ISSUED AUGUST 26, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

MARJORY J. and STRATIN W. SEREMETIS dba Flying Pig Pub 78 South First Street San Jose, CA 95113, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	AB-6677 File: 47-291724 Reg. 95033807 Administrative Law Judge at the Dept. Hearing Jeevan S. Ahuja Date and Place of the Appeals Board Hearing June 4, 1997 Sacramento, CA

Marjory J. and Stratin W. Seremetis, doing business as Flying Pig Pub (appellants), appeal from a decision[1] of the Department of Alcoholic Beverage Control which suspended their on-sale general public eating place license for 10 days, with 5 days of the suspension stayed for a one-year probationary period, for having served an alcoholic beverage in an area not licensed by the Department, 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

[1] The decision of the Department, dated February 29, 1996, is set forth in the appendix.

Professions Code §24200.

Appearances on appeal include appellants Marjory J. Seremetis and Stratin W. Seremetis; and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public eating place license was issued on March 18, 1994. Thereafter, the Department instituted an accusation alleging that on July 11, 1995, one of appellants' employees served an alcoholic beverage to a Department investigator seated on the sidewalk in an unlicensed area outside appellants' premises.

An administrative hearing was held on September 7, 1995, at which time oral and documentary evidence was presented concerning the circumstances surrounding the transaction at issue. Subsequent to the hearing, the Administrative Law Judge (ALJ) determined that the charges had been proven, rejected appellants' claim that they had been unfairly singled out for punishment, and ordered appellants' license suspended for ten days, with five days of the suspension stayed during a one-year probationary period. Appellants filed a timely notice of appeal.

Appellants have filed a letter brief in which, in narrative form, they contend they have been the victims of selective and retaliatory prosecution.

DISCUSSION

Appellants contend that the charge which is the basis for the accusation and penalty order was in retaliation for appellants' actions in going over the heads of field personnel of the Department to complain. Therefore, they contend, "the nature of this violation, the circumstances in which it occurred and the severity of the punishment" are unreasonable. (App.Br., p.1.) In effect, appellants challenge the findings of the ALJ to the contrary, raising the question whether the findings are supported by substantial evidence.

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]

Appellants' brief recites numerous facts which are outside the record of the

---

[2] The 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].

administrative hearing, and, consequently, may not be considered by the Appeals Board. We are restricted to reviewing the findings and determinations of the ALJ on the basis of the record created at the administrative hearing; if there is substantial evidence in the record to support those findings, we must affirm.

"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. 658].)

Our review of the record tells us that this appeal is here in large part because of confusion surrounding what may have been permissible under an outdoor cafe permit issued by the City of San Jose, and what was permissible under a license

issued by the Department of Alcoholic Beverage Control. Although it would appear, based upon information furnished during the course of the hearing, the confusion may have dissipated,[3] appellants remain of the belief they have been unfairly singled out for punishment because they were critical of what they saw as foot-dragging.

Department investigator Seck testified that he visited appellants' premises on May 31, 1995, and observed tables on the sidewalk in front of the licensed premises with what appeared to be beer menus on the tables [RT 6-7]. Appellants' restaurant is located in the transit mall area of the City of San Jose, where, according to the investigator, the sidewalks are "extra large" [RT 10]. Upon checking appellants' license, he determined that the portion of the sidewalk occupied by the tables was not part of the licensed premises.[4] He so advised appellants by telephone later that day or the next day, telling them they could not

---

[3] Statements made in the course of the hearing before this Board indicate that, as a result of the 1996 enactment of a new ordinance by the City of San Jose, and, apparently, subsequent action by the Department, appellants now are able to provide alcoholic beverage service at their sidewalk tables, an amenity their customers would both desire and reasonably expect.

[4] A small triangular patio at the front of appellant's premises is part of the licensed area. A condition on the license requires that the patio be clearly defined and designated by physical barriers to separate it from the public sidewalk and adjacent private property. While clearly defined, in that the patio area is tiled, there are no physical barriers enclosing the patio. Given its relatively narrow dimensions, it is understandable how a table may have inadvertently been permitted to encroach upon the public walkway. And see Note 3, supra.

serve alcoholic beverages at the sidewalk tables [RT 11].

On July 11, 1995, a Department investigator seated at a table on the public sidewalk area requested and was served a bottle of beer [15, 22-23]. Investigator Seck observed this from a vantage point across the street, and immediately issued a citation to the bartender [RT 15-16].

Appellant Marjory Seremetis conceded at the administrative hearing that she had been warned about serving alcoholic beverages to tables located on the public sidewalk [RT 37]. She also acknowledged that she had warned her employees that such sales were not permitted, and had terminated the employment of the waiter who made the sale that was charged in the accusation [RT 48]:

> "And did we have a violation that day? Yes, we did, an employee who was instructed not to serve past the property line did ... . So we did serve beer at a table within a few inches over the line, and that employee's been fired."[5]

Appellant Marjory Seremetis candidly admitted that she was aware of the Department's position with regard to the placement of tables beyond the property line onto the sidewalk, and although she disagreed with it, "understood what he [investigator Seck] told us, yes, and we questioned the validity of it, but we understood it, definitely" [RT 51]. (See also, RT 67: "We were aware that Vince

[5] Appellants have submitted with their letter brief two declarations purporting to show that the table where the Department investigator was seated when he was served the beer was on the tiled patio rather than the sidewalk. Neither of these declarants testified at the administrative hearing. The declarations are not part of the record on appeal, and the Board may not consider them.

