

ISSUED DECEMBER 18, 1996

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

FRANK M. GRAY, SR.	)	A-6502a
dba Gray's Liquor)	
2007 South El Dorado Street	)	File: 21-183303
Stockton, CA 95206,	)	Reg: 94029645
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	John D. Wagner
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	September 4, 1996
	)	San Francisco, CA
)	

Frank M. Gray, Sr., doing business as Gray's Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his off-sale general license for 30 days, with 15 days thereof stayed, and imposed two specified conditions on the license. The Department's original decision determined that appellant had allowed his premises to be used in a manner which created a law enforcement problem, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of

¹The "Decision Following Appeals Board Decision" dated April 29, 1996, is set forth in the appendix.

Business and Professions Code section 24200, subdivision (a).

Appearances on appeal include appellant Frank M. Gray, Sr., appearing through his counsel, Michael F. Babitzke; and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Murphy.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on May 5, 1986. Thereafter, the Department instituted an accusation against appellant on March 17, 1994.

An administrative hearing was held on September 8, 1994, at which time oral and documentary evidence was received. At that hearing, testimony was presented that appellant had allowed his premises to become a law enforcement problem for the Stockton Police Department, establishing 42 incidents of police problems from April 7, 1992, to May 21, 1993.

Subsequent to the hearing, the Department issued its decision which conditionally revoked appellant's license, with revocation stayed for a three-year probationary period, including a 30-day suspension and the imposition of six additional conditions on the license. Appellant filed a timely notice of appeal.

The Appeals Board considered appellant's appeal and concluded in its decision of April 5, 1996, that there was no connection between the operation of the premises and many of the incidents alleged to be part of the law enforcement problem. The Board reversed a portion of the Department's decision and remanded the reversed portion to the Department for reconsideration of the penalty and a re-review of the language of the conditions.

The Department's "Decision Following Appeals Board Decision" dated April 29, 1996, suspended appellant's license for 30 days, with 15 days thereof stayed for a probationary period of one year and imposed two additional conditions on the license: a prohibition against a pay telephone attached to the exterior of the premises or in any adjacent area over which appellant had control; and a prohibition against public access to the fenced-in area immediately behind the premises. Appellant filed a timely notice of appeal.

In his appeal, appellant raises the following issues: (1) finding IV, sub-findings 20, 21, 24, and 26, are not supported by substantial evidence and appellant should not be sanctioned for activities not within his knowledge; and (2) the penalty was excessive.

DISCUSSION

I

Appellant contends that finding IV, sub-findings 20, 21, 24, and 26, are not supported by substantial evidence and appellant should not be sanctioned for activities not within his knowledge.

The Appeals Board in its prior decision of April 5, 1996, concluded that finding IV, sub-findings 20, 21, 24, and 26, were supported by substantial evidence, and were therefore, sustained. The Appeals Board decision was filed on April 5, 1996, and pursuant to Business and Professions Code §23090.7 became effective (and final) 30 days following the date of filing. Thereafter, the Department of Alcoholic Beverage Control obtained full and complete jurisdiction to follow the instructions the Appeals

Board made in its decision, subject to any review by the courts of California as provided in Business and Professions Code §23089.

Whether the Department's Findings of Fact and Determination of Issues in its decision of April 29, 1996, are overly inclusive or merely a statement of the essentials of the Appeals Board decision's conclusion, the fact remains that the Appeals Board rendered its final decision on April 5, 1996. Within the time provided by law, it became effective and final for all purposes, subject only to review by a higher appellate tribunal.

Since the Appeals Board is prohibited by Business and Professions Code §23088 from reconsidering its own decisions, the Appeals Board declines to review this contention.

II

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

Since the Appeals Board remanded the matter to the Department for reconsideration of the penalty--which originally was conditional revocation--the Department had discretion to set a reasonable penalty short of revocation, conditional

or unconditional.

The Department had the following factors to review in reconsidering the penalty: (1) from April 1992 through May 1993, there was an acute law enforcement problem on or about the public areas near or adjacent to appellant's premises for which the Appeals Board determined appellant was not legally responsible; (2) the Department determined that appellant had allowed people on four occasions to loiter within the fenced-in area behind the premises; and (3) the Appeals Board observed, during its review of the affirmative duty a licensee owes to the public welfare and morals of the community, that "We view appellant's duty [in the present matter] as maintaining the licensed premises and property under his control in such a manner as to not create a law enforcement problem, or in any manner assisting violators of the law to avoid police enforcement, affirmatively or by abstinence from preventative action;" and, (4) the Appeals Board also observed in its final decision that "Appellant knew of the acute police problem with the loiterers in front of and beside his premises. A few days before the administrative hearing, David Senecal of the Department observed a man sitting in front of the premises consuming a can of beer. When the man left, the chair he occupied remained [RT 18-19]. While not chargeable as an offense, the incident does show appellant's passivity, if not participation, as sufficient to enhance any penalty. The evidence, while not strong, is sufficient to show abstinence from preventive action in allowing apparently free (even though limited) access into and out of the fenced area, providing a base for loitering and drinking just off the sidewalk area.

Considering such factors, the issue of the appropriateness of the penalty must be

left to the discretion of the Department. The Department having exercised its discretion reasonably, the Appeals Board will not disturb the penalty.

CONCLUSION

The decision of the Department is affirmed.²

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

²This 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.