BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-7509

A.J. CALOR, INC. dba El Calor
2916 West Lincoln Avenue, Anaheim, CA 92801,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 47- and 58- 294323 Reg: 99046090

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: March 1, 2001
Los Angeles, CA

ISSUED APRIL 26, 2001

A.J. Calor, Inc., doing business as El Calor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked its license, but stayed revocation thereof, and ordered specified periods of suspension, for various statutory, rule, and license condition violations determined to have been committed by appellant.

Appearances on appeal include appellant A.J. Calor, Inc., appearing through its counsel, Ralph Barat Saltsman, Stephen Warren Solomon, and Joseph Budesky, 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 with caterer's permit license was

[1]The decision of the Department, dated September 16, 1999, is set forth in the appendix.

issued on July 7, 1995.

The accusation, as amended, which formed the basis for the administrative hearing and the decision from which this appeal has been taken, was filed on April 1, 1999, and contained 10 counts, one of which (count 8) included 12 subcounts. The charges were as follows: sales of alcoholic beverages to minors, in violation of Business and Professions Code §25658, subdivision (a) (counts 1 and 2);[2] the failure to operate the premises as a bona fide public eating place, in violation of §§23038 and 23396 (count 3); the making of physical changes to the interior of the premises without the prior written consent of the Department, in violation of Department Rule 64.2(b)(1) (count 4); the sale of alcoholic beverages in an unlicensed patio adjacent to the premises, in violation of §§23300 and 23355 (counts 5, 6, and 7); the violation of certain conditions to which the license was subject, in violation of §23804 (count 8);[3] and the selling or offering for sale of adulterated alcoholic beverages, in violation of Penal Code §347b and Health and Safety Code §§110560, 110630, and 110620 (counts 9 and 10).

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[2] Unless otherwise indicated, all statutory references are to the California Business and Professions Code.

[3] Count 8 charged violations of various license conditions: a condition which prohibited the service and/or consumption of alcoholic beverages on property adjacent to the premises under the control of the licensee (subcounts A, D, and I); a condition which prohibited a cover charge prior to 9:00 p.m. (subcount B); a condition which prohibited dancing (subcount C); a condition which required that food service be available while the premises was open (subcounts E and K); a condition which prohibited the maintenance of a coin-operated game on the premises (subcounts F and J); a condition which prohibited certain advertising on the exterior of the premises indicating the availability of alcoholic beverages (subcounts G and H); and a condition which required the maintenance of separate records of sales of food and beverages (subcount L).

Following an administrative hearing held on June 29 and 30,1999, the proposed decision of the Administrative Law Judge (ALJ) sustained the charges alleged in counts 1, 2, 4, and 7 and subcounts A, B, C, D, G, H, K, and L of count 8; the remaining charges were ordered dismissed. The proposed decision was adopted by the Department on September 16, 1999.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the sale-to-minor violations (counts 1 and 2) must be reversed because (a) the ALJ failed to make an essential finding under Department Rule 141(b)(2), and (b) the decoy operation was conducted in an unfair manner, in violation of Rule 141(a); (2) the determination that Rule 64.2(b)(1) was violated (count 3) must be reversed because there was no alteration to the interior of the premises; (3) the condition violations based upon appellant having permitted consumption of alcoholic beverages on property adjacent to the premises (subcounts A and D of count 8) must be reversed because the ALJ failed to make findings that appellant or its employees observed or should have observed such consumption; (4) the determination that appellant had failed to operate the premises as a bona fide public eating place (subcount K of count 8) must be reversed because the ALJ's own findings contradict the existence of such a violation; (5) the conditions which prohibited dancing and the assessment of a cover charge before 9:00 p.m. are arbitrary and capricious, and the findings that they were violated must be reversed (subcounts B and C of count 8); (6) the ALJ misinterpreted the condition relating to the requirement that records be kept regarding the sales of food and alcohol (subcount L of count

8); and (7) it was an abuse of discretion to order revocation for a first-time violation of the record-keeping condition of the license. Appellant has not contested the findings of the sale of alcoholic beverages in an unlicensed area (count 7) or the findings of violations of the conditions on the license prohibiting advertising on the exterior of the premises which indicated the availability of alcoholic beverages (subcounts G and H of count 8).

