ISSUED MARCH 1, 2001

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

DAUD M. JAMILI dba Jersey Crown Dairy 1522 Springs Road Vallejo, CA 94591, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7447 File: 20-285100 Reg: 98044277 Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja Date and Place of the Appeals Board Hearing: September 22, 2000 San Francisco, CA

Daud M. Jamili, doing business as Jersey Crown Dairy (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license following his plea of nolo contendere to a charge of purchase of stolen cigarettes, contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Penal Code §§664 and 496.

[1]The decision of the Department, dated July 15, 1999, made pursuant to Government Code §11517, subdivision (c), is set forth in the appendix, together with the proposed decision of the Administrative Law Judge.

Appearances on appeal include appellant Daud M. Jamili, appearing through his counsel, Richard D. Warren, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on March 14, 1994. On August 12, 1998, the Department instituted an accusation against appellant charging that, on three occasions in May 1998 appellant purchased cigarettes he believed to have been stolen.

An administrative hearing was held on October 30, 1998. At that time, the parties stipulated that appellant had entered a plea of nolo contendere to criminal charges that he had purchased stolen cigarettes. Appellant presented evidence purporting to show the hardships he and his family would incur if his license was revoked outright. He argued that the public welfare and morals would be adequately protected by a stayed order of revocation conditioned upon sale of the business within 180 days, and imposing an immediate indefinite suspension that would continue until the business was sold. Appellant expressed his opinion that the value of the business without a license would be such that no buyer would be interested.

Department counsel argued to the ALJ that the Appeals Board had "agreed" that financial considerations are not an appropriate factor in determining the type of discipline." In a subsequent submission, pursuant to the ALJ's request, Department counsel cited Carlos Almendra and Mitzi Eubanks (1998) AB-6864 for the proposition that the Board rarely considers the economic impact of a decision,

and does so only when it considers the penalty to be for the purpose of punishment rather than to assure compliance with the law and protection of the public. In that case, the Board found that a 25-day suspension, in the circumstances of that case, was in fact punishment, and remanded the case to the Department for reconsideration of the penalty.

Subsequent to the hearing, the Administrative Law Judge (ALJ) issued his proposed decision, which recommended a penalty in the form urged by appellant - a stayed revocation and a 60-day suspension plus an indefinite suspension until the business was sold. The proposed order further provided that, if the business was not sold within 180 days, the Department was free enter an order revoking the license.

In his proposed decision, the ALJ set forth special findings of fact regarding penalty considerations:

> "The Department recommended that Respondent's license be revoked.
>
> "Respondent explained that he had purchased the business about six years ago for $100,000 and he presently owes about $20,000 of that amount. He has been attempting to sell the business. If he sells the business with the alcoholic beverage license, he expects to recoup most, if not all, of his investment. If, however, his alcoholic beverage license is revoked, he does not believe anybody would buy the business without the alcoholic beverage license.
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> "Respondent and his wife have two children – one eight years old, one eleven years old. He has a mortgage payment of $1050 per month for the home he owns, and pays property taxes of $150 per month. He has minimal equity in the home. It is found that the public welfare and morals will be adequately protected in this matter if Respondent's license is suspended and if Respondent is permitted to transfer his license to a person or persons acceptable to the Department."

The Department rejected the proposed decision, and entered its own order

revoking the license. In so doing, the Department summarized the hardship factors urged by appellant in support of his plea for a lesser penalty than outright revocation, but ordered revocation, stating:

> "The considerations of economic hardship do not constitute mitigation nor do they absolve respondent from his responsibility to comply with the law. Indeed, if economic impact or hardship were considered in making a penalty determination, it would result in an unequal application of the law, depending upon the economic status or situation of a licensee. Not only is such a result not warranted, it is impermissible if the Department is to apply similar penalties for similar conduct for all licensees in the state."

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) the Department's penalty of revocation is arbitrary because in a similar case considered by the Department on the very same day it considered appellant's case, the Department adopted a proposed decision in which an ALJ had found, based mainly upon the economic hardship to the licensee, that outright revocation was not an appropriate penalty; (2) the Department should consider the economic impact upon a licensee in its consideration of mitigation evidence; and (3) the penalty of outright revocation is an abuse of discretion. These issue are interrelated, and will be discussed together.

DISCUSSION

Appellant contends that the penalty of revocation is arbitrary because in a similar case considered by the Department on the very same day it considered appellant's case, the Department adopted a proposed decision in which an ALJ had found, based mainly upon the economic hardship to the licensee, that outright revocation was not an appropriate penalty. That case, Nary Ty and Srun Veng Ty (May 8, 2000) AB-7383 ("Ty"), involved an appeal from an order which suspended

the license for 60 days, and indefinitely thereafter, for a maximum of 180 days or until the business was sold, after one of the licensees entered a plea of nolo contendere to a charge of exchanging food stamps for cash and alcoholic beverages, a crime involving moral turpitude. In Ty, as in the instant case, Department counsel had recommended that the license be revoked. Instead, the same ALJ who presided over appellant's hearing opted to recommend the stayed revocation and indefinite suspension, in order to permit the sale of the business. He stated, in a "Special Finding of Fact and Penalty Consideration:

> "Respondent Srun Veng Ty came to the United States in 1975 from Cambodia as a political refugee. He fought with the United States Army during the war in Cambodia. Respondent Nary Ty explained that she was concerned about the financial consequences to the family if the license to sell alcoholic beverages is revoked. She explained that alcoholic beverages account for 50 percent of their sales, and in summer this figure increases to 60 percent. Respondents have three children - two in high school and one in elementary school. The above circumstances have been considered in determining the penalty to be imposed in this matter."

The Department adopted this decision without comment, and the Appeals Board affirmed, rejecting appellants' claim that the penalty was an abuse of discretion.

This Board has seen too many appeals where an administrative law judge has taken into account in some fashion the economic or financial impact his proposed order will have on a licensee, that order then being adopted without comment by the Department, to accept at face value the Department's disclaimer that such considerations are taken into account in the determination of penalty. Administrative law judges regularly listen to the appeals of a licensee, or of counsel, to take into consideration the hardships which are predicted to flow from a suspension or revocation. Their proposed decisions may or may not articulate their

reaction to such pleas, and when they do not, there may still be room to speculate that the licensee's plea had some effect on the penalty.

No doubt, equality of treatment, all other things being equal, is, and should be the goal of the Department. As the Department states in its brief (at page 5), "it would be improper for two different licensees, identically situated except for economic considerations and having committed identical violations, to receive different penalties based only on those different economic considerations."

But, every case is different and multi-faceted. Neither the Department nor this Board has the ability to match with computer-like precision one case to another. Any attempt to do so would be doomed from the start.

Where the penalty is one which does not appear out of line with the offense, and is otherwise within the broad discretion of the Department, this Board should not interfere. See Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296], where, in affirming an order of revocation, the California Supreme Court said:

> "The most that can be said is that reasonable minds might differ as to the propriety of the penalty imposed, but this fact serves only to fortify the conclusion that the Department acted within the broad area of discretion conferred on it."

We think this is such a case.

ORDER

The decision of the Department is affirmed.[2]

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

[2] 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.