ISSUED OCTOBER 30, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

JANTILAL N. PATEL dba John's Liquor Mart 3701 Marysville Blvd. Sacramento, CA 95838, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7068 File: 21-296107 Reg: 97039111 Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja Date and Place of the Appeals Board Hearing: September 2, 1998 San Francisco, CA

Jantilal N. Patel, doing business as John's Liquor Mart (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his off-sale general license for negotiating for, and purchasing, property purported to be stolen and a subsequent nolo contendere plea to the charge of attempted receiving stolen property, a crime involving moral turpitude, and for failing to correct objectional conditions after being advised to correct those conditions, such conduct being contrary to the universal and generic public welfare and morals

[1]The decision of the Department filed pursuant to Government Code §11517, subdivision (c), dated February 23, 1998, and the proposed decision dated September 12, 1997, are set forth in the appendix.

provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivisions (a) and (b), arising from violations of Business and Professions Code §24200, subdivisions (d), (e), and (f),[2] and Penal Code §§664/496, subdivision (a).

Appearances on appeal include appellant Jantilal N. Patel, appearing through his counsel, Richard G. Antoine, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Murphy.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on July 5, 1994. Thereafter, the Department instituted an accusation against appellant charging the referenced violations. An administrative hearing was held on May 1 and 2, 1997, and August 11, 12, 13, 14 & 15, 1997, at which time oral and documentary evidence was received. Subsequent to the hearings, the Administrative Law Judge (ALJ) issued his proposed decision which found the allegations were true, and conditionally revoked the license but allowed appellant 180 days to transfer the license to another acceptable to the Department. The Department rejected the proposed decision pursuant to the Government Code section referenced in footnote 1, and ordered the license revoked.

---

[2]Business and Professions Code §23402 (purchase of distilled spirits from other than a lawful wholesaler) was alleged in the accusation, and questionably alluded to in Findings VIII and XII. The Decision's Determination of Issues VII references Finding VII for its support. Finding VII does not support Determination of Issues VII, therefore, the Determination must fail. Count VII of the accusation must be dismissed.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) appellant was entrapped; (2) the allegations of loitering were not sufficiently proven; and (3) the penalty is excessive.

DISCUSSION

I

Appellant contends that he was entrapped, arguing that appellant did not solicit the purported stolen property, that he rebuffed the first attempt to sell the property to appellant, and that he then bought only a small amount (less than $30), on the second attempt by the Department's investigator to sell the property.

The test for entrapment has been stated in the California Supreme Court case of People v. Barraza (1979) 23 Cal.3d 675 [153 Cal.Rptr. 459], as follows:

> "... We hold that the proper test of entrapment in California is the following: was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense? For the purposes of this test, we presume that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect - for example, a decoy program - is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime." (23 Cal.3d at 689-690) (fn. omitted)

Appellant argues that he was "not willing from the beginning" to purchase stolen property, and that he "refused the law enforcement officer's first attempt to sell ... (on October 3, 1996).

The record shows that the investigator, on October 3, 1996, said to appellant and appellant's wife, that the investigator could sell them stolen alcohol

and cigarettes, and that he would be back the next day for that purpose [I RT 25]. The investigator, in his testimony, stated that he did not want to appear "pushy" to appellant, and that is why he did not attempt to sell any goods that first day, even though he had the goods in his car [I RT 84, 87].

On October 4, 1996, appellant purchased three bottles of tequila for $4.50, and four bottles of cognac for $24 from the investigator (on November 6, 1996, the date of the search of the premises by a task force of Department investigators, they found two of the bottles with identifying marks thereon, which are the basis of the code violation alluded to in footnote 2 -- the violation being that appellant did not purchase the spirits from an authorized wholesaler as required by law) [I RT 31-41].

On October 17, appellant purchased 5 cartons of cigarettes for $40 from the investigator [I RT 41-48].

On October 24, 1996, appellant purchased 14 cartons of cigarettes for $112 from the investigator [I RT 49-58].

On November 6, appellant purchased 48 cartons of cigarettes for $384 from the investigator [I RT 61-66].

Appellant testified that his wife purchased the cigarettes on one occasion, and "I told her that she might get caught one day if she keeps doing that ... I just told her not to, but she said, 'don't worry. Nobody will find out'." [VI RT 35]. Appellant admitted he could get caught buying stolen property [VI RT 70], and bought the cigarettes for half-price, giving him a bigger profit than if he bought

them at Price Club [VI RT 71, 74]. Appellant also testified that he thought his actions were wrong because they were dishonest [VI RT 72].

We determine that appellant was not entrapped.

II

Appellant contends that the allegations of loitering by patrons and others outside the premises, were not sufficiently proven, arguing that the investigator for the Department could not determine if the people around the premises might have been waiting for someone who may have been in the premises.

The Department investigator testified to passing by the premises and parking and observing the premises on six occasions. Apparently, on all six of the occasions, the time of observation was short, ranging from passing by, to watching from 10 to 20 minutes, all depending on the conflicting testimony of the investigator and reports placed into evidence (Exhibits A through F).

