ISSUED JANUARY 14, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

VETERANS OF FOREIGN WARS POST 3208 dba VFW Post 3208 40 East Montecito Street Sierra Madre, CA 91204, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	AB-6840 File: 52-277601 Reg: 96038275 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: November 5, 1997 Los Angeles, CA

Veterans of Foreign Wars Post 3208, doing business as VFW Post 3208 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered its club license revoked, with revocation stayed for a probationary period of two years, subject to an actual suspension of 25 days, for its having on two occasions in a two-week period violated conditions on its license regarding noise control, usage of certain doors, sale, service or consumption of alcoholic beverages

[1] The decision of the Department dated April 3, 1997, is set forth in the appendix.

outside the structure or in the rear parking lot, and the employment of licensed security guards, all allegedly in violation of Business and Professions Code §23804, and for having made changes to the premises which materially altered the premises from the diagram on file with the Department (ABC-257A, dated February 28, 1995), being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §23804 and Department Rule 64.2, subdivision (b)(1)(B) (Cal.Code Regs., title 4, div. 1, §64.2, subd. (b)(1)(B)).

Appearances on appeal include appellant Veterans of Foreign Wars Post 3208, appearing through its counsel, Louis Mittelstadt, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's veterans' club license was issued in 1954.[2] On December 4, 1996, the Department instituted an accusation alleging that appellant, on two different dates, violated four separate conditions on its license, relating to noise, door usage, consumption outside the premises, and employment of licensed security guards, and, in

[2] The accusation in this matter states that appellant's license was issued January 1, 1965. The 1954 date in the text is based on a finding of fact in a proposed decision of Administrative law Judge Richard E. Ranger dated September 17, 1993, following a hearing on protests by nearby residents against appellant's application for licensing of an expanded banquet room area. The proposed decision is part of Exhibit 2, at pp.20-24.

addition, violated Rule 64.2, subdivision (b)(1)(B), by installing a door without prior Department approval.

An administrative hearing was held on February 10, 1997, at which time oral and written evidence was received. At the commencement of the hearing, quartermaster Evans, a lay person, stipulated with Department counsel that "the facts as set forth in the accusation are true," stating that appellant wished to argue for mitigation of penalty [RT 5]. The Administrative Law Judge (ALJ) accepted the stipulation [RT 5]. Evans declined to stipulate to appellant's having received a warning regarding the condition violations after the first occurrence [RT 6-7]. As a consequence, the Department presented the testimony of Department investigator Scott James Stonebrook, and the hearing proceeded on the premise the warning issue was contested.

Thereafter, the ALJ submitted his proposed decision, finding in favor of the Department with respect to all of the allegations in the accusation. He ordered appellant's license revoked, but stayed revocation subject to a two-year probationary period, and an actual suspension of 25 days. The ALJ found that the condition violations were established as a result of the stipulation, and found the condition violations on the second occasion to be aggravated in light of the warning given by the

Department investigator.[3] As to the violation involving the installation of the new door, the ALJ concluded that "in light of the obvious discrepancy regarding the number of doors on the east side of the premises as depicted on Exhibit B as compared with the diagram of Licensed Premises, it is not surprising that the Respondent was confused as to whether the Department had approved the changes requested by the Respondent" [Finding of fact V].

Appellant filed a timely notice of appeal and now makes the following contentions: (1) it did not knowingly violate the conditions of the license, the conduct upon which the accusation was based having been the result of guests having opened the soundproof doors while music was playing, using the doors in violation of the rental agreement with the Post, and the failure of the security guards to enforce the terms of

---

[3] Finding of Fact III recites that "the parties stipulated that the facts set forth in the accusation are true and correct and that a warning was received by the respondent after the first violation of August 17, 1996. The underlined portion of this finding is incorrect. Not only was appellant's representative unwilling to stipulate that it had been warned, the ALJ expressly acknowledged that there was no stipulation to that effect [RT 7]. Indeed, this was the reason investigator Stonebrook's testimony was offered. The ALJ ultimately found that "the fact that a second violation of the same conditions occurred only two weeks after Respondent's representative was confronted with the violation of those same conditions was considered as an aggravating factor in the imposition of a penalty and justifies a substantial penalty." Since Stonebrook's testimony is sufficient to establish that appellant was, in fact, warned about condition violations, the error regarding the scope of the stipulation would not appear to have been prejudicial.

the rental agreement; (2) appellant reasonably believed the installation of the new door had been approved by the Department; and (3) the penalty is excessive when appellant's long period of discipline-free operation is taken into account.

