ISSUED MAY 17, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

RICHARD KRITZER dba Aftershock 11345 Ventura Boulevard Studio City, California 91604, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7127 File: 47-254878 Reg: 97040560 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: April 1, 1999 Los Angeles, CA

Richard Kritzer, doing business as Aftershock (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his on-sale general public eating place license, but stayed revocation for two years on condition of no cause for disciplinary action during such period, and imposed an actual suspension of 60 days. The Department found violations of Business and Professions Code §§24200, subdivisions (a) (operation of premises in such manner as to create law enforcement problem) and (e) (failure to take reasonable steps to correct objectionable conditions on licensed premises), 25601 (disorderly house), 25602, subdivision (a) (sales of alcoholic beverages to obviously intoxicated

[1]The decision of the Department, dated April 23, 1998, is set forth in the appendix.

persons), and Penal Code §647, subdivision (f) (permitting intoxicated person to remain on premises while unable to care for own safety or that of others), such being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22.

Appearances on appeal include appellant Richard Kritzer, appearing through his counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, David Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on August 26, 1997. The license was issued with the agreement that Kritzer would be responsible for any violations of law which occurred when the license was held by Kritzer and a co-licensee, Arkady Kivman. The accusation in this matter was filed slightly more than one month prior to the issuance of the present license. The Department's decision refers to Kritzer and Kivman as if they were still co-licensees.

The accusation contained twelve counts. Count 1 alleged that appellant failed to take reasonable steps to correct objectionable conditions on the licensed premises, even though a reasonable period of time had elapsed since appellant had been placed on notice of such conditions by the Department, in violation of Business and Professions Code §24200, subdivision (e). Count 2 alleged that appellant had permitted the premises to be operated as a disorderly house, in violation of Business and Professions Code §25601. Count 2 set forth 66 specific instances (subcounts) of conduct alleged to support the disorderly house allegation. Count 3 alleged that appellant had permitted the premises to be operated in a manner which created a

law enforcement problem for the Los Angeles Police Department and conditions contrary to public welfare and morals, in violation of Business and Professions Code §24200, subdivision (a). Count 3 listed 10 incidents involving police activity, and, in addition, incorporated subcounts 1 through 9 of count 2, and the allegations in counts 4 through 12 of the accusation. Counts 4 through 12 alleged eight instances of the sale or furnishing of an alcoholic beverage to an obviously intoxicated person (Counts 4 through 7 and 9 through 12), in violation of Business and Professions Code §25602, subdivision (a), and one instance of permitting an intoxicated person to remain in the premises while unable to care for her own safety or that of others (count 8), in violation of Penal Code §647, subdivision (f).

An administrative hearing was held on November 10, 12, 13, 14, 18, and 20, 1997, at which time oral and documentary evidence was received.[2] The Department presented the testimony of 14 Los Angeles police officers, one Department investigator, four patrons, and four nearby residents. Appellant testified on his own behalf, and presented the testimony of a deputy district attorney who utilizes the premises for a weekly western dance program, and a consultant in the field of acoustical engineering.

Subsequent to the hearing, the Department issued its decision which sustained the charges of the accusation concerning the disorderly house and law enforcement problem allegations, and six of the eight counts alleging the sale of

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[2] For reference purposes, the hearing transcripts are designated 1 RT for November 10, 2 RT for November 12, etc., reflecting the succession of hearing days.

alcoholic beverage to obviously intoxicated patrons.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) the Department illegally accumulated counts contrary to the rule established in Walsh v. Kirby (1974) 13 Cal.3d 95 [118 Cal.Rptr. 1]; (2) Count 3 and its subcounts fail to set forth a legally cognizant basis for disciplinary action; (3) the evidence in support of the accusation is insufficient and not substantial as a matter of law; (4) appellant cannot be held responsible for the conduct of those it did not employ, nor for misconduct it took every reasonable precaution to prevent; (5) the Department may not litigate issues of private nuisance; (6) the penalty is excessive and amounts to cruel and unusual punishment; and (7) the entire proceeding is constitutionally infirm by virtue of the unconstitutionality of Business and Professions Code §24210.

