ISSUED SEPTEMBER 30, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

DENNIS and GEORGIA STATHOULIS and ANA VLACHOPOLOS dba Georgia's Greek Cuisine 3550 Rosecrans St., Suite A San Diego, California 92110, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6924 File: 41-279518 Reg: 97038958 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: July 8, 1998 Los Angeles CA

Dennis and Georgia Stathoulis and Ana Vlachopolos, doing business as Georgia's Greek Cuisine (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 25 days, with 10 days thereof stayed for a probationary period of one year, for having violated conditions on their license relating to entertainment audible beyond the licensed premises and live entertainment on the patio, being contrary to the universal and

[1]The decision of the Department, dated July 17, 1997, is set forth in the appendix.

generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §23804.

Appearances on appeal include appellants Dennis and Georgia Stathoulis and Ana Vlachopolos, appearing through their counsel, William A. Adams, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer and wine public eating place license was issued on April 12, 1993. Thereafter, the Department instituted an accusation against appellants charging that on October 4, 1996, they violated conditions on the license prohibiting live entertainment on the patio and entertainment audible beyond the licensed premises.

An administrative hearing was held on May 23, 1997, at which time oral and documentary evidence was received. At that hearing, San Diego police officer William Frew testified that while he was driving on Rosecrans Street, while conducting inspections of "ABC license and police control businesses," he heard loud music coming from the premises. He made a U-turn at the next intersection, drove back, parked in a lot 50 to 75 feet from the premises, and could still hear the music. Upon reaching the patio, he saw that the source of the music was a set of speakers mounted on top of the patio awning. He also observed, for approximately six minutes, a belly dancer performing on the patio, where customers were eating

and drinking.

Frew described his conversation with appellant Dennis Stathoulis, in which he informed Stathoulis the music was plainly audible outside the premises, and probably because the speakers were directed outside.

Dennis Stathoulis testified regarding the physical characteristics of the premises at the time the conditional license was issued, and structural changes which had been made since then, to control noise. He said the belly dancer had been engaged to entertain a party of six, celebrating an anniversary. The group was originally to be seated inside but, when one of them wanted to smoke, they were moved to the patio. It had slipped his mind that dancing on the patio was not permitted. In addition, he was away on an errand, and Frew was there when he returned.

Subsequent to the hearing, the Department issued its decision which determined that the charges of the accusation had been sustained, and a suspension was ordered.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) the Department's interpretation of the condition relating to audible entertainment is unreasonable; (2) the Department failed to prove appellants permitted live entertainment on the patio; and (3) the penalty is excessive.

DISCUSSION

I

Appellants contend that the Department's interpretation of the condition regarding audible entertainment is unreasonable, suggesting there should be no violation even though the entertainment is audible beyond the licensed premises, because no residences are located nearby and the area is a commercial district with a high volume of traffic daily.

The authority of the Department to impose conditions on a license is set forth in Business and Professions Code §23800. The test of reasonableness as set forth in §23800, subdivision (a), is that "...if grounds exist for the denial of an application...and if the department finds that those grounds [the problem presented] may be removed by the imposition of those conditions..." the department may grant the license subject to those conditions. Section 23801 states that the conditions "...may cover any matter...which will protect the public welfare and morals...."

The condition in question states: "Entertainment provided shall not be audible beyond the licensed premises."

The petition for conditional license, which sets forth the condition, recites that the San Diego Police Department has protested the issuance of the license on the grounds issuance of a license will aggravate an existing police problem and would add to an undue concentration of licenses.

Whatever the concerns of the police may have been, the inclusion of a

limitation on noise emissions appears to have been one of them. If appellants did not believe at the time that it was a reasonable condition, they could have objected and challenged any denial of their application on appeal.

Instead, they now argue, in effect, that the only possible interpretation of the language in the condition is unreasonable. They do not dispute the fact that the noise was audible to a police officer while in his car in moving traffic. If there is substance to their position, which, in effect, is that the condition was unnecessary, their objections should have been raised at some earlier time, or in a different procedural setting.[2]

II

Appellants contend they did not "permit" dancing on the patio. They argue that the belly dancer was not a regular feature of the restaurant but was an independent contractor hired specifically for a group of customers. Her performance was planned for the interior of the premises, they argue, but the customers spontaneously moved to the patio and directed the belly dancer to follow them. Stathoulis was away from the premises at that time, and the other employees were unaware of possible violations.[3]

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[2] Appellants suggest that the Department is in the process of eliminating the condition. Even if that is so, that fact has no bearing on the case presently before the Appeals Board.

[3] Appellants appear to suggest that because not all of the general partners were asked to sign the license conditions, their ignorance of the requirements of the conditions should be excused, because entertainment rarely occurred. However, Dennis Stathoulis was fully aware of the condition, and was negligent in

"Permitting" does not require the personal knowledge of the licensee. A licensee has an active duty to operate a lawful establishment, and a failure to perform that duty is a permitting of the unlawful activity. (Mercurio v. Department of Alcoholic Beverage Control (1956) 144 Cal.App.2d 626 [301 P.2d 474].) Passive conduct on the part of the licensee or his employee will constitute a "permitting" of the objectionable conduct where such conduct is readily apparent. (Mundell v. Department of Alcoholic Beverage Control (1962) 211 Cal.App.2d 231 [27 Cal.Rptr. 62].)

In this case, the license condition was clear. Appellant Stathoulis and his partners were charged with the duty of compliance with the condition. That partners or employees left in charge of the premises during Stathoulis' absence were not sufficiently informed by him of the condition equates with the passivity that constitutes a "permitting" within the meaning of the case law.

That the dancer was an independent contractor does not excuse the condition violation. By hiring her services, Stathoulis was under an obligation to control her behavior insofar as confining her performance to the area where it was permissible.

III

Appellants challenge the penalty as too severe, and not justified by the evidence. They argue that there is no evidence the violation was intentional, and

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failing to inform his partners of it, if, indeed, that was the case.

that there was no negative impact on the public welfare and morals.

Where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].) However, the Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].)

That the violation was unintentional is only minimally relevant, as an element of mitigation. However, we cannot assume that the Department did not take this factor into consideration when it imposed the suspension at issue.

Appellant Stathoulis displayed a somewhat cavalier attitude toward the conditions, reflected in his failure to advise his partners about the conditions, and his assumption that, because he made some structural modifications, he need no longer comply with the conditions.

Although a condition must be reasonably connected with the anticipated problem at which it is directed, it is inappropriate to address this question long after the time to challenge the original imposition of the condition has passed. Appellants' remedy, which they appear to have belatedly pursued in a separate proceeding, is to seek the removal of the condition as no longer necessary, in accordance with Business and Professions Code §23803. If they are correct in that belief, but obtain no relief from the Department, then is the appropriate time to

seek review by the Appeals Board.

The Department has a great deal of discretion in determining what level of discipline is warranted, and unless the Board can say that discretion has been abused, the penalty must stand. Here, a net suspension of 15 days does not suggest that an abuse has occurred.

CONCLUSION

The decision of the Department is affirmed.[4]

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

Separate concurring opinion of Ben Davidian follows:

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[4]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.

CONCURRING OPINION

I agree with my fellow Board members that appellants violated the condition in question, and that the Department has a great deal of discretion in setting the appropriate penalty, to which we must defer. Nevertheless, this appears to be a violation with minimal impact on the general public; the net fifteen-day suspension seems, to me, to be somewhat harsh, especially when one considers the fact that, according to the testimony, the offending speakers have been in place since 1993, and this case is apparently the first time their use has been questioned.

BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD