

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

AB-8423

File: 47-406559 Reg: 04057805

MARGARET SHERMAN and MICHAEL DAVID SHERMAN dba Coyote Ugly Bar & Grill
1805 University Avenue, Riverside, CA 92507,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 1, 2005
Los Angeles, CA

ISSUED: FEBRUARY 1, 2006

Margaret Sherman and Michael Sherman, doing business as Coyote Ugly Bar & Grill (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days, 10 of which were conditionally stayed subject to one year of discipline-free operation, for having allowed the consumption of alcoholic beverages on an unlicensed outdoor patio, a violation of Business and Professions Code sections 23300 and 23355.

Appearances on appeal include appellants Margaret Sherman and Michael David Sherman, representing themselves, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public eating place license was issued on February

¹The decision of the Department, dated March 3, 2005, is set forth in the appendix.

2, 2004. Thereafter, the Department instituted an accusation against appellants charging the licensees with having allowed the consumption of alcoholic beverages in an unlicensed patio.

An administrative hearing was held on December 22, 2004, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established.

No brief was filed by appellant. Appellant Michael Sherman appeared at the hearing and asserted that it was only through inadvertence that the patrons were able to take beer to the patio. He also contended that there was no evidence of consumption on the patio, claiming that both bottles appeared to him to be full. He urged the Board to reduce the penalty.

DISCUSSION

We have reviewed the record and are satisfied that the Department's factual findings are supported by substantial evidence. The administrative law judge (ALJ) accepted the testimony of the Department's witnesses that the patrons had consumed beer when on the patio, and it was his province, not ours, to judge the credibility of the witnesses.

The Appeals Board may 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, as here, an appellant raises the issue of an excessive penalty, the Appeals Board may examine that issue. (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

The license restriction was imposed in the first instance to protect closely-situated neighbors from noise emanating from the premises. Hence, any violation of the condition has the potential of interfering with their quiet enjoyment of their residences. The Department recommended a 15-day suspension. The ALJ accepted that recommendation, but tempered its impact by staying 10 days of the suspension. Thus, appellants are in a position to serve a relatively short suspension or offer a payment in compromise, pursuant to Business and Professions Code section 23095. We cannot say that the penalty is so unreasonable as to amount to an abuse of discretion.

ORDER

The decision of the Department is affirmed.²

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, 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 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.