The record shows that, in accordance with Business and Professions Code §24200, subdivisions (e) and (f), the Department sent a letter, dated August 8, 1995, to appellant advising of a violation of the statute (the letter was dated a little over 11 months before the first alleged violation was observed - Exhibit 6). The letter alleged that "patrons of your premises, as well as members of the public, are loitering, littering, (sic) consuming alcoholic beverages in an area which you have control over (sidewalk on the east side [in front of the premises] and parking area to the southwest [apparently the area where the persons leaned against the premises' wall, and the area of the dumpster])."

Business and Professions Code §24200, subdivisions (e) and (f), state in pertinent part as follows:

> "(e) Failure to take reasonable steps to correct objectionable conditions on the licensed premises, including the immediately adjacent area that is owned, leased, or rented by the licensee ...."
>
> "(f) Failure to take reasonable steps to correct objectionable conditions that occur during business hours on any public sidewalk abutting a licensed premises ...."
>
> "[f](1) 'Any public sidewalk abutting a licensed premises' means the publicly owned, pedestrian-traveled way, not more than 20 feet from the premises ...."
>
> "[f](2)(A) Calling the local law enforcement agency."
>
> "[f](2)(B) Requesting those persons engaging in activities causing objectionable conditions to cease those activities ...."

July 19, 1996, Investigation

The investigators, in their vehicle, passed by the premises at three different times that night: 7:45, 8:10, and 8:35 p.m. Traffic was apparently congested with double parking, so the investigators had only a few moments of time to observe, on each pass [II RT 118-120, and Exhibit A].

Investigator Diana Maria Fouts-Guter testified as to each pass by: (1) about 30 people were in front of the premises and on the side, consuming unknown beverages [II RT 117-118]; (2) 18 to 20 people were leaning against a wall, consuming unknown bagged beverages [II RT 118-119]; and (3) 15 to 20 people on the side of the premises, as previously described (in an extremely general manner), with no one consuming [II RT 120]. (See also Exhibit A). Apparently, the

east side is the front of the premises, and the southwest side is a parking lot next to the premises [Exhibit 6].

We are not able to determine from the record how many people were on the east side or the southwest side of the premises at any given time, or if the people standing on the southwest side of the premises were in such an area as being under the control of appellant. The record is sadly deficient. However, the record, such as it is, does show loitering as defined in the statute, in the first and last pass by. We conclude that Finding X-A is supported by substantial evidence.

September 13, 1996, Investigation

The investigator watched the premises from a parked car, for about 20 minutes [II RT 121-123, and Exhibit B]. Eight people were directly in front of the premises, directly in front of the door, consuming from containers that looked like beer bottles [II RT 123, and Exhibit B]. We conclude that Finding X-B is supported by substantial evidence.

September 18, 1996, Investigation

The investigator observed the premises for 10 minutes, at about 6:15 p.m., while parked. She observed two people standing in front of the premises and four to the side of the premises, with one person consuming a beer [II RT 124-126, and Exhibit C]. We conclude that Finding X-C was not supported by substantial evidence.

October 10, 1996, Investigation

The investigator observed the premises for about 15 minutes, commencing

about 6:40 p.m., while parked. Two people were seen standing in front of the premises and eight people were to the side of the premises [II RT 127-128, and Exhibit D]. We conclude that Finding X-D was not supported by substantial evidence.

November 1, 1996, Investigation

The investigator observed the premises for about 5 minutes, while parked at 7:45 p.m. Two people were sitting beside a dumpster on the side of the premises [II RT 130-131, and Exhibit E]. We conclude that Finding X-E was not supported by substantial evidence.

November 2, 1996, Investigation

The investigator observed the premises for five minutes, at about 5:45 p.m., while parked. She saw three persons in front of the premises, and about five persons near a pay phone, with two of the three people in front of the premises drinking beer [II RT 132-134.]. We conclude that Finding X-F was supported by substantial evidence.

The record is patently deficient considering the testimony of the investigator and, at times, the contradictory reports of the investigator. Additionally, the Department did not prove who owns or controls the property beside the premises. If it is not under appellant's control, he is not responsible, notwithstanding the presence of signs on his building prohibiting loitering (see Exhibits C, D, E, and F).

III

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 at the time of the administrative hearing admitted that he knew it was dishonest to buy stolen property, and did so for personal gain [VI RT 72-73]. The admission of his dishonesty in the purchases, and the plea to the criminal charge [Exhibit 2], along with the full record, causes us to conclude that the decision of the Department must be sustained.

ORDER

The decision of the Department is reversed as to that portion of Determination of Issues VII, which concerns Finding VII, being not supported by that finding; and that portion of Determination of Issues IX, which concerns Findings X-C, X-D, X-E, being not supported by those Findings in the absence of substantial evidence; but in all other particulars, the decision of the Department is affirmed.[3]

---

[3]This 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 order as provided by §23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code §23090 et seq.

The remaining Findings are more than adequate to sustain the order of revocation.

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