ISSUED JANUARY 16, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

KDM ENTERTAINMENT, INC. dba Kokomo's 17927 MacArthur Boulevard Irvine, CA 92714, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6647 File: 47-185953 Reg: 95032758 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: October 2, 1996 Los Angeles, CA

KDM Entertainment, Inc., doing business as Kokomo's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked appellant's on-sale general public eating place license, with revocation stayed for a probationary period of two years, and imposed a suspension for 30 days, with no portion thereof stayed, for appellant's employee, a bouncer/security person, having willfully and unlawfully incited others to commit the crime of using force or violence against a patron, contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Penal Code § 182

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[1]The decision of the Department dated March 7, 1996, is set forth in the appendix.

subdivision (a)(1), and §242.

Appearances on appeal include appellant KDM Entertainment, Inc., appearing through its counsel, Rick A. Blake; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued August 21, 1986. Thereafter, the Department instituted an accusation against appellant on May 23, 1996. Appellant requested a hearing.

An administrative hearing was held on December 19 and 20, 1995, at which time oral and documentary evidence was received. At that hearing, it was determined that appellant's bouncer/security person, James Jonas, conspired with two patrons, John Scott Ashe and Thomas Ota, to start a fight with patron Yair Wein. Jonas told Ashe and Ota that patron Wein was the new boyfriend of his former girlfriend, who had accompanied Wein to the licensed premises. Wein was required to seek medical treatment for the injuries he sustained in the ensuing melee.

Subsequent to the hearing, the Department issued its decision which revoked appellant's license, but stayed revocation for a two-year probationary period, and imposed a suspension of appellant's license for 30 days, no portion of which was stayed. Appellant filed a timely notice of appeal, raising generally each of the statutory grounds for appeal.

In its brief, appellant raises the following issues: (1) the conduct evidenced by the Department varied from that charged in the Accusation, in violation of due process;

(2) the evidence was insufficient to show that the licensee permitted or condoned the wrongful conduct; (3) the inclusion in Finding of Fact IV of references to prior disciplinary matters involving the licensee was improper and prejudicial, amounting to an abuse of discretion; and (4) the terms of the stay order are unreasonably and inequitably broad.

DISCUSSION

I

Appellant contends that the conclusions contained in Determination of Issues I, that one of licensee's employees allowed two patrons to use force or violence against a patron within the licensed premises, and that other employees forcibly removed the assaulted patron from the premises while at the same time assisting the assailants in an attempt to conceal themselves from the police, in some way varied from the charges in the Accusation. It appears to be appellant's contention that the inclusion of the finding that licensee's employees attempted to assist the assailants in evading capture, not specifically charged in the Accusation, was a fatal variance.

While it is true that the Accusation says nothing about licensee's employees assisting the assailant's attempts to hide, such conduct, as was found to have occurred, was relevant to the issue of the licensee's responsibility for conduct occurring on the premises. The Administrative Law Judge (ALJ) was entitled to take this information into account in determining whether, under applicable law, it was reasonable to hold the licensee responsible for the wrongful acts of its employee.

II

Appellant contends that the acts of Jonas were not acts condoned by management and were outside the scope and course of his employment, "and in fact contrary to what he was hired to do." Appellant argues that this scenario is different from a case in which an employee hired to sell alcohol sells alcohol to a minor.

At the hearing before the ALJ, appellant relied on the case of Laube v. Stroh (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779]. That decision was actually two cases - Laube and Delena - both of which involved restaurants/bars - consolidated for decision by the Court of Appeal.

The Laube portion dealt with surreptitious contraband transactions between patrons and an undercover agent--a type of patron activity concerning which the licensee had no indication and therefore no actual or constructive knowledge--and the court ruled the licensee should not have been required to take preventive steps to suppress that type of unknown patron activity.

The DeLena portion of the Laube case concerned employee misconduct, wherein an off-duty employee on four occasions sold contraband on the licensed premises. The court held that the absence of preventative steps was not dispositive, but the licensee's penalty should be based solely on the imputation to the employer of the off-duty employee's illegal acts.

