ISSUED MAY 21, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

VE CORPORATION dba Cheers 685 East El Camino Real Sunnyvale, California 94087, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6797 File: 47-219103 Reg: 95034046 Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja Date and Place of the Appeals Board Hearing: March 4, 1998 San Francisco, CA

VE Corporation, doing business as Cheers (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered appellant's on-sale general public eating place license revoked, with revocation stayed for a period of 180 days during which time appellant must effect a transfer of the license, and an actual suspension of 20 days, for having permitted the premises to operate as a disorderly house and in such manner as to create a law

[1] The decision of the Department, dated December 26, 1996, is set forth in the appendix.

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).

Appearances on appeal include appellant VE Corporation, appearing through its counsel, Donald A. Tenenbaum; and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on March 24, 1989. Thereafter, on October 5, 1995, the Department instituted an accusation alleging, in separate counts, that appellant had permitted the premises to be operated as a disorderly house and in a manner such as to create a law enforcement problem, in violation of the constitutional and statutory provisions cited above.

An administrative hearing took place on October 21, 22, 23, and 24, 1996, at which time oral and documentary evidence was presented. Subsequent to the hearing, the Administrative Law Judge (ALJ) issued his proposed decision which determined that, with few exceptions, the charges in the accusation had been established, and ordered the license revoked. Appellant filed its timely notice of appeal following the Department's adoption of the proposed decision.

In its appeal appellant raises the following issues: (1) the Department's findings are not supported by the evidence; (2) the Department's determinations are

not supported by the findings; and (3) the penalty imposed is excessive in light of the evidence. Appellant raises a number of subsidiary issues in connection with these contentions, and these will, to the extent necessary, be addressed in the discussion which follows. Since issues 1 and 2 turn on the evidence introduced at the hearing, they will be addressed together.

DISCUSSION

I

Appellant contends that the Department's findings are not supported by substantial evidence, citing Harris v. Alcoholic Beverage Control Appeals Board (1966) 245 Cal.App.2d 919 [54 Cal.Rptr. 346]; Estate of Teed (1952) 112 Cal.App.2d 638, 644 [247 P.2d 54]; and Reimel v. Alcoholic Beverage Control Appeals Board (1967) 255 Cal.App.2d 40, 43 [62 Cal.Rptr. 778].

"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 U.S. 474, 477 [71 S.Ct. 456]; Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 747].)

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].

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's 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. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[2]

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.2d 658].)

Our review of the record, assisted by the briefs of the parties, leads us to the conclusion that the Department's evidence is sufficient to sustain the charges of the accusation. Our analysis follows.

A. Disorderly house allegations (Count I)

---

[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].

With the exception of sub-count 3 (and subcount 6, which the Department dismissed), the ALJ found the allegations of Count 1 of the accusation to have been established by the evidence.

The ALJ was confronted with much contradictory and conflicting evidence, from which numerous inferences could reasonably have been drawn as to what happened and why. The ALJ apparently chose to draw inferences that supported the charges in the accusation. Based upon our own review of the extensive record in this case, we cannot say that he committed error sufficient to warrant reversal. There is no question but that appellant's restaurant and bar was a focal point for conflict and disturbance.

The disorderly house statute, Business and Professions Code §23601, states:

> "Every licensee, or agent or employee of a 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 in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience, or safety, is guilty of a misdemeanor."

. For there to be any reasonable limit on the scope and definition of the disorderly house statute, it must contemplate acts or conduct which are illegal or violative of the public welfare and morals due to the premises' location, management, clientele, or mode of operation.

The incidents which were established by the evidence in this case, although spread over a considerable period of time, had a common thread, in that they demonstrated a pattern of fights and physical violence.

The relevance and, possibly, even necessity of a pattern of objectionable activity is suggested in Los Robles Motor Lodge, Inc. v. Department of Alcoholic Beverage Control (1969) 246 Cal.App.2d 198 [54 Cal.Rptr. 547]:

> "We see no similar indefiniteness in 'disorderly house.' Its meaning is specific both in common parlance and in common law. ... 'A house is "disorderly" if it is kept as a place where acts prohibited by statute are habitually indulged in or permitted ... one where acts are performed which tend to corrupt morals of the community or promote breaches of the peace."