DISCUSSION

I

On April 11, 1998, Armando Pardo ("Pardo") and James Anthony Rodriguez ("Rodriguez"), 19 and 18 years of age, respectively, were each sold a 12-ounce bottle of beer by separate bartenders employed by appellant. Neither was asked for identification by either bartender. Prior to their entry into the premises, both Pardo and Rodriguez had been asked for identification, and had produced valid identification indicating each to be a minor, at which time their hands were stamped and green plastic bands were placed on their wrists.

Appellant contends that the ALJ failed to make an essential finding under Department Rule 141(b)(2), and that the decoy operation was conducted in an unfair manner, in violation of Rule 141(a).[4]

[4] We should point out that there was no claim made at the hearing that either of the decoys lacked the appearance required by Rule 141(b)(2). Under the circumstances, then, we see no need for the ALJ to have made a specific finding with respect to the appearance of the decoys. It would have been enough that the ALJ addressed the Rule 141 issue which was presented to him, although, as we conclude, he did in fact address the appearance issue sufficiently to warrant our rejection of the contention that he did not do so.

The Rule 141(b)(2) issue

Appellant quotes portions of Findings of Fact V-A and V-B,[5] and contends that the ALJ failed to find that the decoys displayed the appearance which could generally be expected of a person under 21 years of age. The findings state:

> "A. Armando Pardo was, at the time of the sale dressed as is shown in the two Exhibit 6 photographs. He stood between 5 feet, 8 and 5 feet, 9 inches tall and weighed about 180 pounds. Pardo appeared at the hearing and his appearance there, that is, his physical appearance and his demeanor, was that generally expected of a person his age, 20 at the time of the hearing, such that a reasonably prudent licensee would request his age or identification before selling him an alcoholic beverage. That conclusion was reached despite a slight weight gain to 185 pounds.
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> "B. James Rodriguez was, at the time of the sale dressed as is shown in the two Exhibit 7 photographs. He stood between 5 feet, 6 and 5 feet, 7 inches tall and weighed between 135 and 140 pounds. Rodriguez appeared at the hearing and his appearance there, that is, his physical appearance and his demeanor, was that generally expected of a person his age, 19 at the time of the hearing, such that a reasonably prudent licensee would request his age or identification before selling him an alcoholic beverage. That conclusion was reached despite a healthy weight gain to 170 pounds.

In The Southland Corporation/R.A.N. (1998) AB-6967, cited by appellant, the Board held that the ALJ "should have made a definitive finding that the decoy looked under 21 at the time of the sale, based on his observations at the time of the hearing and the other evidence of ... appearance at the time of the transaction." Did the ALJ meet that standard here?

We believe that he did. We do not believe The Southland Corporation

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[5] Appellant has omitted from the quoted material the ALJ's reference to Pardo's age. In view of our analysis of the ALJ's decision, this omission is, we would hope, inadvertent.

/R.A.N. decision should be read to require an exhaustive delineation of all possible indicia of age presented by a decoy which persuade the trier of fact that the decoy presents the appearance of a person under 21 years of age. As the Board observed in Circle K Stores, Inc. (1999) AB-7080:

> "It is not the Appeals Board's expectation that the Department, and the ALJ's, be required to recite in their written decisions an exhaustive list of the indicia of appearance that have been considered. We know from many of the decisions we have reviewed that the ALJ's are capable of delineating enough of these aspects of appearance to indicate that they are focusing on the whole person of the decoy, and not just his or her physical appearance, in assessing whether he or she could generally be expected to convey the appearance of a person under the age of 21 years."

In the absence of evidence of any material change in the appearance of a decoy between the time of the transaction and the time of the hearing, it seems reasonable to assume, or infer, that the decoy did not present a younger appearance at the hearing which took place many months (in this case, 14 months) after the transaction than he or she did months earlier.

It must be kept in mind that an ALJ is necessarily considering a number of factors, some of which may be subconscious and not capable of articulation, in the decisional process whether a decoy presents the appearance required by Rule 141(b)(2). The Board's concern in those cases where it has reversed and/or remanded cases to the Department for further proceedings involving this aspect of the rule has been that the ALJ may have interjected an improper standard into the application of the rule, or unduly limited his consideration of pertinent indicia of age to the decoy's physical appearance.

We believe that the considerations set forth in the findings in this case

satisfy the requirement of Rule 141. The ALJ did not limit his consideration of the decoy's appearance to a single indicia of age, nor do his findings reflect any consideration of inappropriate factors. While he may not have made explicit reference to the appearance of the two decoys at the time they made their purchases, we think it fairly clear that he had both time frames in mind.