DISCUSSION

I

Appellant argues that the Department had sufficient information to inform appellant there were perceived problems in connection with the premises, but delayed and chose to accumulate counts in order to justify an accusation seeking revocation. Appellant cites the decision of the California Supreme Court in Walsh v. Kirby (1974) 13 Cal.3d 95, 103 [118 Cal.Rptr. 1], in support of his contention that, by doing so, the Department is presumed to act arbitrarily, out of an apparent improper motive to increase the penalty rather than to obtain compliance.

Appellant's argument is unpersuasive. Walsh v. Kirby is clearly

distinguishable.

In Walsh, the Court found that the Department accumulated a series of violations involving sales of alcoholic beverages below minimum retail prices established by law, for the purpose of increasing the monetary penalties which could be imposed, and, thereby, achieving "de facto" revocation.

The statute involved in Walsh expressly provided for a graduated scale of the fines which could be assessed for the first and succeeding violations, and did not provide for license suspension or revocation in the case of single or repeated violations. The vice seen by the court was the accumulation of financial penalties to the point where a licensee unable to pay them would be forced into bankruptcy, the equivalent of having his license revoked, coupled with the failure to give the licensee a chance to mend the error of his ways before that occurred. The violations occurred when Department investigators made purchases of wine at prices below what at that time were mandatory minimum prices.

In past cases the Appeals Board has declined to overturn Department disciplinary actions where licensees have claimed violations were unfairly accumulated for the purpose of imposing harsher disciplinary measures. The Board has distinguished Walsh on the basis it involved a statute under which additional violations increased monetary penalties which could be assessed for successive violations. (See, e.g., Felcyn and Suarez (1996) AB-6560.) Walsh is also distinguishable on the ground the Department was aware of, and involved in, the violations as they occurred, akin to a sting operation, rather than merely a passive

collector of violations occurring independently of Department involvement, as in this case.

The Board has stated that the process whereby the Department investigates possible unlawful conduct is within the exercise of its discretion to suspend or revoke an alcoholic beverage license if it shall determine for good cause that the continuation of such license would be contrary to public welfare and morals, and should not be disturbed except upon a showing of illegal, arbitrary or abusive conduct on the part of the Department.

The extent to which Department investigators should have contacted appellant concerning the investigation is a matter of discretion within the police powers granted the Department. It is not for the Appeals Board to mandate at what point in an investigation the Department is to inform a licensee that the licensed premises are under scrutiny. A continuing investigation may very well be needed to determine the existence of violations or the degree to which a law is being violated. This is especially the case where the concern is that the premises are being operated as a disorderly house, and where violations of similar nature occur on a repetitive or habitual basis even after the licensee is aware of the problem.

Indeed, an investigation of a possible disorderly house violation necessarily will continue over time, since it is the habitual character of the conduct which implicates the disorderly house statute. (See Los Robles Motor Lodge, Inc. v. Department of Alcoholic Beverage Control (1966) 246 Cal.App.2d 96 [54 Cal.Rptr.

547.) Moreover, the kind of conduct which gives rise to a disorderly house violation is usually conduct of which the licensee can hardly be unaware - excessive noise, fights, obviously intoxicated patrons and the like.

In this case, the violations extended over a time period of approximately one year, and were of the kind that management must surely have been aware were occurring.

Finally, it is not insignificant in this analysis that appellant was put on official notice of the kinds of license violations which were occurring, and, certainly with respect to noise, and possibly the others as well, did little to cure the problem until long after the Department had said "enough!".

II

Appellant has challenged the adequacy of the pleadings, but focuses his attack on the evidence in support of Count 3, which alleges that the operation of the premises created a law enforcement problem.

Appellant argues that the absence of comparative statistics, which would permit a comparison of appellant's operation to other licensees whose operations invite police attention, precludes the finding of a law enforcement problem.

