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

AB-8565
File: 48-361213 Reg: 05061096

ULEN ENTERPRISES, INC. dba Coach's
40968 Fremont Boulevard, Fremont, CA 94538,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: September 7, 2007
Los Angeles, CA

ISSUED DECEMBER 19, 2007

Ulen Enterprises, Inc., doing business as Coach's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 50 days for its employees having sold to, and permitted the consumption of alcoholic beverages by, two non-decoy minors, and permitted them to remain in the premises without lawful business therein, violations of Business and Professions Code section 25658, subdivisions (a) and (d), and 25665.

Appearances on appeal include appellant Ulen Enterprises, Inc., appearing through its counsel, Rick Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, John Peirce.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on January 6,

[1]The decision of the Department, dated April 13, 2006, is set forth in the appendix.

2000. On November 16, 2005, the Department instituted an accusation against appellant charging the sale to, and permitting the consumption of alcoholic beverages by, two non-decoy minors, and permitting them to remain in the premises without lawful business therein.

An administrative hearing was held on February 15, 2006, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charges of the accusation had been established, and imposed a 50-day suspension on each of the six counts of the accusation.

The uncontested facts of this case are fairly simple. On September 30, 2005, two minors purchased alcoholic beverages and consumed a portion of them, while being permitted to remain in the premises with no lawful purpose, separate violations of Business and Professions Code sections 25658, subdivisions (a) and (b), and 25665 on the part of each minor.

Under the Department penalty guidelines (Department Rule 144), the standard penalty for each violation of section 25658, subdivisions (a) and (b), is 15 days, and the standard penalty for each violation of section 25665 is 10 days. Thus, the total maximum standard penalty which might have been imposed by the Department could have been an 80-day suspension if all of the charged violations were dealt with on a cumulative basis and the suspensions were to be served consecutively.[2]

In a prior disciplinary matter, the licensee had stipulated to the finding that it violated, or permitted the violation of section 25658, subdivision (b), and to a penalty of

[2] This subject is discussed in more detail in section II, *infra*.

25 days.

The administrative law judge (ALJ) in this case imposed a suspension of 50 days on each count, jointly and severally. Appellant contends the penalty is an abuse of discretion for several reasons: (1) the Department erred in considering a Department report relating to a past disciplinary action and relying on charges in the prior action that were not pursued; (2) it was error to assess a higher penalty simply because two minors were involved in the violation; and (3) it was error to assess the penalties separately and jointly on each count of the accusation. Issues 2 and 3, relating to penalty, will be discussed together.

DISCUSSION

I

The report in question is a Department investigation report which was attached to the prior discipline package. The report contained the details underlying a seven-count accusation charging appellant with having permitted consumption of alcoholic beverages by two minors, and having permitted those two minors and two additional minors to enter and remain in the premises without lawful business therein, violations of Business and Professions Code sections 24200, subdivisions (a) and (b), 25658, subdivision (b), and 25665. The decision in the prior matter, entered following appellant's execution of a stipulation and waiver, based discipline on only a violation of section 25658, subdivision (b).

Appellant objected to the introduction of the report, and its objection was overruled. The question for this Board is whether the ALJ erred in admitting it and erred further in relying on the section 25665 charges that were not the subject of the prior discipline.

Contrary to appellant's assertion, we do not find it all that "clear" that the ALJ considered the violations of section 25665 in determining what he thought an appropriate penalty. We read Finding of Fact XII(c), which refers to that section, as focusing on the ages of three of the four minors who were involved in the violations of section 25658, subdivision (b) (consumption of alcoholic beverages), and not on any assumption that there was a finding that section 25665 was violated.

There is nothing explicit in anything in the proposed decision to the effect that the penalty is aggravated because of prior section 25665 violations, and we disagree with appellant's suggestion that we read into it such a motive on the part of the ALJ. At most, the ALJ appears to be reflecting on the laxity on appellant's part in controlling the premises.

The report itself was part of the record in the prior proceeding, and provided the basis for the entry of the order in that case. We find no error in its admission.

II

Appellant contends that it was error to assess penalties based on the fact two minors were involved, and that it was error to impose the penalties on each count separately and jointly.

The accusation charged, and the Department found, that each of the minors was sold or served an alcoholic beverage and allowed to remain in the premises without a lawful reason. Under the Department's published penalty schedule, each of the two sale-to-minor violations exposed appellant to a 15-day suspension, while the same schedule provided for 10-day suspensions for each of the two permitted-to-remain-in-the- premises violations, for a total of 50 days.

The ALJ concluded that the Department recommendation of a 50-day

suspension did not appear either unreasonable or inappropriate considering the number of violations "and respondent's prior disciple that occurred a little over 14 months previous to this matter."

Both the decision and the Department in its brief appear to have substantially overstated the time span between the two incidents. The prior violations to which appellant stipulated were alleged to have occurred on July 7, 2005, (See Exhibit 4.) The violations in the case now on appeal occurred on September 30, 2005, only days short of three months later - not 14 months later! Appellant has little basis to complain about the level of discipline imposed for the September 2005 violations.

We have some doubts about the propriety of imposing the same 50-day suspension on each count of the accusation, even though we have no difficulty in concluding that a suspension totaling 50 days could be justified under the Department's policy of graduated suspension for repetitive offenses. Multiple like offenses less than three months after a 25-day suspension for a violation involving minors would seem to invite an aggravated penalty, and that is what the ALJ appears to have done, albeit without indicating whether he was considering aggravation as a factor.

Appellant argues that "[e]ach count needs to be defined as to the appropriate penalty, " and concedes that this could result in a penalty of up to or even in excess of 50 days, which, if served concurrently, could be limited to 50 days.

This Board is not equipped to fine tune a Department penalty. We are satisfied that the facts of this case, coupled with appellant's disciplinary history, could well support a substatntial penalty. However, since we cannot discern the reasoning which led the ALJ to recommend the joint and separate 50-day suspension on each of the counts of the accusation, we cannot be assured that the penalty as a whole was

properly determined. Thus, we are compelled to remand the case to the Department for reconsideration of the penalty.

It may well be, when things are sorted out, that the Department will again impose a suspension that totals 50 days. That, we think, on the facts of this case, is probably the outer limit. That being said, we are confident that, whatever suspension the Department decides is appropriate, it will be clearly explained so that appellant can understand how it was determined (Cf. *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 635 [166 Cal.Rptr. 826].)

ORDER

The decision of the Department is reversed, and the case is remanded to the Department for reconsideration of the penalty.[3]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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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.