DISCUSSION

I

Appellant claims that it did not knowingly commit any of the condition violations charged in the accusation, blaming the conduct which formed the basis for the charges on guests of the Post or on security guards who were lax in their enforcement duties.

Appellant's representative at the administrative hearing agreed on the record to a stipulation that "the facts as set forth in the accusation are true" [RT 5]. Consequently, the Department did not present any witnesses with respect to the counts of the accusation charging violations of license conditions.

It would appear that Evans may not have fully understood the consequences of the stipulation, since appellant attempted, in the post-hearing submission permitted by the ALJ, to refute the accusation charges, and does so on this appeal.

The law views a stipulation as in the nature of a contract, and ordinarily a party who has stipulated to the charges will be held to the terms of the stipulation. The Department obviously relied on the stipulation as to the condition violations, since it did not present any testimony with respect to those charges. However, as the discussion which follows will demonstrate, the unusual combination of circumstances in this case indicates that a departure from this general rule is in order with respect to the door issue.

When he entered into the stipulation, Evans indicated that appellant was

preserving the right to argue mitigation. To the extent its arguments directed at the merits have any relevance as to the appropriate penalty, the Board is free to consider them. However, it is our view that, as to the charges themselves, appellant is bound by its stipulation, and cannot challenge them on their merits - again, with the exception of the issue involving the door.

II

Appellant contends it had been given approval to install the door in question, asserting that it sought the approval in 1995, but was unable to complete the installation until 1996 because of a lack of funds. The Department contended at the administrative hearing that the door in question was not the door for which approval had been given. Although this would appear to be a simple factual issue, it generated more heat than light in the administrative hearing.

Department investigator Stonebrook testified that, during his visit to the premises on August 17, 1995, at which time he observed the violations charged on that date, he had a conversation with a person named Walter Ferris, identified to him as appellant's then quartermaster. Ferris told him appellant intended to install a new door into the banquet room on the east side of the premises. When asked if appellant had Department approval, Stonebrook testified, Ferris said he had approval from the city of Sierra Madre, but did not have approval from the Department. Stonebrook then told him he needed Department approval before installing the door. Upon his return to the

premises two weeks later, on August 31, 1995, when he presumably observed the violations charged in count 2 of the accusation, Stonebrook also observed a newly-installed door [RT 10]. He testified this was the door Ferris had described to him [RT 8-12, 24-25].

Quartermaster Evans testified it was appellant's understanding that while it could use certain of the doors only for emergency exits, the installation of a new door in the older part of the building would be acceptable to the Department [RT 14-15]. Consequently, the Post applied for permission to do so both from the city of Sierra Madre and from the Department. According to Evans [RT 15], the actual installation of the new door was then delayed for lack of funds, a delay confirmed in Commander Grotewiel's testimony [RT 28]. It was Evans' belief, he testified, that the Department's approval was set forth in a letter to appellant. The ALJ then agreed to delay closing the record for ten days to permit Evans to locate the letter and make it part of the record.

Appellant thereafter submitted what has been marked as Exhibit A, consisting of a cover letter dated February 18, 1997, and a number of attachments. The Department responded with a brief dated February 27, 1997 (Exhibit 2), to which a number of documents were attached. The attachments included a Diagram of Licensed Premises (Exhibit 2, pp. 32-33, referred to in the brief as Exhibit E) purporting to show the disputed fourth door.

These documents suggest that the Department did in fact approve the installation of the new door, and that the door the investigator saw was that door. The distinction the Department attempts to make between a "third" door and a "fourth" door, as we shall attempt to show, is based on a mistaken understanding of what the documents portray.

