ISSUED JANUARY 16, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

RAAD J. KITI dba F & R Market 4740 ½ Orange Avenue San Diego, CA 92115, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6813 File: 20-192270 Reg: 93028671 Order of Revocation Date and Place of the Appeals Board Hearing: November 5, 1997 Los Angeles, CA

Raad J. Kiti, doing business as F & R Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license for having violated the terms of his probation.

Appearances on appeal include appellant Raad J. Kiti, appearing through his counsel, Ralph Barat Saltsman; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

[1]The order of revocation of the Department dated February 25, 1997, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on September 5, 1986. Appellant's license history shows that on April 19, 1993, the Department instituted an accusation against appellant charging that on five different dates, appellant had sold or offered for sale, drug paraphernalia.

On September 17, 1993, appellant signed a stipulation and waiver form which consented to having his license conditionally revoked, with revocation stayed during a three-year probationary period together with serving an actual 15-day suspension.

A decision of the Department dated October 6, 1993 (1993 decision), was entered in conformity with the agreement. Appellant served the suspension commencing October 12, 1993.

Subsequently, another accusation was initiated on April 26, 1995, charging a violation on two separate dates, the sale or offering for sale of drug paraphernalia, possession of a nunchaku in violation of the Penal Code, and a violation for the sale of an alcoholic beverage to a person under the age of 21 years. The Department thereafter, issued its decision dated January 4, 1996 (1996 decision), finding one of the sales of drug paraphernalia and the possession of the nunchaku, to be true, and suspended appellant's license for 45 days, which was appealed. On January 24, 1997, the Appeals Board affirmed the

Department's decision.

On February 25, 1997 (1997 decision), the Department ordered appellant's stayed revocation vacated and revocation reimposed due to the violations as found true in the 1996 decision. Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the issue that the ordering of revocation is an abuse of the Department's discretion.

DISCUSSION

The 1993 decision of the Department which imposed the stayed revocation, and imposed certain terms of probation, stated that the agreed penalty was imposed:

> "...on condition that no cause for disciplinary action occur within the stayed period. If cause for disciplinary action occurred [sic] during the stayed period, the Director may, in his discretion ... vacate the stay and revoke the license ...."

We view the wording of the decision as extremely broad in its scope giving to the Department wide latitude in assessing any future course of action which may arise from some future violation.

However, the Appeals Board's duty is to review any such action of the Department to determine if the Department "has proceeded in the manner required by law" (Business and Professions Code §23084), that is, among other things, has adhered to the principles of due process, and substantial justice attained. The Board in the case of KDM, Inc. (1997) AB-6647, considered the question of the broad powers of the Department in this area of inquiry:

> "Appellant contends that the condition of the stay, that 'no cause for disciplinary action occurs within the stayed period' is unreasonably broad, in that it is not limited to a violation similar in nature. It asks whether a records keeping violation, and after-hours sale, a failure to post a license, or other nominal violations, would result in the revocation of appellant's license.
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> "Appellant's contention does not bear directly on the penalty itself. Instead, it seeks some sort of prediction from the Appeals Board as to what kind of future violation would trigger a lifting of the stay order. The Board is not in a position to make such a prediction. Nor is the Board able to say that the Department's unwillingness to specify in advance a category of violation sufficient to induce it to seek a revocation of the stay is an abuse of discretion.
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> "Although the Department's brief did not address this issue, it is the Department's standard practice to frame an order staying revocation broadly, and not to attempt to characterize the kind of future violation which would warrant a lifting of the stay order. A requirement would unduly tie the Department's hands. The better course is for the Board to review such action consistent with an abuse of discretion standard when and if the situation arises."

In the 1993 decision, the Department determined that the ultimate penalty of revocation was not at that time, reasonable, thus allowing appellant to continue to exercise the privileges of the license. However, the Department retained the power to revoke the license under the probationary terms, if a future violation occurred, all designed, hopefully, to obtain the desired result of conformity to law.

In cases where violations occur subsequent to the Department's stayed revocation decision, the Department has many options to enforce conformity to law short of revocation, such as, extending the terms of probation for an additional period to impress upon the licensee that revocation is a clear danger to continuation of the license; impose new terms to the existing probation, which could address

circumstances found in the new violation, which circumstances were not known or considered at the time of the original imposition of probation, or both; or, impose revocation as the Department has done in the present appeal. It is not for the Board to advise the Department which option the Department should chose, but to consider the choice made in relationship to the rule of abuse of discretion.

