ISSUED JULY 11, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

FLORA C. BRAVO dba El Paseo Night Club 13293 Van Nuys Blvd. Pacoima, CA 91331, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7441 File: 48-183380 Reg: 99045880 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: May 4, 2000 Los Angeles, CA

Flora C. Bravo, doing business as El Paseo Night Club (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended her on-sale general public premises license for 40 days with 10 days stayed, for permitting two conditions on her license to be violated, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200,

[1]The decision of the Department, dated July 15, 1999, is set forth in the appendix.

subdivisions (a) and (b), arising from a violation of Business and Professions Code §23804.

Appearances on appeal include appellant Flora C. Bravo, appearing through her counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on March 31, 1986. Thereafter, the Department instituted an accusation against appellant charging the condition violations. The accusation alleges that in violation of conditions on her license, appellant allowed live entertainment to be heard beyond the area under her control, and second, that a door was left open contrary to a condition on the license. Appellant concedes that the violation of music being heard was a violation of the condition.

An administrative hearing was held on May 18, 1999, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the alleged violations were proven to be true. Appellant thereafter filed a timely notice of appeal.

In her appeal, appellant raises the issues that (1) the door was broken, creating an emergency, so appellant was excused from having the door closed, and (2) the penalty is excessive.

DISCUSSION

I

Appellant contends that the door was broken to the extent that it became a danger to ingress and egress, thereby coming within the clause of the condition concerning an emergency.

A Department investigator saw a rear door at the premises partly open, about 30 degrees, with people standing around that partially opened door. The investigator was told the door was broken, did not inspect the door, but opened the door to enter the premises and heard it creak. He saw no apparent damage [RT 12-13, 23, 25-26, 28, 30].

Appellant testified that the door was broken at the top hinge, had been broken on that day, and feared it would fall on patrons if opened for ingress and egress [RT 33-34, 37].

There is confusion in the record whether there were two doors available for ingress and egress [RT 35-36, 45]. However, the matter was resolved when appellant was recalled at the end of the Department's hearing and stated that there was a second door at the time of the investigation [RT 46].

The broken door should have been closed until repaired and the ingress and egress should have been through the other door.

II

Appellant contends 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].)

The record shows that appellant was informed by a letter from the Department dated February 9, 1998, to correct objectionable conditions at the premises, such as loud music emanating from the premises and other complaints.

Subsequently, an accusation was filed against appellant which led to the issuance of a decision dated November 4, 1998, concerning noise emanating from the premises, the same activity as the present appealed matter. As appellant concedes the noise violation in the present appeal, the ALJ could properly aggravate the present noise violation (normally 20 days for the present violation).

The question, therefore, is whether the present penalty (40 days with 10 days stayed or a net suspension of 30 days) is excessive. If it is considered that part of the net 30 days constitutes 20 days for the noise violation, with the remaining 10 days for the violation of having the door improperly open and the aggravation of the prior noise decision, the penalty does not appear to be an

excessive act of discretion on the part of the Department. We also conclude that the stayed suspension of 10 days is to obtain future conformity to the conditions on the license.

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

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[2]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.