

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

AB-9666

File: 21-537327; Reg: 17085254

DJEMI KUMALA CORPORATION,
dba J & R Gas and Mini Mart
850 Sereno Drive,
Vallejo, CA 94589-2411,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: December 6, 2018
Sacramento, CA

ISSUED JANUARY 28, 2019

Appearances: *Appellant:* Jeffrey S. Kravitz, of Kravitz & Chan, LLP, as counsel
for Djemi Kumala Corporation,

 Respondent: Colleen R. Villareal, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

Djemi Kumala Corporation, doing business as J & R Gas and Mini Mart, appeals from a decision of the Department of Alcoholic Beverage Control¹ revoking its license because it attempted to purchase and receive distilled spirits, believing them to have been stolen, in violation of Business and Professions Code section 24200, subdivisions

¹The decision of the Department, dated September 6, 2017, is set forth in the appendix.

(a) and (b) and Penal Code sections 664/496(a).

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on October 21, 2013 and there is no record of prior discipline against the license in its current form. Appellant was licensed at the premises under a different business structure from 1997 until 2013, and operated without discipline during that period.

On January 13, 2017, the Department instituted a four-count accusation against appellant charging that on four separate occasions — July 7, 2016, July 15, 2016, August 5, 2016, and August 12, 2016 — appellant attempted to purchase and receive distilled spirits, believing them to have been stolen, in violation of Article XX, section 22 of the California Constitution; Business and Professions Code section 24200, subdivisions (a) and (b); and Penal Code sections 664/496(a).

Both Article XX, section 22 of the California Constitution, and Business and Professions Code section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

Business and Professions Code section 24200(b) provides that a licensee's violation of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

Penal Code section 664 provides that a person who attempts to commit any crime, but fails, or who is prevented or intercepted in its perpetration, shall nevertheless be punished.

Penal Code section 496 makes it unlawful to buy or receive property which has been stolen, knowing it to have been stolen. The two Penal Code provisions, in

combination, embrace the conduct involved here.

At the administrative hearing held on May 23, 2017, documentary evidence was received and testimony concerning the violation charged was presented by Department Agents Casey Tinloy and Jason Stockbridge; by the licensee, Djemi Kumala; and by James Saxton, a representative from San Francisco Liquor Licenses.

Testimony established that sometime prior to July of 2016, the Department received a complaint from the Napa Police Department alleging the receipt of stolen property at the licensed premises. As a result, the Department determined to use an undercover officer to investigate the allegation. Department Agent Casey Tinloy was provided with a Beverages & More (BevMo) uniform and marked bottles of distilled spirits for the investigation.

On July 7, 2016, at approximately 9:00 p.m., Tinloy entered the premises wearing a BevMo uniform and name badge. He selected two cigarillos and went to the counter where he purchased them from an employee, Helen Winsanto. He observed the licensee, Kumala, working at another register. Tinloy went back to the coolers to select a soft drink.

Returning to the counter, Tinloy engaged in small talk with Kumala while his soft drink was rung up. Winsanto was cleaning nearby. During the interaction, Tinloy mentioned to Kumala that it was easy to steal from BevMo. Kumala asked what he could get and Tinloy told him he could get anything, but that he had some distilled spirits with him that he had just taken and wanted to sell. This conversation took place in hushed tones. Tinloy placed his duffel bag on the counter and removed two bottles of Bacardi Rum and two bottles of Tanqueray Gin. (Exh. D-2.) He told Kumala it was

\$10 for the four bottles. Kumala asked if he had any Hennessy. Tinloy said no, but that he could get that in the future. Kumala declined the rum as a slow mover, but expressed interest in the gin. Kumala obtained \$5 from the register and handed it to Tinloy, then took possession of the two bottles of Tanqueray. Tinloy said he would come back another time with the Hennessy, then departed.

On July 15, 2016, at approximately 8:55 p.m., Tinloy returned to the licensed premises in the BevMo uniform. He selected a soft drink and pack of cigarillos and went to Kumala's register. He told Kumala that he had three bottles of Hennessy like Kumala had requested. Tinloy placed three bottles of Hennessy VS Cognac and one bottle of Remy Martin VSOP Cognac on the counter. The retail value of the Hennessy bottles totaled approximately \$120. Kumala asked how much he wanted and Tinloy said \$20 for each bottle of Hennessy and \$25 for the Remy Martin. Kumala declined the Remy Martin as a slow mover but offered \$10 each for the bottles of Hennessy. Tinloy attempted to negotiate a higher price but ultimately accepted \$30 for the three bottles. Kumala removed \$30 in cash from the register and paid Tinloy then took possession of the three bottles of Hennessy.