The Rule 141(a) fairness issue

Appellant contends the decoy operation violated, in two respects, the admonition in Rule 141(a) that such an operation be conducted in a manner which promotes fairness. Appellant contends it was unfair to conduct the decoy operation at a time when the premises were extremely crowded and busy, and that it was deceitful for the decoys to attempt to purchase an alcoholic beverage after they had been physically marked as being under 21 and the doorman had made "intentional and deliberate efforts" to prevent them from doing so.

We do not believe either of appellant's arguments support a conclusion that the decoy operation was conducted unfairly.

The contention that it was unfair to conduct a decoy operation when the premises were crowded and busy assumes that either of the two conditions justifies the failure of appellant's bartenders to exercise care with respect to whom they sold alcoholic beverages. The record is devoid of any evidence, let alone anything persuasive, that the number of patrons or the level of the bar activity was such as to prevent either bartender from observing the obvious - two youths whose appearance was such that the doorman identified them as minors and, pursuant to appellant's practice, stamped each of their wrists with an "X" to denote their

minority, and fastened a non-removable green plastic band on each minor's wrist for the same purpose.

Appellant's contention that it was an act of deceit for the decoys to attempt to purchase an alcoholic beverage after having been told they should not do so is, in the context of this case, unpersuasive. Under appellant's theory, once it "physically marked" the decoys as minors, that was all it had to do. Thus, the bartenders need not concern themselves with to whom they were selling alcoholic beverages, since, in appellant's view, any "physically marked" minor who sought to purchase a beer or alcoholic drink would be acting deceitfully.

We do not think the fairness requirement of Rule 141 must be construed in a manner that rewards appellant with a fail-safe system against a sale-to-minor violation. Nothing occurred that might not have occurred in a non-decoy situation. Appellant's practice of identifying minor patrons at the door is nothing more than an early warning system which, if without any follow through, affords appellant, and the public, little or no protection against a serious social problem - minority drinking.

II

The accusation alleged that on and prior to May 22, 1998, and continuing to the date of the accusation, appellant had made physical changes to the premises which resulted in a change of usage of the premises from the plan contained in the diagram on file with the Department, without the consent of the Department, in violation of Department Rule 64.2(b)(1). Rule 64.2(b)(1) provides, in pertinent part:

"After issuance or transfer of a license, the licensee shall make no changes

> or alterations of the interior physical arrangements which materially or substantially alter the premises or usage of the premises from the plan contained in the diagram on file with his application, unless and until prior written assent of the department."

As noted by the ALJ, the rule also provides some examples of what could be considered material or substantial physical changes, one of which is a "substantial increase or decrease in the total area of the licensed premises previously diagrammed."

John Adger, one of appellant's corporate officers, testified that two six-feet-high block walls were constructed to convert the patio into a smoking area, following the enactment of a smoking ordinance by the City of Anaheim. The testimony of investigator Rose indicates that there was also a canvas awning covering the area created by the walls.

Appellant contends that the patio is by definition not an interior physical arrangement of the building, but is an exterior physical arrangement. In addition, appellant asserts, the ALJ failed to make any finding that there were any alterations to the interior of the licensed premises.

The ALJ premised his conclusion that there had been a violation of Rule 64.2(1)(a) on his findings that investigator Rose had consumed beer on the patio on May 22, 1998 (Finding VIII-D); that investigators Rose and Tran consumed alcoholic beverages on the patio on June 4, 1998 (Finding IX-E), and purchased and consumed alcoholic beverages on June 12, 1998 (Finding X-C); that Exhibit 16, the ABC-257 form depicting the Diagram of Licensed Premises, submitted in connection with appellant's license application, did not show any open air patio or

any patio of any sort (Finding XIII); and the testimony of John Adger as to the conversion of the previously unused patio area to a smoking area.

There is no specific finding that the addition of the walls described by Adger, or the awning referred to by investigator Rose, constituted an alteration of the interior physical arrangements which materially or substantially altered the premises or the usage of the premises, nor do we think the ALJ could have made such a finding.

