ISSUED MARCH 6, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

DANIEL P. SHERBONDY, dba Australian Beach Club 245 East Redlands Blvd.#A-C San Bernardino, CA 92408, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6675 File: 47-279418 Reg: 95033891 Administrative Law Judge at the Dept. Hearing: John A. Willd Date and Place of the Appeals Board Hearing: January 8, 1997 Los Angeles, CA

Daniel P. Sherbondy, doing business as Australian Beach Club (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered appellant's on-sale general eating place license revoked, for having permitted the premises to be used in a manner contrary to the public welfare and morals, contrary to article XX, §22 of the California Constitution and Business and Professions Code §24200, subdivision (a), resulting from violations of Penal Code §245, subdivision (a)

[1] The decision of the Department, dated May 16, 1996, is set forth in the appendix.

(1) (assault with deadly weapon); Penal Code §242 (battery) (two incidents); and Penal Code §415, subdivision (3) (offensive language inherently likely to promote violence).

Appearances on appeal include appellant Daniel P. Sherbondy, appearing through his counsel, Rick A. Blake; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on February 22, 1993. Thereafter, the Department instituted an accusation on September 20, 1995, alleging that on various dates appellant had struck a patron, used force and violence against a second patron, and also used force and violence against an individual in a parking lot adjacent to the premises. An amended accusation filed January 8, 1996, added an allegation that appellant used force and violence against a female patron, and used offensive words likely to provoke an immediate violent reaction.

An administrative hearing was held on February 13, 1996, and March 28, 1996, at which time oral and documentary evidence was presented. Following the hearing, the Administrative Law Judge (ALJ) entered his proposed decision which ordered appellant's license revoked, concluding that appellant had, with a single exception, committed the acts alleged in the accusation, and that appellant had permitted the licensed premises to be operated contrary to the public welfare and morals in violation of article XX, §22, of the California Constitution and Business and Professions Code §24200, subdivision (a). The ALJ found specifically as follows:

(a) On August 24, 1994, appellant struck patron Paul Garcia, a deputy sheriff, in the face with a flashlight, a violation of Penal Code §245, subdivision (a) (1);

(b) On January 1, 1995, appellant grabbed patron Morakod Lim, picked him up, and threw him against a railing, a violation of Penal Code §242;

(c) On February 13, 1995, while in the parking lot adjacent to the licensed premises, appellant, in violation of Penal Code §242, grabbed Sergio Magana, a disk jockey employed by a rival nightclub, by the neck and waist, threw him to the ground, and stepped on his foot. Magana suffered a broken leg or ankle.

(d) On August 30, 1995, appellant used offensive language likely to provoke an immediate violent reaction, directed at the girlfriend of a female patron, in violation of Penal Code §415, subdivision (3).[2]

(e) The ALJ found that the charge that appellant had used force or violence against a female patron had not been sustained.

The Department adopted the ALJ's decision in its entirety, and appellant filed a timely notice of appeal.

In his appeal, appellant raises the following issues: (1) the Department improperly considered disciplinary action involving the licensee which related to a separate and distinct license at separate and distinct premises; (2) the findings are not supported by

---

[2] The ALJ found that the evidence did not sustain the allegation of the amended accusation that appellant had used force and violence against a female patron. The incident in question was, however, the same incident which gave rise to the offensive language finding.

the evidence; (3) the Department failed to consider any factors of mitigation; and (4) the penalty of revocation is excessive.

DISCUSSION

I

Appellant contends that the Department improperly and prejudicially took into consideration in both its findings and the penalty imposed the fact that appellant had been disciplined on a prior occasion, in a proceeding involving a different license at a different location.

In Finding III, the ALJ found that, pursuant to a stipulation and waiver entered into in an earlier proceeding, appellant, a co-licensee of premises known as the Australian Beach Club in Orange, California, had on October 1, 1993, committed an assault and battery on a patron by kicking the patron in the back and striking the patron's head and face with clenched fists. The Department in that proceeding ordered the license suspended for 45 days, with 30 days of the suspension stayed for a probationary period of one year.

Appellant argues that the recital in Business and Professions Code §24070 that "each license is separate and distinct ..." reflects a legislative intent that each license should have its own separate and distinct existence. Appellant also cites the Department's procedures manual, which states that in the determination of the amount of payment required for an offer in compromise under Business and Professions Code

§23095, subdivision (b), only prior disciplines against the same license should be considered.

Appellant disputes the Department's argument that appellant's prior disciplinary history is relevant proof of a course of conduct, contending that such an approach would justify the same charge with respect to sales to minors by licensees with multiple locations. This, appellant contends, would "severely disturb the current practice of settlement and discipline" [App.Br., p. 5].

