ISSUED JUNE 30, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

MARANO ENTERPRISES, INC. dba Applebee's 7007 N. Cedar Fresno, CA 93720, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6740 File: 47-305782 Reg: 96036310 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: June 4, 1997 Sacramento, CA

Marano Enterprises, Inc., doing business as Applebee's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered its on-sale general eating place license suspended for eight days for its bartender having sold alcoholic beverages (beer) to two 18-year-old minor decoys, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Marano Enterprises, Inc., appearing through its president, Leon J. Marano; and the Department of Alcoholic Beverage

[1] The decision of the Department dated October 24, 1996, is set forth in the appendix.

Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on June 12, 1995. Thereafter, on May 31, 1996, the Department instituted an accusation alleging that on April 17, 1996, appellant's bartender, Blake Barnett, sold alcoholic beverages (beer) to two 18-year-old minor decoys.

An administrative hearing was held on September 11, 1996. At the hearing, the parties stipulated to the facts of the violation, and appellant presented testimony on the issue of an appropriate penalty. Counsel for the Department recommended a 10-day suspension. Subsequent to the hearing, the Administrative Law Judge (ALJ) filed his proposed decision recommending that appellant's license be suspended for eight days. The Department adopted the proposed decision, and appellant thereafter filed its timely notice of appeal.

In its appeal, appellant contends that the penalty is excessive.

DISCUSSION

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].)

Appellant argues that the penalty is excessive, offering a number of reasons in support of its position. Appellant cites a 14-year history without any previous violations; its use of a LEAD training program; the fact that proof of age was requested from one of the undercover police officers by a different employee demonstrating appellant's compliance concerns; the fact that it immediately fired the offending bartender; its policy of vigilance in cautioning its employees of the consequences of violations; and its belief that the suspension was retaliatory for its having requested a hearing rather than accept a proposed 10-day stayed suspension offered by the Department prior to the accusation having been filed.

The Department acknowledges appellant's compliance efforts, but defends the penalty as one well within the bounds of its discretion and appropriate for the violation. The Department denies it is penalizing appellant for having insisted upon a hearing, asserting that "whenever a decision is made to go to hearing, both sides take their chances, both as to the facts and as to the penalty." (Dept.Br., p. 4.)

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing a Department decision, the Appeals Board

may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[2]

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals.

The Department has broad discretion in its determination of an appropriate discipline:

> "Under the constitutional and statutory provisions the propriety of the penalty is a matter vested in the discretion of the Department, and its determination may not be disturbed unless there is a clear abuse of discretion. ... 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 Board (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633, 636].) That discretion is not unlimited, however. "[W]hile the administrative body has a broad discretion in respect to the imposition of a penalty or discipline, 'it does not have absolute and unlimited power. It is bound to exercise legal discretion, which is, in the circumstances, judicial discretion.'" (Skelly v. State Personnel

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[2] California Constitution, article XX, § 22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

Board (1975) 15 cal.3d 194, 217-218 [124 Cal.Rptr.14].)

In the abstract, an eight-day suspension for a sale-to-minor violation is extremely mild. The Department's standard penalty for a first-time sale-to-minor violation is 15 days; if a decoy program is involved, the standard is 10 days. In either case, whether any portion of the suspension is stayed will in the ordinary course turn on the facts of the particular case.

In the administrative hearing, the Department suggested [RT 14-16) that its recommended 10-day suspension was not necessarily more severe than the stayed 10-day suspension tendered prior to the filing of the accusation. This is said to be because the suspension could be made the subject of an offer in compromise, while the stayed suspension would hang over the licensee's head for a year, and, in the event of a subsequent violation, have to be served.

The Department may or may not be correct in its assessment of the relative desirability of the one choice of discipline compared to the other. Nor is the licensee necessarily in a position to know which would be more desirable, since the probable likelihood of a subsequent violation is an unknown.

There is merit in the Department's position that a licensee takes its chances when it declines a pre-accusation offer and chooses to go to a hearing. As recognized by the court in Kirby v. Alcoholic Beverage Control Appeals Board (1971) 17 Cal.App.3d 255 [94 Cal.Rptr. 514], the Department would have little incentive to make a pre-filing settlement offer if a licensee had nothing to lose by declining and opting for a risk-free hearing in which an ALJ might be persuaded that a lighter penalty was appropriate.

On the other hand, where there was a significant discrepancy between the

Department's initial proposal and the ultimate penalty imposed after hearing, without some explanation as to why, it is conceivable that the more severe penalty could be found to be retaliatory.

This case does not appear to be a case of retaliation. The ALJ imposed a penalty more lenient than the penalty sought by the Department at the hearing, and the Department accepted his decision. The question whether an eight-day suspension, which may be avoided by payment of a fine, is a more severe penalty than a stayed 10-day suspension, offered prior to the hearing, which cannot, is sufficiently debatable that it would be difficult to characterize it as an abuse of discretion.[3]

CONCLUSION

The decision of the Department is affirmed.[4]

BEN DAVIDIAN, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3] A suspension of eight days is less than the standard 10-day suspension for a sale to a minor decoy. Here, the sale was to two minors, candidly depicted by appellant's chief executive officer as having the appearance of being only 15 years old. But for appellant's conscientious and continuing efforts directed toward compliance, there is little doubt the penalty would have been more stringent.

[4] 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 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.