ISSUED JANUARY 12, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

WESTSIDE RESTAURANT VENTURES III, INC. dba Benvenuto Cafe 8512 Santa Monica Boulevard West Hollywood, CA 90069, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6730 File: 47-271548 Reg: 96035170 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of Appeals Board Hearing: October 1, 1997 Los Angeles, CA

Westside Restaurant Ventures III, Inc., doing business as Benvenuto Cafe (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered its on-sale general public eating place license suspended for 15 days for having violated conditions on its license prohibiting the consumption of alcoholic beverages in an area adjacent to the licensed premises and having music audible

[1] The decision of the Department dated October 3, 1996, is set forth in the appendix.

beyond the portion of the structure under the control of the licensee, being contrary to the universal and 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 appellant Westside Restaurant Ventures III, Inc., appearing through its vice-president, Demitri Samaha and its general manager, Tony Bamin; and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale public eating place license was issued on July 27, 1992. Thereafter, the Department instituted an accusation alleging in a single count that appellant had violated conditions on its license which prohibited (1) the consumption of alcoholic beverages on any property adjacent to the licensed premises; (2) live entertainment or patron dancing on the premises at any time; and (3) music audible beyond that part of the structure under the control of the licensee

An administrative hearing was held on August 8, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the events on the evening of October 31 and the early morning of November 1, 1995, during a festive Halloween carnival held in the City of West Hollywood, an event which attracts thousands of party-goers and celebrants.

Subsequent to the hearing, the Department issued its decision which determined

that appellant had violated the conditions of its license relating to the consumption of alcoholic beverages in an unlicensed area adjacent to the licensed premises (count 1 (a))[2] and having music audible beyond the portion of the premises under the licensee's control (count 1 (c)), but that appellant had not violated the condition relating to patron dancing (count 1 (b)). The Department ordered appellant's license suspended for 15 days. Thereafter, appellant filed a timely notice of appeal.

In its original notice of appeal, appellant contended that the local office of the Department refused without explanation to permit appellant to pay a fine in lieu of serving the suspension, pursuant to Business and Professions Code §23095. In its current letter brief, in addition to other contentions raised, appellant asserts that it never has admitted guilt as to the alleged violations, and was simply attempting to resolve the matter without the necessity of a full-blown appeal.

Appellant now asserts the following interrelated grounds for appeal: (1) the alleged violations occurred during the Halloween carnival festivities, during which people crowded the street in front of appellant's restaurant while consuming alcoholic beverages purchased elsewhere, and were beyond appellant's control; and (2) the

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[2] Appellant had enclosed an area adjacent to the outdoor patio located in the front of the premises so that it could add additional tables. Although the addition was built in accordance with a permit from the City of West Hollywood, appellant knew, having been informed by the Department prior to the date in question, that the sale and/or service of alcoholic beverages in that area was not permitted. The area in question was referred to throughout the hearing, and in this decision, as the "unlicensed area."

location was targeted by the Department for the "slightest perceived violation." In support of this assertion, appellant claims that Department undercover officers attempted more than once during that night to purchase "beer to go," and that all such attempts were rebuffed. In addition, appellant alleges that at one time there were as many as six officers observing the location, and that the Department manufactured testimony as to the brand of beer being consumed.

DISCUSSION

I

Business and Professions Code §23095 sets forth a procedure whereby a licensee may petition the Department for permission to make an offer in compromise, consisting of the payment of a sum of money, computed according to a formula set forth in the statute, in lieu of serving a suspension of 15 days or less. The Department may grant such a petition if it is satisfied that two requirements are met: (1) the public welfare and morals will not be impaired by permitting the licensee to operate during the period of the suspension and that the payment of the money will achieve the desired disciplinary purposes; and (2) the books and records of the licensee will permit the computation with reasonable accuracy of the loss of sales of alcoholic beverages the licensee would have suffered had the suspension gone into effect.

It is apparent from the language of the statute that the Department has a great deal of discretion in deciding whether to entertain such a petition. However, the Department asserted in its brief that it had received no formal request to pay a fine in

lieu of suspension since the issuance of its decision. The Department correctly noted that under Business and Professions Code §23095, the time for filing such a request is after the decision of the Department has become final.[3] Further, the pendency of this appeal prevents the decision from becoming final insofar as permitting payment of a fine in lieu of serving a suspension.

The Department's initial position was that the issue was not ripe for review by the Board. The Department suggested in its initial brief that the appeal be withdrawn or dismissed, at which time the decision would become final, and appellant could then ask the Department to exercise its discretion by considering whether it will accept payment of a fine in lieu of the 15-day suspension it has ordered. This alternative was discussed during the July hearing of this matter, and the matter was continued to permit appellant to elect whether to pursue the merits of the appeal, which it now does, apparently after being unable to reach an accord with the Department.

The Department has now advised the Board that it is unwilling to accept an offer in compromise because of what it deems the aggravated character of the violation.