Finally, appellant argues in his brief that not only is the penalty of revocation itself evidence of the prejudice flowing from the improper consideration of the previous disciplinary proceeding, the prejudicial effect is also seen in the comments of the ALJ, "some of which are actually non-sensicle [sic]" [App.Br., p.5].

The Department stresses the fact that what was to be considered was appellant's personal conduct,[3] and that it was his demonstrated and repeated propensity for using force and violence in confrontational situations that required the drastic remedy of revocation.

The issue, then, is whether the recital in Business and Professions Code §24070 that "each license is separate and distinct" immunizes appellant from having to account for violent behavior on other occasions when these incidents are offered to show a need for corrective discipline. Appellant is not in a position to contest the finding in the

[3] Appellant's brief concedes that "Mr. Sherbondy [appellant] may have, to some extent, been involved in both incidents" [App.Br., p.4].

earlier proceeding that he committed an assault and battery upon a patron by hitting and kicking him. And, based on the evidence in this matter, he has been shown to be a person who is prone to use force and violence against others when provoked. Is the Department required to blind itself to this reality? Is the Department required to compartmentalize behavior which has so much in common? To state these questions is to answer them.

It is a general rule of evidence that while the fact that the defendant in a criminal prosecution has committed other crimes may be evidence of his bad character and his propensity or disposition to commit the crime charged, bad character may not be shown for such purpose, and if that is the only purpose for which such evidence is offered, it will be excluded. (See 1 Witkin, California Evidence, §356, p. 325, 3d ed., and cases cited therein.) However, as Witkin notes (Id. at §357, p. 327):

> "the exceptions [to the rule] are so much more numerous than those applying the exclusionary rule that it has been suggested that the true rule could be more realistically stated in affirmative form: That evidence of other crimes is admissible whenever it is relevant to a material issue, and that it should be excluded only where its sole purpose and effect is to show the defendant's bad moral character (disposition to commit crime)."

Witkin cites People v. Peete (1946) 28 C.2d 306, 314 [169 P.2d 924, 929], a case in which the Supreme Court affirmed a murder conviction where the evidence included proof that the defendant had committed a murder over 20 years earlier. The Court stated that the question to be answered was whether the evidence tended logically,

naturally and by reasonable inference to establish any fact material to the prosecution, or to overcome any material matter sought to be proved by the defense:

> "If it does, then it is admissible, whether it embraces the commission of another crime or does not, whether the other crime be similar in kind or not, whether it be part of a single design or not."

In the present proceeding, the ALJ and the Department were charged with determining what disciplinary action was required in light of the conduct of the licensee himself which the ALJ found had been proven. The incidents which the ALJ and the Department found had been proven, with one exception, involved acts of violence. The Department was on notice that the same individual had demonstrated a propensity for violence on another occasion. There is no indication in the record that the ALJ's factual findings with respect to the amended accusation were influenced by appellant's prior brush with discipline. At most, the ALJ and the Department took this into account in determining the type of disciplinary action warranted.

We have reviewed the so-called "non-sensicle" comments of the ALJ. His comments, rather than lacking sense, reflect a certain sensitivity toward the duties a licensee has toward patrons, a sensitivity appellant sadly lacks.

II

Appellant challenges the sufficiency of the evidence to support the findings.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v.

National Labor Relations Board (1950) 340 US 474, 477 [71 S.Ct. 456]; Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

Appellate review does not "... resolve conflict[s] in the evidence, or between inferences reasonably deducible from the evidence ... ." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr. 658].)

The ALJ's proposed decision reviewed the evidence relating to each of the charged incidents, and, except with the incident involving the female patron, found the facts as the Department contended, and rejected appellant's denials and the interpretations he placed upon the evidence.

(a) The Garcia incident

The ALJ found that appellant struck Garcia in the face with a flashlight, and that Garcia lost consciousness for a period of time. This occurred while Garcia was being restrained from following other patrons out the door after a beer-tossing incident. Garcia suffered a broken nose and facial lacerations. Although Garcia was able to

testify to facts from which it could be inferred that he was rendered unconscious,[4] he was unable to identify his assailant. However, another deputy sheriff, Paul Casas, testified that he saw Sherbondy hit Garcia with the flashlight [II RT 8-9]. On cross-examination, Casas conceded that he did not know whether the blow was intentional or accidental [II RT 18], but described the blow as a "push-type punch. They are pretty much the same to me" [II RT 27].

Appellant suggests that the ALJ was engaged in speculation in concluding that Garcia lost consciousness. This, we suggest, ignores Garcia's testimony regarding his state of awareness, which the ALJ apparently accepted. (See note 4, supra.)

---

[4] A. After I got hit, the only thing I remember was being outside.

Q. You don't know how you got there?

A. I have no idea if I was dragged or I walked or --

The Court: Did you lose consciousness at some point?

A. I must have.

...

The Court: ... You have a lapse of memory in there at some point?.

A. Yes.

The Court: Okay. From what period to what period?

