ISSUED APRIL 3, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

HASSAN SALEH JOHER dba La Mirage Restaurant 17104 Pioneer Boulevard Artesia, CA 90701, Appellant/Licensee v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6850 File: 47-312571 Reg: 96037649 Administrative Law Judge at the Dept. Hearing: John McCarthy Date and Place of the Appeals Board Hearing: January 7, 1998 Los Angeles, CA

Hassan Saleh Joher, doing business as La Mirage Restaurant (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered his on-sale general public eating place license suspended for 25 days, with 10 days thereof suspended for a probationary period of one year, for having violated a condition on his license which required him to have three uniformed security guards on duty in his restaurant from 7:00 p.m. until one-half hour after closing, being contrary to the universal and generic public welfare and morals provisions of the California

[1] The decision of the Department dated March 27, 1997, is set forth in the appendix.

Constitution, article XX, §22, arising from a violation of Business and Professions Code §23804.

Appearances on appeal include appellant Hassan Saleh Joher, appearing through his counsel, Joshua Kaplan; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on March 4, 1996. Thereafter, the Department instituted an accusation alleging that on May 24, 1996, appellant violated the condition on his license which required him to provide three uniformed security guards between the hours from 7:00 p.m. until one-half hour after closing.

An administrative hearing was held on September 30, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Department investigator Peter Parzik that when he visited the restaurant at 8:00 p.m., he was unable to see any security guards inside or outside the premises. When he spoke to Mike Joher, appellant's son, and advised him of the suspected violation of the condition, Mike Joher advised Parzik that the requirement of security guards had been changed by the city, and so, he thought, it changed with the Department, as well. Joher also said security guards would come in later that evening, at 9:00 p.m. Parzik testified further that he told Mike Joher that unless the condition was modified, he still had to have the guards at 7:00 p.m. On cross-examination by Hassan Saleh Joher,

representing himself, Parzik said he had asked to speak to the person in charge, and was told by Mike Joher that he was that person. In response to questioning by the Administrative Law Judge, Parzik testified he would have recognized appellant had he been present on the night in question, but did not recall whether he had seen him or not that evening. Had he seen him, Parzik said, he would have spoken to him about the violation. Since he apparently did not speak to appellant, Parzik concluded he had not seen him.

Bill Biltagi, who described his duties as food manager of the restaurant section, stated the business records showed that one security guard reported for duty at 4:00 p.m. on the day in question, two more at 7:00 p.m., and an additional three at 9:00 p.m. Biltagi relied upon an invoice prepared in advance and presented to the business at the end of the evening. Biltagi explained Parzik's failure to see any security guards on the likelihood they were eating dinner when Parzik conducted his inspection.

Following the conclusion of the hearing, the ALJ determined that the condition had been violated, finding there were no guards on duty. He based his decision on two alternatives: either the invoice billed appellant for services not provided, or else the guards were all having dinner at a time they were supposed to be on duty, in which case the condition was not being satisfied.

Appellant thereafter filed a timely notice of appeal.

In his appeal, appellant raises the following issues: (1) appellant lacked

competence to represent himself, so was deprived of due process in that he was not advised of the potential consequences of proceeding without counsel and did not knowingly waive the presence of counsel; (2) the decision is not supported by the findings and the findings are not supported by the evidence; (3) the penalty was excessive and constitutes cruel and unusual punishment; and (4) the proceeding is constitutionally defective by virtue of the unconstitutionality of Business and Professions Code §24210.

DISCUSSION

I

Appellant contends that he was denied due process because he was permitted to go forward with the hearing without counsel, and without having been advised of the possibility of adverse consequences if he chose to proceed without an attorney.

We find appellant's arguments unconvincing. Appellant was put on notice by the accusation that he faced a possible suspension if the Department proved its charges. He was informed in the same document of his right to retain counsel: "At any or all stages of these proceedings, you have the right to be represented by counsel at your own expense or to represent yourself without legal counsel. You are not entitled to the appointment of an attorney to represent you."

In the Notice of Hearing appellant is given the same advice regarding his right to retain an attorney for his defense.

