

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

AB-8682

File: 48-414965 Reg: 06062988

MOOD NIGHTCLUB, INC., dba Mood
6623 Hollywood Boulevard, Los Angeles, CA 90028,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: May 1, 2008

ISSUED JULY 10, 2008

Mood Nightclub, Inc., doing business as Mood (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its on-sale general public premises license for 10 days for having permitted a minor to remain in the premises without lawful business therein, a violation of Business and Professions Code section 25665.

Appearances on appeal include appellant Mood Nightclub, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry Winters.

1

The decision of the Department, dated January 22, 2007, is set forth in the appendix.

PROCEDURAL HISTORY

Appellant's license was issued on December 13, 2004. On May 30, 2006, the Department instituted an accusation against appellant charging that it permitted a minor to remain in the premises without lawful business therein.

An administrative hearing was held on November 30, 2006, at which time documentary evidence was received and testimony concerning the violation charged was presented. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established.

Appellant filed a timely notice of appeal in which it raises the following issues: (1) the certified record contains documents that were not in the administrative record before the administrative law judge; (2) the Department communicated ex parte with its decision maker by way of a report of hearing; and (3) the Department erred in rejecting a defense based upon reliance upon government-issued photographic identification.

DISCUSSION

The only issue we will address is that involving the claim that the certified record contains documents that were not in the administrative record before the administrative law judge.

According to appellant, there are two certified records which are appreciably at odds. Appellant's counsel received a "corrected" certified record on January 25, 2008, the certification stating it was signed under penalty of perjury on August 2, 2007. This

record, according to appellant, appeared to be an accurate reflection of the record before the administrative law judge. Since this "corrected" record was forwarded to appellant by Department counsel, it would seem that Department counsel agreed.

However, appellant states in its brief that its counsel had earlier received, on December 6, 2007, a certified record signed under penalty of perjury December 5, 2007, that contained a number of documents that were never placed before the administrative law judge. These documents, according to appellant, included two investigator's reports, a complaint letter, two DMV photos, and a photograph of one of the decoys with a caption indicating date of birth. The necessary implication is that Department's decision maker may have reviewed a record corrupted by the ex parte inclusion of the listed documents.

The Board has not seen the so-called "corrected record." It was advised by the Department that a copy could not be located.

The Department's reply brief does not challenge any of the statements in the appellant's brief regarding the discrepancies between the two records. It simply states that the Department, without conceding any issues in appellant's opening brief, submits on the opening brief, reporter's transcript and exhibits presented at the hearing.

The Department's failure to challenge appellant's assertions regarding ex parte contacts, combined with the fact this Board has been unable to obtain a copy of the "corrected" record, leaves the Board without tools necessary for a meaningful review. Under the circumstances, we think justice will best be served by our remand of this matter to the Department, so that the issues surrounding the variant records and whether there was, in fact, the ex parte communication claimed by appellant, can be

addressed in an evidentiary hearing.

ORDER

This matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing opinion.²

TINA FRANK, ACTING CHAIRPERSON
SOPHIE C. WONG, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²

This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.