The conversion of the patio area did not result in an increase in the total area of the licensed premises. If this were so, then the Department could not have properly sustained the charge in count 7, that a waitress had sold an alcoholic beverage in the adjacent patio area without a license authorizing such a sale. Indeed, given that the licensed area is delineated in a two-dimensional mode, it would seem that the only way it could be enlarged by any interior change would be by the creation of an additional upper or lower level.

There are other reasons as well why this portion of the decision should be reversed.

In the decision itself, the patio is referred to as "an open air patio" (Finding XX), and investigator Rose testified that he "went out to the patio" [I RT 183], passing through a door, past the two restrooms, and through another door out to the patio [I RT 187]. Rose's testimony, and the questions posed to him by Department counsel, made it clear they were talking about an area that was not part of the interior of the premises.

We do not understand how the patio area can be considered part of an

enlargement of the interior of the licensed premises and at the same time an unlicensed area outside. This count must be reversed.

III

One of the conditions on the license provided that no alcoholic beverages shall be consumed on any property adjacent to the licensed premises under the control of the licensee. There is no contention by appellant that the patio was not an area reached by the condition, or that it was a licensed area.[6] Appellant contends, however, that there was no evidence or finding that appellant permitted the consumption of alcoholic beverages on the patio adjacent to the premises during the visits by the Department investigators on May 22 and June 4, 1998, as charged in subcounts 8-A and 8-D.

The evidence of appellant having permitted consumption on the patio during the investigators' visit on May 22, 1998, is based upon the testimony of Investigator Rose that, drink in hand, he went out to the patio after being told by the bartender that food was available there. There was no one on the patio that night. [I RT 184]. Although Rose testified he consumed part of his drink while on the patio, he could not recall whether his partner drank any of hers. Further, Rose testified that after he had observed a window pass-through open to the kitchen, and ascertained from a person there that tacos and quesadillas were available, he went back inside, in "less than a minute." [I RT 188-190].

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[6] Appellant has not appealed from the findings and determination that one of its waitresses sold alcoholic beverages to Department investigators while on the unlicensed patio during their third visit to the premises on June 12, 1998.

Given the relatively brief time Rose was on the patio, and the absence of anyone who might have observed him drink from his beer during the time he was there, it might seem unreasonable to infer that he had been permitted to do so. Although an inference could be drawn that the availability of food on the patio was an invitation to patrons to bring their drinks to the patio, it is a weak inference, especially since, in this case, there was no evidence of anyone other than the two investigators on the patio, and then only a few minutes.

Rose had reviewed the license conditions at least by the time of his second visit to the premises on June 4, 1998, when he and a second investigator again went to the patio, drinks in hand. On this occasion, they remained for approximately 10 minutes, during which time one other patron came to the patio to inquire about food. However, this patron was unable to capture the attention of anyone, and left the patio.

There is no evidence any employee of appellant was even aware there were people on the patio. It cannot be presumed that people going to the patio to inquire about food would necessarily bring their drinks with them. If, as one could surmise, the investigators did so for the purpose of making a case for a condition violation, fairness would require at least some opportunity for appellant or one of its employees to become aware that there was a possibility that the prohibited consumption might occur.

Investigator Rose returned to the premises on June 12, 1998. This time he and a second investigator, while on the patio, purchased drinks from a waitress. This was a clear instance of the sale and service of an alcoholic beverage in an area

not licensed for such sale, was so found by the ALJ, and appellant has not appealed from this finding. It is worthy of note that, had this occurred before either the May 22 or June 4 visits, a much more persuasive case could have been made that the consumption said to have occurred during those visits was "permitted" within the meaning of that term as construed in Laube v. Stroh (1992) 2 Cal.App.4th 364, 379 [3 Cal.Rptr.2d 779]:

> "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 the law, that duty becomes specific and focuses on the elimination of the violation. Failure to prevent the problem from recurring, once the licensee knows of it, is to 'permit' by a failure to take preventive action."

We do not mean to say that the testimony of an investigator is not, by itself, enough to establish the kind of violation here alleged. But where, as here, his testimony reveals that he was the only person involved in the activity without which there would be no violation, where there is no evidence he was observed by anyone, and where there is no evidence of any such conduct on any prior occasion, we believe the licensee would be entitled to the benefit of the doubt.