A. From the point where I got hit in the face to the point where I was on my knees and blood dripping on my face outside.

[I RT 21-22]

Appellant also suggests that a flashlight may not be considered a deadly weapon under Penal Code §245, subdivision (a) (1). However, it is not the object per se, but the manner in which it is used and the effect it may have. For example, in People v. Hahn (1957) 147 Cal.App.2d 308, 305 P.2d 192, a conviction of assault with a deadly weapon was affirmed on appeal in a case where the "deadly weapon" was a beer can, the victim did not lose consciousness and suffered only lacerations to his head. As the court there observed, it is the potential for great bodily injury which is the determinant, not necessarily just the injury which is inflicted.

Finally, appellant argues that the evidence would lead a reasonable trier-of-fact to conclude that the injury to Garcia was accidentally inflicted in the course of preventing him from pursuing another patron leaving the premises. The ALJ instead appears to have concluded that an excessive use of force by appellant could not have been an accident. Nor is appellant's argument strengthened by the alternative explanation he offered [RT 222-224] for Garcia's nose injury - that he never touched Garcia, and while standing 10 to 20 feet away, saw Garcia injured while trying to head-butt one of appellant's bouncers - an explanation the ALJ found unpersuasive.

(b) The Lim incident

Appellant argues that the versions of the incident offered by Mr. Lim and Mr. Sherbondy could both be correct, but that since appellant was attempting to deal with a potentially dangerous situation (he claimed he was hurrying to assist a young woman who was hanging over a second floor railing and in danger of falling), his conduct was

only a technical battery. Sherbondy testified that he merely pushed or shoved Lim in order to get past him.

However, the ALJ chose not to accept appellant's version of the incident, and instead to believe Lim. Since it was the ALJ who saw and heard the witnesses, not this Board, we are not inclined to second guess him. Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (substantial evidence supported both the Department's and the license-applicant's position); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; Gore v. Harris (1964) 229 Cal.App.2d 821 [40 Cal.Rptr. 666].) Lim's testimony is sufficient to support the charge.

(c) The Magana incident

Sergio Magana was a disk jockey employed by a competing nightclub. Magana testified that he was in the company of two other persons who were passing out handbills for the rival nightclub, but that he was on his way into the premises when he was attacked by appellant and others. Appellant testified that he merely pushed Magana away as a defensive measure as Magana was attempting to strike him. Here, appellant argues that the testimony of Mr. Magana should be viewed with great

skepticism, since, according to Magana, after suffering a broken leg or ankle as a result of appellant's assault, he was able to hurry across a highway and request assistance from a highway patrol officer, who declined to help him.

The ALJ accepted the interpretation the Department placed on the incident, finding it unlikely that Magana would have instigated the fracas, being smaller than appellant and substantially outnumbered by appellant and at least three other security personnel. The ALJ did, in fact, view the Magana testimony with caution, a caution he acknowledged was called for with respect to all of the Department's witnesses. Nevertheless, he chose to believe Magana.

(d) The Shelly Leitch/Brenda Stewart incident

The accusation charged appellant with using physical force against Brenda Stewart. The ALJ found this had not been proven. However, he did find that appellant had used offensive language of the type violative of Penal Code §415, subdivision (3)[5], when he cursed Brenda Stewart for inducing her girlfriend, Shelly Leitch, to leave the club with her, thereby interrupting a romantic "tryst" between appellant and Leitch.

At the hearing, appellant denied using any offensive language, asserting that it was Stewart who was using profanity. In his brief, appellant argues that the language

[5] Penal Code §415, subdivision (3), in pertinent part, prescribes punishment by incarceration or fine, of "any person who uses offensive words in a public place which are inherently likely to provoke an immediate violent reaction."

used - "ugly," "slut," "fucking bitch," and "fuck" - may not be "nice," but are not the type of words contemplated by the Penal Code provision. He contends that the statute is directed at challenges to fight [App.Br., p.10].

Although the ALJ found that appellant had used offensive language, the proposed decision, which the Department adopted, contains only a conclusory finding that the language used was likely to provoke immediate violence. In In re Alejandro G. (1995) 37 Cal.App.4th 44, 48 [43 Cal.Rptr.2d 471], the court said:

> "Whether offensive words uttered in a public place are inherently likely to provoke an immediate violent reaction must be decided on a case-by-case basis. 'The mere use of a vulgar, profane, indecorous, scurrilous, opprobrious, epithet cannot alone be grounds for prosecution. ...
>
> The context in which the words are used must be considered, and there must be a showing that the words were uttered in a provocative manner, so that there was a clear and present danger violence would erupt.' Jefferson v. Superior Court (1975) 51 Cal.App.3d 721, 724-725 [124 Cal.Rptr. 507]."

In that case, the offensive language was directed at a police officer.