The absence of comparative statistics is not a fatal defect. There is ample testimonial evidence from the police officers who were summoned to appellant's business on numerous occasions to support the determination that the operation of the business created a problem for law enforcement.

Appellant's suggestion that one fight a month, on average, is acceptable,

must be rejected. An atmosphere that permits the predictability of physical altercations such as those seen in this case is simply not consistent with sound welfare and morals.

III

Appellant contends that the evidence offered in support of the accusation is insufficient and not substantial as a matter of law.

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals. It has so determined in this case, hence, this appeal.

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.[3]

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

"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 [95 L.Ed. 456, 71 S.Ct. 456] and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

We do not believe that the Board must address every facet of the evidence, or the testimony of the 14 police officer, the residents, and other witnesses, to refute appellant's generalized claim that the record is insufficient and lacks substantial evidence. It is enough that appellant concedes that the record discloses that the Shaidells and the Behmers were disturbed on many occasions by loud music and noise arising from the behavior of patrons of Aftershock while departing the premises, and that police testimony establishes a substantial number of instances of offensive, objectionable, and unlawful conduct by appellant's employees and patrons in the course of the operation of the business.

Appellant argues that residents Shaidell and Behmer, having chosen to live adjacent to a busy commercial district, must simply put up with the noise generated by appellants. While it may be true that other restaurants and nightclubs previously operated in the structure now occupied by Aftershock, there is no evidence that any of those businesses produced a level of noise anywhere near that demonstrated by the testimony in this case. Indeed, the fact that the loud music reaches across and beyond what appellant characterizes as a busy highway - perhaps not as busy during the late night and early morning hours when the loud music provokes complaints - is strong

evidence that it is far louder than reasonable under the circumstances.

Appellant complains that he is being held to a zero tolerance level with regard to noise. Although the Department's decision does not assert that as a requisite standard, the Appeals Board knows from its experience in other cases that the Department commonly imposes requirements on licensees that the noise from music or entertainment be confined to areas under the control of the licensee. Although there was no such condition in this case, appellant was on notice from the Department's letter of complaint that he must take steps to curb the noise being emitted from the premises. The volume and frequency of complaints, well after appellant had been put on notice, demonstrate that any action taken by appellant did not sufficiently address the problem, at least until shortly before this matter went to hearing, in November, 1997.

Appellant cites California Code of Civil Procedure §731, and argues that, under that section, the Department must show that appellant has employed unnecessary and injurious methods of operation. He cites Galfand v. O'Haver (1948) 33 Cal.2d 218 [200 P.2d 790], a case where an injunction was issued against a music studio which had taken no steps to prevent the music from escaping the structure and bothering nearby residents.

In Galfand, the music which was enjoined was an inherent part of the operation of the music studio. Here, appellant's music is part of the night club entertainment he provides under the umbrella of a public eating place license. To the extent the sound of the music traveled nearly 250 feet from the licensed premises, it would seem prima facie unreasonably and unnecessarily loud.

Appellant Kritzer testified [4 RT 471-472) that he would be willing to abide by a list of conditions proposed in a letter to Department counsel, dated October 8, 1997,

and now argues in his brief (App.Br. 17) that this proposal "absolutely militates against any ... finding" of a disorderly house violation or license suspension.

This argument is unpersuasive for several reasons. First, it appears from the record that the proposal was part of a settlement proposal submitted to the Department, which the Department has apparently not chosen to accept. Second, the list of conditions was submitted less than a month before the commencement of the hearings, and in no way tended to cure the violations which the Administrative Law Judge (ALJ) found to have occurred. Third, even if it is assumed that the proposed conditions would eliminate, in the future, the various violations found by the Department, they do not afford any immunity from discipline for past violations.

Appellant quotes from Boreta Enterprises, Inc. v. Department of Alcoholic beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113], suggesting that, under the teachings of that decision, "the subjective, infrequent disturbance of residents proximate to a long established commercial area by a long term entertainment venue" is not so vile or corruptive as to be per se contrary to public welfare and morals. We do not so read Boreta.