The Department's post-hearing brief explained [at p.2] that the documents which were attached to it[4] were also contained in the post-hearing submission of the licensee, but added that "obviously the version of Exhibit E submitted by the respondents does not include Inv. Stonebrook's writing" (Dept. Br., p.2).

A comparison of the two versions of the Diagram of Licensed Premises reveals that the doors shown on the Department's version have been assigned numbers (e.g., door #1, etc.). Two parallel lines have been drawn vertically just to the left of the door marked by the arrow and the word "ENTER," and have been designated "door #2. The door marked with the arrow has been designated "door #3, and the door shown on the far right of the diagram is marked "door #4." The Department's brief then explains the

[4] These documents included, among others, an order entered by the Department ordering the modification of conditions presently on the license in accordance with a petition dated May 25, 1995, an exchange of correspondence between appellant and District Administrator Kelly in February and March 1995, and a copy of a diagram of the licensed premises. The conditional license which reflects the changes is Exhibit A in the record.

significance of these annotations:

> "As indicated on Ex. E, the door referred to by the respondents is the third door and a fourth door was installed later as marked. It is this fourth door which is the source of the violation. This is consistent with Inv. Stonebrook's testimony at the hearing, particularly his warning to the respondents that they did not have approval to install a fourth door before the door was installed."

We have been unable to find anywhere in the relatively short transcript of the administrative hearing any explanation of how the annotations on the Department's version of the Diagram of Licensed Premises got there. Considering the weight placed on this document by Department counsel, and, apparently, the ALJ, it concerns us that there is no testimony from the investigator that he placed them on the document, or, if he did, when he did so. We are unwilling to accept, on an issue of controlling importance, the contention of Department counsel that these annotations, supposedly placed on the document by investigator Stonebrook, correctly denote the addition of a door other than the door appellant sought and obtained authorization from the Department to install. We do not know when the annotations were placed on the diagram, whether before or after the hearing - there is nothing that would indicate it was done in the course of the hearing, when Stonebrook could have been cross-examined as to how he chose where on the diagram to denote the newly-installed door. For all we know, assuming investigator Stonebrook did number the doors and draw the vertical lines to denote the new door, it is altogether possible that he recognized that if he saw a new door, it had to be close in proximity to the existing entry door - which,

appellant would have us believe, was all along the only new door there ever was.

In its brief on this appeal, appellant argues that it acted reasonably in its belief that it already had the necessary Department approval to install the new door.

> "The door installed on August 19, 1996 was included on a plan submitted to the Department in February, 1995. This attached plan even highlighted the door in question with an arrow and the word "enter" in large letters. Therefor [sic], though the Department had notice of this door and it was 'on file' with the Department. ... Several months later, the Department issued condition 4 containing the language 'except for the northeast door.' Since the one other door that could possibly be construed as a 'northeast door' is the service entrance at the back of the bar which has never been open to the public, it is understandable that lay volunteers could interpret this situation as allowing the installation of the door and its public use per condition 4 ..." (App.Br. 3).

We agree that it was reasonable for appellant to believe it had the Department's okay. Indeed, the documents submitted with the Department's post-hearing brief demonstrate that, at least in 1995, the Department also believed that to be the case.

The documents tell the following tale:

(a) In July 1992, appellant sought the licensing of an expanded banquet room area on the south side of the premises structure. The application was approved in a proposed decision dated September 13, 1994 (Exhibit 2, pp. 20-24), subject to a number of conditions, the one relevant to the present case stating as follows: "4. The rear doors on the south and east side of the premises structure shall not be used for entrance or exit except for emergency purposes" (Id. at p. 23).

