 18-20].

Appellant cites two Appeals Board cases which show, according to appellant, that the 60-day penalty is excessive.

A case entitled The Southland Corporation & Reddy (1994) AB-6405, concerned the sale of alcoholic beverages on three different dates, using federal food stamps as payment which is prohibited by law. The Department ordered a 10-day suspension.

A case entitled San Joaquin Display, Inc. (1996) AB-6515, concerned the giving of excessive change in a federal food stamp transaction, on four different dates by the same clerk, which transaction is a violation of law. The Department

ordered a 10-day suspension stating that appellant had taken a number of steps to prevent a recurrence, and citing appellant's long history of lack of discipline.

Another more recent case, Ayesh (1998) AB-6903, concerned a co-licensee who purchased federal food stamps which he believed to be stolen. The penalty was unconditional revocation. This case is not applicable as the issue was one of intent to purchase stolen property.

The Department at the administrative hearing in the present matter recommended the license be unconditionally revoked. The Department in its brief states that it recommended unconditional revocation because (1) a member of appellant's family committed the violation,² and (2) the violation took place on the premises -- a highly dubious factor in aggravating the penalty, since most all such federal food stamp violations occur on the premises, as was the case in Southland, San Joaquin, and Ayesh, supra.

The Administrative Law Judge ordered in his proposed decision which the Department adopted, the license be conditionally revoked with a 60-day suspension. The Administrative Law Judge stated in Determination of Issues IV:

"Because of the seriousness of the violations in this case, a severe penalty is warranted. However, because 1) the violations were committed by someone who was temporarily running the store, rather than a regular employee, 2) Respondent [sic] had no involvement with the violations, and 3) Respondent [sic] had no knowledge about the violations, mitigation of the penalty is also warranted."

²The Department uses the term "family," but does not explain to what level or degree the nomenclature "family" would determine penalty. Without such explanation in the record as to what level in the "family" would merit a penalty, the apparent private and subjective interpretation of what constitutes a "family member" renders the use of such term, meaningless, therefore, arbitrary.

The words of Cornell v. Reilly (1954) 127 Cal.App.2d 178, 187 [273 P.2d 572] have meaning in the present appeal:

“The object of an administrative proceeding aimed at revoking a license is to protect the public, that is, to determine whether a licensee has exercised his privilege in derogation of the public interest, and to keep the regulated business clean and wholesome. Such proceedings are not conducted for the primary purpose of punishing an individual.”

Food stamps were illegally purchased by the cousin “in-law” of appellant, who was placed in charge while appellant and her husband went to Bangladesh for the funeral of appellant’s father.

The food stamps sold were of a relatively high denomination - \$450 on the first sale, and \$525 on the second. This case is different in magnitude than the Southland and San Joaquin cases, with their 10-day suspensions.

The Department’s brief speaks to a “standard” penalty used by the Department in evaluation of the Southland and San Joaquin cases, supra. The Department lists as a “standard” penalty in its Instructions, Interpretations and Procedures manual at L229, the following: “... Food stamp trafficking (i.e. purchasing stamps at discount) ... By employee - Revocation/stayed with 20 day suspension.” The Department’s recommended unconditional revocation of the license penalty is excessive, when judged by its own standards.

The ALJ’s “mitigation,” of stayed revocation with a 60-day suspension, is also extreme, considering the “standard.” The record is silent as to whether the ALJ was privy to the “standard” of the Department.

CONCLUSION

Each sale of the food stamps was of a relatively high denomination. There was a family relationship of some degree between appellant and her husband's cousin. The crime committed is imputed to appellant.

Contrary to the above factors which would demand some imposition of a penalty, appellant was at a funeral in another nation, a half-a-world away. There is no inference in the record that appellant, while vicariously responsible for the crime, condoned or in any way abetted or aided in the commission of the crime.

We conclude that the penalty ordered comes within the censured "punishment intent" as found in the reasoning of the Cornell case, supra. A realistic penalty appears more to be in the area of the Department's standard penalty as referenced in its manual,³ if even that, than the present abusive penalty, without valid reasons for deviation from the "standard" norm.

The decision of the Department of Alcoholic Beverage Control is affirmed, except that the order is reversed and remanded to the Department to reconsider the penalty in accordance with the views expressed in this decision.⁴

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

³See page 5 of this decision.

⁴This 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 final 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.