ISSUED SEPTEMBER 30, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

MAKRUHI and MARTIN CHNGIDAKYAN, GRIGOR MANOUKIAN and VARTITER MANUKIAN dba Russian Village 13325 Moorpark Street Sherman Oaks, CA 91423, Appellants/Licensees,	)	AB-6807
	)	File: 47-273784
	)	Reg: 96036100
	)	Administrative Law Judge at the Dept. Hearing: John P. McCarthy
v.	)	
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	Date and Place of the Appeals Board Hearing: August 6, 1997 Los Angeles, CA

Makruhi and Martin Chngidakyan, Grigor Manoukian and Vartiter Manukian, doing business as Russian Village (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which ordered their on-sale general public eating place license suspended for 35 days, with 15 days thereof suspended,[2] for their having

[1] The decision of the Department dated January 23, 1997, is set forth in the appendix.

[2] The Department had recommended a 45-day suspension, with 10 days suspended. The slightly more lenient penalty imposed by the decision presumably reflects the fact the Department did not prevail on two of the three counts of the

permitted music to be audible beyond the area under their control, 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 appellants Makruhi and Martin Chngidakyan, Grigor Manoukian and Vartiter Manukian, appearing through their counsel, Rick A. Blake; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public eating place license was issued December 24, 1992. Thereafter, the Department instituted an accusation alleging that appellants violated conditions on the license which provided that (1) entertainment shall not be audible beyond the area under the control of the licensees; (2) there shall be no bar or lounge area for the purpose of sale or service directly to patrons for consumption; and (3) there shall be no dancing permitted on the premises.

An administrative hearing was held on October 30, 1996, following which the Administrative Law Judge (ALJ) issued a proposed decision sustaining only the allegation regarding appellants having permitted entertainment (live music) to be audible beyond the area under their control, and ordering appellants' license suspended for 35

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accusation. Appellant has not challenged the penalty as excessive.

days, with 15 days thereof stayed for a probationary period of one year. The ALJ relied on testimony of Department investigator Dan Shoham that when he and fellow investigators approached the premises in their automobile, music, consisting of bass sounds and emanating from appellants' premises, could be heard while their vehicle was leaving the street and entering the parking lot which served the premises and several other businesses, and after parking 180 to 190 feet away. The ALJ rejected appellants' contention that since they controlled the entire area of the parking lot, there was no violation of the condition.

The Department adopted the proposed decision on January 23, 1997, and appellants thereafter filed a timely notice of appeal.

In their appeal, appellants raise the following issues: (1) the testimony of the investigator as to where the music could be heard is not credible; (2) the parking lot where the music was heard is a part of the area under the control of the licensee; and (3) there is no evidence in the record that the music came from a portion of the premises which was licensed and subject to the condition. Issues (1) and (2) are interrelated and will be discussed together.

DISCUSSION

I

Appellants challenge the testimony of the investigator as to where the music was audible, characterizing it as "less than credible," his "believability" requiring "a very large stretch," and "extremely questionable."

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

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].)

Appellants question the investigator's testimony where he stated that he heard the same music when he entered the premises as he had heard when he was outside. They argue that since he first identified the music he heard while outside as having a bass sound, he would be unable to identify the music as being the same once he entered the premises. Appellants offer no explanation why this should be the case. Although it would be expected that the music, and the bass sound, should be louder inside the premises, it does not follow that the investigator should be unable to discern that he was hearing the same music.

Appellants also contend the investigator is not to be believed in his testimony that he could hear the bass sounds while driving on the street prior to entering the parking lot, and that since the parking lot is, according to the ABC-253 diagram (Exhibit B), part of the premises under the appellants' control, there was no violation of the condition.[3] They argue, as to the control over the parking lot, that the Department's position would be exactly contrary in a hypothetical situation where the condition involved littering, loitering or drinking outside the premises but in an area under the licensees' control.

