

ISSUED JULY 11, 2000

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

JAGG, INC.	)	AB-6954b
dba Captain Cremes)	
23642 Rockfield	)	File: 48-221463
Lake Forest, CA 92630,	)	Reg: 97038802
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Rodolfo Echeverria
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	June 6, 2000
	)	Los Angeles, CA

Jagg, Inc., doing business as Captain Cremes (appellant), appeals from a Department of Alcoholic Beverage Control "Decision Following Appeals Board Decision"¹ which imposed a license suspension of 25 days, with 5 days stayed for a probationary period of 1 year, after the Appeals Board, on September 2, 1999, reversed another "Decision Following Appeals Board Decision,"² which had re-

¹The "Decision Following Appeals Board Decision" (AB-6954a), dated November 12, 1999, is set forth in the appendix.

²The "Decision Following Appeals Board Decision" (AB-6954), dated February 1, 1999, is set forth in the appendix.

imposed a license suspension of 35 days with 10 days stayed after the Appeals Board had affirmed the decision of Department in AB-6954, but reversed the penalty and remanded it for reconsideration.

Appearances on appeal include appellant Jagg, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

FIRST APPEAL (AB-6954): The Department instituted a four-count accusation against appellant charging violations of Department Rule 143.3 (counts 1, 2, and 3) and a condition on appellant's license (count 4, sub-counts A, B, and C.). Parts (a) and (b) of the condition involved corresponded, essentially word for word, to Rules 143.3(1) and 143.3(2), respectively.

After a hearing, the Department issued its decision [Decision 1] which determined that the Rule 143.3 violations charged in counts 1 and 3 and the condition violations charged in count 4, sub-counts A and C, had been proven, but that the violations charged in count 2 and sub-count B of count 4 had not been established. The license was ordered suspended for 35 days, with 10 days stayed for a probationary period of one year. The Order stated that the penalty was imposed “[t]aking into consideration that the Department failed to establish the allegations in Count 2 and Count 4 Sub-Count B”

On appeal, appellant argued that the Department illegally determined the penalty by considering condition violations that duplicated rule violations. The Department did not disagree with appellant's argument, and asked that it be given

the opportunity to review the penalty. This Board agreed, relying on Cohan v. Department of Alcoholic Beverage Control (1978) 76 Cal.App.3d 905 [143 Cal.Rptr. 199], and affirmed the Department decision, but reversed the penalty and remanded the matter to the Department for reconsideration of the penalty.

The Department's subsequent "Decision Following Appeals Board Decision" (AB-6954) [Decision 2] imposed the same penalty of 35 days' suspension, with 10 days stayed for a one-year probationary period. However, the penalty was said to be based on the violations of Rules 143.3(2) and 143.3(1)(b). No reference was made to any condition violations.

SECOND APPEAL (AB-6954a): Appellant filed a timely re-appeal, arguing that the Department's imposition of the same penalty on reconsideration was an abuse of its discretion.

We agreed, saying that, although there was no indication in the Department's original decision how much of the penalty was attributable to each of the violations, "*some part of the original penalty was attributable to the condition violation. . . . With absolutely no explanation or justification, reimposition of the same penalty when two counts were reversed is arbitrary and an abuse of discretion.*" The order said simply, "The decision of the Department is reversed."

THE PRESENT APPEAL (AB-6954b): After the Appeals Board issued its decision in AB-6954a on September 2, 1999, the Department, on November 12, 1999, issued a "Decision Following Appeals Board Decision" (AB-6954a) [Decision 3] which is the subject of the present appeal. Decision 3 consists of a four-sentence preamble noting that the Appeals Board reversed the Decision 2 and an

order that suspended appellant's license for 25 days, with 5 days stayed for a one-year probationary period.

Appellant has filed a timely appeal and argues that the Department was without jurisdiction to act after the Appeals Board reversed Decision 2 without remand. The Appeals Board is allowed, but not required, to remand a matter to the Department. It did not do so in this instance. Therefore, the Department's only remedy after the Appeals Board reversal, appellant argues, was to petition the Court of Appeal or the Supreme Court for a writ of review within 30 days after the Appeals Board's final order was filed on September 2, 1999.

Alternatively, appellant argues that, should the Appeals Board decide the Department had jurisdiction to issue Decision 3, the Department abused its authority in imposing a penalty only slightly less onerous than the original one.

DISCUSSION

I

Appellant contends since the Appeals Board only reversed, and did not also remand, Decision 2 to the Department, the Department issued Decision 3 and imposed a penalty without jurisdiction to do so. The matter has been final, appellant asserts, since September 2, 1999, and the Department's only relief was to file a petition for a writ of review within 30 days thereafter, which it did not do.

This appeal revisits the argument made by counsel for appellant in Circle K Stores, Inc. (12/27/99) AB-7080a. In that appeal, the Board held that the Department does have the power to conduct further proceedings after the Appeals Board has issued an unqualified reversal, so long as the Department's action is not

inconsistent with the Board's decision.

Appellant's counsel filed a petition for writ of review in AB-7080a which was denied by the Court of Appeal on April 18, 2000. (Circle K Stores, Inc. v. Department of Alcoholic Beverage Control, et al., B138381, Second Appellate District.) Therefore, the Board's decision in AB-7080a stands, and the Department properly reconsidered its decision in this matter after the Board reversed it.

II

Appellant contends, alternatively, that the Department abused its discretion in only reducing the penalty to a 25-day suspension with 5 days stayed, from a 35-day suspension with 10 days stayed.

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].)

In imposing its revised penalty, an actual suspension of 20 days, the Department had two Rule 143 (lewd conduct) violations to consider. While a suspension of 20 days is not a light penalty, it cannot be said that it is so severe under the circumstances as to constitute an abuse of the Department's discretion.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This 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 order as provided by §23090.7 of said code.

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