ISSUED NOVEMBER 6, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

MAY 2ND, INC. dba One for the Road 4168 Beverly Boulevard Los Angeles, CA 90004, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6761 File: 48-160439 Reg: 96035758 Administrative Law Judge at the Dept. Hearing: John A. Willd Date and Place of the Appeals Board Hearing: August 6, 1997 Los Angeles, CA

May 2nd, Inc., doing business as One for the Road (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked its on-sale general public premises license, for conduct being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §§23804 and 25657, subdivisions (a) and (b), and Penal Code §303a - (solicitation and loitering to solicit, alcoholic beverages); and California Code of Regulations, title IV, §§143 -

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

(loitering to solicit, and accepting, alcoholic beverages), 143.2, subdivisions (2) and (3) - (exposure of breasts and touching the genitals of another), 143.3, subdivision (1) (b) -- (exposing and touching breasts, genitals, vulva, and pubic hair), and 143.3, subdivision (2) - (exposing buttocks and breasts).

Appearances on appeal include appellant May 2nd, Inc., appearing through its counsel, James C. Lee and John O. Auyeung; and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's present license was issued on April 9, 1985, but it has been licensed since 1967 [Finding IV]. Thereafter, the Department instituted an accusation alleging acts of solicitation of alcoholic beverages, lewd acts, and possession of contaminated alcoholic beverages.

An administrative hearing was held on September 19, 1996, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that some of the allegations were true and that appellant's license should be revoked. Appellant thereafter filed a timely notice of appeal.

In its appeal, appellant raises the following issues: (1) the finding that Piyaraj Chuenjit was an employee at the time of the violations was not supported by substantial evidence; (2) appellant was not under the terms of probation at the time

of the violations; and (3) the penalty it excessive.[2]

DISCUSSION

I

Appellant contends that the finding that Piyaraj Chuenjit was an employee at the time of the violations was not supported by substantial evidence. "Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [71 S.Ct. 456]; Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

Appellate review does not "... resolve conflict[s] in the evidence, or between inferences reasonably deducible from the evidence ... ." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

Police officer Aaron McCraney testified that he observed Piyaraj Chuenjit (called "Sherry") walking in the premises and talking to apparent customers of the

[2]Contentions 2 and 3 essentially concern the issue of the penalty and will be considered together.

premises. Sherry later talked to McCraney and his partner, asked their names, indicated she worked at the premises, and said that her job was to talk to customers and get them to buy drinks for her in order to get tips [RT 12-14, 44].[3]

Sherry solicited a drink telling McCraney the charge was five dollars, which sum was paid to the bartender by the officer. Sherry consumed her drink, left to go behind the bar (where she had deposited her purse in a area under the cash register), traveled to the far end of the bar, where she talked to others, apparently, patrons. McCraney saw Sherry pull down her blouse exposing her breast. Sherry later returned to the officers, asked for another drink, which was ordered with two beers for the officers [RT 1-19, 36-37]. After McCraney paid for the drinks, the bartender returned change in the form of a five dollar bill, which Sherry returned to the bartender, telling the bartender that change was necessary for her to obtain a tip [RT 20].

Thereafter, Sherry exposed her breasts to McCraney, advising him to place her tip in the breast area, to which he refused [RT 20-21].

Leonor Hannah, the owner, testified that Sherry was to work as a bartender that night but another woman had come in and was working as the bartender, so there was no need for Sherry that night. McCraney testified that Hannah told him Sherry was an employee [RT 28, 219,222]. Hannah testified further that Sherry

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[3]While hearsay as to appellant, the testimony can be used to explain the conduct of Sherry in view of the issue of whether Sherry acted as an employee or a patron.

had previously worked as a waitress, but did not want that job back because some people slapped "her butt or things like that. She want to be behind the bar" [RT 222].

We conclude that Sherry was employed by appellant, and the findings are supported by the record as to the issue of employment and the issue of solicitation.

II

Appellant contends that it was not under the terms of probation at the time of the violations alleged in this present appeal, and that the penalty is excessive, arguing that the 1986 and the two 1988 decisions should not have been considered by the Department of Alcoholic Beverage Control.