However, the testimony of John Adger that, when the patio was converted to a smoking area, people were allowed to take their drinks there, is sufficient, when added to that of the Department investigator, to sustain both charges. Although Adger testified this practice stopped once he or his partner was notified by a Department investigator on June 12, 1998, that the practice was impermissible without the Department's consent to an expansion of the licensed

premises,[7] his testimony establishes that prior to June 12, 1998 the patio had regularly been used by patrons who were smoking, eating, and, critically, drinking. This, we think, compels a finding that the consumption by Rose was permitted.

IV

Appellant contends that the conditions of the license which prohibited dancing and the imposition of a cover charge are arbitrary and capricious in that they have no rational connection with the operation of the business, restrict appellant's right of free speech, and are not reasonably related to protecting nearby residents' quiet enjoyment.[8]

Aside from the fact that the time has long passed for any objection to the validity of the conditions, appellant's arguments miss the point.

It is obvious from the conditions imposed upon the license that the Department sought to minimize the potential that the premises would not operate as a bona fide public eating place. As the decision of the Department made clear in its justification of the discipline imposed - "[appellant's] failure to comply with condition 04[9] goes to the very heart of its licensure with the Department." The

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[7] Such an application was filed, and, pending action on the application, a security guard has been posted to insure that only smoking and eating are permitted.

[8] Appellant also suggests that the dancing which was observed by the investigators consisted of an instructional class in Latin dancing. Although there was testimony that instructors were permitted to hold classes during the 8:00 p.m.-9:00 p.m. period, there is no evidence that what the investigators observed was such a class.

[9] This condition required that quarterly sales of alcoholic beverages not exceed quarterly sales of food, and that records be kept reflecting each separately.

evidence at the hearing clearly bore out the Department's concerns.

It seems obvious that people will be unwilling to pay a cover charge for the privilege of merely dining in a restaurant. On the other hand, a cover charge is common in nightclub operations, which is what appellant was offering, and would tend to discourage people interested only in dining.

By prohibiting dancing and the imposition of a cover charge prior to the end of a reasonable dinner hour, the conditions require appellant to focus on its primary reason for being - the service of meals accompanied by alcoholic beverages - rather than on the operation of a popular nightclub where food service was limited and virtually unavailable.

This Board is not so naive as to fail to understand appellant's motives. With the type of license it sought and obtained from the Department, it could, among other things, permit the presence of minors. For that privilege, there were responsibilities, including those embodied in the conditions at issue here. Appellant cannot now be heard to complain.

V

Subcount 8-K of the accusation charged a violation of a condition of appellant's license that food service with an available meal shall be available up until closing time on each day of operation. The ALJ found this condition had been violated, based upon the undisputed testimony of Department investigator Rose that food was not available when he requested it during his June 12, 1998, visit. Appellant contends that this finding is contradicted by the ALJ's determination that

there was no violation of §23038, and that the unavailability of food for what might have been a very short period of time in the course of the evening should not be treated as a violation.

A close reading of the determination of issues set forth in the ALJ's proposed decision suggests that the supposed contradiction does not exist.

It is true that the ALJ found no violation of §23038. However, he could hardly have been more clear in his view that appellant's compliance with §23038 was marginal at best, and that there could be a violation of a specific condition drawn more narrowly, as was the condition in this case.

The condition in question states: "Food service with an available meal shall be available up until closing time on each day of operation."

Section 23038 is much more general in its requirements:

> "'Bona fide public eating place' means a place which is regularly and in a bona fide manner used and kept open for the serving of meals to guests for compensation and which has suitable kitchen facilities connected therewith, containing conveniences for cooking an assortment of foods which may be required for ordinary meals, the kitchen of which must be kept in a sanitary condition with the proper amount of refrigeration for keeping of food on said premises and must comply with all the regulations of the local department of health. 'Meals' means the usual assortment of foods commonly ordered at various hours of the day; the service of such food and victuals only as sandwiches or salads shall not be deemed a compliance with this requirement. 'Guests' shall mean persons who, during the hours when meals are regularly served therein, come to a bona fide public eating place for the purpose of obtaining, and actually order and obtain at such time, in good faith, a meal therein. Nothing in this section, however, shall be construed to require that any food be sold or purchased with any beverage."

In Determination of Issues II, the ALJ acknowledged that "one occasion without food is not sufficient to conclude that the kitchen was not in compliance with Section 23038." It is apparent, however, that the somewhat loosely-defined

relationship appellant had with its cook raised real questions as to when and under what circumstances food might actually be available at any given time.