The key words in the Los Robles court's definition are "habitually" and "promote." The word "habitually" supports the concept that there must be some repetitive nature of the conduct. Where fights are tolerated, they could be considered habitual, and where nothing is done to alter a way of doing business that has the tendency to foster such objectionable conduct, it could be said that breaches of the peace are promoted.

Appellant argues that the number of incidents was minimal in light of the large number of people who patronize the premises over the course of a year, stressing that there were no incidents at all during most of the months making up the period covered by the accusation. Department counsel discounted Cheers'

contention, characterizing as "the heart of this case" that Cheers "allowed its customers to become intoxicated."

The cases indicate that the test is not one of simply counting numbers. Common sense tells us that some conduct is more socially troublesome than others, and that human frailty will emerge in almost every context. People who drink sometimes fight. It is not enough merely to employ a staff of security personnel capable of breaking up fights. The failure to remove from the premises persons who have become intoxicated invites fights to occur. People who become intoxicated suffer from impaired judgment, and may be more likely to become pugnacious than if sober. A review of the incidents making up the disorderly house allegations bears this out.

(a) Count I, subcount 1: Officer Ahearn observed a fresh puncture wound on the arm of the victim, Michael Koblis. and a laceration on his head and scalp. Officer Ahearn also saw the wounds on the hand of one of the alleged assailants consistent with his having held a glass shard, the alleged deadly weapon. These observations are certainly sufficient to support an inference that there had been a fight in the bar. The comments of witnesses and others in officer Ahearn's report and the reports of other officers on the scene simply illuminate by way of further explanation what had occurred, and could properly have been considered as administrative hearsay.

(b) Count I, subcount 2: Officer Carlyle's report described the statements made to him by Mark Keel, a bouncer employed by appellant. Keel described how he was assaulted while attempting to assist fellow employees in quelling the fight which was the subject of subcount 1. When Officer Carlyle arrived on the scene, Keel had the assailant pinned to the ground, and identified him as the person who struck him.[3] Keel's statements that Dean had hit him were admissible as administrative hearsay, in that they explained why Dean was being restrained and why Keel wished to effect a citizen's arrest.

(c) Count I, subcount 3: This subcount was found not to have been established.

(d) Count I, subcount 4: Appellant contends there is no evidence that Sandra Murphy was allowed to remain in the premises while intoxicated. However, Murphy's behavior in the parking lot immediately after being asked to leave the premises because of her behavior while inside, was such as to persuade two police officers she was intoxicated. Appellant's manager, Badra, had earlier observed Murphy twice involved in arguments, and apparently took no action, even though other of appellant's personnel were aware that Murphy had been a troublemaker in the past as well as on the evening in question. Gary Spitz, one of appellant's

---

[3] Appellant states that Keel said he did not know who hit him (App.Br. 20). Keel only said that he was "not positive" [I RT 96].

bouncers, admitted to detective Marculesco that Murphy had regularly come into the bar, acted in an objectionable manner, had become intoxicated, and got in arguments. Nevertheless, on the night in question, after having once been escorted from the premises for objectionable behavior, Murphy was allowed to return, only to again cause trouble and again provoke her removal, this time resulting in the physical altercation with appellant's employees and the police officers.

(e) Count 1, subcount 5: The evidence indicates that a Cheers patron who was intoxicated left the patio of the premises and shouted profanities at a passing police officer. Appellant argues that the patron's ability to escape from handcuffs while in the patrol car is evidence that he was not intoxicated. Indeed, it might well be. However, it was not sufficiently persuasive to overcome the testimony of the police officer detailing the symptoms and behavior that led him to conclude the patron was intoxicated. The resolution of the conflict in the evidence was the ALJ's responsibility.

(f) Count I, subcount 6: This subcount was dismissed by the Department.

(g) Count I, subcount 7: This incident involved the arrest of a patron charged with public drunkenness, as well as possessing pepper spray without a permit. The patron interfered with police responding to a dispute involving the bar bill of friends he was presumed to have been with inside the premises. Appellant contends there was no evidence of the intoxicated condition of the patron while he was inside the

premises. It is reasonable to infer that his intoxicated state was the result of drinks he had consumed inside the premises. Additionally, the incident took place in appellant's parking lot.