Historically, the record shows that the probationary period under review, arose from 19 violations on June 29, August 31, September 11, and September 13, 1989. After hearing on that prior accusation, an Administrative Law Judge issued a proposed decision which ordered the license revoked, but the penalty conditionally stayed for a three-year period. The Department of Alcoholic Beverage Control, on April 28, 1992, rejected that proposed decision under authority of Government code §11517, subdivision (c), and ordered the license unconditionally revoked.

On July 12, 1993, the Appeals Board affirmed the 1992 decision of the Department of Alcoholic Beverage Control but reversed the penalty and remanded the matter to the Department to reconsider the penalty. On August 5, 1994, the

Department ordered the license revoked, but the penalty conditionally stayed for a three-year period. The August 1994 decision became the final decision of the Department setting up the period of probation to August 5, 1997. Appellant appealed the August 1994 decision, and the Appeals Board affirmed the Department's decision.

The violations in the present appeal, according to the accusation initiated on March 22, 1996, occurred on June 30, and December 7, 1995 -- well within the probationary period.

However, appellant argues that the probationary period of three years commenced in 1990. Most likely appellant is referring to the date of February 27, 1990, which appears on the accusation which initiated the Department of Alcoholic Beverage Control's action ultimately culminating in the present appeal. We point out that the date of February 27, 1990, appears to be the registration date of the original accusation.[4] Since there was no final decision of the Department setting the terms of probation in 1990, the argument of appellant has no merit.

It has been the position of the Appeals Board that a decision of the Department of Alcoholic Beverage Control becomes final on the date it is issued. While an appeal may proceed through other levels of appellate review, the decision

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[4]The dates that show on a listing of the prior history of appellant's license (see the decision of Department of Alcoholic Beverage Control in the appendix) are not used by the Appeals Board as meaningful dates. The date of February 27, 1990 (shown as 2-27-90) is the date the Department (in Sacramento) registers the accusation prepared by the Department's district office, at which time a "reg" (registration) number is assigned and the accusation then served on a licensee.

of the Department of Alcoholic Beverage Control is the final decision, but is unenforceable until the end of the appellate process. (Hollywood Sunset, Inc. (1995) AB-6447a).

Proceeding to the argument concerning the 1986 and 1989 decisions, the Appeals Board's decision of July 12, 1993, reversed the penalty portion of the Department of Alcoholic Beverage Control's decision, stating that the 1986 and two 1989 prior decisions should not have been a factor in assessing the penalty. Appellant correctly argues that the Administrative Law Judge in the hearing said that he would not consider, "at all" the three prior decisions [RT 164], and stated further that "there comes a time when your past has to leave you." However, the Administrative Law Judge could not let the past go, as he stated in Determination of Issues I, last paragraph:

> "... and the Respondent's [appellant] total disciplinary action has been considered to establish the fact that this Respondent has repeatedly engaged in conduct which is contrary to public welfare and morals and in violation of the State Constitution."

This is error. However, we will not order a remand in this instance in accordance with the case of Miller v. Eisenhower Medical Center (1980) 27 Cal.3d 614, 635 [166 Cal.Rptr. 826], as we cannot say the Department of Alcoholic Beverage Control's decision in this matter would be altered. While we are disturbed by such error, or hopefully, in artful drafting, we are without proper cause to change the penalty in the present appeal.

III

Addressing the argument concerning the penalty, the Appeals Board will not disturb the Department of Alcoholic Beverage Control's penalty orders in the absence of 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 California v. Alcoholic Beverage Control Appeals Board (1971 19 Cal.App.3d 785 [97 Cal.Rptr. 183].) The record shows that the Department of Alcoholic Beverage Control had the following factors to consider in assessing the penalty: (1) at the time of the incidents which gave rise to the filing of the accusation in the present appeal, appellant was under a stayed revocation probation for essentially the same type conduct as was proven in the present appeal; (2) the conduct of Sherry in soliciting the police officer for drinks on two occasions, and openly taking some of the change, in front of the bartender, was a blatant violation of law; (3) the conduct of Sherry exposing her breasts to customers as well as to the officers, was reprehensible conduct under the law; and (4) such conduct by Sherry, alleged and proven to be true, would be sufficient cause for unconditional or condition revocation of the license.

Considering such factors, any dilemma as to the appropriateness of the penalty must be left to the discretion of the Department of Alcoholic Beverage Control. The Department having exercised its discretion in a reasonable manner, the Appeals Board will not disturb the penalty.

CONCLUSION

The decision of the Department is affirmed.[5]

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

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[5]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.