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

AB-8711
File: 48-436388 Reg: 07064759

SHANE JOSEPH CORCORAN, dba Spanky's Lounge
20812 Baker Road, Castro Valley, CA 94546,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: April 3, 2008
San Francisco, CA

ISSUED JULY 24, 2008

Shane Joseph Corcoran, doing business as Spanky's Lounge (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 20 days, with 5 days stayed for a probationary period of one year, because his employee sold an alcoholic beverage to an obviously intoxicated person and permitted another person to remain in the premises while intoxicated and unable to care for his own safety or the safety of others, violations of Business and Professions Code section 25602, subdivision (a), and Penal Code 647, subdivision (f).

Appearances on appeal include appellant Shane Joseph Corcoran, appearing in propia persona, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

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[1]The decision of the Department, dated July 26, 2007, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on February 15, 2006. On January 5, 2007, the Department instituted a two-count accusation against appellant charging violations for selling an alcoholic beverage to a patron who was obviously intoxicated and for permitting an intoxicated patron to remain in the premises when he was unable to care for his own safety or that of others.

At the administrative hearing held on April 4, 2007, documentary evidence was received and appellant stipulated to the violations charged in the accusation. Appellant presented testimony concerning mitigation of the penalty. The Department recommended suspension of the license for 15 days for count 1 and 5 days for count 2, the suspensions to run consecutively, for a total suspension of 20 days.

Subsequent to the hearing, the Department issued its decision which determined that the violations occurred as charged, but imposed a total suspension of 20 days with 5 days of the suspension stayed for a 1-year probationary period. Appellant filed a timely appeal contending that the penalty is excessive.

DISCUSSION

Appellant contends the penalty imposed is too severe because: he managed the premises for six years before owning it, and had no violations in all that time; the employee involved was new and had not had a chance to attend the Department's training yet; he has taken measures to ensure such a violation does not occur again; and other nearby licensed premises have not received such harsh penalties.

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, 789 [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, 291 [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. 2d 589, 594 [43 Cal.Rptr. 633].)

At the end of the hearing, the Department asked the administrative law judge (ALJ) to impose a 20-day suspension – 15 days for one count and 5 days for the other. The ALJ proposed, and the Department adopted, a suspension of 20 days, but stayed 5 of the days for a one-year probationary period. Therefore the penalty has been mitigated to some extent already.

The longer period of time without violation while appellant managed the premises might have served as further mitigation of the penalty – or might not have. In any case, that was evidence available to appellant at the time of the administrative hearing and should have been presented to the ALJ then. This Board is not empowered to modify the penalty and cannot send the case back to the Department to consider additional evidence unless that evidence, "in the exercise of reasonable diligence, could not have been produced or . . . was improperly excluded at the hearing before the department." (Bus. & Prof. Code, §§ 23084, subd. (e); 23085.) There is no certainty that this information would have made a difference in the penalty imposed but, in any case, appellant is too late with this evidence.

It is unfortunate that appellant's new employee had not had the Department's training yet, but that does not excuse the violations or mitigate the penalty. The measures appellant has taken since the violation to prevent a repetition have already been considered by the Department, and have resulted in five days of the suspension being stayed. If appellant has no similar violation in the one-year probationary period, his suspension will be not the 20 days suggested at the hearing, but only 15 days.

The fact that other licensed premises may have had penalties imposed which are different from appellant's 15-day suspension is ordinarily not pertinent to deciding whether the Department abused its discretion in imposing the penalty in appellant's case. Each case is individual and must be decided on its own facts. Even if the other violations were the same type as charged in appellant's case, the circumstances of each case would be unique to the premises and people involved. Without a clear showing that the Department exceeded the bounds of reason in treating appellant differently from all other similarly situated premises and licensees, we could not conclude that the Department abused its discretion in this case.

This Board is limited to determining whether the Department abused its discretion in imposing the penalty in appellant's case. "Under the relevant constitutional and statutory provisions, the Department is expressly empowered to either suspend or revoke an issued license . . . ; the propriety of the penalty to be imposed rests solely within the discretion of the Department whose determination may not be disturbed in the absence of a showing of palpable abuse." (*Rice v. Alcoholic Beverage Control Appeals Board* (1979) 89 Cal.App.3d 30, 39 [152 Cal.Rptr. 285].)

We cannot say appellant has shown that a suspension of 15 days for two violations involving intoxicated patrons is "palpable abuse." The suspension, while understandably more than appellant would like, is well within the bounds of the Department's 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

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[2]This 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.