

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

YELDA H. ATTISHA)	AB-6763
dba Attisha's Handy Market)	
215 South 30th Street)	File: 20-134145
San Diego, California 92113,)	Reg: 93029049
Appellant/Licensee,)	
)	Order of Revocation
v.)	Dated October 23, 1996
)	
DEPARTMENT OF ALCOHOLIC)	Date and Place of the
BEVERAGE CONTROL,)	Appeals Board Hearing:
Respondent.)	January 7, 1998
)	Los Angeles, CA
)	

Yelda H. Attisha, doing business as Attisha's Handy Market (appellant), appeals from an order of the Department of Alcoholic Beverage Control¹ which revoked his off-sale beer and wine license, for violating the terms of his probation.

Appearances on appeal include appellant Yelda H. Attisha, appearing through his counsel, Freddy A. Garmo; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

¹The order of the Department dated October 23, 1996, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued in 1983. The license history shows that in September 1993, the Department initiated an accusation alleging 35 instances of police calls and arrests at the premises. Thereafter, appellant signed a stipulation and waiver form consenting to having his license revoked, with the penalty of revocation stayed during a probationary period of three years. That agreement was formally entered into a decision dated October 8, 1993.² The decision stated as to the probationary term:

"That no cause for disciplinary action occur within the stayed period [three years or until October 8, 1996] ... If cause for disciplinary action occurred [sic] during the stayed period, the Director of the Department of Alcoholic Beverage Control may, in his discretion and without further hearing, vacate the stay and revoke the license."

On August 23, 1994 (within the stayed revocation probationary period), the Department initiated another accusation alleging 74 instances of police calls and arrests at the premises. The accusation also alleged two condition violations, one prohibiting a coin-operated telephone "in or about the premises for use of the public," and one mandating that all graffiti be removed from the walls of the premises within 24 hours (presumably after discovery). Apparently, the two conditions were consented to by appellant as a part of the October 8, 1993, decision's requirements. An administrative hearing was held and three days of testimony was received. The Administrative Law Judge found all of the 74 law

²A copy of the stipulation and waiver form, with the resulting decision, is set forth in the appendix.

enforcement allegations true, except four. The Department thereafter adopted the Administrative Law Judge's proposed decision and ordered appellant's license revoked, by a decision dated July 6, 1995. Appellant filed an appeal.

Thereafter, the Appeals Board issued its decision on June 24, 1996, which determined that only one of the 70 law enforcement allegations found by the Department to be true, was valid and proper, along with the two condition violations. The Board stated in its decision that the "Aggravation in the present matter was based more on speculation than a valid connection between the premises and the deteriorating community area...[T]he desire [by the police and the Department] to rid the community of a source of its problems is not sufficient in itself without some connection to the mismanagement of the license." The Appeals Board reversed the Department's decision as to the law enforcement problem, but determined that appellant had violated the two conditions on his license. On September 10, 1996, the Department issued its Decision Following Appeals Board Decision which suspended appellant's license for 30 days with 10 days stayed.

Thereafter, on October 23, 1996, the Department issued its order vacating the original stay order (from the 1993 decision), and reimposed revocation of the license. This was done under authority of the original stayed revocation decision, and based on a violation of the terms of that original decision "... That no cause for disciplinary action occur within the stayed period."

Appellant thereafter filed a timely notice of appeal.

DISCUSSION

Appellant contends that revocation of the license constitutes an abuse of discretion. Appellant is questioning the discretion of the Department of Alcoholic Beverage Control to revoke the license by using the 1994 decision as the "trigger" to impose revocation in accordance with the 1993 decision's probation.

The Appeals Board's duty is to review any action of the Department to determine if the Department "has proceeded in the manner required by law" (Bus.& Prof. Code §23084), that is, among other things has adhered to the principles of due process, and substantial justice. The Board in the case of KDM, Inc. (1997) AB-6647, considered the question of the broad powers of the Department in this area of inquiry:

"Appellant contends that the condition of the stay, that 'no cause for disciplinary action occurs within the stayed period' is unreasonably broad, in that it is not limited to a violation similar in nature. It asks whether a records keeping violation, and after-hours sale, a failure to post a license, or other nominal violations, would result in the revocation of appellant's license.

"Appellant's contention does not bear directly on the penalty itself. Instead, it seeks some sort of prediction from the Appeals Board as to what kind of future violation would trigger a lifting of the stay order. The Board is not in a position to make such a prediction. Nor is the Board able to say that the Department's unwillingness to specify in advance a category of violation sufficient to induce it to seek a revocation of the stay is an abuse of discretion.

"Although the Department's brief did not address this issue, it is the Department's standard practice to frame an order staying revocation broadly, and not to attempt to characterize the kind of future violation which would warrant a lifting of the stay order. A requirement would unduly tie the Department's hands. The better course is for the Board to review such action consistent with an abuse of discretion standard when and if the

situation arises.”