Tinloy told Kumala he had some expensive spirits at home that he wanted to sell, including a bottle of Hennessy Paradis. Kumala asked how much he wanted and Tinloy told him the liquor was worth \$1100 retail but that he would take \$600 for it. Kumala said he would give him \$300 because it would take time to find a buyer. Kumala asked if Tinloy could get Johnny Walker Blue Label because that is what Kumala drinks. Kumala eventually agreed to pay \$350 for both the Paradis and Blue Label.

Tinloy said he would return another day with the items and they exchanged cell phone numbers so Tinloy could text Kumala when he was coming so that Kumala would have enough cash on hand to pay for the bottles. (Exh. D-5.) During this conversation they spoke in hushed tones and Kumala would stop talking and have Tinloy stand to the side when customers approached the register.

On August 5, 2016 at approximately 9:40 p.m., Tinloy returned to the premises in his undercover capacity. Tinloy selected a soft drink and cigarillos for purchase then waited for the customers to leave. Tinloy then placed four bottles on the counter: Hennessy VS Cognac, Hennessy VSOP Cognac, Ciroc Vodka, and Belvedere Vodka. (Exh. D-8.) The premises suddenly became busy and Kumala moved the bottles to under the counter while he waited on customers. When it became quiet again, Kumala told Tinloy he would give him \$50 for the four bottles. Tinloy countered with \$70 since the retail value of the bottles was \$180. Ultimately they settled on \$60. Kumala took \$60 in cash from the register and paid Tinloy for the four bottles. Tinloy said he would return the following Friday with the Paradis and Johnny Walker Blue Label. Kumala expressed an interest in buying some Remy Martin XO Cognac.

On August 12, 2016 at approximately 8:55 p.m., Tinloy returned to the licensed premises with a box containing one 750 ml. bottle each of Hennessy Paradis Cognac, Remy Martin Extra, Johnny Walker Blue Scotch Whiskey, and two 750 ml. bottles of Remy Martin XO. All were in decorative packaging and had a total retail value of \$2,230. (Exhs. D-9, D-10, D-11, D-12, D-15, and D-16.) Tinloy showed Kumala the bottles and Kumala examined them. They bargained about the price and Kumala ultimately offered \$550 for the five bottles. Tinloy countered with \$600 and they

agreed. Kumala brought Tinloy into his office where he counted out \$600 in \$50 bills and handed it to Tinloy.

Later that evening, after Tinloy departed, Department agents entered the licensed premises to arrest Kumala and recover the purported stolen property. All of the bottles used in the undercover operation were specially marked in a way invisible to the naked eye, so that they could be identified with a special tool. Most, but not all, of the bottles used in the operation were recovered. (See FF ¶ 19.)

The administrative law judge (ALJ) submitted his proposed decision on June 6, 2017, recommending that the license be revoked. The Department adopted the proposed decision in its entirety and issued its Certificate of Decision on September 6, 2017.

Appellant then filed a timely appeal raising the following issues: (1) the Department cannot conclude that the penal code was violated, and (2) the penalty is excessive.

DISCUSSION

I

Appellant contends the Department cannot conclude that the penal code was violated because there was no criminal conviction in this case. Appellant maintains “the findings in this case cannot be sustained as they are dependent upon the finding of criminal culpability by a tribunal that does not have jurisdiction over criminal matters.”

(AOB at p. 3.)

Appellant appears to be arguing — without citation to any authority — that only a criminal court can prosecute this matter, and that since appellant has not been

convicted of the attempted receipt of stolen property by a criminal court, the Department is prohibited from doing so.

To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. (*City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239, fn. 16 [126 Cal.Rptr.2d 178].) Where a point is merely asserted without any argument of or authority for the proposition, “it is deemed to be without foundation and requires no discussion by the reviewing court.” (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 [199 Cal.Rptr. 72].) Appellant has failed to present anything beyond a statement of opinion.

