

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

AB-8124

File: 21-360356 Reg: 02053945

RISHI SACHAR dba Adolfo's Liquor
2734 North Bristol Street, Santa Ana, CA 92706,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: February 19, 2004
Los Angeles, CA

ISSUED MAY 17, 2004

Rishi Sachar, doing business as Adolfo's Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which ordered his license suspended for 30 days, 15 of which were conditionally stayed for two years, and, in addition, a second suspension for 15 days, the two suspensions to run concurrently, for having possessed a slot machine on the premises and for having possessed marijuana on the premises, violations of Penal Code sections 330, subdivision (b)(1) and 330.1, and Health and Safety Code section 11357, subdivision (b).

Appearances on appeal include appellant Rishi Sachar, appearing through his counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

¹The decision of the Department, dated March 27, 2003, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on March 9, 2000. Thereafter, the Department instituted an accusation against appellant charging that he possessed and/or maintained on the premises a slot machine as that term is defined in Penal Code section 330b, and that he also possessed marijuana on the premises, a violation of Health and Safety Code section 11357, subdivision (b).

An administrative hearing was held on January 23, 2003, at which time oral and documentary evidence was received. At that hearing, counsel for appellant stipulated to the charges in the accusation regarding the presence of the slot machine and the marijuana, but not that the marijuana was appellant's. Counsel for appellant also stipulated to the admission into evidence of the evidentiary report prepared by Department investigator Robles regarding the discovery of the slot machine and the marijuana. Subsequent to the hearing, the Department issued its decision which determined that the charges of the accusation were true and ordered the suspensions from which this timely appeal has been taken.

Appellant contends that the penalty must be set aside and reconsidered because it was based upon guidelines which were never published in the California Code of Regulations. Additionally, appellant contends that the penalty is excessive, and out of proportion to the offense.

DISCUSSION

I

Appellant contends that the penalty imposed by the Department was the product of an "underground regulation," and, thus, in violation of provisions of the Administrative Procedure Act.

Government Code section 11340.5, subdivision (a) states: “No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.” Section 11342.600 defines regulation as “every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.” Section 11425.50, subdivision (e), provides that “a penalty may not be based upon a guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule subject to Chapter 3.5 (commencing with section 11340) unless it has been adopted as a regulation pursuant to Chapter 3.5 (commencing with section 11340).”

Appellant’s brief requests the Board to take administrative notice of “General Guidelines” from the Department’s Guidebook. Copies of such guidelines did not accompany appellant’s brief, and there are no copies in the record. The Department has objected to appellant’s request on grounds, among others, of authenticity. In addition, the Department argues that its recommended penalties are not regulations as defined in section 11342.600 because they are non-binding recommendations presented to the administrative law judge (ALJ) at the conclusion of the hearing, and the ALJ is free to modify the recommended penalty in any way he deems appropriate.

There is no evidence in the record that would support a determination that the penalty imposed by the ALJ was pursuant to any guidelines.

To the contrary, the suspensions ordered appear to have been carefully tailored to fit the circumstances of the case. The ALJ wrote:

Complainant asked that Respondent's license be suspended for 30 days, with 15 days of the suspension stayed on probationary conditions for two years. Respondent argued that a more appropriate sanction would be an all-stayed 30-day suspension. That recommendation was held more appropriate because (1) Respondent has almost three years of licensure without cause for discipline, (2) the misconduct was not alcohol related and (3) employee Kumar received, *inter alia*, three years probation in criminal court and that should provide sufficient oversight. Two and one-half years of licensure without discipline are not normally enough to warrant penalty mitigation. The objective of a sanction against the license is protection of the public and to impress upon the Respondent/licensee his duty to ensure no future law violations. How probation imposed on his employee will accomplish that objective was not specified. The sanction ordered should accomplish the desired purpose.

ALJ McCarthy made no reference to any guidelines, nor did Department counsel when making the penalty recommendations on behalf of the Department. Hence, it would be unwarranted for the Board to assume that the penalty order was based upon guidelines, and appellant has offered nothing to support his argument that any guidelines were followed.

We cannot assume, simply because penalty guidelines exist, that they controlled the penalty imposed by the ALJ, particularly where, as here, he carefully articulated his reasons for deciding what penalty he thought appropriate to achieve the desired level of discipline.

Appellant cites *Jamili* (2000) AB-7447 as a supposed example of the Department "steadfastly adhering" to its "underground regulations." In *Jamili*, the Department entered its own order of revocation after the ALJ had proposed a lesser penalty. The "underground regulation" issue was not raised in that case, and both the proposed decision of the ALJ and that of the Department indicate that their disagreement was over the degree of alleged hardship which would flow from a revocation versus the

need for protection of welfare and morals. We do not think *Jamili* bears on the issue in this case.

II

Appellant challenges the penalty as excessive and disproportionate to the offense.

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].)

Appellant was found to have possessed and/or maintained on the premises a slot machine as that term is defined in Penal Code section 330, subdivision (b)(1), and that he also possessed marijuana on the premises, a violation of Health and Safety Code section 11357, subdivision (b). Neither violation can be considered trivial. The ALJ imposed a 30-day suspension for the possession of the slot machine, and conditionally stayed 15 days of the suspension subject to two years discipline-free operation free of similar cause for disciplinary action. He ordered a 15-day suspension on the possession of marijuana charge, and ordered both suspensions to be served concurrently.

In support of his contention that the penalty is disproportionate to the offense, appellant compares this case to *Matter of Wyrick* (1992) 2 Cal. State Bar Rptr. 83, where an attorney was suspended from the practice of law for **five years** on a

conviction for receiving stolen property. Appellant tells the Board that the practice of law is a much more important and potentially damaging profession than maintaining a slot machine or possessing a small amount of marijuana. We might agree, and if the suspension now under review in any way resembled that in *Wyrick*, we could find merit in appellant's arguments. It does not, and we do not.

The Department appears to have exercised its discretion in a reasonable manner, and we see no reason to order reconsideration of the penalty.

ORDER

The decision of the Department is affirmed.²

TED HUNT, CHAIRMAN
KAREN GETMAN, 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.