The imputation to the licensee/employer of an employee's on-premises knowledge and misconduct is well settled in Alcoholic Beverage Control Act case law. (See Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; Morell v. Department of Alcoholic Beverage Control (1962)

204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633]; and Endo v. State Board of Equalization (1956) 143 Cal.App.2d 395 [300 P.2d 366, 370-371]. "A licensee can be held to have permitted a violation by a showing that the acts themselves took place. ... .[¶] ... If there is evidence that a violation occurred on the premises the licensee is responsible for it." (Munro v. Alcoholic Beverage Control Appeals Board (1957) 154 Cal.App.2d 326, 329-330 [316 P.2d 401, 403].) It is unnecessary to show that the licensee knew of, or was negligent in discovering the violation. Ibid. As stated in Mantzoros v. State Board of Equalization (1948) 87 Cal.App.2d 140 [196 P.2d 657,660], "[t]he licensee, if he elects to operate his business through employees must be responsible for their conduct in the exercise of his license." In Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 316], the court reviewed a series of decisions which applied such a rule, holding that knowledge of the employee's activity is imputed as a matter of law. In Harris, as here, the conduct of the employee was claimed to have been outside the course and scope of employment.

Appellant's attempt to distinguish this case from one where an employee hired to sell alcohol sells to a minor is unpersuasive. Jonas was hired to provide security. It was in his position as a security person that he had the opportunity to enlist the two assailants and assure them of protection.

Appellant also contends that it is clear from the evidence that Jonas's acts were not condoned by management. While it is true Jonas was fired on the spot, it is also

true that management took no disciplinary action against any of the other security personnel who were found by the hearing officer to have participated in the plot by attempting to assist the assailants in evading capture. See Determination of Issues I, paragraph three. There is substantial evidence in the record, primarily the testimony of the assailants themselves, based upon which such a finding could be made.

III

Appellant contends that "the inclusion of pending disciplinary matters as a basis for consideration and penalty" is improper, prejudicial and an abuse of discretion.

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

The decision ordered revocation, but stayed the order for two years, and imposed a suspension for thirty days. There is no express indication in the decision of what specific factors the ALJ took into account. It may well be that the severity of the suspension that was ordered took into account his finding, which is supported by substantial evidence, that a number of the licensee's employees were involved in the overall plot to conduct a criminal assault and assist the assailants in their escape, and, yet, only one was disciplined.

Appellant asserts that the hearing officer took the existence of pending

disciplinary matters into consideration in his determination of the merits of the Accusation. There is nothing in the decision of the ALJ that would so suggest. On the other hand, it is clear that the ALJ was aware of the other matters. See Finding of Fact VI. There is no indication that he gave them any weight in setting the terms of the order. The Appeals Board may not assume that he did.

Considering these factors, appropriateness of the penalty must be left to the discretion of the Department. The Department having exercised its discretion reasonably, the Appeals Board will not disturb the penalty.

IV

Appellant contends that the condition of the stay that "no cause for disciplinary action occurs within the stayed period" is unreasonably broad, in that it is not limited to a violation similar in nature. It asks whether a records keeping violation, an after-hours sale, a failure to post a license, or other nominal violation, would result in the revocation of appellant's license.

Appellant's contention does not bear directly on the penalty itself. Instead, it seeks some sort of prediction from the Appeals Board as to what kind of future violation would trigger a lifting of the stay order. The Board is not in a position to make such a prediction. Nor is the Board able to say that the Department's unwillingness to specify in advance a category of violation sufficient to induce it to seek a revocation of the stay is an abuse of discretion.

Although the Department's brief did not address this issue, it is the Department's standard practice to frame an order staying revocation broadly, and not to attempt to

characterize the kind of future violation which would warrant a lifting of the stay order. A requirement would unduly tie the Department's hands. The better course is for this Board to review such action consistent with an abuse of discretion standard when and if the situation arises.

CONCLUSION

The decision of the Department is affirmed.[2]

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

[2]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.