In the present appeal, the Department in 1993 stayed the revocation of appellant’s license. Where revocation is stayed for some probationary period, essentially, the Department has determined that the ultimate penalty of revocation was not at that time, reasonable, thus allowing appellant to continue to exercise the privileges of the license. However, the Department retained the power to revoke the license under its probationary terms, if a future violation occurred, all designed, hopefully, to obtain the desired result of conformity to law.

In those occasions where a violation has occurred subsequent to the Department’s stayed revocation decision, the Department has many options to enforce conformity to law short of revocation. It may extend the terms of probation for an additional period to impress upon the licensee that revocation is a danger to continuation of the license; impose new terms to the existing probation, which could address circumstances found in the new violation which circumstances were not known or considered at the time of the original imposition of the probation, or both. The Department chose to revoke the license. It is not for the Board to advise the Department which option the Department should chose, but to consider the choice made in relationship to the rule of abuse of discretion.

The 1996 decision of the Department to revoke the license was predicated on the terms of probation in the 1993 decision, which state in pertinent part:

“That no cause for disciplinary action occur within the stayed period. If cause for disciplinary action occurred [sic] during the stayed period, the

Director of the Department of Alcoholic Beverage Control may, in his discretion and without further hearing, vacate the stay and revoke the license.”

We view the wording of the decision as extremely broad in its scope giving to the Department wide latitude in assessing any future course of action which may arise from some future violation, as was present in KDM, Inc., supra.

We note that the practice of granting or revoking probation, is a useful tool in the criminal law (Penal Code §§1203, et seq). While criminal law has many facets not applicable in administrative law, many of the objectives, such as the discretionary nature of allowing probation, and emphasizing conformity to law in future conduct, have parallels. It has been stated that probation is an act of clemency and may be withdrawn if the privileges are abused. (In re Bine (1957) 47 Cal.2d 814 [306 P.2d 445].) Also, revocation of probation is justified even though the circumstances of a new act of unlawful conduct would not justify a conviction. (People v. Calais (1974) 37 Cal.App.3d 898 [112 Cal.Rptr. 685].)

The Department by the exercise of its discretion to revoke the license under authority of the 1993 decision, in effect, has concluded that continuation of the license would be contrary to the public welfare or morals. This means that the Department considers that either the licensee is unfit, or the premises is not eligible, any longer to hold a license -- that is, continuation of the license would be “harmful or undesirable,” per Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85, 99 [84 Cal.Rptr. 1113], for the common

community good.

Concerning the concept of public welfare or morals, the court in Boreta, supra, stated the following:

“It seems apparent that the ‘public welfare’ is not a single, platonic archetypal idea, as it were, but a construct of political philosophy embracing a wide range of goals including the enhancement of majority interest in safety, health, education, the economy, and the political process, to name a few. In order intelligently to conclude that a course of conduct is ‘contrary to the public welfare’ its effects must be canvassed, considered and evaluated as being harmful or undesirable....”

It appears then, that the 1994 decision must, upon its own merits or in combination with the merits of the 1993 decision, be detrimental to public welfare or morals sufficient to revoke the license.

The Appeals Board in its review believes that it must consider the decision of the Department within two contexts: (1) the Department’s responsibility under the public welfare or morals provisions of the Constitution, and (2) a pattern of misconduct by appellant as shown in the record.³

After a review of the record, we determine that continuation of the license

³We are guided by two basic principles, the first of which states that: “If the decision is without reason under the evidence, the action of the Department constitutes an abuse of discretion and may be set aside. But where the decision is subject to a choice within reason, the Department is vested with the discretion of making the selection....” (Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (1982) 133 Cal.App.3d 814, 817 [184 Cal.Rptr. 367].) The second concept is that “Review for abuse of discretion consists of two distinct inquiries: the adequacy of the factual underpinning of the discretionary decision and the rationality of the choice.” (The Scope of Judicial Review of Decisions of California Administrative Agencies, Asimow, June 1995, Vol.42, No. 5, p. 1229.)

would not be detrimental to the public welfare or morals as the 1994 decision was for one instance of drinking within the premises, and two condition violations -- not revocation matters in their own right.

The duty imposed by the Constitution was for the Department to protect the public welfare or morals, within lawful and reasonable constraints. From a review of the record as a whole, continuation of the license could not be considered contrary to the public welfare or morals. We cannot say, considering Boreta, supra, that continuation of the license would be "harmful or undesirable," based on this record. We conclude that the revocation of the license based upon this record, would be a miscarriage of justice as the penalty sought is arbitrary, from a public welfare or morals view.

Passing to the next question as to whether there was a pattern of misconduct, the 1993 decision's accusation shows:

- a). 13 instances of open containers on the premises and drinking in a restricted area;
- b). 19 instances of narcotic violations -- apparently on the public sidewalk;
- c). two public intoxication violations -- apparently on the public sidewalk;
- d). one sale to an obviously intoxicated person;
- e). one mayhem charge.⁴

⁴The case of Gray (1996) AB-6502, concerned mostly loitering and violations which occurred on the public sidewalk either in front or to the side of the licensed premises. The Appeals Board concluded in that case that "the loiterers were a community and police problem, and appellant [therein] had no legal duty, or right, to remove the loiterers from a public sidewalk." The Board cited the Department's instructions manual which states that "Public sidewalks contiguous to a licensed premises are not to be included as part of the premises" [Department's manual, p. L191.1].

