

ISSUED MAY 4, 2000

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

RJW CORPORATION	)	AB-7370
dba Stingers)	
1038 Garnet Avenue	)	File: 48-225983
San Diego, CA 92109,	)	Reg: 98042737
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Rodolfo Echeverria
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	March 2, 2000
	)	Los Angeles, CA

RJW Corporation, doing business as Stingers (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked its license for appellant's employees selling and permitting the consumption of an alcoholic beverage, by a person under the age of 21, and allowing a person under the age of 21 to enter and remain in the licensed premises, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article

¹The decision of the Department, issued pursuant to Government Code §11517, subdivision (c), dated February 18, 1999, and the Proposed Decision of the Administrative Law Judge, dated July 29, 1998, are set forth in the appendix.

XX, §22, arising from violations of Business and Professions Code §25665 and 25658, subdivisions (a) and (b).

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's on-sale general public premises license was issued on December 12, 1988. Thereafter, the Department instituted a four-count accusation against appellant charging that on November 21, 1997, appellant's bartender, Kathleen Hall, sold a beer to 19-year-old Amber Torbett, a minor decoy for the San Diego Police Department (Count 1), and appellant's doorman, Eric Felders, permitted Amber Torbett to enter and remain on the premises (Count 2), and on December 6, 1997, other employees allowed another minor to consume a beer and to enter and remain in the premises (Counts 3 and 4).

An administrative hearing was held on July 9, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by San Diego police officer Mark A. Carlson and Amber Torbett ("the decoy") for the Department. Witnesses on behalf of appellant were William G. McGee, a Certified Public Accountant; Kathleen J. Hall, appellant's bartender; and Judy Willgoss, an officer and shareholder in appellant corporation. The Department presented rebuttal testimony of John Willgoss, officer and shareholder of appellant corporation; and Martin Hibsich, enforcement supervisor for the Department's San Diego district

office. No evidence was presented with regard to Counts 3 and 4 of the accusation.

Subsequent to the hearing, the ALJ issued his Proposed Decision which determined that the violations charged in Counts 1 and 2 had occurred as charged and no defenses had been established. The ALJ's order revoked the license, but stayed the revocation for 180 days to permit the transfer of the license to a party acceptable to the Department and suspended the license until a transfer occurred.

Subsequently, the Department sent appellant a copy of the ALJ's Proposed Decision, accompanied by a notice that the Department had not adopted the Proposed Decision, but would decide the matter itself as provided in Government Code §11517, subdivision (c). On February 18, 1999, the Department issued its "Decision Under Government Code Section 11517(c)," which adopted all of the ALJ's Findings of Fact except VII and all his Determinations of Issues. It substituted a new Finding VII, added new Determinations V and VI, and ordered the license revoked.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends that the Department abused its discretion in ordering outright revocation of this license.

DISCUSSION

Appellant contends that the Department's order of revocation is too severe in this instance and amounts to an abuse of discretion. It argues that the Department did not have "good cause" for outright revocation, basing this argument on its review of previous Board decisions; evidence of the preventive policies and

procedures that appellant had instituted; the lack of personal culpability of the Willgosses, sole shareholders and officers of appellant; the hardship imposed on the Willgosses by outright revocation; the circumstances of appellant's previous violations involving minors; and the failure of this penalty to serve the public interest and substantial justice.

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 Willgosses, the sole shareholders of appellant, are arguing that the penalty should be revocation, but the revocation should be stayed, as the ALJ ordered, to allow them to sell the license. They listed the property for sale in 1995 and have had a ready buyer, with money in escrow, since late 1997. The sale, however, has not been completed because the Department's policy was (and is) not to allow the transfer of licenses while disciplinary action is pending. An accusation was issued against appellant in April 1997, and six days after that matter was resolved and a suspension was served, the accusation in the present matter was issued. Therefore, even if the Department would agree to the transfer, the timing of events has made it virtually impossible for appellants to consummate the sale of this license.

The Willgosses' argue that their circumstances make revocation particularly harsh: Mr. Willgoss is 71 years old; Mrs. Willgoss is 58 years old and in poor health; their daughter is schizophrenic; the daughter's diagnosis in 1994 forced Mrs. Willgoss to cease managing the premises herself; and loss of the ability to sell the license would work a severe economic hardship on them.

The Department contends that the number of prior violations involving minors warrants a severe penalty and outweighs any mitigating circumstances. Appellant had four prior sale-to-minor violations, occurring on 10/8/93; 12/20/93; 4/19/96; and 10/24/96. The present violation, on 11/21/97, was the third sale-to-minor violation within 19 months.

This case clearly falls within the provisions of §25658.1, whereby the Department is allowed to revoke a license when three sale-to-minor violations occur within a 36-month period. We cannot say that the order of revocation was an abuse of the Department's discretion in this instance.

ORDER

The decision of the Department is affirmed.²

TED HUNT, CHAIRMAN
 RAY T. BLAIR, JR., MEMBER
 E. LYNN BROWN, MEMBER
 ALCOHOLIC BEVERAGE CONTROL
 APPEALS BOARD

²This 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.