(h) Count I, subcount 8: This subcount involved a controversy which began with verbal disputes inside the bar, twice during the evening, and culminated in a physical assault in appellant's parking lot.

(I) Count I, subcount 9: This subcount involves the conduct of appellant's manager while ejecting a patron who refused to comply with the bar's dress code. The evidence was in sharp conflict, and the ALJ chose to believe the testimony of the witnesses presented by the Department to the effect that the manager exerted substantially more force than reasonably necessary under the circumstances.

(j) Count I, subcount 10: This subcount involved an alleged assault by one patron on another with a beer bottle. Appellant states that the altercation began suddenly and was immediately stopped by Cheers personnel, and that there was no evidence of use of a beer bottle. Detective Schillinger, who was called to the scene, spoke to James Garcia, one of the participants in the dispute. Garcia was bleeding heavily, with many wounds to his face. The evidence supports the finding that a battery was committed, whether or not a bottle was used as a weapon.

(k) Count I, subcount 11: This incident occurred on the patio of the premises. One patron suffered facial injuries and a fractured cheek bone after being struck

with a beer bottle by another patron. Appellant states this incident erupted without warning, and the participants were immediately ejected. Nonetheless, the incident took place on the premises and drinking appears to have been involved.

(l) Count I, subcount 12: The ALJ found that a patron, David Hawkins, was the victim of an assault with a deadly weapon, a belt buckle. Hawkins suffered a one-fourth inch deep laceration in his head. No belt was found. The ALJ was entitled to consider Hawkins' statement that he was struck with a belt as an explanation of the nature of the wound Hawkins suffered.

(m) Count I, subcount 13: The ALJ found that an intoxicated patron was permitted to remain in the premises. Appellant contends there is no evidence the patron consumed anything in the premises or that he was obviously intoxicated while inside. One of appellant's bouncers told the responding officer that the patron had been yelling at customers and throwing things around the bar. This conduct is consistent with intoxicated behavior.

(n) Count I, subcount 14: This incident began with an argument inside the premises. The incident grew into domestic violence as Eduardo and Miroslava Lopez moved to the outdoor patio, when, according to one of appellant's bouncers, Eduardo repeatedly struck Miroslava. According to one of the officers who arrived at the scene, both appeared to be intoxicated.

As can be seen, all of these incidents, except, perhaps, one, are consistent

with a pattern of fights, assaults, and/or conduct bordering on physical violence, and more than a few appeared to involve behavior while intoxicated.

B. Law enforcement problem allegations (Count II)

The ALJ also determined that appellants had created a law enforcement problem for the Sunnyvale Department of Public Safety as a result of the demand for services generated by the operation of the premises (Determination of Issues III).

Despite our disagreement with some of the ALJ's findings with respect to specific subcounts, we are inclined to agree with the determination that appellants created a law enforcement problem.

The accusation listed 86 instances where police responses were required during the time period covered by the accusation.

The ALJ found some subcounts of count II unfounded (subcounts 34 and 63); some duplicative (subcounts 20 and 30); some unrelated to the premises (subcounts 13 and 75); and some apparently based on unwarranted complaints (subcounts 33 and 68).

In addition, our review of the record leads us to conclude that the following subcounts were not established, either because (1) we can find no support for them in the record (subcounts 8, 9, 22, 25, 26, 31, 39, 50, and 65), or (2) there is insufficient relationship to the premises for the instances to be attributed to Cheers'

exercise of the privileges of its license (subcounts 12 (lot sweeper), 42 (auto break-in), 34 and 46 (suspicious person), 52 (call canceled), 58 (vandalism to auto), 61 (insane person), 68 (call canceled), 78 (man jumping on cars), and 83 (injured person)).

A number of the responses appeared to be routine security checks (subcounts 37, 45, 47, 54, 60, and 82), which ordinarily are not considered chargeable to the licensee.[4]

53 instances of police response remain after subtracting the 33 subcounts itemized above. This does not include the 12 incidents comprising Count I of the accusation, which were realleged in Count II.

