ISSUED MARCH 6, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

DANIEL P. SHERBONDY, dba Australian Beach Club 245 East Redlands Blvd.#A-C San Bernardino, CA 92408, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6658 File: 47-279418 Reg: 95033890 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: January 8, 1997 Los Angeles, CA

Daniel P. Sherbondy, doing business as Australian Beach Club (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered appellant's on-sale general eating place license revoked, with revocation stayed for a probationary period of two years, subject to an actual suspension of 45 days, for the premises having operated as a disorderly house and for having created a law enforcement problem, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §§25601 and 24200, subdivision (a).

[1] The decision of the Department, dated April 4, 1996, is set forth in the appendix.

Appearances on appeal include appellant Daniel P. Sherbondy, appearing through his counsel, Rick A. Blake; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on February 22, 1993. Thereafter, the Department instituted an accusation, later amended, alleging that the premises operated as a disorderly house and that the operation of the premises created a law enforcement problem for the City of San Bernardino.

Administrative hearings were held on January 22, 23, 24, 25 and 29, 1996, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charges of the accusation had been established and ordered appellant's license revoked, with the revocation stayed for a probationary period of two years and an actual suspension of 45 days. Appellant thereafter filed a timely notice of appeal.

In his appeal, appellant raises the following issues: (1) the findings and determinations are not supported by substantial evidence; (2) there are insufficient incidents to warrant a disorderly house finding; and (3) the penalty is excessive.

DISCUSSION

I

Appellant contends that the findings were not supported by substantial evidence.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing a Department decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings.[2]

"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 [71 S.Ct. 456]; 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].)

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[2]The California Constitution, article XX, §22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

Appellate review does not "... resolve conflict[s] in the evidence, or between inferences reasonably deducible from the evidence ... ." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr. 658].)

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (substantial evidence supported both the Department's and the license-applicant's position); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; Gore v. Harris (1964) 229 Cal.App.2d 821 [40 Cal.Rptr. 666].)

A. Disorderly house

Count I of the Department's accusation set forth 16 incidents over a 26-month period which were alleged to have created the conditions which violated Business and Professions Code §25601, the disorderly house statute, which states, in pertinent part:

> "Every licensee ... who keeps, permits to be used, or suffers to be used, in conjunction with a licensed premises, any disorderly house or place in which people abide or to which people resort, to the disturbance of the neighborhood, or to which people resort for purposes which are injurious to the public morals, health, convenience, or safety, is guilty of a misdemeanor."

The Administrative Law Judge (ALJ) found that of the 16 incidents alleged under count 1 of the accusation, ten had been established by the evidence. Of these ten, five

(count 1- (b), (c), (d), (g) and (k)) involved assaults by patrons on other patrons; two (count 1- (e) and (o)) involved assaults by patrons against employees of the licensed premises; and three (count 1- (I), (l) and (p)) involved assaults by employees against patrons.

Appellant argues that the incidents involving assaults by patrons against other patrons arose from circumstances which could not reasonably be blamed on the licensed premises. Similarly, appellant suggests that it is improper to charge appellant with the two incidents in which the patrons were the aggressors, in the absence of evidence that appellant's employees were in some way blameworthy.

If the Department's case consisted only of these instances, we would consider reversal. While there is no indication in the ALJ's decision of the extent to which these incidents were taken into account in his determination of the appropriate penalty, it may be inferred that the manner in which the premises were operated made it more likely than not that events of the kind in question would occur on a regular or frequent basis.

Three of the incidents involved the overly-aggressive manner in which appellant's "door hosts," or bouncers, dealt with patrons once a disturbance arose. The ALJ made special findings (Findings V- A through F) regarding the bouncers' performance of their duties:

> "Respondent's [appellant] bouncers/door hosts did use excessive force in dealing with patrons which included pushing, using headlocks, using choke holds, and punching or kicking patrons in the face or back even when they were being held

> down by other bouncers. They also used vulgar language when dealing with patrons on several occasions. The bouncers are easily recognizable because they wear blue or white t-shirts which say 'staff' on them and which also contain the Australian Beach Club name and logo.
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> The licensed premises attract people out to have a good time. Many of the patrons get high or become intoxicated after drinking alcoholic beverages and they cause disturbances or commit crimes. Respondent's bouncers have often failed to control the patrons and the overly aggressive behavior of the bouncers has actually provoked fights with patrons. Although Protestant [sic-Respondent] has had knowledge of the use of unreasonable force by his bouncers and has held staff meetings to discuss methods of controlling patrons, he has been unable to adequately control his bouncers and in some instances, he and his manager have also ended up in fights with patrons. Additionally, no bouncer has been terminated for using unreasonable force. Respondent's inability to adequately control his bouncers and patrons has resulted in excessive police calls."