It may be true that the area has been commercial in nature for many years. However, the testimony of the nearby residents was that, prior to Aftershock's arrival on the scene, the businesses which occupied the structure conducted quiet operations, and were not a disturbance. It is indisputable that appellant's operation is of a distinctly different character than its predecessors. Although the holder of a restaurant license, appellant candidly admits that the premises has never opened for business before 9:00 p.m., and remains open until 2:00 a.m. [4 RT 473].

The evidence which appellant presented in his behalf addressed, for the most

part, events which occurred near or after the end of the period covered by the violations alleged in the accusation, and did little to refute the proof of the offenses.

Appellant's acoustical expert, Bruce Davey, testified [5 RT 34] that he could not hear any music while standing in front of the residences occupied by the Shaidells and the Behmers. Steven J. Ipsen, a deputy district attorney for the County of Los Angeles, and a business affiliate of appellant,[4] also testified that he could not hear music while standing immediately outside the front door of the premises. It is noteworthy that Davey conducted his test on November 16, 1997, only four days before the hearings concluded, and, according to Ipsen, after a sound curtain and padded doors had been installed only weeks earlier. (See 5 RT 19-20). As laudable as these improvements may be, their eleventh-hour installation certainly does not excuse the many instances of noise disturbance which preceded their installation.

This is a case mostly about noise and disturbances of the peace. The evidence featured complaints from nearby residents about loud music and noise from patrons parking in a residential area near the premises, evidence of security employee assaults on patrons, patron assaults on patrons, a patron assault on an off-duty employee, drinking by persons prior to entering the premises, and public urination. Quite obviously, it would not be possible for appellant to prevent all of the incidents about which the Department complained. Yet, we are satisfied from our review of the record that there is sufficient evidence of the requisite nexus between the subjects of complaint that the ALJ found to have been established and chargeable to appellant's

[4] Ipsen described an arrangement he has with appellant whereby he sponsors a western dance group, and charges admission fees. Appellant underwrites the cost of security guards, and derives revenues from drinks purchased by Ipsen's guests. (See 5 RT 16, 18).

operation of the premises to warrant discipline.[5]

This is also a case involving the excessive consumption of alcohol and the consequences which flow from that. In addition to the employee-patron and patron-patron assaults which were alleged and proved, and appear to be alcohol-related, the accusation alleged eight counts charging the sale of alcoholic beverages to obviously intoxicated patrons, in violation of Business and Professions Code §25602, subdivision (a). The Department found six of those counts to have ben established (Counts 4 through 7, 9 and 12), and dismissed the remaining two (Counts 10 and 11). Appellant attacks the Department's findings on these counts in a generalized fashion, asserting that in none of the counts did the Department present substantial evidence that the patron in question was obviously intoxicated. (See App.Br. 19).

We have reviewed the transcript where these incidents were discussed. The testimony of Los Angeles police officers Mike Peters (as to Counts 4 through 7) and Sherry Blankenship (as to Counts 9 and 12) is sufficient, as we read the cases, to support the Department's decision.

The law demands that a licensee use substantial efforts in maintaining a lawfully-conducted business. (Givens v. Department of Alcoholic Beverage Control

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[5] It is noteworthy that the ALJ (and the Department) rejected a number of charges that were premised on illegal public drinking by patrons on their way to Aftershock, on the ground there was lacking any reasonable nexus with the operation of the premises. By the same token, the ALJ and the Department sustained charges involving public urination by patrons departing the premises, again on the apparent assumption that a reasonable nexus existed between that conduct and the operation of the premises. While we may question such a conclusion when the act takes place a considerable distance from the premises, as some of those in question did, the overall impact on the Department's ultimate decision is so minimal as not to warrant specific delineation of those which did possess the requisite nexus and those which did not.

(1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446, 450].)