Captain Steven Pigott, a 28-year veteran of the Sunnyvale Department of Public Safety, the officer in charge of the department's detective, narcotics and vice divisions since February, 1994, and of uniformed patrol officers during the preceding five years [II RT 53, 57], testified extensively regarding the department's expenditures of effort in connection with incidents involving Cheers. In terms of demand for services, Captain Pigott placed Cheers "well above" the only

---

[4] Several of the public safety officers employed by the City of Sunnyvale testified that they routinely conducted security checks of Cheers' parking lot, often stopping, leaving their patrol cars, and going to the door of the premises. (See. e.g., I RT 67-68 (Barba).) However, the officers presumably did not log these inspections, since the computer dispatch summaries (Exhibits 9 and 10) do not reflect them.

comparable restaurant bar establishment in the city catering to the 21-30 age group [II RT 96-97].

Appellant suggests that the absence of written reports relating to most of the police responses means that they lack significance in assessing the extent to which the Cheers premises may have created a law enforcement problem. The Department counters with the point that the issue is the need for a police presence, and not the number of written reports

Captain Pigott testified that, as the police gained experience with the kinds of problems encountered at Cheers, frequently involving fights and arguments, the department began deploying more than one officer in response to the scene. Such tactics may have been successful in preventing situations from escalating to the point where a report would be likely to be written. Their success does not mean that law enforcement problems did not exist, but simply had to be dealt with in a more demonstrative, albeit manpower-intensive manner, resulting in a more efficient violence reducing operation requiring fewer written reports,.

We are inclined to agree with the Department's position. The police were required to respond to what the situation was at any given time. They could not know or decide in advance that, since the incident giving rise to the dispatch call might have only been minor, and not warrant a formal written report, they might as well not respond.

According to Captain Pigott, the police would also receive calls that, while involving Cheers patrons, were incidents that took place in the parking lots of nearby businesses, so would be recorded under the address of that other business [II RT 103]. The import of this testimony is that the listing of incidents reflected on Exhibits 9 and 10 as representing calls for service relating to Cheers would be somewhat understated. Captain Pigott conceded that some of the entries on the exhibits could involve matters unrelated to Cheers but which simply occurred in front of Cheers

[II RT 107].

Captain Pigott's opinion that Cheers taxed the resources of the Sunnyvale Department of Public Safety is entitled to considerable weight. He clearly was in a position, both from the standpoint of his overall experience and from the specific responsibilities of his posts during the period in question to gauge the impact on his department as a result of the diversion of resources to Cheers. To the extent the ALJ relied on Captain Pigott's opinions and testimony, his reliance was fully warranted. (See Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 441 [102 Cal.Rptr. 857)).

Appellant makes a number of evidentiary arguments with respect to the evidence relating to the law enforcement count.

Appellant suggests that the inclusion of entries having no relation to the

licensed premises renders the relevance of Exhibit 9 questionable. (App.Br. 19.) Appellant also argues that the Department's inability to identify what data that was in Exhibit 9 was not also in Exhibit 10, and Captain Pigott's inability to explain one entry on Exhibit 9 constitute further evidence of Exhibit 9's lack of relevance.

The ALJ overruled appellant's objections to Exhibit 9, and we think he did so correctly. Appellant's objections would go to the weight to which Exhibit 9 was entitled, rather than to relevance.

Appellant asserts that Exhibit 10 contains no explanation for a large number of the subcounts under count II, and as a consequence, those subcounts cannot be substantiated. At page 22 of its brief, appellant lists subcounts 6, 8, 9, 15 through 35, 39, 50, 65, 72, and 80 (App.Br. 22). At page 9, appellant sets forth a similar list, but excludes subcounts 6, 39 and 80, and adds subcount 24.

Appellant is, for the most part, mistaken. Only subcounts 8, 9, 22, 25, 26, 31, 39, 50, and 65 appear to lack support in Exhibit 10. For example, subcounts 6 and 15 are identified in Exhibit 10 as calls in response to Penal Code §647, subdivision (f), violations (public intoxication); subcount 16 was a response to a report of a disturbance involving an argument, as were subcounts 18, 20 and 29; subcount 17 was a response to a report of a disturbance involving a fight, as was subcount 30; and subcounts 21, 23, 24, 27, 28, 32, 33 and 35 all involved loud music or noise.

Appellant characterizes as "disturbing" that in the Department's decision, "reference is still made to the 'fact' that there were 86 calls for service," citing Determination of Issues I (App.Br. 23). Appellant mischaracterizes the decision. Determination of Issues I states only that "there are 86 subcounts alleged in support of the Department's contention that the premises constituted a law enforcement problem," and it acknowledges that some of them were not established.

