

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

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|-------------------------|---|--------------------------|
| KAPOR H CORPORATION |) | AB-7344 |
| dba Doohinkey's |) | |
| 8929 Woodman Avenue |) | File: 48-266039 |
| Arleta, CA 91331, |) | Reg: 97040755 |
| Appellant/Licensee, |) | |
| |) | Administrative Law Judge |
| v. |) | at the Dept. Hearing: |
| |) | John P. McCarthy |
| |) | |
| DEPARTMENT OF ALCOHOLIC |) | Date and Place of the |
| BEVERAGE CONTROL, |) | Appeals Board Hearing: |
| Respondent. |) | February 3, 2000 |
| |) | Los Angeles, CA |

Kapor H Corporation, doing business as Doohinkey's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 75 days, with execution of 25 of those days stayed, conditioned upon a two-year period of discipline-free operation, for its having possessed a slot machine on the premises, served an alcoholic beverage to an obviously intoxicated patron, and having purchased distilled spirits from a seller not properly licensed, being contrary to the universal and generic public welfare and morals provisions of

¹The decision of the Department, dated December 31, 1998, is set forth in the appendix.

the California Constitution, article XX, §22, arising from violations of Business and Professions Code §§23402 and 25602, subdivision (a), and Penal Code §§330b, 330.1, and 330.4.

Appearances on appeal include appellant Kapor H Corporation, appearing through its counsel, Roberto J. Ramirez, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on January 14, 1992. Thereafter, the Department instituted an eight-count accusation against appellant containing six counts charging B-girl activity, one count charging the unlawful possession of a slot machine, and one count charging the purchase of distilled spirits from a seller who lacked the appropriate manufacturer's or wholesaler's license. The accusation was later amended to add 23 additional counts, including additional charges of B-girl activities and sales to intoxicated patrons, and new charges of permitting minors in the premises, service of alcoholic beverages to minors, and contaminated alcoholic beverage bottles.

An administrative hearing was held on July 17 and October 16, 1998, at which time oral and documentary evidence was received. At the conclusion of that hearing, the Administrative Law Judge (ALJ) sustained only three of the charges, and imposed separate suspensions for each of the three violations which he found: the possession of the slot machine (count 7) (15-day suspension); the purchase of distilled spirits from an unlicensed seller (count 8) (25-day suspension); and the sale

of an alcoholic beverage to an intoxicated patron (count 9) (20-day suspension). In addition, he imposed an additional 15-day suspension, all stayed, because of appellant's history of prior discipline, and stayed an additional 10 days to avoid unduly penalizing appellant. The Department adopted the proposed decision, and this timely appeal followed.

Appellant raises a single issue on appeal;² it contends that the Department, by failing to verify that Albertson's (the seller of the distilled spirits (vodka)) was unlicensed,³ and by failing to confirm that Southern Wine and Spirits (a licensed wholesaler from whom appellant's manager claimed the purchases were made) did not carry the brand of vodka in question, did not prove the vodka was not purchased from a holder of a wholesale license.

Department investigator Dan Shoham was a member of a law enforcement task force investigating B-girl activity on the night in question. He testified that he discovered a number of one-liter bottles of vodka labeled "Albertson's" mixed in with other bottles of distilled spirits on a shelf behind appellant's fixed bar. When he asked appellant's manager,⁴ Jose Hernandez, the source of the vodka, Shoham

² Appellant expressly concedes that the record contains sufficient evidence to sustain the charges regarding the presence of the slot machine and the service of an alcoholic beverage to an obviously intoxicated patron.

³ Albertson's is a large supermarket chain, with numerous stores in California and other parts of the West. There is apparently no dispute that it holds retail licenses. The issue is whether it held the requisite wholesale license.

⁴ Shoham was of the belief he was talking to the owner. Hernandez testified that he told the police he was the owner when demanding to know what they were doing, but, when he testified, said he was only the manager. He said his brother is

was told "Southern Wines and Spirits,"⁵ which Hernandez said was the source of all of appellant's spirits. Shoham seized the vodka, and produced the bottles at the hearing.

Shoham testified without objection that he spoke to a sales representative of Albertson's, and to the bottler of the vodka, and was informed it was bottled and sold exclusively to Albertson's. Shoham acknowledged that he had not confirmed with Albertson's that it did not hold a wholesaler's license, but stated he was unaware of any such license held by Albertson's in his district.

The Department points out that, as a holder of retail licenses, Albertson's could not legally hold a wholesaler's license, citing Business and Professions Code §25550, et seq. Section 25502 thereof specifically prohibits any wholesaler from owning, directly or indirectly, an interest in an off-sale license.

At the hearing, Hernandez claimed that the bottles of vodka were left in the bar by a predecessor licensee, in 1991. However, Shoham had earlier testified that he was informed that numbers on the bottles established the date of their manufacture as sometime in 1997.

The ALJ rejected appellant's explanations of the source of the bottles of vodka, finding that the "changing explanations severely damage the credibility of any one such explanation."

Since the evidence established Albertson's as the exclusive source for

the owner.

⁵ Shoham was aware that Southern Wines and Spirits was a licensed wholesaler.

the bottles bearing the Albertson's label, the ALJ could reasonably infer they were purchased from Albertson's. And since Shoham's familiarity with the holders of wholesale licenses in his district, and with the licenses held by Albertson's, provided a sufficient foundation for his testimony, it follows that the ALJ correctly found that appellant made purchases of distilled spirits from a seller not holding a wholesale license.

ORDER

The decision of the Department is affirmed.⁶

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁶ 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.