To appellant's credit, he acknowledges in his brief the Court of Appeal decision in Borror v. Department of Investment (1971) 15 Cal.App.3d 531, 543-544 [92 Cal.Rptr. 525], in which the court made it clear that the rules governing the right and need for counsel in criminal cases had little application in administrative proceedings. The language of the court applies with force in this case:

> " ... [W]e conclude that in a proceeding to revoke or suspend a license or other administrative action of a disciplinary nature the licensee or respondent is entitled to have counsel of his own choosing, which burden he must bear himself, and that he is not denied due process of law when counsel is not furnished him, even though he is unable to afford counsel. Such a proceeding does not bear a close identity to the aims and objectives of criminal law enforcement, but has for its objective the protection of the public rather than to punish the offender. There is no constitutional requirement, therefore, that the hearing officer or agency advise a party that he is entitled to be represented by counsel, and that if he cannot afford counsel one will be afforded him. In proceedings under the Administrative Procedure Act there is a statutory requirement, however, that a party be advised that he is entitled to be represented by counsel chosen and employed by him. In the present case the licensee does not maintain that she was deprived of this right.
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> "Since the requirements of due process are satisfied in a proceeding under the Administrative Procedure Act, insofar as representation by counsel is concerned, if a party is advised that he is entitled to be represented by counsel employed by him, and such attorney is permitted to represent him in the proceeding, there is no requirement, in the event that the party does not choose to be represented by counsel, or does not have the funds with which to hire an attorney, that the analogies of the criminal law be followed in ascertaining whether there has been an intelligent waiver of counsel. Accordingly, there is no requirement that the hearing officer determine whether the accused understands the nature of the charge, the elements of the offense, the pleas and defenses which may be available, or the punishment or penalty which may be exacted. In this regard, we apprehend that as to all of the elements, other than the last mentioned, these are adequately specified under the Administrative Procedure Act in the accusation (§11503) and the notice of defense (§11506). As to the penalties involved, it is inconceivable that a licensee is not aware by virtue of the licensing procedures of the sanctions which may be imposed for violation of his

duties and obligations as such licensee."

Appellant's style may not have demonstrated as much grace in his cross-examination as a more experienced counsel might have displayed, but it cannot be said that he was totally defenseless, as appellant's brief suggests. He challenged, albeit unsuccessfully, the testimony of the Department's investigator as to whether he spoke to a person having any authority to speak on appellant's behalf, and whether he really did attempt to locate the security guards. In addition, he presented the testimony of one of his management employees, again, however, being unable to account for the non-presence of the security guards during time periods their presence should have been obvious.

II

Appellant contends the findings are not supported by substantial evidence, since the evidence "demonstrated only that the three security guards were most probably having dinner when the ABC investigator appeared at the premises" (App.Br. 13). Appellant argues that he is not required to do any more than provide three security guards, contending that the condition does not require that "all of them be on duty at 7:00 p.m. when the uncontroverted evidence demonstrated that there was no patronage and thus nothing to secure."

We are inclined to agree with the ALJ that, if the guards are eating dinner, they are not "on duty." If all three are eating dinner at the same time, then there is no

effective security until they are back at work.

Additionally, it may be noted, If uniformed security guards had, in fact, been on the premises, it would seem likely that Parzik would have encountered one or more of them.

III

Appellant challenges the penalty as constituting cruel and unusual punishment.

This argument deserves little comment. It is well-settled that a disciplinary suspension is not cruel and unusual punishment. The net suspension in this case, 15 days, is neither cruel nor unusual.

IV

Appellant challenges the constitutionality of Business and Professions Code §24210, which empowers the Department to employ administrative law judges to conduct application and disciplinary hearings.

The California Constitution, in article III, §3.5, prohibits an administrative agency such as the Alcoholic Beverage Control Appeals Board from refusing to enforce or declaring any statute unconstitutional unless that statute has first been determined to be unconstitutional by an appellate court.

Being unaware of any appellate court so holding with respect to Business and Professions Code §24210, the Appeals Board declines to consider this contention.

CONCLUSION

The decision of the Department is affirmed.[2]

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

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[2]This final order 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 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.