

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

AB-8139

File: 21-310932 Reg: 02054213

GEORGE O. BRYANT, ULYSSES MAYFIELD, and JOHNNY WALKER,
dba BMW Liquor
4533 West Imperial Highway, Lennox, CA 90304,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: April 8, 2004
Los Angeles, CA

ISSUED MAY 25, 2004

George O. Bryant, Ulysses Mayfield, and Johnny Walker, doing business as BMW Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their license, but stayed revocation for a 24-month probationary period and suspended the license for 15 days for their clerk selling drug paraphernalia, a violation of Business and Professions Code section 24200, subdivision (a), and Health and Safety Code sections 11364.7, subdivisions (a) and (d), and 11014.5, subdivision (a).

Appearances on appeal include appellants George O. Bryant, Ulysses Mayfield, and Johnny Walker, appearing through their representative, Charles Benninghoff, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

¹The decision of the Department, dated April 24, 2003, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on October 20, 1995. On December 17, 2002, the Department filed an accusation against appellants charging that, on September 16, 2002, appellants' clerk, Charles M. Phillips, possessed with intent to deliver, furnish or transfer, drug paraphernalia consisting of two glass pipes.

At the administrative hearing held on March 13, 2003, documentary evidence was received, and testimony concerning the violation charged was presented by Department investigator Gerardo Sanchez, and by the clerk, Phillips. Co-licensee Johnny Walker also testified.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation. Appellants then filed this appeal in which they contend that the penalty is excessive.

DISCUSSION

I

Appellants do not contest the stayed revocation imposed, but contend that imposition of a 15-day suspension is unduly harsh in comparison to the lesser penalties imposed in actions against larger, more profitable businesses. They argue that a more appropriate (presumably lesser) penalty should be imposed because this was their first violation, they are minority businessmen operating in a predominately minority neighborhood, and they have already paid a cost in terms of finances, time expended, and stress.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California v. Alcoholic Beverage Control Appeals Bd.* (1971))

19 Cal.App.3d 785 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal.App. 2d 589, 594 [43 Cal.Rptr. 633].)

The Department originally recommended revocation stayed for three years and a 15-day suspension. Counsel stated that the suspension recommended was less than the 20 days typically asked for by the Department, in recognition of appellants' discipline-free operation for seven years. The ALJ felt that appellants' record deserved greater consideration and his proposed order imposed revocation stayed for only a two-year probationary period, but retaining the 15 days of suspension, which the Department adopted as the penalty.

The grounds argued by appellants for reduction of the suspension period do not compel us to conclude that the Department has abused its discretion. The cases referred to by appellants are not at all comparable to appellants' case. Even if they had been similar types of cases, each case, and its penalty, must be decided on its own facts. Appellants do not allege any reason, such as some improper discriminatory action by the Department, that might conceivably make race or ethnicity relevant. The simple fact that appellants are minority businessmen in a minority neighborhood can have no bearing on the penalty. Money, time, and stress are expended by all

appellants; appellants did not quantify these expenditures or allege that they were extraordinary in some way that distinguishes their situation from those of other appellants.

Appellants have not shown that the 15-day suspension was an abuse of the Department's discretion in this case.

ORDER

The decision of the Department is affirmed.²

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

²This 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.