ISSUED MAY 24, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

V-BAR, INC. dba The Australian Pub 1014 Grand Avenue San Diego, California 92109, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7145 File: 47-272470 Reg: 97041568 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: April 1, 1999 Los Angeles, CA

V-Bar, Inc., doing business as The Australian Pub (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its on-sale general public eating place license for 20 days, with 10 days thereof stayed for a probationary period of one year, for having violated a condition on its license requiring the quarterly gross sales of food to exceed the gross sales of alcoholic beverages, this being found to be 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.

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[1] The decision of the Department, dated May 7, 1998, is set forth in the appendix

Appearances on appeal include appellant V-Bar, Inc., appearing through John Kelsey, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on August 3, 1992.[2] In October 1997, the Department charged in an accusation that, in three successive quarterly periods, appellant's gross sales of food failed to exceed its gross sales of alcoholic beverages, as required by a condition on its license.

An administrative hearing was held on March 18, 1998, at which time oral and documentary evidence was received. At that hearing, appellant stipulated to the admission and accuracy of sales records which showed that in the three quarterly periods between October 1996 and June 1997, appellant's sales never met that requirement.[3]

Department investigator Jack Bresnahan testified that his investigation was prompted by a complaint from the ex-wife of John Kelsey, corporate secretary of appellant, and, apparently, its owner, that the business was being operated as a bar and not as a restaurant. Bresnahan said this was the first time he had investigated the

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[2] *Appellant was not the original licensee. He purchased the stock of appellant corporation in 1995.*

[3] Exhibit 3 reveals that the percentage ratio between food sales and alcoholic beverage sales on a monthly basis was as follows: October, 1996 - 24%/76%; November, 1996 - 22%/78%; December, 1996 - 26%/74%; January, 1997 - 26%/74%; February, 1997 - 26%/74%; March, 1997 - 27%/73%; April, 1997 - 28%/72%; May, 1997 - 27%/73%; June, 1997 - 25%/75%. The record does not contain any more current information.

premises since it was licensed, and that it was serving food on the day he went to the premises.

Kelsey testified that, in 1995, at a time when the premises was about to go out of business, and he was considering buying the corporation, he spoke on at least three separate occasions to Paul Hayes, another Department investigator, about his concerns about the license condition now under discussion. According to Kelsey, Hayes told him that, as long as there were no other problems, the Department did not generally enforce that condition.

Kelsey testified that he believed the Department's requirement that they operate as a restaurant was met by the fact that the business serves breakfast, lunch and dinner, remains open reasonable hours, and has a complete menu. He expressed doubts over the business's ability to meet the greater than 50% requirement for food sales at the present time, but said there were plans to remodel and expand, so as to enlarge the area in which customers could dine. Another part of the problem, he explained, is that his food prices are low in comparison to the prices for the alcoholic beverages. A patron who orders two drinks may very well exceed the food portion of the tab. In addition to his testimony, Kelsey argued in closing that a suspension would create a substantial hardship, and that it was unfair for the Department to proceed on the basis of a complaint from an ex-spouse.

Subsequent to the hearing, the Department issued a decision finding that the charges of the accusation had been established, and ordering a 20-day suspension, with 10 of those days stayed.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant renews the contention by Kelsey that he had been assured by Paul Hayes, on behalf of the Department, that the condition would not be a concern so long as there were no other problems, attempts to explain what it is doing to address the problem in the future, the difficulties it foresees in doing so, and predicts the hardships which it believes would flow from a forced closure.

DISCUSSION

A condition of the kind involved in this case, one requiring that quarterly gross sales of alcoholic beverages not exceed gross sales of food during the same period, is often imposed on an on-sale general public eating place license. Its purpose is to insure that the premises operates as a bona fide restaurant, and not as a disguised bar or nightclub enjoying the privilege that accompanies an on-sale general public eating place license, i.e., that permits minors to be present in the premises.

