

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

ALBERTO LEON QUINTERO and	)	AB-7119
LOURDES QUINTERO)	
dba La Boom	)	File: 40-301252
37 North Catalina Avenue	)	Reg: 97041272
Pasadena, CA 91106,)	
Appellants/Licensees,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	Sonny Lo
)	
	)	Date and Place of the
DEPARTMENT OF ALCOHOLIC	)	Appeals Board Hearing:
BEVERAGE CONTROL,	)	April 1, 1999
Respondent.	)	Los Angeles, CA
)	

Alberto Leon Quintero and Lourdes Quintero, doing business as La Boom (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 45 days, with 15 days of the suspension stayed for a two-year probationary period, for violations of a condition on their license and for appellants' bartender furnishing an alcoholic beverage, beer, to a person under the age of 21, such action being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22,

¹The decision of the Department, dated April 30, 1998, is set forth in the appendix.

arising from violations of Business and Professions Code §§23804 and 25658, subdivision (a).

Appearances on appeal include appellants Alberto Leon Quintero and Lourdes Quintero, appearing through their counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, David Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer license was issued on December 5, 1994. Thereafter, the Department instituted an accusation against appellants charging that, on July 26, 1997, appellants' bartender furnished a beer to a 16-year-old (Count 1), on various dates appellants violated a condition on their license (Counts 2, 3, 4, 5, and 7), and appellants' bartender sold an alcoholic beverage during hours when it was unlawful to do so (Count 6).

An administrative hearing was held on March 23, 1998, at which time oral and documentary evidence was received. Appellants admitted as true the allegations in Counts 2, 3, 4, 5, and 7, and Count 6 was dismissed pursuant to the Department's request, leaving only Count 1, the furnishing-to-a-minor allegation, to be heard. At the hearing, testimony was presented by Patrick Polimeni, a Pasadena police officer; Domino Scott, the 16-year-old decoy working with the Pasadena Police Department; Evangelina Castro, appellants' bartender; and Norman Lugo, Ms. Castro's husband.

Subsequent to the hearing, the Department issued its decision which determined that the appellants' bartender furnished an alcoholic beverage to a person under the age of 21 as alleged in Count 1, and that this, along with the admitted violations as alleged in Counts 2 - 5 and Count 7 of the accusation constituted cause for suspension of appellants' license.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) The minor was not served an alcoholic beverage within the meaning of Business and Professions Code §25658, subdivision (a); and (2) the penalty is excessive.

DISCUSSION

I

Appellants contend that the beer was not furnished to the decoy² because the bartender placed the beer bottle and glass in the narrow "channel" on the bartender's side of the bar, rather than on the counter top in front of the decoy, while she checked the decoy's I.D.

Appellants refer only to the testimony of the bartender, who said she placed the beer in the channel while she checked the decoy's I.D. and, therefore, had not yet served the beer to the decoy [RT 76-78, 88]. Both the officer and the decoy testified that the beer was placed on the counter in front of the minor, rather than in the channel on the bartender's side of the bar [RT 13, 35, 90, 99, 100]. The

² There is no question in this case of whether there was a sale. Both parties agree that the decoy did not pay for the beer.

ALJ found that the bartender placed the beer on the bar counter in front of the decoy (Findings III.B. and III.D.), and specifically rejected the bartender's testimony about where she placed the beer as not credible (Finding III.E.).

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's 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.³

The testimony was somewhat confusing, but it cannot be said that there is not substantial evidence to support the findings of the ALJ.

II

Appellants contend that the penalty is excessive because there was no furnishing-to-a-minor violation, and a penalty for the condition violations would be 15 days' suspension or less.

³The 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 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].)

Appellants' first contention, that there was no furnishing-to-a-minor violation, is in error. That violation was found to have occurred and was properly taken into account in imposing a penalty. Appellants' second contention, regarding an appropriate penalty for condition violations, is unsupported.

The "standard" penalty for a first sale-to-minor violation is 15 days, and the Department has said that the standard penalty for a condition violation is 20 days, so a "standard" penalty for these violations would be 35 days instead of the 45 days imposed. The Department has stayed 15 days for a two-year probationary period, so the actual suspension time is 30 days.

Although we reject the specific arguments made by appellants regarding the penalty, we do have some concerns about this penalty. Neither the Department nor the ALJ delineated how much of the penalty was attributable to each of the violations or to each of the types of violations. Although penalties will vary based on the facts of the particular case, the penalties should be imposed by the

Department in a consistent and even-handed manner.⁴ When separate penalties are not specified for separate violations, we cannot provide effective review to determine if a penalty might be excessive for one or more of the violations. Therefore, we feel it necessary to remand this matter to the Department so that it may reconsider this penalty in light of our comments and concerns.

ORDER

The decision of the Department is affirmed, but the matter is remanded to the Department for reconsideration of the penalty.⁵

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

⁴Business and Professions Code §23049 states: "It is the intention of the Legislature in enacting [the ABC Act] to provide a governmental organization which will ensure a strict, honest, impartial, and uniform administration and enforcement of the liquor laws throughout the State."

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 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.