The 1993 accusation alleged that the violations were "on" the premises. However, that same wording also was used in the 1994 decision's accusation. The Appeals Board in its ruling on the Department's 1994 decision, found that the violations did not occur on the premises, but on a public sidewalk in front of the premises, and down the street some distance from the premises. A review of the 1993 decision's accusation wording is couched in the same wording as the 1994 decision's accusation wording.

The 1994 decision which triggered the 1993 decision's probationary terms resulting in the revocation decision of 1996, shows:

- a). 25 instances of open containers and drinking on the premises. All the counts but one, were for conduct on the public sidewalk. The one exception was the September 26, 1993, incident of a person drinking while standing in the premises' doorway;
- b). 19 instances of arrests for possession of a syringe or cocaine pipe - - all the counts were for conduct on the public sidewalk;
- c). 9 arrests for warrants outstanding -- all the counts were for investigations on the public sidewalk that produced the facts of the outstanding warrants;
- d). 7 arrests for possession or under the influence of narcotics -- all on the sidewalk;
- e). 10 instances of loitering (on the sidewalk);
- f). one instance of vandalism -- location unknown;
- g). one instance of an assault with a deadly weapon -- location unknown.⁵

We point out that the above were not proven true except for one instance of drinking within the door of the premises, even though alleged and sustained by the Department's decision -- which in and of itself raises questions of arbitrariness in

⁵See footnote 4, supra, which references the Gray case, which concerned loitering on public sidewalks.

the dealings of the Department with this licensee.

We conclude there is no proven pattern of misconduct which would call the terms of probation in the 1993 decision into play. Blindness but to the written word of the probationary terms would create the very disrespect for lawful conduct that the Department has been empowered by the State Constitution and the Legislature to uphold and enforce, on a rational basis. Revocation in the present appeal would be irrational and unreasonable, and an abuse of the Department's discretion and therefore, contrary to the public welfare or morals.

CONCLUSION

We are deeply concerned about the problems which seem to engulf the area around the licensed premises. They are severe and apparently ongoing. The Administrative Law Judge in his 1994 proposed decision (which was reviewed by the Board) painted a sorry picture of the area:

"[On]...a daily basis people [would be] loitering about the Handy Market, either directly in front of it or to either side, drinking wine or beer which was usually purchased at the Handy Market, under the influence of alcoholic beverages or controlled substances, and selling narcotics or narcotic paraphernalia, generally needles and syringes. In addition, various crimes of violence have occurred in the area surrounding the Handy Market. It was common for customers to purchase beer and wine at the Handy Market and walk outside and drink it while still within the premises⁶ of the Handy Market.

"The officers testified many of the people who committed these crimes were 'locals,' that is, transients who 'lived' in vacant houses in the

⁶Apparently, the ALJ was so incensed at the out-of-control situation around the market that he confused the outside-the-premises drinkers as being in the premises. The "outside" was a public sidewalk, which is not under the control and authority of appellant.

area, who had nothing else to do, and simply hung out all day, usually trading for drugs and prostitution. These 'locals' were frequently cited by the police for various crimes, but nevertheless continued to loiter in the immediate vicinity of the Handy Market and commit other crimes. Officer Gutierrez described how he has observed people who have been involved in drug transactions, upon seeing a police officer approach the premises, go into the Handy Market and dispose of the drugs there. Officer Doherty described how he would frequently observe groups of people in front of or to the side of the Handy Market, upon seeing the officer approach, immediately scatter, leaving the area, only to return upon the officer's departure ...

"[The police had a program to target the market and the immediate area] The Handy Market was a target of this program as well because of the large number of calls for service, arrests, and field interviews related to the premises, and the numerous complaints of members of the community ...

"The Attisha family has been active in the Logan Heights community and is well-known and well-respected. They own and operate other businesses in the area, have raised money for charitable events such as the Jackie Robinson YMCA, and have worked with the police in helping to clean up the area. The family, and the Handy Market, are supported by other businesses in the area and by its neighbors and customers."

We can understand and fully appreciate the Department's concern for its written injunctions which form the basis of its probationary orders -- designed to obtain conformity to lawful conduct. But the record shows only one valid incident in the 1994 decision. While that one lone incident was similar to the violations contained in the 1993 decision, it alone cannot call for a revocation of the license. The two condition violations were essentially first time violations.

We are also concerned that the license is situated in a "sea of area despair" so graphically explained by the Administrative Law Judge. These conditions being true, the Department needs to proceed under its duty to protect the public welfare or morals upon properly phrased allegations based upon presently operating legal authority which could resolve the matter in a manner which would not do violence

to due process.

As we observed in KDM, Inc., supra, such a question of enforcement must be on a case-by-case basis, so that the Department may protect the important concept of the public welfare or morals, yet does not, unwittingly, defeat the same, by proceeding upon tenuous legal and factual premises.

The Order of the Department dated October 23, 1996, is reversed.⁷

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

⁷This 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.