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

AB-7963
File: 48-354479 Reg: 01052137

MARTIN RAYMOND HALL and SUSAN JANE HALL dba M & H Tavern
17365 Monterey Street, Morgan Hill, CA 95037,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart Judson

Appeals Board Hearing: March 13, 2003
San Francisco, CA

ISSUED MAY 1, 2003

Martin Raymond Hall and Susan Jane Hall, doing business as M & H Tavern (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 20 days for their bartender having served an alcoholic beverage to an obviously intoxicated patron, in violation of Business and Professions Code section 25602, subdivision (a).

Appearances on appeal include appellants Martin Raymond Hall and Susan Jane Hall, representing themselves, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises license was issued on July 7, 1999. On December 28, 2001, the Department instituted an accusation against appellants charging that, on October 5, 2001, appellants’ bartender, Shauna St. Cloud, served an

---

[1]The decision of the Department, dated April 4, 2002, is set forth in the appendix.

alcoholic beverage (a distilled spirit) to Lauri Aldrighette, a person who was obviously intoxicated.

An administrative hearing was held on February 20, 2002. Anthony Barabas, a Department investigator testified that he entered appellant's premises "looking for possible violations." When he sat down, he observed Aldrighette, who appeared to him to be obviously intoxicated. Her clothing was disheveled, she smelled of an alcoholic beverage, and was talking to the bartender in a loud "demonstrative" voice. When Aldrighette asked the bartender for a rum and coke, the bartender responded "you've had enough, drunk, you drunk bitch." Despite her comment, the bartender returned from the end of the bar with a rum and coke. When the bartender asked to be paid, Aldrighette said she would pay later, but the bartender insisted upon immediate payment. Aldrighette removed some money from her pocket, placed it on the table, and told the bartender she could keep the change. While the bartender was serving the patron sitting next to Aldrighette, Aldrighette said to Barabas "Haven't you ever seen a drunk person before?" Aldrighette sipped from the drink, then went outside to smoke a cigarette. When Barabas and Department investigator Chapman confronted her, she had difficulty understanding they were police officers. Barabas said she was staggering, barely able to stand, incoherent and unintelligible. Aldrighette was turned over to the police. Barabas did not know whether Aldrighette was given a blood alcohol test.

Martin Hall testified that, although he was not present that night, he knew Aldrighette, that she was normally loud and boisterous, and wore disheveled clothing.

Following the conclusion of the hearing, the Administrative Law Judge issued his proposed decision, finding the charge of the accusation having been established, and

ordered appellants' license suspended for 20 days.

Appellants have filed a timely appeal, and now contend that the penalty is excessive. They argue that Department counsel should have informed the ALJ they had been offered the opportunity to pay a fine, which they are unable to do in light of the length of the suspension.

DISCUSSION

It is not unusual for the Department to order a longer suspension after a hearing than the suspension offered as part of a pre-hearing settlement. Indeed, if appellants had nothing to risk by going to a hearing, where a full exposition of the facts may disclose information previously unknown to the Department, there would be vastly fewer settlements.

The issue of the Department's ability to impose a penalty after a hearing greater than it had offered prior to the hearing was addressed long ago in *Kirby v. Alcoholic Beverage Control Appeals Board* (1971) 17 Cal.App.3d 255 [94 Cal.Rptr. 514]. Viewing the initial proposal as in the nature of a settlement proposal, the court stated (17 Cal.App. 3d at 260-261):

> Even in cases strictly criminal, there is a public policy in favor of negotiations for compromise ...; a fortiori there is an equal policy in cases such as this. The department, acting on the basis of written reports, secures a prompt determination, at little administrative cost; the licensee avoids the risks that testimony at a formal hearing may paint him in a worse light than the reports and, also, avoids the costs and delay of a hearing. The licensee who rejects a proffered settlement hopes that the hearing will clear - or at least partially excuse - him and he hopes that even if he is not found innocent, he will be dealt with less harshly than the department proposes. But if the department can never, no matter what a hearing may develop, assess a penalty greater than that proposed in its offer, a licensee has little to lose by rejection. Only the cost of a hearing is risked; he could not otherwise be harmed. In that situation, licensees would be induced to gamble on the chance of prevailing at the trial, while the department would lose much of its inducement to attempt settlement. The law should not permit that kind of tactic by an accused.

It follows that the mere fact - if it be a fact - that the department had once offered a settlement more favorable than the discipline ultimately imposed is not, in and of itself, a ground for setting aside the penalty ultimately adopted.

In the last analysis, the question is whether there is a rational basis in the record for the ALJ's determination of what he believed was an appropriate level of discipline.

The penalty which the Department customarily imposes in cases involving service of an alcoholic beverage to an obviously intoxicated patron is 20 days. The suspension in this case is 20 days. We cannot say this is an inappropriate level of discipline.

ORDER

The decision of the Department is affirmed.[2]

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

---

[2] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

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