One reading the transcripts of the five days of hearings is left with the indelible impression that appellant's bouncers were not to be trifled with. The ALJ's special findings are clearly on the mark. We are satisfied that there is sufficient evidence in the record to support the ALJ's factual determinations, including his special findings. There is an abundance of evidence, which, if believed, demonstrates that appellant's employees were quick to respond in force and numbers to an incident, often making a bad situation worse. Appellant's employees who testified did little to dispel this impression.

The premises operate as a nightclub, and attract large numbers of patrons, especially on weekends. With crowds of young people (patrons 18 and older are allowed on the premises on Thursday and Sunday evenings; on other evenings, patrons must be over 21), loud music and alcohol, it is a foregone conclusion that incidents will

occur, and procedures should have been in place to prevent them from occurring or getting out of hand.

Appellant argues that the number of incidents is insufficient to support a disorderly house determination. The Department contends that mere numbers do not always tell the whole story. We must agree. It is the type of incident and the circumstances surrounding it which must be considered. In this respect, the testimony with respect to the incidents involving patrons Stilkey and Martinez is particularly persuasive in its portrayal of the behavior of appellant's bouncers.

For there to be any reasonable limit and definition of the scope of the disorderly house statute, we think it must contemplate acts or conduct which are illegal or violative of the public morals and welfare due to the premises' location, management, clientele or manner of operation. We think that sufficient connection has been shown between the incidents in the accusation, viewed collectively, and the manner in which the premises are operated, to satisfy this test.

B. Law enforcement problem

Count 2 of the accusation alleged that the operation of appellant's premises created a law enforcement problem. Count 2 was based on the same allegations that made up count I of the accusation, and, in addition, 29 allegations of instances where the San Bernardino Police Department was required to make service calls, arrests or patrols relating to conduct at the premises.

Appellant argues that, considering the time period involved, and doubts as to whether all of the 29 instances in part (b) of count 2 could fairly be blamed on the premises, the frequency of incidents is insufficient to demonstrate a police problem.

The ALJ found that, in addition to the incidents in count 1, nine incidents resulted in law enforcement activity consisting of an arrest or a report, and 12 service calls were required. As to the service calls, appellant argues that the Board can only speculate whether they related to appellant's premises, since appellant shares a large parking lot with other establishments.

The City of San Bernardino, acting under a grant from the Department of Alcoholic Beverage Control, reviewed its computer records to determine which businesses had generated the most calls for service. Appellant's premises was said to have led the list of the top ten. The record does not contain any detailed information from which this Board could determine whether the premises to which appellant was compared were open and operating the entire period, involved (with one exception) the same type of license, involved comparable calls for service, and whether the calls were scattered or focused on specific incidents at specific times.

Over the 26-month period covered by the computer search, a total of approximately 30 incidents were identified, with some overlap, and, as to some of those incidents, there is uncertainty as to whether appellant's premises was responsible. This is an average of slightly more than one call a month.

The Department is, of course, vested with a certain amount of discretion, and is entitled to draw on its expertise in determining whether the public morals and welfare are threatened. The Department argues that "the types and numbers of occurrences alleged in this accusation are simply unacceptable"' (Dept.Br. at p. 3), and that "the method of operation by the respondent and his employees is the primary factor." (Dept. brief at p. 4.) We cannot say that the Department's assessment of the evidence is an abuse of discretion, or that there is insufficient evidence to support such a determination.

II

Appellant contends that the penalty was excessive.

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 Department recommended to the ALJ that appellant's license be revoked. Appellant, while continuing to dispute the substantive allegations of the accusation, argued in the alternative that, at most, a period of suspension was appropriate. The ALJ ordered the license revoked, but stayed revocation for a two-year probationary period, and ordered an actual suspension of 45 days.

The ALJ acknowledged that appellant had taken corrective measures, including employee training, raising drink prices to reduce consumption, enforcing restrictions on the use of force by threat of termination and the requirement that all bouncers obtain a California security guard license. He did not indicate whether it was these steps which led him to reject the Department's plea for an outright revocation.

As his special findings indicate, the ALJ clearly was impressed by the testimony concerning the behavior of appellant's door hosts/bouncers. There is little doubt that in several instances their conduct went far beyond what was appropriate. At the same time, he stopped short of imposing the penalty of full revocation, and the Department acceded to his views.

On balance, then, although the penalty is stern, we cannot say that the Department has abused its discretion.

CONCLUSION

The decision of the Department is affirmed.[3]

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

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[3] This final order is filed as provided in 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.