ISSUED JUNE 9, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

KIL YE KANG dba Muse Salon and Cafe Muse 540 S. Vermont Avenue Los Angeles, CA 90020, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6717 File: 47-291743 Reg: 96035540 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: April 2, 1997 Los Angeles, CA

Kil Ye Kang, doing business as Muse Salon and Cafe Muse (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered her on-sale public eating place license revoked for having violated conditions on her license, 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 Professions Code §23804.

[1]The decision of the Department dated August 15, 1996, is set forth in the appendix.

Appearances on appeal include appellant Kil Ye Kang, appearing through her counsel, Rick A. Blake; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale public eating place license was issued on February 24, 1994. Thereafter, the Department instituted an accusation alleging the violation of certain conditions imposed on appellant's license having to do with alterations and additions affecting visibility into certain booth areas of the premises.

An administrative hearing was held on July 16, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the discovery by investigators of the presence of potted trees placed in various areas of the licensed premises, the installation of swinging doors at the entrance to booths, and the absence of three mirrors on the walls of the booths called for by conditions on the license.

Subsequent to the hearing, the Department issued its decision which determined (1) that the presence of the trees and the installation of the swinging doors violated conditions 7 and 8 of the license, in that they constituted partitions, dividers or curtains (condition 7) or obstructions fastened or connected to the partitions or ceilings (condition 8) which limited and obstructed the clear observation of occupants inside the booths (Findings of Fact re Count I, subparagraphs (a) and (b), and Special Finding I), and (2) that the failure to install

the mirrors violated conditions 17 and 18 of the license. Appellant filed a timely notice of appeal.

In her appeal, appellant raises the following issue: the evidence is insufficient to support the findings in that (1) there was no obstruction of the visibility of the booth areas within the meaning of the condition; (2) the trees are not partitions, dividers or curtains by any reasonable definition; (3) the swinging doors are no higher than the partitions to which they are attached, and are not obstructions fastened between the partitions or ceiling for the purpose of separating the booths and dining areas; (4) there was no showing that the premises were open for business or exercising the privileges of the license at the time of the Department's investigation; and (5) there was evidence in mitigation. These issues, because they are essentially interrelated, will be discussed together.

DISCUSSION

Appellant contends that, for various reasons, the evidence is insufficient to support the Department's findings.

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]

"Substantial evidence" is relevant evidence which reasonable minds would accept as 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].)

(a) Issue involving the placement of the trees.

The Department presented testimony and photographs depicting the placement of potted trees, described as 73 to 83 inches tall, scattered about the premises, most of them said to be inside the booths [RT 16; exhibits 4 A-E]. The

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[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].

Department contended at the hearing, and the Administrative Law Judge (ALJ) found, that the placement of the trees exceeded the height limits contained in condition 7 to the license, and obstructed visibility. This condition states:

"7. No booths or group seating shall be installed with dividers or partitions between them that are more than 54 inches high. No partitions, dividers or curtains shall be installed that restrict, limit or obstruct the clear observation of the occupants."

Appellant challenges this finding, arguing that trees are decorative, and can not reasonably come within the terms "dividers," "partitions" or "curtains" used in the conditions. Appellant contends further that the evidence presented by the Department showed that any obstruction to the view into the interior of the booths was only from the entry into the premises, citing the testimony of Department investigator Musselman at Page 25 of the administrative hearing transcript:

> "Q. (By Mr. Wainstein): Did you advise [appellant] of why you were there and what you discovered?
>
> "A. I advised her and spoke to her regarding condition No. 7 regarding the trees.
>
> "Q. And what, if anything, did she say to you?
>
> "A. I showed her that the trees obstructed our views into the booths. And she indicated to me that if you walk up to the wall of the booth right to the trees, you can see inside the booth.
>
> "Q. And what was your response to that?
>
> "A. I advised her that my view was obstructed into the booths when I walked into the front door of the premises."[3]

[3] Earlier, at page 16 of the hearing transcript, investigator Musselman stated that when he entered the premises:

According to the Department investigator, the concern that there be visibility into the booths is to facilitate investigations of "B-Girl activity," since some licensed locations have the booths so that the guests may be entertained. However, no evidence was presented that such activity had taken place in appellant's premises.[4]

It is noteworthy that the photographs offered by the Department to illustrate how visibility into the booths was obstructed show that the interior of the booths can be plainly seen from the vantage point from which the photographs were taken.[5] It is also significant that the condition in question does not state from where the interior of the booths must be visible. This is important, we think, because the use of potted trees and plants, some quite tall and others low and

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> "I immediately observed potted trees in the premises. And these potted trees, there were approximately 19 of them. They were approximately 73 to 83 inches tall, and they were scattered about the premises, most of them being inside the booths."

[4] Where, as here, the Department is urging an interpretation of language of a condition that is other than obvious, it is helpful to this Board to be able to see some evidence of the problem motivating the Department to take the position it does. Presumably, in the present case, if such evidence had been available, an investigation staffed as extensively as this one would have discovered at least some of it. The investigative team, according to the Department's witness, included, in addition to himself, two other investigators, a supervising investigator, a police sergeant and "numerous officers" [RT 24].