This argument has a number of flaws. First, the ALJ, who saw and heard the investigator testify, accepted his testimony as worthy of belief. The Board is not free to second guess the ALJ on the issue of witness credibility. Second, the ALJ's unwillingness to accept the appellants' contention that portions of the parking lot up to 200 feet away could be considered under their control is an implicit rejection of their interpretation of the ABC-253 diagram. Third, appellant Martin Chngidakayan, while claiming to control 40 to 42 of the spaces in the parking lot, admitted he did not control the spaces in front of the 7-Eleven, and also admitted that none of the spaces were marked for the exclusive use of the Russian Village. Although he offers valet

[3] Appellants concede "the evidence is relatively clear from the investigator's testimony that the music was heard in the parking lot." (App.Br., p.4.) They question his ability to have heard the music while on the adjacent street, or to connect what he heard to appellants' premises.

parking, patrons are not required to use it, and people who are not patrons can, nonetheless, park in the lot.

II

Appellants contend there is no evidence the music emanated from the licensed premises. They argue that since the ALJ found no violation of the condition prohibiting dancing on the premises, concluding that the persons who were dancing were doing so in an area which was not part of the licensed premises (Finding II), the same result should be reached with respect to the music, since the band was probably in the same area. This contention has superficial appeal. The premises appear to have been enlarged after being licensed, apparently without the knowledge of the Department,[4] and the evidence suggests that this was the area where not only the dancing took place, but was also where the band was situated.

The testimony of the investigator regarding the dance floor and the brief colloquy which followed [RT 11-12] apparently led the ALJ to conclude, as he did, that the dance floor had not been shown to be within the licensed premises.

"Q. Did you notice any patrons in the immediate area of the live band?

A. Yes.

Q. What were those patrons doing?

A. Dancing.

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[4] The ALJ commented that, although this appeared to be the case, the accusation did not allege any violation of Rule 64.2.

Q. Can you describe the area where these patrons were dancing in front of the live band?

A. Well, that area appears to be another portion of the premises. It appears as if it was another unit of that shopping strip that was connected to the original premises.

Q. And the area between the live band and the area between the licensed premises, was there any barrier between those two locations?

A. No.

Q. Were there tables set up in the area of the dance floor?

A. No.

Q. How big was the dance floor area?
A. About 10 by 10.

Q. Was any portion of that dance floor area within the licensed premises as depicted on the ABC 257 form?

THE COURT: Could I have the question again?

Q. BY MR. LOGAN: Was any portion of the dance floor area within the licensed premises as depicted on the ABC 257 form?

A. I couldn't tell. Some of it might have been part of the licensed premises. Some of the clear area might have been part of the licensed premises.

MR. BLAKE: I object and move to strike. Speculation.

THE COURT: Well, he said he couldn't tell.

MR. BLAKE: Okay. I'll accept that."

On cross-examination, the investigator explained [RT 18-19] that the area where the dancing occurred had apparently been added to the premises by the removal of a wall. Since there was no dividing line between the two units, he was unable to tell

whether any of the couples "were actually intruding into the licensed premises or whether they were all inside the unlicensed portion."

Department Exhibit 4, a photograph taken from the interior of the premises, shows an interior area beyond a brick arch. According to Department counsel, the archway marked the eastern edge of the licensed premises [RT 44]. Appellant Chngidakayan testified that people shown in the "far back portion of that photograph," alluding to the area beyond the arch, were not standing in an area depicted on the diagram of the licensed premises [RT 43-44].

Close examination of Exhibit 4 reveals what would appear to be a musician standing behind a keyboard, with a microphone in front of him. This indicates that the band which is the source of the music is, like the dancers, off the licensed premises.

Although the investigator had earlier testified, without later being challenged on the point, that he "observed a live band playing on a stage inside the licensed premises [RT 10], his later testimony concerning the structural alterations to the premises would indicate he was mistaken as to the band actually being within the licensed premises.

However, the condition in question (condition 7) states that "entertainment provided shall not be audible beyond the area under control of the license." It is clear that appellants were providing entertainment for the benefit of their patrons. Patrons could go to the unlicensed area and dance, or could remain where they were and enjoy the music. If the music was so loud it escaped the premises, it does not matter where it originated. The condition is not limited to live entertainment. Suppose appellants

piped in Muzak, or some other form of electronic music from some external source, and then set the volume to a level where it spread to the surrounding neighborhood. It would seem clear that such behavior would be violative of the condition. This being so, then the controlling consideration was not the source of the entertainment, but the fact that it was music provided by the licensees within the licensed premises, or within an area under their apparent control.

Thus, the ALJ's findings and determinations with respect to the two conditions in question are not, as appellants suggest, inconsistent. It is simply that each must be applied with regard to different considerations and circumstances.

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.