In the present case, the language was directed at two departing female patrons by a male of larger stature, whose romantic interlude with one of them had been interrupted by the other. In Alejandro, supra, 37 Cal.App. 4th 44, the words which were found to violate the statute were challenges to fight directed at police officers. The words in the present case were not challenges to fight, but simply crude and vulgar reflections of anger and, perhaps, disappointment. They did not precipitate actual violence, and there was no evidence or testimony that violence was imminent as a result of appellant's utterances.

Although appellant's use of what could be described as "vulgar, profane, indecorous or opprobrious" words and phrases could hardly be said to be acceptable parting greetings, we do not believe that, in the circumstances in which the words were uttered, they were inherently likely to promote an immediate violent reaction. But here, the targets of the verbal assault were hurrying to leave, appellant was making no effort to stop them, and no violence broke out. Consequently, without a specific finding that the setting in which the offensive language was used made it inherently likely that the danger addressed by the Penal Code provision existed, we think this portion of the Department's decision should be reversed. Needless to say, we do not approve of appellant's behavior; we simply say that it did not, on the facts of this case, violate Penal Code §415, subdivision (3).

III

Appellant contends that the Department failed to consider any mitigating facts or circumstances, such as an absence of prior discipline, that each of the relevant incidents contained questionable circumstances, that the premises did a large volume of business, and that the complaining witnesses had inherent biases or personal motivations to shade their testimony. Appellant cites the beer-throwing incident associated with the assault on Garcia; the rush to aid a patron in distress associated with the manhandling of Lim; Magana's employment with a competitor; and Stewart's interference with a male/female relationship.

These do not seem to be factors in mitigation as much as they are simply an attack on the strength of the evidence in support of the findings, an attack we find lacks merit.

IV

Appellant's contends that the penalty, revocation of appellant's on-sale general license, 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 Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

Appellant argues that the ultimate penalty of revocation of any license, let alone a general license, which has attached to it an investment of considerable magnitude, requires unequivocal findings. Appellant contrasts unidentified instances where crimes of moral turpitude deliberately engaged in have not evoked revocation, and similarly unidentified disorderly house accusations with multiple counts of more significant and serious nature than here but not resulting in revocation.

We are handicapped in our ability to compare this case with others of the type appellant refers to but to which he does not give us citations. We do agree, however,

with appellant's contention that an order of revocation should be accompanied with unequivocal findings. Where we disagree with appellant is in our view that the Department's findings in this case are unequivocal and do warrant the penalty of revocation.

This is not a case where the licensee is exposed to possible loss of his or her license as a result of some failing beyond the licensee's ability to foresee, control or prevent. This is the unusual case where the licensee himself is the perpetrator of the wrongdoing which was the subject of the accusation. For this reason, we cannot look for guidance to other cases where persons other than the licensee himself were the culprits. Indeed, even if we could, the paramount consideration would still have to be the facts of this particular case.

In the last analysis, we see this matter governed by the teachings of the California Supreme Court in Martin v. Alcoholic Beverage Control Appeals Board, supra, at 300:

> "But viewing the propriety of the penalty as a matter vested in the discretion of the Department under our constitutional provision (art. XX, §22), and considering the rule that its determination of the penalty will not be disturbed unless there is a clear abuse of its discretion ... it does not appear that the Department abused its discretion here.

We believe this is true in this case as well. There is little doubt that Mr. Sherbondy is, as the ALJ concluded, "an individual with a rather short temper who is very willing to engage in violent actions." The ALJ's word of caution regarding the possible biases of the various witnesses is not inappropriate; it should be noted,

however, that appellant's counsel had full opportunity to cross-examine them and expose weaknesses, if any, in their testimony.

We have concluded that the portion of the Department's decision pertaining to the alleged violation of Penal Code §415, subdivision (3), should be reversed, and that in all other respects, including penalty, the decision be affirmed.

We do not believe that our partial reversal requires a remand to the Department for reconsideration of the penalty, even though the penalty is revocation. In Miller v. Eisenhower Medical Center (1980) 27 Cal.3d 614, 635 [166 Cal.Rptr.826], The California Supreme Court has pointed out that "it is well settled" that in cases involving the imposition of a penalty or other disciplinary action by an administrative body, when it appears that some of the charges are not sustained by the evidence, the matter will be returned to the administrative body for redetermination in all cases "where there is a 'real doubt' as to whether the same action would have been taken upon a proper assessment of the evidence." Having considering the arguments in the Department's brief on this appeal, this Board entertains little, if any, doubt, and certainly not a "real doubt" as to what the Department would do on remand. Therefore, we do not remand for reconsideration of the penalty.

CONCLUSION

The decision of the Department that appellant violated Penal Code §415, subdivision (3), is reversed. In all other respects the decision of the Department is affirmed.[6]

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

[6] This final order is filed as provided in 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.