Section 23038 is no more specific as to when meals must be available than "during the hours when meals are regularly available." The license condition, however, is very specific - "up until closing time." In our experience, this condition is commonly found in a on-sale public eating place license, presumably to drive home to the licensee the point that the license is being issued for the primary object of operation as a restaurant, rather than a nightclub.

The explanation given to the investigator was that the cook had not arrived yet, at 9:15 p.m. Clearly no meals were available, and just as clearly there was a breach of the condition which required such.

Appellant's point that the violation may not have continued for very long is speculative. The fact that food became available later in the evening is a factor which, we presume, would have been taken into account by the ALJ in his assessment of the penalty for the condition violation.

VI

The ALJ concluded that appellant had violated condition 04 of the license which required that appellant's quarterly gross sales of alcoholic beverages not exceed its gross sales of food and meals during the same time period, that records be maintained on a quarterly basis reflecting separately the gross sales of food and the gross sales of alcoholic beverages of the business, and that such records be made available to the Department on demand. As noted earlier, the ALJ deemed this a serious violation, going to the heart of the licensee's relationship with the

Department.

At the hearing, appellant blamed its failure to produce records that satisfied the Department on the inadequacy and lack of specificity of the Department's request for such records. Appellant now contends that the condition itself is ambiguous, and that, in any event, the Department misinterpreted and misapplied the condition when evaluating appellant's response to the Department's request. Finally, appellant contends that it was an abuse of discretion for the Department to order its license revoked, for a first violation of a condition.

Appellant's contention that the condition is ambiguous rests on a wrenching of words out of context and an inability or unwillingness to read the condition in a reasonable manner.

Appellant first singles out the words "reflect" and "maintain," attributes to them narrow dictionary definitions, and then argues that, as used, the records need not be exact, and that the condition is not clear whether it requires appellant to prepare specific records or simply maintain records generated independent of the license condition. Continuing with its argument, appellant next attacks the phrase "no less frequently than on a quarterly basis," asserting (App.Br., at page 22) that it "expressly and unequivocally limits the time period for which appellant must keep such records" to a period of three months. Consequently, appellant argues, when the ALJ found that the responses were, as the ALJ said, "terribly inadequate," he improperly took into account documents relating to a 12-month period rather than to the last quarter alone. Finally, appellant asserts that the ALJ's use of the term "50-50" when referring to the information targeted by the condition further

demonstrates a misinterpretation of the language of the condition.

We reject appellant's distorted and myopic reading of condition 04. To us, its meaning could hardly be more clear. Appellant was obligated to keep and maintain, on a quarterly basis, and make available to the Department upon demand, records which would disclose whether its sales of alcoholic beverages exceeded its sales of food. It is obvious that the Department needed such records in order to be able to assure itself that appellant was complying with that part of the condition that forbade that happening. It is also obvious that appellant's obligation was a continuing one.

We have looked at appellant's "do-it-yourself" response to the Department's demand for records, and find ourselves in full agreement with the ALJ that the response was terribly inadequate. We are satisfied that the ALJ read the condition in the manner reasonably intended, and his findings and determination that it was violated should stand.

Finally, we do not find persuasive appellant's claim that the Department abused its discretion by ordering license revocation for a first-time violation of a license condition. It is plain that appellant paid little regard to the primary purpose of its having been issued a public eating place license. The factors articulated by the ALJ are fully supported by the record.

In any event, by staying enforcement of the revocation order, allowing appellant to continue to operate while it brings itself into compliance with the condition, and limiting future reimposition of the order of revocation to a violation of the same condition, the Department has effectively and reasonably addressed

appellant's lack of compliance with the condition and afforded it a fair opportunity to avoid further discipline.

ORDER

The decision of the Department is affirmed, except as to count 4,[10] which is reversed.[11]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[10] The ALJ imposed a single 10-day suspension for both the Rule 64.2 violation and for the sale on the unlicensed patio, the suspension to run consecutively with the 40-day suspension, 10 days of which were stayed, for the various condition violations. A reversal of count 4 means that the 10-day suspension now rests solely on the unlicensed patio sale. Since the Board has no real doubt that the Department would adhere to the net 30 day suspension despite this partial reversal, a remand is unnecessary. (See Miller v. Eisenhower Medical Center (1980) 27 Cal.3d 614, 635 [166 Cal.Rptr. 626].

[11] 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 final 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.