

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

AB-9377

File: 47-460478 Reg: 13078448

NOWHERE BAR & GRILL, INC.,
dba Nowhere Bar & Grill
2035 Woodard Road, San Jose, CA 95124-2740,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: July 10, 2014
San Francisco, CA

ISSUED AUGUST 4, 2014

Nowhere Bar & Grill, Inc., doing business as Nowhere Bar & Grill (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 30 days for its employee having sold alcohol to two minors, and for having permitted the minors to consume alcoholic beverages on the premises, violations of Business and Professions Code sections 24200, subdivision (b) and 25658, subdivisions (a) and (b).

Appearances on appeal include appellant Nowhere Bar & Grill, Inc., appearing through its CEO Robert L. Weber, in propria persona, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

¹The decision of the Department, dated October 3, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on January 10, 2008. On May 2, 2013, the Department instituted a four-count accusation against appellant charging that on January 11, 2013, appellant's employee, Traci Rodrigues, sold or furnished alcoholic beverages to Louie Flores and Joseph Sionne, both of whom were under twenty-one years of age, in violation of Business and Professions Code section 25658(a), and permitted the minors to consume alcoholic beverages on the premises in violation of Business and Professions Code sections 25658(b) and 24200(b).

At the administrative hearing held on September 11, 2013, documentary evidence was received and testimony concerning the violations charged was presented by California Highway Patrol (CHP) Officer David Morasco; Department of Alcoholic Beverage Control Agent Ricky Barone; and by Robert L. Weber, CEO of appellant Nowhere Bar & Grill, Inc.

Testimony established that on January 11, 2013, after consuming alcohol at the licensed premises, the two minors were involved in a single-car collision at approximately 1:35 a.m. Flores died at the scene and Sionne was seriously injured. According to the CHP, Sionne was driving between 80 and 100 miles per hour in a 65 mile per hour zone. His blood alcohol content was .17 — more than twice the legal limit.

After the hearing, the Department issued its decision which determined that the charges had been proven and that no defense had been established.

Appellant then filed a timely appeal raising the following issue: the penalty is excessive.

DISCUSSION

Appellant does not dispute the charges, but contends the penalty should be mitigated because of five years' discipline-free licensure, its cooperation with the investigation, its allegation that the minors' identifications were checked under a black light — although no evidence was presented to that effect — and that subsequent to this incident it purchased an additional electronic scanner to check ID's. Appellant maintains that a 30-day suspension is excessive in light of these mitigating factors.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Department rule 144, which sets forth the Department's penalty guidelines, provides that higher or lower penalties from the schedule may be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances. (Cal. Code Regs., tit. 4, § 144.) Mitigating factors may include, but are not limited to, the length of licensure without prior discipline or problems, positive action by the licensee to correct the problem, documented training of licensee and employees, and cooperation by the licensee in the investigation.

Rule 144 itself addresses the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

Penalty Policy Guidelines:

The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

Unless some statute requires it, an administrative agency's decision need not include findings with regard to mitigation. (*Vienna v. Cal. Horse Racing Bd.* (1982) 133 Cal.App.3d 387, 400 [184 Cal.Rptr. 64]; *Otash v. Bureau of Private Investigators* (1964) 230 Cal.App.2d 568, 574-575 [41 Cal.Rptr. 263].) Appellant has not pointed out a statute with such requirements. Findings regarding the penalty imposed are not necessary as long as specific findings are made that support the decision to impose disciplinary action. (*Williamson v. Bd. of Med. Quality Assurance* (1990) 217 Cal.App.3d 1343, 1346-1347 [266 Cal.Rptr. 520].)

Whether an appellant's evidence serves to mitigate the standard penalty is a discretionary determination left in the hands of the ALJ. Depending on the facts of an individual case, evidence of mitigation may or may not serve to lessen the penalty imposed. Either way, the law is clear: the ALJ is not required to make findings regarding the penalty imposed, nor is he bound to mitigate the penalty according to

some formula.

In this case, the mitigating factors that the ALJ considered include appellant's five years of discipline-free licensure, its cooperation with the investigation, and its subsequent purchase of an additional electronic scanner to check ID's. Appellant's allegation about checking the minors' identification under a black light was not supported by the evidence.

It would have been well within the ALJ's discretion to impose a harsher penalty than 30-days' suspension. At the administrative hearing, the Department asked for a stayed revocation of appellant's license in addition to the imposition of a 30-day suspension. And in their brief, the Department points out that under the standard penalties of rule 144, a 60-day penalty would have been entirely reasonable since two consecutive 30-day suspensions could have been imposed — one for each minor. (Reply Br. at p. 4.) A single 30-day suspension, therefore, is reasonable and in line with rule 144, and we believe the ALJ in this case acted within the discretion provided to him by the rule.

ORDER

The decision of the Department is affirmed.²

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.