The Board has no power to compel the Department to compromise a matter by payment of a fine, despite our disagreement with the reasons motivating the

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[3] In practice, however, the Department routinely accompanies an order imposing a suspension of 15 days or less with a form letter advising of the ability to resolve the matter by way of an offer in compromise. This procedure may not have occurred in this case.

Department's position.[4] The decision whether to settle a matter is peculiarly within the broad discretion which has been afforded the Department. Whether the refusal on the part of the Department to accept an offer in compromise could ever be an abuse of that discretion is not before us. We limit our ruling to the case before us, and find no abuse of discretion.

II

Appellant contends that it was targeted by the Department for the "slightest perceived violation," suggesting that the presence of six Department investigators on what is a traditionally festive Halloween evening in the City of West Hollywood could have had no other justification.

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[4] The factor most influencing our impression that the Department's brief overstates the case is that, while at the close of the administrative hearing, the Department recommended a 25-day suspension, with 10 of those days stayed, the ALJ imposed only a 15-day suspension, and did that after inquiring as to the period of suspension which would still permit payment of a fine in lieu of suspension. This suggests to us the ALJ was signaling the Department that a compromise would not be inappropriate.

It is true that appellant was given warnings against permitting the sale and consumption of alcoholic beverages in the unlicensed area, but the warnings were viewed as directed at affirmative acts of the licensee, and appellant did not anticipate the problems resulting from uncontrolled crowd activity and alcoholic beverages purchased elsewhere.

At best, the Board can commiserate with appellant that despite its otherwise diligent and effective compliance efforts, its lapse of judgment in failing to employ additional security was its undoing, and that while the decision of the Department must be affirmed, the Board by no means deems the appellant's appeal to have been frivolous.

The only specific assertions cited by appellant in support of its claim that it was specially targeted are that there were six investigators, that more than one investigator attempted, in the upstairs bar, to purchase beer to go, and that after one investigator testified he observed Budweiser beer being consumed, a brand appellant did not serve, a subsequent witness testified he observed Corona beer being consumed. Appellant asserts that this was manufactured testimony.

That there were six investigators present is of no significance. The evidence is that the investigative team was assigned to check on licensed premises in the area in anticipation of the large crowds for the Halloween festival [RT 22]. Their arrival at appellant's premises at just after midnight would have been one aspect of that assignment, and not a targeting.

That several of the investigators were directed to attempt to purchase beer and remove it from the premises has also not been shown to be objectionable. Such efforts are to test the licensee's compliance with the law. Indeed, the very lack of success in these efforts redounds to appellant's credit, since it demonstrates that appellant was taking its responsibilities seriously.

The record evidence is that each of the attempts either to purchase alcoholic beverages and remove them from the premises or to purchase alcoholic beverages in the unlicensed area adjacent to the patio were completely unsuccessful [RT 51, 59-60].

There is no evidence in the record that any sales of alcoholic beverages were made in the unlicensed area. The violation consisted solely from appellant's inability to

control the crowds which streamed into the unlicensed area with beverages they had purchased elsewhere and, according to the testimony of investigator Alvarez [at RT 23-24] were consuming beer in the unlicensed area.

It is fair to assume that the ALJ was influenced to a large extent in his determination of an appropriate penalty by the fact that the condition violation involving consumption arose largely in spite of appellant's compliance efforts.

It is also probably fair to assume, as the ALJ apparently did, that appellant could have prevented the members of the street crowd from bringing beer into the unlicensed area simply by posting someone at the actual entrance. Appellant was aware of the fact that the festivities planned for the evening would attract large crowds, and once seeing them in front of the licensed premises, should have taken action to prevent what ultimately took place.

Had the evidence of consumption consisted only of an observation of one or two drinkers with beverage containers, a question might be raised as to whether the contents were an alcoholic beverage. The legal presumption that the label of a sealed container correctly describes its contents (see Mercurio v. Department of Alcoholic Beverage Control (1956) 144 Cal.App.2d 626 [301 P.2d 474]) would not apply, because the containers were not sealed. However, given the number and variety of bottles from which people were drinking, bearing the names of popular brands of beer, it would be most unlikely none contained beer.

The assertion that one of the investigators testified he saw Corona bottles in order to rectify another investigator's testimony that she saw Budweiser bottles is simply incorrect. It is true that investigator Alvarez testified she saw Budweiser containers, but she also saw Corona and other brands. Her testimony is consistent with the ALJ's findings, endorsed by appellant, that the people drinking in the unlicensed area had purchased their beverages elsewhere.

Appellant's claim it was targeted by the Department is not borne out by the record. From the evidence as a whole, it would appear that the Department investigative team was initially attracted to the premises by the large crowds its loud music had drawn, and the investigators' activities from that point on were essentially routine.

CONCLUSION

The decision of the Department is affirmed.[5]

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

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[5] This final decision 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 district 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.