In the Appeals Board's experience, the cases charging a breach of such a condition almost invariably involve an establishment which lacks the most fundamental facilities for providing meals to patrons, i.e., a facility which has no freezer or refrigerator capacity, or which lacks the means of preparing food, or, which, if it has such facilities, has made no genuine effort to provide meals.

This is the unusual case. Here, there has been no contention by the Department that appellant's operation as a restaurant was a sham, or that appellant was not acting

in good faith.[4] Instead, appellant, for reasons accorded weight by the ALJ, could not attain the required food/alcohol ratio simply because its food and drink prices, coupled with its limited capacity for accommodating diners, worked against it.

On the other hand, that appellant was the target of a complaint from a vindictive ex-spouse may be unfortunate, from appellant's point of view, but the Department can not be faulted for acting on such a complaint.

Nevertheless, taking these considerations in mind, some consideration might be given to appellant's having acted in reliance upon assurances from one of the Department's investigators that, absent other problems, the Department did not enforce such conditions.

The ALJ appeared to accept Kelsey's statement that he had been given such assurances. The Department made no effort to refute the assertion that Hayes had done so. It neither denied the representations had been made, nor sought a continuance in order to present Hayes' testimony. Despite this, the Department approached the case at the hearing as if it were no different from any other case, deserving of the Department's "standard penalty," a 25-day suspension, with 10 days stayed.

The Board is not in a position to determine whether Hayes either had or lacked the authority to make such representations, or to determine whether they were true, if made. But, since what is significant in this case is whether appellant relied upon them,

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[4] *The Department does suggest that appellant has created its own problem by placing undue emphasis upon an appetizer item, buffalo wings, that is popular and inexpensive compared to the cost of drinks that the customer will purchase to accompany the appetizer.*

thinking Hayes had described a valid Department policy, much depends upon whether what Hayes allegedly said to Kelsey was true - and, of course, whether it was in fact said. We have seen nothing to lead us to believe appellant has fabricated the event, nor, apparently, did the ALJ, who saw appellant testify.

Appellant, albeit unartfully, has invoked the doctrine of equitable estoppel against the Department. The leading case of City of Long Beach v. Mansell (1970) 3 Cal.3d 462, 489, 493 [91 Cal.Rptr. 23], explains what must be proved to invoke this doctrine:

> "Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.
> ...
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> "It is settled that '[t]he doctrine of equitable estoppel may be applied against the government where justice and right require it. ... Correlative to this general rule, however, is the well-established proposition that an estoppel will not be applied against the government if to do so would effectively nullify 'a strong rule of policy adopted for the benefit of the public.'"

If appellant's witness is to be believed, as the ALJ apparently did, he purchased stock and undertook the operation of a business in the belief that the condition would not be enforced, absent other problems.

The ALJ, on the basis of Kelsey's testimony, mitigated the "standard" penalty by 5 days, imposed a 20-day suspension, and then stayed 10 of those days, leaving appellant obligated to serve a 10-day suspension, but, very possibly, also confronted with serious problems in the future in the event its inability to achieve the requisite sales

ratios persists.

There is little this Board can do to provide appellant any definitive relief from its dilemma, relief to which we think it entitled, other than remand the case to the Department for reconsideration of the penalty. Perhaps, in the process of doing so, the Department may be able, in its broad discretion, to ensure that the ultimate resolution of this matter is fair and just to both sides. Indeed, based upon what we heard in oral argument, there may be reason for the Department to consider a modification of the condition to better accommodate the mutual needs of the Department and appellant.

The practical result of this remand, the Board hopes, will be to provide additional time for appellant to implement the steps that it says it has undertaken to enlarge its ability to serve more dining patrons, and through those steps, satisfy the food/alcohol ratio of the condition as it now reads. Should those steps prove unsuccessful, and the Department again see a need for action, appellant will at least have had a fair chance, and the Board will have afforded appellant some measure of justice.

ORDER

The findings of the Department that there was non-compliance with the condition is affirmed. The penalty is reversed, and the case is remanded to the Department for reconsideration in light of our comments herein.[5]

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[5] *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.

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