The jurisdiction of the Department is very clearly defined. The California Constitution states in relevant part:

The Department of Alcoholic Beverage Control shall have the exclusive power . . . to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof. **The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude.** It shall be unlawful for any person other than a licensee of said department to manufacture, import or sell alcoholic beverages in this State.

(CA Constitution, Art. XX, § 22, emphasis added.)

The authority of the Department is codified in statute (in pertinent part) as follows:

§ 24200. The following are the grounds that constitute a basis for the suspension or revocation of licenses:

(a) When the continuance of a license would be contrary to public welfare or morals. However, proceedings under this subdivision are not a limitation upon the department's authority to proceed under Section 22 of Article XX of the California Constitution.

(b) . . . the violation or the causing or permitting of a violation by a licensee of this division, any rules of the board adopted pursuant to Part 14 (commencing with Section 32001) of Division 2 of the Revenue and Taxation Code, any rules of the department adopted pursuant to the provisions of this division, **or any other penal provisions of law of this state** prohibiting or regulating the sale, exposing for sale, use, possession, giving away, adulteration, dilution, misbranding, or mislabeling of alcoholic beverages or intoxicating liquors.

(Bus. & Prof. Code § 24200, subdivisions (a) & (b), emphasis added.)

We are unaware of any provision in California state law — and appellant fails to identify one — that requires a criminal conviction by a tribunal with jurisdiction over criminal matters before a licensee may be disciplined by the Department for a violation of the Penal Code. Clearly, both under the authority of the California Constitution and the Business and Professions Code, the Department was authorized to discipline this licensee as a result of his attempted receipt of stolen property.

In this case, appellant was not charged with the receipt of stolen property because the bottles used were not actually stolen. The standard is as follows:

In order to establish the commission of the crime of receiving stolen property . . . it must be established by substantial evidence (1) that the particular property was stolen, (2) that the accused received, concealed or withheld it from the owner thereof, and (3) that the accused knew that the property was stolen. [Citation.]

(*People v. Moses* (1990) 217Cal.App.3d 1245, 1250-1251 [266 Cal.Rptr. 538].)

Instead, appellant was charged with the attempted receipt of stolen property. The standard applied in such a case is as follows:

. . . a defendant is guilty of an attempt where he has the specific intent to

commit the substantive offense and, under the circumstances as he reasonably sees them, does the acts necessary to consummate the substantive offense; however, because of circumstances unknown to him there is an absence of one or more of the essential elements of the substantive crime. [Citation.]

(*People v. Wright* (1980) 105 Cal.App.3d 329, 332 [164 Cal.Rptr. 207].) Here, appellant clearly intended to purchase and receive what he believed to be stolen property.

The decision of the Department, sustaining four counts of the attempt to receive stolen property, is supported by substantial evidence. Accordingly, the decision must be affirmed.

II

Appellant contends the penalty is excessive and that, at most, it should be disciplined for violating Business and Professions Code section 23402 — for failing to purchase alcohol through a licensed wholesaler. Appellant maintains its licensure for 20 years without disciplinary action, and other mitigating factors, should outweigh all other factors. It maintains that the penalty of revocation is an abuse of discretion under the circumstances of this case. (AOB at pp. 3-5.)

This 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].) "Abuse of discretion" in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.](*Brown*

v. Gordon, 240 Cal.App.2d 659, 666-667 (1966) [49 Cal.Rptr. 901].)

Rule 144 provides:

In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act (Bus. and Prof. Code Sections 23000, et seq.), and the Administrative Procedures Act (Govt. Code Sections 11400, et seq.), the Department shall consider the disciplinary guidelines entitled "Penalty Guidelines" (dated 12/17/2003) which are hereby incorporated by reference. Deviation from these guidelines is appropriate where the Department in its sole discretion determines that the facts of the particular case warrant such a deviation - such as where facts in aggravation or mitigation exist.

(Cal. Code Regs., tit. 4, § 144.)

Among the mitigating factors provided by the rule are the length of licensure without prior discipline, positive actions taken by the licensee to correct the problem, cooperation by the licensee in the investigation, and documented training of the licensee and employees. Aggravating factors include, *inter alia*, prior disciplinary history, licensee involvement, lack of cooperation by the licensee in the investigation, and a continuing course or pattern of conduct. (*Ibid.*)

The Penalty Policy Guidelines further address 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.

