ISSUED ARPIL 30, 1996

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

GLORIA H. FELCYN and IVAN SUAREZ dba La Bamba Restaurant 61 North Raymond Avenue Pasadena, CA 91103 Licensees/Appellants, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6560 File: 47-278705 Reg: 94030562 Administrative Law Judge at the Dept. Hearing: Samuel D. Reyes Date and Place of the Appeals Board Hearing: February 8, 1996 Los Angeles, CA

Gloria H. Felcyn and Ivan Suarez, doing business as La Bamba Restaurant (appellants), appealed from a decision of the Department of Alcoholic Beverage Control[1] which suspended their on-sale general public eating place license for one year, but stayed the suspension for a one-year probationary period, provided an actual suspension of 30 days was served, for violating conditions on the license prohibiting live entertainment by groups of more than four people, dancing on the premises, and having entertainment audible beyond the area under the control of appellants, being a violation of Business and Professions Code §23804.

Appearances on appeal included Joshua Kaplan, counsel for appellants; and

[1]The decision of the department dated July 20, 1995 is set forth in the appendix.

Jonathon E. Logan, counsel for the department.

FACTS AND PROCEDURAL HISTORY

Appellants' Type 47 license (on-sale general public eating place) was issued December 3, 1992. In September 1993, appellants were disciplined for a violation of their license conditions prohibiting live entertainment. The penalty was a 30-day suspension.

In the present matter, the department instituted an accusation against appellants on August 16, 1994. The department filed a one-count accusation that listed prohibited audibility of entertainment on one occasion, prohibited live entertainment (as to the number of members) on two occasions, and prohibited dancing by patrons on three occasions.

An administrative hearing was held on May 19, 1995, at which time oral and documentary evidence was received. At that hearing, it was determined that appellants were in violation of their license conditions.[2] Subsequent to the hearing, the department issued its decision, which was adverse to appellants. Appellants then filed a timely notice of appeal.

In their appeal, appellants raised the following issues: (1) the findings were not supported by substantial evidence, (2) the department accumulated counts in order to increase the penalty, (3) the penalty imposed was cruel or unusual and contravened

[2]The conditions placed on the license were: "(05) Live entertainment shall be limited to 4 people in the group; (06) There shall be no dancing permitted on the premises at any time; (07) Entertainment provided shall not be audible beyond the area under the control of the licensee."

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the United States and California Constitutions, and (4) the department was estopped from asserting the violations herein.

DISCUSSION

I

Appellants contended that the decision lacked substantial evidence. "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, 95 L.Ed. 456, 71 S.Ct. 456, and 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).

Jennifer Smith, a department investigator, testified at the administrative hearing that on June 18, 1994, she was able to hear music emanating from the premises when she was approximately 120 feet away (an area not under the control of appellants) [R.T. 10, 12, 30-31]. Also on that date, Kathi Barnes, a department investigator, testified that she could hear music from the premises as she and her department team walked out to the street [R.T. 53].

Investigator Smith also testified that on June 18, 1994, she saw dancing within

the premises [R.T. 17, 19, 21-22]. Investigator Barnes also testified to observing dancing in the premises [R.T. 56-58]. Anthony Pacheco, a department investigator, testified as to dancing in the premises on June 25, 1994 [R.T. 65-66]. Leslie Crabb, a department investigator, testified as to dancing in the premises on June 26, 1994 [R.T. 84-85]. Co-appellant Gloria Felcyn testified that dancing was allowed on Fridays and Saturdays [R.T. 105].

Investigator Smith testified that at the premises on June 18, 1994, there were six members in the band [R.T. 26, 45]. Kathi Barnes testified that at the premises on June 18, 1994, there were six members in the band [R.T. 58-59]. Investigator Pacheco testified that at the premises on June 25, 1994, there were five members in the band [R.T. 64].

Appellant argues that condition 5 (concerning the number of people in the group) was so vague as to be unenforceable. However, a reading of the condition indicates that any live performance shall be limited to four people actually performing.

We determine that there was substantial evidence supporting the findings.

II

Appellants contended that the department accumulated counts in order to increase the penalty. Appellants argue that the department should have given information to appellants as to the alleged violations at the earliest opportunity. The record shows that the investigators for the department came to the premises on three occasions and conducted undercover investigations.

It is the department which is authorized by the State Constitution to exercise its

discretion to suspend or revoke an alcoholic beverage license, if the department shall reasonably determine for "good cause" that the continuance of such license would be contrary to public welfare or morals. The process whereby the department investigates possible unlawful conduct is within that discretion and should not be disturbed except on a showing of illegal, arbitrary, or abusive conduct on the part of the department. Whether the department investigators should have contacted appellants concerning the investigation is a matter of discretion within the police powers granted the department. It is not for the appeals board to mandate at what point in an investigation the department is to inform appellants that the licensed premises is under scrutiny, as oftentimes a continuing investigation is needed to determine the existence of violations or the degree to which a law is being violated. The appeals board finds nothing in the record that shows an unreasonable or arbitrary manner of investigation.

Appellants argue that the case of Walsh v. Kirby (1974) 13 Cal.3d 95, 118 Cal.Rptr. 1, specifically prohibits accumulation of violations. The Walsh case concerned the now-repealed fair trade statutes and the use of progressively-increasing fines to bring about compliance with those statutes. The present matter does not involve such laws and the abuse the Walsh case concerned.

III

Appellants contended that the violations were de minimis and therefore the penalty imposed was so excessive as to be cruel and unusual.

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). However, where an appellant raises the issue of an excessive penalty, the appeals board will

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examine that issue (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785, 97 Cal.Rptr. 183).

Any violation of a statute or rule of the department, which would include conditions, when done with intent, as is shown by the record, is contrary to the public welfare and morals (Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85, 99, fn. 22, 84 Cal.Rptr. 113.

The department had several factors to consider: (1) appellants applied for a removal of the dance restriction, thus showing knowledge [R.T. 118], and (2) appellants knowingly allowed that condition to be violated from the very beginning of their license history [R.T. 98].

We determine the penalty was a reasonable exercise of the department's discretion.

IV

Appellants contended that the department was estopped from asserting the violations in the present matter, arguing that in 1992 the department accepted a modification request and promptly approved that request. Appellants argued that they relied on such efficient action in seeking modification of the present conditions.

Co-appellant Gloria Felcyn testified that she applied for a change in music format, from Irish to Latin, in October 1992 and the request was granted in June or July of

1993, approximately eight months later [R.T. 100]. Co-appellant also testified that she applied for a change of the dancing condition on June 20,1994, and this request was granted on September 12, 1994, approximately three months later [R.T. 112-113].

The applied-for modification of the no-dancing condition was applied for two days after the June 18 violation. Appellants cited the case of City of Long Beach v. Mansell (1970) 3 Cal.3d 462, 91 Cal.Rptr. 23, 48, for the proposition that estoppel would apply to the department's conduct. The Mansell case, from the facts of the present matter, is not on point.[3] Notwithstanding, the elements in the Mansell case are not present in the instant matter (3 Cal.3d at 489).

CONCLUSION

The decision of the department is affirmed.[4]

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

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[3]See the case of Harris v. Capital Growth Investors XIV (1991) 52 Cal.3d 1142, 1157, 278 Cal.Rptr. 614.

[4]This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.