The term "obviously" denotes circumstances "easily discovered, plain, and evident" which place upon the seller of an alcoholic beverage the duty to see what is easily visible under the circumstances. (People v. Johnson (1947) 81 Cal.App.2d Supp. 973 [185 P.2d 105].) Such signs of intoxication may include bloodshot or glassy eyes, flushed face, alcoholic breath, loud or boisterous conduct, slurred speech, unsteady walking, or an unkempt appearance. (Jones v. Toyota Motor Co. (1988) 198 Cal.App.3d 364, 370 [243 Cal.Rptr. 611].) These symptoms were exhibited by the patrons in question, and in circumstances such that appellant's bartender and waitresses should have been aware of them. [See 3 RT 247-259 and 4 RT 387-403.]

IV

. Appellant argues that he cannot be held responsible for the misconduct of non-employees in or near his premises when he has taken all reasonable steps to prevent such conduct. Appellant stresses his employment of a large, trained security force, the presence of existing security procedures, and his cooperation with law enforcement authorities.

As stated earlier herein, the law demands that a licensee use substantial efforts in maintaining a lawfully-conducted business. (Givens v. Department of Alcoholic Beverage Control (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446, 450].)

We agree with appellant that the test set forth in Laube v. Stroh 1992) 2 Cal.App.4th 364, 379 [3 Cal.Rptr.2d 781] is controlling:

> A licensee has a general affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly. Once a licensee knows of a particular violation of law, that duty becomes specific and focuses on the elimination of the violation. Failure to prevent the problem from reoccurring, once the licensee knows of it, is to 'permit' by a failure to take preventative action.

Appellant was aware of noise problems involving music. Appellant was aware that the fusion of a young clientele, loud music and alcohol could provoke violence, public disturbance, excessive noise, and excessive consumption of alcohol. Having chosen a method of operation with that potential, appellant was under a duty to act before the occurrence of the events the record shows occurred. It is plain that in many instances, appellant did not do so. Concededly, appellant's employment of a substantial security force is in his favor. Nonetheless, it is ironic that three of the matters which the Department found unacceptable involved the actions of a member of that security force.

V

Appellant suggests that the Department has pursued a private nuisance theory in this case. Presumably, appellant is telling the Board that since the noise disturbed only a few nearby residents, he may not be disciplined even if his music was unreasonably and excessively loud.

It does not appear that the Department proceeded on a nuisance basis. That only a few residents testified does not imply others were not disturbed. Nor does it follow that unreasonable conduct in the exploitation of a liquor license must be overlooked simply because it may offend only a few.

Appellant's brief on this issue appears as if it was written for another case, and not this case. Its general nature, and a specific reference to a "nuisance theory advanced by the Sheriff" (App.Br. 29), suggest that appellant's counsel has simply incorporated irrelevant portions of an earlier brief to some other forum, not intended for our consumption.

VI

Appellant contends that the penalty imposed by the Department - a 60-day suspension and a stayed revocation - is excessive, and, because it is cruel and unusual, unconstitutional.

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].)

Admittedly, the suspension is severe medicine. However, there is much the Department could have taken into consideration in determining what it might take to persuade appellant to operate his business in the future in compliance with the Alcoholic Beverage Control act and other pertinent statutes.

While it is to appellant's credit that he finally installed padded doors and other sound suppressants, the fact that he did not do so promptly upon receipt of the Department's complaint letter, but more than a year later, may well have influenced the Department not to treat that effort as a mitigating factor. We do not know what

considerations, of the many this record reveals, the Department took into account. All we can say is that while the 60-day suspension may be onerous, it does not seem so offensive, in light of the record, as to amount to an abuse of discretion or cruel or unusual punishment.

VII

Appellant contends that the entire proceeding is unconstitutionally infirm by virtue of the unconstitutionality of Business and Professions Code §24210. That code section authorizes the Director to delegate to administrative law judges appointed by him the power to hear and decide.

The Appeals Board is prohibited by the California Constitution, art. 3, §3.5, from declaring unconstitutional an act of the Legislature. Consequently, it has been the practice of the Board to decline to hear such contentions, and it so declines in this case.

ORDER

The decision of the Department is affirmed.[6]

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

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[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 order as provided by §23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code §23090 et seq.