[5] There is some indication that from the entrance the investigator would not have been able to see into the booths even if there were no trees. Looking at Exhibit E, it appears that a person several feet away from a booth would not be able to see occupants seated in the booth. In any event, it is the exposure to public view, which the trees do not infringe, that would stop improper conduct. B-girl activity could continue, trees or no trees.

spreading, is a common decorating technique in restaurants, lounges, lobbies, and similar interiors. In the present case the trees were "scattered" about the premises, suggesting the absence of any intended attempt at concealment or obstruction.

Placement of such decorative foliage may indeed obstruct visibility from some directions and some locations in and outside the premises. The question is, from what point is visibility to be determined? The condition in question does not so specify. The testimony of the sole witness presented by the Department was only that his visibility was obstructed when at the entrance to the premises. It can be determined from the photographs in evidence that visibility from other points is not obscured. Indeed, the fact that the investigation took place after the normal business hours permitted under the license,[6] prevented the investigators from determining whether or not the activities of patrons and others in the booths could be observed.

We are of the view that the Department's application of the condition in the circumstances of this case was unreasonable. While we are not prepared to say that trees, flowers or other decorative items could never fall within the terms "partitions," "dividers" or "curtains," we are of the belief that, on the facts of this case, this determination would be an unreasonable interpretation of the condition in question.

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[6] The investigation occurred at 1:10 a.m. on the day in question. Condition 15 to the license dictates that all activities on the premises shall cease at 1:00 a.m.

The Department's brief does not address the question concerning the vantage point from which the interior of the booths must be visible. Instead, it merely argues that the trees and the doors can be dividers or obstructions. Indeed, in the appropriate case, this may well be true.

Here, however, the evidence is insufficient to show that the trees limited or obstructed the clear observation of the occupants, a finding essential to a finding of a violation of condition 7, since the only testimony was that the visibility was obstructed upon entering the front door.

(b) Issue involving installation of the swinging doors.

The ALJ also found that condition 8 was violated by appellant's having attached swinging doors to the partitions enclosing the various booths. Condition 8 states:

> "No obstructions shall be attached, fastened or connected to either the partitions or the ceiling to separate the booths/dining areas within the interior space of the licensed premises."

The photographs in evidence depict the swinging doors. They appear to be the same height, or slightly lower than the partitions to which they were attached. The Department argues the doors are in violation of the condition because they are obstructions, in the sense that they limit the view into the booths, and are attached to the partitions [RT 73]. Appellant contends that condition 8 should be interpreted to prohibit the attachment of such things as curtains, shades, shutters and the like that would hang down or stick up, blocking the view between rooms. Appellant

argues that the focus of the condition is on height, and it is unreasonable to interpret it to apply to doors that are no higher than the partitions themselves.

Once again the condition in question does not specify the vantage point from which the view into the booths is obstructed. While it is clear that the doors, when closed, eliminate an opening that existed before they were installed, it is not at all clear that it was that angle of viewing that was sought to be protected. As we read the condition, it appears more directed at the walling off of the booths in some manner as to effectively nullify the height restrictions. The doors simply obscure a horizontal view from below normal eye level, and only as to the opening. Suppose appellant merely modified one of the partitions to make it a swinging door. Is it a door or a partition? We think the same question can be asked with respect to the doors in question.

We think conditions 7 and 8 should, in this respect, be read together, and in so doing, it becomes clear, that, reasonably interpreted, they do not cover the doors in question. The photographs bear this out, in that they show that the opportunity to view the interior of the booths is only minimally affected by the doors, and not at any level involving the height limits of the condition.

The Department argues that the doors constitute "obstructions of view, if only partially," and states that the degree to which they obstruct would depend specifically on where a viewer was standing. (Dept.Br., p. 3.) This is of course, true, but "only partially." The real test should be whether they prevent a fair observation of the interior of the booths so as to discourage the kind of activity at

which the condition was presumably targeted, i.e., nudity, prostitution or other similar sexually-related activity.

(c) Issue involving mirrors.

The ALJ found that appellant violated conditions 17 and 18 by failing to attach mirrors as required by those conditions.[7] Appellant suggests that the investigator's testimony regarding the absence of these mirrors is hearsay, asserting that the investigator is merely relating what he was told by an accompanying police officer. (App.Br. 5.) Appellant is mistaken. The investigator testified at various times that he did not see the mirrors where they were supposed to be [RT 23-24, 28], and that police officer Spradling pointed out their absence to him [RT 55, 60]. This is direct testimony and is sufficient to establish the fact that the mirrors were not in place as required. The Department has met its burden on this issue.

(d) Issue concerning whether premises open for business.

Appellant also contends there is no evidence that the licensed premises were open for business or exercising any of the privileges of the license at the time the investigation took place. It follows, appellant argues, that no violation has been

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[7] These conditions provide:

"17. Two mirrors (minimum size of 24 by 18 inches) shall be attached in the booth located at the northeast corner of the aforementioned establishment, one on the north wall and one the east wall.

