

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

AB-7989

File: 21-356184 Reg: 02052441

DEBY O'GORMAN and KELLY DAVID O'GORMAN, dba Tahoe Keys Liquor
2297 Lake Tahoe Boulevard, South Lake Tahoe, CA 96150,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: March 13, 2003
San Francisco, CA

ISSUED APRIL 10, 2003

Deby O'Gorman and Kelly David O'Gorman, doing business as Tahoe Keys Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for co-appellant Kelly O'Gorman selling an alcoholic beverage to a person under the age of 21, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Deby O'Gorman and Kelly David O'Gorman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas Loehr.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 20, 1999. Thereafter, the Department instituted an accusation against appellants charging that,

¹The decision of the Department, dated June 13, 2002, is set forth in the appendix.

on December 28, 2001, Kelly Gorman sold beer to 18-year-old Christopher Anthony O. Loew.

An administrative hearing was held on May 2, 2002. Documentary evidence was received and testimony concerning the transaction was presented. Subsequently, the Department issued its decision which determined that the charge of the accusation had been established and appellants had not established a defense. Appellants thereafter filed a timely appeal in which they contend that the penalty is excessive.

DISCUSSION

Along with the Department's decision, appellants received a Certificate of Decision indicating their license would be suspended on or after August 1, 2002. They contend that beginning a suspension on August 1 would be excessive because most of their yearly income from the store is earned during the summer months, particularly August. In addition, appellants allege they recently discovered an employee's embezzlement amounting to a loss of over \$72,000. This, appellants assert, places them in such a precarious financial position that no suspension should be imposed before January 15, 2004. In no event, they urge, should a suspension be imposed during the months of June, July, August, or during the Christmas/New Year's holiday season.

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].)

Even in light of the alleged embezzlement, we cannot say that a 15-day suspension is an abuse of the Department's discretion. This is a standard penalty for a first sale-to-minor violation.

Appellants' primary objection appears not to be to the number of days of the suspension, but to its timing. However, this Board may only review the Department's actions for abuse of discretion; it is not empowered to revise the timing of a suspension.²

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²Obviously, the date set in the Certificate of Decision has passed, so appellants' specific objection is moot. When this Board's decision becomes final, the Department will set a new time for the suspension to start. In light of the particular circumstances of this case, a suspension set to be served during the summer months might well be considered an abuse of discretion. In all likelihood, however, the suspension will be set to start well before the onset of the summer season. With a 15-day suspension, appellants have the opportunity to avoid a suspension altogether by petitioning the Department to make an offer in compromise and pay a fine pursuant to Business and Professions Code section 23095.

³This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.