

ISSUED JANUARY 23, 1997

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

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|---|---|---------------------------|
| MIDWAY RESOURCES, INC. |) | AB-6490a |
| dba Clairemont-Sunset Bowl/Volcano Club |) | |
| 3093 Clairemont Drive |) | File: 47-062218 & 47 Dup. |
| San Diego, CA 92117, |) | Reg: 94029585 |
| Appellant/Licensee, |) | |
| |) | Administrative Law Judge |
| v. |) | at the Dept. Hearing: |
| |) | James Ahler |
| DEPARTMENT OF ALCOHOLIC |) | |
| BEVERAGE CONTROL, |) | Date and Place of the |
| Respondent. |) | Appeals Board Hearing: |
| |) | November 6, 1996 |
| |) | Los Angeles, California |
| |) | |
| |) | |

Midway Resources, Inc., doing business as Clairemont-Sunset Bowl/Volcano Club (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended appellant's on-sale general public eating place license and duplicate on-sale general public eating place license for 25 days with 10 of those days stayed during a probationary period of one year, for allowing two patrons to remain on the premises while intoxicated, and for appellant's employees providing to, and allowing consumption of alcoholic beverages by, patrons who were minors, in violation

¹The Decision Following Appeals Board Decision filed by the Department and dated February 5, 1996, is set forth in the appendix.

of Business and Professions Code §25658, subdivisions (a) and (b).

Appearances on appeal include appellant Midway Resources, Inc., appearing through its counsel Stephen J. Fitch and Robert L. Slaughter; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant is a family-controlled corporation which owns and controls the Clairemont-Sunset Bowl, a bowling alley operation with 52 lanes and 90 employees. The Volcano Club is also owned by appellant and is located in the same complex, but with a doorman-staffed entrance separate from the bowling alley. The club had a restricted entrance policy under which minors were not to be admitted..

Appellant had been licensed since 1954, but with the current license since November 1991. On January 11, 1994, an accusation was initiated alleging various violations of law. An administrative hearing was held on July 12 and 13, and August 17 and 18, 1994, wherein oral and documentary evidence was received.

The Department found, after the presentation of the evidence and arguments, that appellant had allowed two unknown patrons to remain in the premises while intoxicated and unable to care for their own safety or that of others. The Department also found that appellant's employees had provided alcoholic beverages to two patrons who were minors, had allowed five patrons who were minors to consume alcoholic beverages while on the premises, and had allowed a lewd act during a performance.

Following the hearing, the Department filed its decision which was adverse to appellant. Appellant thereafter filed a timely notice of appeal. The Appeals Board

heard the matter and rendered its decision on January 8, 1996, which affirmed the decision of the Department as to the intoxicated persons and minor service and consumption findings, but reversed the decision concerning the lewd dancing finding.

The Department thereafter issued its decision which essentially reduced the penalty to 25 days with 10 days stayed. Appellant subsequently filed a timely notice of appeal.

In its appeal, appellant raises the contention that the penalty is excessive.

DISCUSSION

Appellant contends that the penalty is excessive. 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 California v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

Appellant argues that it operated under various licenses for over 40 years (during that time incurring only two violations which did include sales to minors), but has been violation free for the last 25 years. This record of minor sales and consumption control is impressive, if not outstanding.

Notwithstanding that laudatory record, in the present matter, appellant's employees on August 27, 1993, allowed two intoxicated persons to remain on the premises; on November 5 and 18, 1993, allowed the service of alcoholic beverages to

two minors; and allowed a total of four minors on four different dates, to consume alcoholic beverages.

Appellant cites the case of Joseph's of California, supra, and sets forth in its brief the language of the court (19 Cal.App.3d) at page 789. That court affirmed a ten- day suspension for a violation which the court found was deliberate, but reversed a five-day suspension which occurred due to a part-time employee's mistake. The Joseph's matter has little applicability to the instant appeal. The present record shows that there were two intoxicated persons and six minors involved during a six-day investigation on August 27, 1993; November 5, 18, and 29, 1993; and December 3 and 10, 1993.

The people of the State of California in the State Constitution, article XX, §22, specifically addressed the evils of sales and service to the young. Penalties for minor-sales violations appear to have been increased over time since the Joseph's case, supra, following legislative enactment of increased penalties in Business and Professions Code §25658.1. The concern of society and its representatives about the evils of alcohol sales to minors, and alcohol consumption by minors, clearly is part of the Department's mandated duty to protect the public welfare and morals of society, including its youth. The Department is authorized by the California Constitution to exercise its discretion whether to suspend or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause," that the continuance of such license, would be contrary to public welfare or morals.

Different from the powers of the Department, the scope of the Appeals Board's

review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.²

In our review of the actions of the Department in assessing the present penalty, we find that the Department's standard state-wide penalties are 20 days for one "obviously intoxicated" violation, 15 days for a count of service to one person under 21 years, and 10 days for allowing consumption by one person under 21 years, or a total of 45 days for the three enumerated violations (Department's Instructions, Interpretations and Procedure Manual, page L227.1). The manual also states that the Department may increase the penalties depending on the circumstances.

Thus, we are unable to say that the penalty imposed by the Department, modified downward from what it had imposed prior to our earlier decision in this matter (AB-6490), is an abuse of its discretion or is in excess of its statutory powers.

² The California Constitution, article XX, §22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

CONCLUSION

The decision of the Department is affirmed.³

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.