[the employee] made a mistake that day. We were aware.")

Appellants' position was concisely stated by Marjory Seremetis at the beginning of her testimony at the administrative hearing [RT 31-32]:

> "This is what my husband and I think the issues are: Number one, we were making every effort to comply with the ABC, Redevelopment and all the agencies that were coming at us for permits before, during and after we opened.
>
> "Number two, we tried to speed up the bureaucratic process by going over someone's head in the Department, and the local ABC uses its extensive power to call us after he did that.
>
> "The use of this power was selective, it was specifically aimed at us, at the Flying Pig Pub, and it was definitely selective enforcement."

The rules applicable to the issue of selective or discriminatory prosecution are set out in numerous federal and California cases. People v. Battin (1978) 77 Cal.App.3d 635, 666 [143 Cal.Rptr.731], summarized the burden on a party making such a claim:

> "Discriminatory prosecution constitutes adequate grounds for reversing a conviction ... when the defendant proves: '(1) that he has been deliberately singled out for prosecution on the basis of some invidious criterion;' and (2) that 'the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities."' ... The discrimination must be 'intentional and purposeful.' ... Further, defendant must carry the burden of proof that he has been deliberately singled out in order to overcome the presumption that '[prosecutorial] dut[ies have] been properly, and constitutionally exercised.' (Citations omitted.)

Marjory Seremetis' claim is based solely on her contention that the visit by the investigators on July 11, 1995, was instigated by her complaint to their

superior in Sacramento on the preceding day, and that appellants were the only licensee cited even though, based on appellants' observations, other licensees also served alcoholic beverages to patrons seated on the public sidewalk [RT 35; Exhibit B; App.Br., pp. 1-2, 3]. However, investigator Seck testified that even before Mrs. Seremetis' phone call, about which he was not told, he had independently made plans to visit downtown San Jose, and that on the day in question attempts to be served an alcoholic beverage on the public sidewalk by other downtown licensees were rejected [RT 58-59].[6] Appellants suggest that such attempts were doomed to fail because the investigators were known to the other licensees, and their efforts followed the lunch hour, when a request for an alcoholic beverage in the sidewalk area would have aroused suspicions.

The ALJ found that appellants had failed to meet their burden of proving they were the victims of retaliatory enforcement, choosing to accept the testimony of investigator Seck. (See Findings of Fact III, V). Since there is evidence in the record to support this determination, the Appeals Board is bound by the findings.

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State

[6] Investigator Seck stated that while he believed it to be true that other licensees did sell and/or serve alcoholic beverages to patrons on the public sidewalk, none would do so on the day in question, which is why appellants were the only licensees cited that day [RT 64].

Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].) Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (substantial evidence supported both the Department's and the license-applicant's position); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; Gore v. Harris (1964) 229 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Appellants also contend that the penalty is excessive "and just plain vindictive." (App.Br., p. 4.)

We sympathize with appellants' frustrations generated by the difficulties they have encountered in launching their new business. However, In view of our determination that their claims of retaliatory or selective prosecution must fail, we must also reject their attack on the penalty.

Department counsel recommended a 10-day suspension, with none of the suspension stayed [RT 70]. The ALJ, impressed with appellants' efforts at compliance and to obtain the necessary permits, and acknowledging appellants' apparent confusion about the rules regulating the sale of alcoholic beverages,

agreed with the Department's recommendation as to the length of the suspension, but ordered five days of the suspension stayed. In adopting his proposed decision, the Department acceded to the reduced penalty. Thus, the ALJ and the Department each acknowledged the existence of mitigating factors, and the resulting penalty was, in the experience of the Board, one of the more lenient for similar violations. Thus, we are unable to say that a net five-day suspension is excessive.

CONCLUSION

The decision of the Department is affirmed.[7]

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

DISSENT TO FOLLOW

---

[7] 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.

DISSENT OF JOHN B. TSU

I agree there was a great deal of confusion surrounding appellant's efforts to offer cafe dining. The existence of such confusion, coupled with the willingness of the Department to license an area as limited in size as the patio area involved in this case, was certain to give rise to problems, and resulting unfairness.

Under such circumstances, I find it impossible to discern how the technical violation, which appellants candidly acknowledged, injured or placed in jeopardy the public welfare and morals of the people of the State of California. Despite the light and lenient penalty imposed by the Department on the licensee, for fairness and equity (or as a matter of principle) I would vote to reverse the Department for having abused its discretion in failing to provide an adequate warning to appellants of the risks its own licensing actions had created. In such circumstances, the Department should order the licensee to place some kind of signs on the tables at the sidewalk informing customers that alcoholic beverages cannot be served at the tables on the sidewalk.