

ISSUED AUGUST 27, 1998

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

RJW CORPORATION	)	AB-7004
dba Stingers)	
1038 Garnet Avenue	)	File: 48-225983
San Diego, California 92109,	)	Reg: 96035893
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	None
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	May 6, 1998
	)	Los Angeles, CA

RJW Corporation, doing business as Stingers (appellant), appeals from an order of the Department of Alcoholic Beverage Control¹ which reimposed the 25-day stayed period of a penalty which had originally been imposed in April 1996, pursuant to a stipulation and waiver of appeal, based upon a violation of Business and Professions Code §25658, subdivision (a). The reimposition of penalty was ordered on January 9, 1998, following the withdrawal of an appeal (AB-6974) of an October 30, 1997, decision suspending appellant's license for 50 days, 20 of

¹The decision of the Department, dated January 9, 1998, is set forth in the appendix.

which were stayed, for violations of Business and Professions Code §§25667 (permitting a minor to remain in premises) and 25658, subdivision (b) (permitting consumption by minor), contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivision (a).

Appearances on appeal include appellant RJW Corporation, appearing through its counsel, John B. Barriage, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant has been the subject of a total of four disciplinary actions for violations of the Alcoholic Beverage Control Act and Department Rules since the issuance of its license on December 12, 1988.

The first disciplinary proceeding was in 1993, and involved the presence of a minor on the premises. The second matter, involving violations of Business and Professions Code §25658, subdivision (b) (consumption by minor) and §25665 (minor in premises), resulted in an order suspending appellant's license for 20 days, with 10 of those days stayed. This suspension was also resolved by payment of a fine. These two matters have no direct relevance on this appeal, except to the extent they may have influenced the Department's thinking as to its ultimate choice of discipline.

The Department proceedings which resulted in the third and fourth violations

are the matters directly involved in this appeal.

On April 19, 1996, appellant's license was suspended for 35 days, with 25 of those days stayed for a probationary period of one year (the "1996 decision and order"), for a violation of Business and Professions Code §25658, subdivision (a) (sale to minor).² It is this stayed period of suspension which is the focus of the present appeal. This was the third proceeding against the license.

On October 30, 1997, an order was entered in the fourth proceeding suspending appellant's license for 50 days, with 20 days stayed for a probationary period of one year. This penalty was imposed pursuant to a stipulation and waiver of appeal, but only after an administrative hearing had taken place, a proposed decision had been submitted to the Department by an administrative law judge, and a notice of appeal had been filed and then withdrawn (in AB-6974). The conduct underlying this latest proceeding appears to have taken place on October 24, 1996, within the period of probation under the 1996 decision and order. The latest action triggered the reimposition of the stayed portion of the penalty from the 1996 violation.

Appellant has not alleged any procedural irregularity with respect to the imposition of the stayed portion of the penalty. Instead, appellant's appeal to the Board is that the reimposition of a stayed period of suspension, in the circumstances of this case, does nothing to protect the public, imposes a hardship

² According to the Department's brief (Dept. Br., p.3), this penalty was entered pursuant to stipulation.

on appellant, and, therefore, is punitive.

The issue presented in this appeal, then, is whether the Department acted within its powers when it imposed the suspended portion of a penalty entered pursuant to a decision which had become final and not subject to appeal. We believe that it has such jurisdiction and that it has properly exercised that jurisdiction in this case. The possibility that a hardship may result is no bar to its power to reimpose the stayed penalty.

Appellant argued in its brief that it was on the verge of transferring the license, and would be able to do so if all disciplinary proceedings pending and threatened against it could be resolved. Appellant had suggested that, since additional disciplinary proceedings involving sale-to-minor violations have been threatened,³ for which license revocation will be sought, it would be better simply to revoke the license now and permit its transfer to appellant's prospective buyer. However, appellant's counsel advised the Board orally that the prospective buyer has since withdrawn, rendering the suggestion moot.

Appellant contends that the additional suspension will work a severe hardship upon its owners, who are in ill health. Appellant argues that a suspension for the combined period covered by the reimposition of the stayed penalty and the suspension for the 1997 violation results in a disproportionate penalty of 55 days of suspension in a single calendar year.

³ According to the Department's brief, one of these threatened proceedings has now been instituted, and assigned Registration No. 98-042737.

Stripped of emotional content, appellant's argument reduces to one that, even with its existing track record, and future violations potentially on the horizon, it should be permitted to transfer (meaning sell) its license rather than suffer a lengthy suspension and/or potential third-strike consequences.

Appellant has requested the Board to take official notice of a series of documents which it contends are records of the Department, and a declaration of one of appellant's owners in which he describes his efforts to sell the license and in which he asserts that the additional suspension will work a hardship on him and his wife.⁴ The Department has objected to the Board's consideration of these documents and the declaration on the ground they are neither records of the Department nor do they qualify as evidence which could not reasonably have been offered at the administrative hearing.

We have examined these documents, and, while we find them informative, do not believe they are the sort of documents of which the Board should take official notice. There is nothing in any of them that is relevant on the narrow question presented by appellant's appeal, especially in light of the apparent abandonment of interest by the prospective buyer.

Since 1993, appellant has incurred four violations of the Business and Professions Code involving minors, either a sale to a minor, consumption by a

⁴ The documents include the following: a copy of the Certificate of Decision and Proposed Decision in Registration No. 97039511; a copy of Department Form 226; copies of correspondence between appellant's counsel and Department Administrator Barnes; and a declaration of the president of appellant.

minor, or permitting minors on the premises. The Department's apparent decision to pursue the normal disciplinary flow, rather than accede to appellant's plea to follow a course of action more beneficial to appellant, cannot, under the circumstances, be said to be an abuse of discretion. The contentions regarding the health of appellant's owners and the existence of a potential buyer were known to, and presumably considered by, the Department.

The Department may also be presumed to have considered the impact on its disciplinary program of permitting a licensee with a track record of violations involving minors to escape from the consequences of those violations by transferring the license, possibly at a profit, once it is apparent its future as a licensee is in serious jeopardy.

We see no basis to set aside the Department's decision.

CONCLUSION

The decision of the Department is affirmed.⁵

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

⁵This final order 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 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.