(b) The proposed decision is one of the attachments to an investigative report (Exhibit 2, pp.9-28) approved by the Department's district administrator on June

6, 1995, prepared in response to the licensee's request "that the Department modify its conditions regarding entering the premises through an east door" (Id. at p.9). The report, prepared and signed by Department investigator Crabb, quotes the existing condition 4, and states:

> "The licensee has requested the Department modify its condition #4 regarding using a door located on the east side of the premises for patron entrance and exit.
> ...
> On May 3, 1995, I spoke to Jack Wolfe, Commander of the VFW. He explained an east door would be constructed near the north end of the premises. The existing east door near the south end of the premises will remain closed and used for emergencies only. The door to be constructed will lead into a foyer then another door will lead into the premises to ensure no noise will emanate from the premises.
>
> The licensee has submitted a written request to change the condition as follows:
>
> Condition#4 amended to read: 'The rear doors on the south and east side of the premises structure, except for the northeast door, shall not be used for entrance or exit except for emergency purposes." [Emphasis supplied].

(c) Nine days later, on June 15, 1995, the Department entered an order (Exhibit 2, p.5) modifying the conditions on the license in accordance with the licensee's request.

(d) In doing so, the Department implicitly approved the installation of a proposed door which it had been told "will lead into a foyer then another door will lead into the premises," and which was referred to in the modified condition as the "northeast door" of the premises structure.

We are aware that the Department argued to the ALJ that it "does not implicitly

approve additions to a premises by modifying the conditions on the license." That may well be true. In this case, however, what appears to have been done is to modify conditions on a license to reflect an addition to the premises which was tacitly approved. It is difficult to read the investigative report approved by the district administrator any other way, and it is understandable that appellant may have believed it had been given approval to install the new door.

We believe the investigator who made the entries on the diagram of the premises confused the situation by locating the "new door" a few feet south of what appellant says is the real "new door,' the door shown on both Exhibit B and on the 2/28/95 diagram as "ENTER."[5] We also believe the ALJ may have failed to understand that while the "approval" came in 1995, the construction was in 1996, as testified to by the VFW witnesses.

When the decision of the Department is viewed in light of the entire record, there is insufficient evidence to sustain the finding that Rule 64.2, subdivision (b)(1)(B) was

---

[5] Indeed, we also cannot help but note that the supposed location of the new door, according to investigator Stonebrook, would mean that patrons of the Post seeking to enter the banquet area are to be led directly through an area clearly marked "STORAGE."

Investigator Stonebrook counted as door number 4 the door farthest to the right of the diagram. That door leads to the upper level of the structure, and is the door appellant wished to close off to patron entry, and direct them through the new entry which would be on the same level as the banquet hall. The testimony of Quartermaster Evans [RT 20, 22] is clear on this point.

violated.

III

Appellant challenges the penalty as excessive. It stresses its long history (at least 32 years) free of discipline; the fact that once current management learned of the condition violations it promptly acted to prevent their future recurrence; and that it reasonably believed the installation of the new doorway had been with the consent and approval of the Department.

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].)

We conclude that the Department has abused its discretion in imposing a penalty of stayed revocation and an actual suspension. The penalty is based not only on condition violations, but also on a violation of Rule 64.2, subdivision (b), as to which we think the decision is in error. In addition, the Department, in its penalty recommendation at the administrative hearing [RT 23-24], stressed the door installation as a significant factor, and, in its brief to the Board (Dept.Br. 1), characterizes it as an aggravating factor, To the extent the penalty rests on such a faulty premise, it is clearly an abuse of discretion.

Although appellant's confusion regarding whether it had been given the Department's approval to install the door is acknowledged in the Department's decision as a mitigating factor, the decision does not indicate the extent to which the penalty rests on the condition violations as opposed to the rule violation involving the door. To the extent the penalty is at all based upon the rule violation, it is flawed.

CONCLUSION

We have determined that the findings and determinations with respect to counts 1 and 2 should be affirmed; that the findings and determinations with respect to count 3 should be reversed; and the matter should be remanded to the Department for reconsideration of the penalty. In so doing, we feel it appropriate to express our view that the conduct found to have occurred does not appear to be the sort of conduct justifying a revocation order, especially in light of the extremely lengthy compliance history of appellant.[6]

BEN DAVIDIAN, CHAIRMAN
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL

---

[6]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.

APPEALS BOARD[7]

[7] Ray T. Blair, Jr., Member, did not participate in the oral argument or decision in this matter.