The Department by the exercise of its discretion to revoke the license under authority of the 1993 decision, in effect, has concluded that continuation of the license would be contrary to the public welfare or morals. This means that the Department considers that either the licensee is unfit, or the premises is not eligible, any longer to hold a license -- that is, continuation of the license would be "harmful or undesirable," per Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1070) 2 Cal.3d 85, 99 [84 Cal.Rptr. 1113], for the common community good. A review of the record does not disclose evidence that location of the premises was a factor. Therefore, the major factor in considering vacation of the probation should rise or fall on a question of appellant's fitness to continue to hold the license.

The court in Boreta, supra, stated, concerning the concept of public welfare or morals, the following:

> "It seems apparent that the 'public welfare' is not a single, platonic archetypal idea, as it were, but a construct of political philosophy embracing a wide range of goals including the enhancement of majority interest in safety, health, education, the economy, and the political process, to name a few. In order intelligently to conclude that a course of conduct is 'contrary to the public welfare its effects must be canvassed, considered and

evaluated as being harmful or undesirable...."
(2 Cal.3d at 99.)

The record shows that a decision was issued (1993 decision) which found appellant violated Health and Safety Code §11364.7, subdivisions (a) and (c), selling or offering to sell, drug paraphernalia. Again, a decision (1996 decision) found appellant had violated the same code section.

Appellant argues that while the 1993 decision was revocation stayed, the suspension imposed was only 15 days, with the new violation under the 1996 decision meriting only 45 days, thus demonstrating that the violations were not of highest priority to the Department and that unconditional revocation would be too great a progressive jump in the penalty scheme -- 15 days, to 45 days, to revocation.

The Appeals Board in its review believes that it must consider the decision of the Department within two contexts, (1) the Department's responsibility under the public welfare or morals provisions of Constitution, and (2) a pattern of misconduct by appellant as shown in the record.[2]

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[2]We are guided by two basic principles, the first of which states that: "If the decision is without reason under the evidence, the action of the Department constitutes an abuse of discretion and may be set aside. But where the decision is subject of a choice within reason, the Department is vested with the discretion of making the selection...." (Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (1982) 133 Cal.App.3d 814, 817 [184 Cal.Rptr. 367].) The second concept is that "Review for abuse of discretion consists of two distinct inquiries: the adequacy of the factual underpinning of the discretionary decision and the rationality of the choice." (The Scope of Judicial Review of Decisions of California Administrative Agencies, Asimow, June 1995, Vol.42, No. 5, p. 1229.)

While appellant's arguments have an emotional persuasiveness which compels us to consider them closely, we find that they must fail.

The record shows a 1993 decision which ordered appellant's license conditionally revoked, and subject to certain terms of probation for a designated period, one of such terms stating: "... on condition that no cause for disciplinary action occur during the stayed period ...."

During the stayed period, a new violation concerning the same type violation occurred. The Department heard the facts of the new violation and ordered a suspension. While the certified record of the prior 1993 decision was entered into the record, it was only for the purpose of aggravating the penalty in the 1996 decision.

As we consider the public welfare or morals provisions, and Boreta, supra, we conclude that the discretion exercised by the Department was not unreasonable. Within the period of the probation for the first violation, appellant was again found to have violated the same laws.

We do not see the violations in the light proposed by appellant, that he is entitled to a graduated increase of penalty for violations, such as, to name a few, sales to minors or intoxicated persons. This matter concerns the use of the license to concurrently sell drug paraphernalia, which in its own right, on a first offense, can conceivably be a revocation offense. There is no hint in the record of mistake, confusion, or ignorance, but a deliberate stocking and offering for sale of the illegal

items. We cannot say the Department has acted arbitrarily in this matter.

Also, the pattern of conduct is sufficient to show a license holder who for profit and little concern for the flood of drugs within the community, after a violation and potential loss of license, again allowed the violation a second time to occur.

CONCLUSION

We cannot say the Department has acted in an unreasonable manner, and that one could say that the retention of the license would not be "harmful or undesirable" for the common community good, as we indicated above.

The decision of the Department of Alcoholic Beverage Control is affirmed.[3]

BEN DAVIDIAN, CHAIRMAN
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD[4]

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[3]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 final 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.

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