

AB-7595
BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA

STEFANOS PAPAGIANNIS dba The Greek's Pizza
1431 Polk Street, San Francisco, CA 94109 ,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 41-145045 Reg: 99047042

Administrative Law Judge at the Dept. Hearing: Robert R. Coffman

Appeals Board Hearing: February 15, 2001
San Francisco, CA

ISSUED: MARCH 7, 2001

Stefanos Papagiannis, doing business as The Greek's Pizza (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his license for 40 days for appellant's obstruction of a suspension notification sign and the serving and allowing consumption of alcoholic beverages while the license was under suspension, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Penal Code §616 and Business and Professions Code §23300.

Appearances on appeal include appellant Stefanos Papagiannis, representing himself, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas Allen.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public eating place license was issued on

¹The decision of the Department, dated February 17, 2000 , is set forth in the appendix.

November 17, 1983. Thereafter, the Department instituted an accusation charging appellant with intentionally defacing, obliterating, tearing down, obstructing, or destroying a notification set up at the licensed premises by order of the Department before the time for which the same was to remain set up, in violation of Penal Code §616 and §108 of Title 4 of the California Code of Regulations² (Rule 108), and with selling, serving, and/or allowing consumption of alcoholic beverages while the license was under suspension, in violation of Business and Professions Code §23300.

An administrative hearing was held on January 11, 2000, at which time documentary evidence was received and testimony was presented concerning the violations by Department investigators Justin Webb and Gary Beard, San Francisco police officer David Pollitt, and by appellant. Count three was dismissed at the request of the Department because it had no one to testify regarding that count. Subsequent to the hearing, the Department issued its decision which determined that the charges of the accusation had been proven.

Appellant thereafter filed a timely notice of appeal. Written notice of the opportunity to file briefs in support of the appellant's position was given on July 18, 2000. No brief has been filed by appellant and the notice of appeal provides no information to aid the Appeals Board's review.

The Appeals Board is not required to make an independent search of the record for error not pointed out by appellant. It was the appellant's duty to show us that the claimed error existed. Without such assistance by appellant, we may deem the general

² The Accusation erroneously refers to "Rule 108 of the Business Regulations, Chapter 4, Title 1, of the California Code of Regulations."

contentions waived or abandoned. (Horowitz v. Noble (1978) 79 Cal.App.3d 120, 139 [144 Cal.Rptr. 710] and Sutter v. Gamel (1962) 210 Cal.App.2d 529, 531 [26 Cal.Rptr. 880, 881].)

However, we have reviewed the record and find that the decision must be reversed with respect to all the counts involving the notification sign (1, 2, 4, and 5), because, but, as a matter of law, there could be no violation of Penal Code §616 or Rule 108 (4 Cal. Code Regs. §108) as charged, because the actions of the licensee do not fall within the prohibitions of those provisions.

Penal Code §616 provides:

"Every person who intentionally defaces, obliterates, tears down, or destroys any copy or transcript, or extract from or of any law of the United States or of this State, or any proclamation, advertisement, or notification set up at any place in this State, by authority of any law of the United States or of this State, or by order of any Court, before the expiration of the time for which the same was to remain set up, is punishable by fine not less than twenty nor more than one hundred dollars, or by imprisonment in the County Jail not more than one month."

Clearly, the licensee did not violate this statute because he did not deface, obliterate, tear down, or destroy the sign posted in his window by the Department. He simply moved it to the other side of the window and put a small signboard in front of, but perpendicular to, the Department notice, leaving the words "Notice of Suspension" clearly visible.

The same counts also charged violation of Department Rule 108, which provides, in pertinent part, that "Every licensee whose licenses have been suspended by order of the department shall post two notices in conspicuous places, one on the exterior and one on the interior of his premises, for the duration of the suspension."

The ALJ found that appellant "obstructed" or "obscured" the notification on various dates, but he made no finding that the notice had been moved to a place that was not "conspicuous." The findings, especially in using the term "obscured" make it sound as if the notice was completely covered up or hidden from view, which was not the case. While the licensee clearly was trying to minimize exposure of his suspension notice, in no case was the sign removed from the front window or covered to such an extent that it could not be read. In fact, the photographic evidence (six photos in Exhibit 3) appears to contradict, in large part, the ALJ's Finding 6, regarding the "circumstances of the . . . violation" as described by the ALJ. The findings in the Department's decision simply do not support determinations of violations of the rule or the statute as charged.

The determination of a violation for serving alcohol while under suspension is affirmed.

ORDER

The decision of the Department is affirmed, except for the determinations with regard to Counts 1, 2, 4, and 5, which are reversed, and the penalty is affirmed.³

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This 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.