In the decision, the ALJ devotes a separate section to the issue of penalty and factors which might lessen or increase the penalty recommended by rule 144:

The Department requested that the Respondent's license be revoked given the severity of the violations and the presumption of Rule 144. The Respondent's argument was in two parts. First, the Respondent sought an outright dismissal of the stolen property allegations by challenging the reliability and truthfulness of the Department officers' testimony through an alternative narrative presented primarily through the Respondent-Licensee's testimony. As noted in the findings in this matter, that alternative narrative has been rejected. The Respondent has been found to have attempted to receive stolen property on four separate occasions. Second, the Respondent argued that mitigation is warranted because of the Respondent's long period of licensure without incident and the Respondent's consistent success in preventing the sale of alcohol to minors.

Certainly, the Respondent is to be applauded for consistently not selling alcohol to minors even when tempted to do so. Also, the Respondent has a long period of operating without prior violations. Under multiple licenses, this appears to be the case since 1997. These are appropriate factors in mitigation pursuant to Rule 144. While the underlying conduct calls for a presumption of revocation, outright revocation^[fn.] or stayed revocation^[fn.] can be appropriate depending upon the circumstances.

In the present case, outright revocation is warranted. The behavior of the Respondent in the actions of Djemi Kumala was not isolated. The Respondent actively and repeatedly sought to have Tinloy bring him additional stolen property. The value of the property Kumala bought on the last occasion made him subject to felony prosecution. Kumala's testimony in this case was the opposite of an effort to learn from and address the problem that lead [sic] to the violations. The absence of this factor in mitigation weighs in favor of finding a factor in aggravation in Kumala not accepting responsibility but instead electing to testify in a patently untruthful manner.

Further, Kumala's interactions with Tinloy showed both a level of criminal sophistication and a willingness to continue the criminal enterprise into the future. Kumala showed skill and recognition of this position of power in the discussions with Tinloy. These factors are appropriate matters to

consider in aggravation and they weigh against the mitigation previously discussed.

The Respondent as the Licensee himself had an affirmative obligation to ensure that the Licensed Premises is operated in full compliance with the law. The Respondent did not. The illegal activities at issue here — repeated negotiations resulting in repeated attempted purchases of purportedly stolen property from an undercover officer clearly warrants revocation given the actions were by the actual President of the corporation Licensee in this case.

The penalty recommended herein complies with rule 144.

(Decision at pp. 9-10.)

The Board may not disturb a penalty order unless it is so clearly excessive that any reasonable person would find it to be an abuse of discretion in light of all the circumstances. “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 its discretion.” (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594

[43

Cal.Rptr. 633].) The penalty here, while severe, is within the bounds of the Department’s discretion.

Appellant’s disagreement with the penalty imposed does not mean the Department abused its discretion. This Board’s review of a penalty looks only to see whether it can be considered reasonable, and, if it is reasonable, the Board’s inquiry ends there. Even though the penalty of revocation may be harsh, as the Court in *Rice* stated:

[T]he propriety of the penalty to be imposed rests solely within the discretion of the Department whose determination may not be disturbed in

the absence of a showing of palpable abuse. [Citations.] **The fact that unconditional revocation may appear too harsh a penalty does not entitle a reviewing agency or court to substitute its own judgment therein** [citation].

(*Rice v. Alcoholic Bev. Control Appeals Bd.* (1979) 89 Cal.App.3d 30, 39 [152 Cal.Rptr. 285], emphasis added.) The Board is simply not empowered to reach a contrary conclusion from that of the Department if the underlying decision is reasonable. The penalty imposed here complies with the guidelines of rule 144.

Having reached the conclusion that the law compels us to affirm the Department's decision in this matter, we nevertheless wish to express our disapproval of the Department's approach in this case. Why, for example, did the Department not talk to the licensee, and perhaps issue a warning? For a licensee with no prior discipline over a 20-year period to be given no opportunity whatsoever to fix what appears to be a newly-noted problem seems draconian at best. In other words, what is the Department's goal? If compliance with the law, and the protection of public welfare and morals are the goals of enforcement, then it seems to us that working with the licensee to achieve compliance — rather than sending an undercover agent to the premises again and again without issuing any kind of warning — would be a far better way to reach these goals than the way this matter was handled.

ORDER

The decision of the Department is reluctantly affirmed.²

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.

BAXTER RICE, CHAIRMAN
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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.