"18. One mirror (minimum size of 24 by 18 inches) shall be attached to the east wall of the booth located at the southeast corner of the premises."

proven, since it is possible that the trees would have been moved to other locations or the mirrors installed or reinstalled (appellant reportedly stated they fell down during an earthquake [RT 26]) before the premises opened for business.

The ALJ rejected this contention. The investigation occurred shortly after appellant's normal closing hour. The photographs of the interior of the booths show signs that they had been in use (Exhibit 4-E shows crumpled napkins, ash trays and other items). We think it reasonable to infer that what the investigative team saw at that time was the appearance of the premises while it was open for business.

The Department's position is that, unless the license has been surrendered or suspended, the license privileges are being exercised. While there may be circumstances short of suspension or surrender where it could be said that a licensee is not exercising the privileges of the license, i.e., when a public eating place licensee is only serving breakfast, for example, it is unnecessary to decide whether the Department's broad contention is correct.[8] The Department aptly observes that it stretches credulity to believe that the licensee removes and replaces the trees and the doors every time it closes and reopens for business.

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[8] We should note, however, that the Department cites an opinion of the Attorney General (Opinion 72/169, reported in 55 Op.Atty.Gen. 342 (1972)) that would appear to agree with its position. In that opinion, the Director of the Department of Alcoholic Beverage Control was advised that a licensee could not permit minors upon the "public premises" of the licensee during the hours of 2:00 a.m. to 6:00 a.m., when alcoholic beverages were not being served. The thrust of the opinion is in the statement: "Section 23039 (of the Business and Professions Code) presumes that 'public premises' is a locality and gives no ground for an inference that the locality might lose its nature as 'public premises' once closing hours appear."

(e) Issue concerning mitigation and penalty.

The ALJ found in Special Finding IV that no evidence of mitigation, extenuation or rehabilitation was offered on the part of the appellant. Appellant contends this ignored evidence that the charges in the current accusation were based on an investigation which took place only a short time after the completion of a suspension stemming from an earlier violation and the approval of a request for modification of certain license conditions, as well as evidence that appellant has difficulty with the English language, all contributing to confusion on appellant's part as to what was required.

Appellant did not testify, so there is no evidence in the record to support the suggestion that appellant misunderstood any of the conditions or was confused about what she was required to do in response to those conditions. There is, however, record evidence which indicates that appellant did take steps to comply with the conditions involving the mirrors. Such evidence suggests rehabilitation, leading us to conclude that Special Finding IV, which states that appellant offered no evidence of rehabilitation is, to that extent, erroneous.

A prior accusation dated November 29, 1994 (Exhibit 2), charged appellant with violation of license conditions and rule 64.2, subdivision (b) (Cal.Code Regs. §64.2), stemming from booth partitions exceeding maximum height limitations (40 inches) and unidentified obstructions attached to the partitions or the ceiling. Pursuant to a stipulation and waiver, a decision (Exhibit 2) was entered finding violations of Business and Professions Code §23804 and rule 64.2, subdivision (b),

and imposing a five-day suspension and indefinitely thereafter until in compliance with a Petition for Conditional License dated October 18, 1995.[9] Appellant commenced serving this suspension on December 28, 1995 [Exhibit 2; RT 67], and on January 2, 1996, her license was returned to her [RT 67]. According to the Department [RT 68], appellant's license would not have been returned to her had not the Department then determined that she was in compliance with the conditions as set forth in the October 18, 1995 petition [Exhibit 1].

The current accusation was directed at the status of appellant's premises on December 9, 1995 only. Therefore, we can only conclude that appellant undertook steps to satisfy the Department by January 2, 1996 that she had corrected in some manner or other the circumstances that, on December 9, 1995, were deemed by the Department to be violative of her license conditions. We do not know what she did, but whatever it was apparently brought her into compliance with the current conditions on her license, demonstrating some evidence of rehabilitation.

The Department contends that the penalty of revocation is warranted on the following grounds: (a) the licensee was under a stayed revocation for similar violations when the violations charged in the accusation occurred; (b) the violations were of a nature completely controllable by the licensee; and (c) there had been

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[9] The petition for conditional license, which enlarged to 54 inches the permissible height of the booth partitions and added the conditions requiring the installation of mirrors, was followed shortly by the decision pursuant to stipulation and waiver, possibly suggesting some sort of compromise agreement between the Department and appellant.

conditions on the license before, which were modified at the licensee's request, making the conclusion inescapable that the violations were deliberate.

CONCLUSION

The findings as to Count 1 of the accusation, subparagraphs (a) and ((b), are reversed, for lack of substantial evidence in the record. These provisions relate to the trees and swinging doors. The findings as to Count 1, subparagraphs (c) and (d) are affirmed. These findings relate to the mirrors.

Special Findings I and IV are reversed for lack of substantial evidence in the record. Determination of Issues I is reversed as to Count 1, subparagraphs (a) and (b), and affirmed as to subparagraphs (c) and (d) thereof.

The penalty is reversed and remanded to the Department for reconsideration.[10]

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

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[10] 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.