

ISSUED SEPTEMBER 30, 1997

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

SHIRLAND, INC.	)	AB-6803
dba Lariat Bar and Grill)	
1146 13th Street	)	File: 47-304756
Imperial Beach, CA 91932,	)	Reg: 96037527
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Rodolfo Echeverria
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	August 6, 1997
	)	Los Angeles, CA
)	

Shirland, Inc., doing business as Lariat Bar and Grill (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which ordered its on-sale general public eating place license suspended for 15 days for appellant’s bartender having served an alcoholic beverage (Goldschlager Liqueur) to a person who was then obviously intoxicated, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25602.

¹ The decision of the Department dated December 19, 1996, is set forth in the appendix.

Appearances on appeal include appellant Shirland, Inc., appearing through its president, Andrew DiAngelo; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on February 14, 1995. Thereafter, the Department instituted an accusation alleging that on August 17, 1996, appellant's bartender served an alcoholic beverage to Lawrence G. Robbins at a time when Robbins was obviously intoxicated.

An administrative hearing was held on November 13, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Department investigator Kenneth Clark and appellant's president, Andrew DiAngelo.

Investigator Clark testified that he observed Robbins at the bar displaying symptoms of being under the influence of a drug or alcohol. When he challenged the bartender who was about to serve Robbins a drink, the bartender said "It's okay, I took his keys away. And besides, he's celebrating his birthday."

Mr. DiAngelo admitted the violation occurred, explaining that there had been a party for Mr. Robbins' birthday, that it was known he had too much to drink, that his car keys had been taken from him, and it was thought he had been taken home. DiAngelo was surprised when he learned Robbins had returned and been served another drink.

Subsequent to the hearing, the Department issued its decision which determined that appellant, through its bartender, had violated Business and Professions Code §25602 and ordered appellant's license suspended for 15 days.

Appellant filed a timely notice of appeal, in which it does not challenge the Department's decision, but seeks to have the penalty stayed, a penalty which appellant concedes "was graciously reduced by five days."

DISCUSSION

The Department recommended a 20-day suspension, described as its standard recommendation for a violation of §25602. Department counsel expressed his view that even though the violation could be considered aggravated, because Robbins had been cut off and sent home earlier, the Department would nonetheless stay with its standard recommendation.

Appellant stressed his clean record, pointing out he had owned the bar since 1990, with only a single violation. He candidly admitted the violation, but suggested the fact it was Robbins' birthday was what led the bartender to err. His effort was moderately successful, in that appellant was suspended 15 days rather than 20.

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].)

Given the clear, and admitted, violation, and the fact the bartender knew that Robbins had earlier been sent home because he had too much to drink, a penalty more lenient than the Department's standard penalty for a violation of this kind cannot be said to be an abuse of discretion.

CONCLUSION

The decision of the Department is affirmed.²

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

² This final decision 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 district 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.