Appellant also asserts in its brief that its objections to the admission of Exhibits 4, 9, and 10 were overruled. While that statement is true with respect to Exhibits 4 and 9, it is in error with respect to Exhibit 10. When Exhibit 10 was offered, appellant's counsel stated that he had no objection [RT 169]. The police reports contained in Exhibit 4 were admissible under Evidence Code §1280, and a sufficient foundation was established for Exhibit 9.

Finally, appellant implies in its brief (App.Br. 13) that Captain Pigott believed that Bentley's, a restaurant bar that he compared to Cheers in terms of frequency of responses, was not like Cheers, because Bentley's had a young crowd. This again distorts the record, since Captain Pigott clearly testified to his belief that both establishments catered to the 21-30 age group [II RT 96-97].

Appellant argues that there is ample evidence of the preventive measures it undertook in response to the various altercations which the evidence showed had

occurred, "many of which were effective" [App.Br. 24].

A question which might be asked is whether appellant could have taken more effective prophylactic measures to prevent some of the altercations from happening in the first place, such as observing the number of drinks patrons were consuming, controlling the size of the crowds to permit easier observation of potential trouble spots, or catering to a less volatile clientele.

Many of the incidents, if not most, appear to have arisen after the patrons involved had consumed enough alcohol to become intoxicated. An example is the dispute which was alleged in subcount 14 of count I, which began with an argument and ended in domestic violence. According to a police report (Exhibit 3-14), an officer who observed them concluded that both appeared to be intoxicated.

Additionally, there is testimony that much of the police activity was associated with what were referred to as "dollar beer" nights, which tended to generate "a lot of calls for service" [II RT 98].

II

Appellant attacks the penalty as arbitrary and capricious, arguing the evidence does not warrant a "death penalty." In addition to a 20-day suspension, appellant was ordered to transfer the license to premises and to a person or person acceptable to the Department within 180 days. If a transfer is not effected during

the 180-day period, the Department may order the license revoked without notice. In addition to its arguments directed at the sufficiency of the evidence to support revocation, appellant cites the fact that its lease has seven years remaining, the apparent implication being that appellant stands to suffer a severe financial loss.

In addition, appellant stresses that none of its employees were cited for any criminal violation, none of the individual incidents was made the subject of an accusation, and none involved drugs or sales to minors.

The Department urges the following considerations: (1) a prior discipline of revocation, stayed for one year, based upon stipulated findings of operating a disorderly house and creation of a law enforcement problem;[5] (2) a warning letter from the chief of the Sunnyvale Department of Public Safety; (3) the findings and determinations in the present matter; and (4) the unique location of the premises, adjacent to parking lots belonging to other businesses, which led to calls for service in the surrounding neighborhood that were more than likely attributable to this license, as well as to traffic hazards resulting from jay-walking by patrons parking across the street to reach or leave the premises.

The Appeals Board has often said that while it will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion, it will, when an appellant raises the issue of an excessive penalty,

[5] It should be noted that this decision was effective April 7, 1994.

examine that issue, citing Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296], and Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].

The Department cites language from Harris v. Alcoholic Beverage Control Appeals Board (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633):

> "Under the constitutional and statutory provisions, the propriety of the penalty is a matter vested in the discretion of the Department, and the determination may not be disturbed unless there is a clear abuse of discretion.
>
> . . . If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion."

The Harris decision goes on to say, on the same and following page:

> "Although the Department's discretion with respect to the penalty is broad, it does not have absolute and unlimited power. It is bound to exercise legal discretion, which is, in the circumstances, judicial discretion. . . . 'The term "judicial discretion" was defined . . . as follows: "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice."'"

There is no doubt the end result may be harsh. The question for this Board is whether it believes the penalty conforms to the broad, general principles stated in the material quoted from the Harris case. We think that it does, based upon the record we have been shown, and that the Department was justified in revoking the license in the manner it did, by compelling the double transfer.

CONCLUSION

The remainder of appellant's contentions have not convinced us that error was committed by the ALJ or the Department, and, accordingly, have been rejected.

The decision of the Department is affirmed.[6]

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

---

[6]This final order 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 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.