ISSUED OCTOBER 14, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

LISA DANEEN PITTERA dba Baja Sharkeez 3801-09 Highland Avenue Manhattan Beach, CA 90266, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7170 File: 47-285692 Reg: 97041028 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: June 3, 1999 Los Angeles CA

Lisa Daneen Pittera, doing business as Baja Sharkeez (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended her on-sale general public eating place license for 35 days, with 10 days thereof stayed for a probationary period of one year, for having violated conditions on her license relating to noise emanating from the premises, the ratio of food sales to sales of alcoholic beverages, and the sale of alcoholic beverages without an accompanying purchase of food, 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.

[1]The decision of the Department, dated June 11, 1998, is set forth in the appendix.

Appearances on appeal include appellant Lisa Daneen Pittera, appearing through her counsel, John A. Hinman and Richard D. Warren, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on October 4, 1993. Thereafter, the Department instituted an accusation against appellant charging: (a) that, on March 13, 1997, and March 21, 1997, she, through her employees, violated a condition on her license by allowing provided entertainment to be audible beyond the area under the control of the licensee; (b) that, on March 21, 1997, and April 24, 1997, again through her employees, appellant violated a condition on her license by serving an alcoholic beverage to Department investigators without an accompanying purchase of food; and (c) that appellant's gross sales of alcoholic beverages exceeded her gross sales of food during calendar year 1996, and that appellant failed to maintain separate records of food and alcoholic beverage sales during that same period, again in violation of a condition on her license.[2]

An administrative hearing was held on February 6, 1998, at which time oral and documentary evidence was received. Subsequent to the hearing, the

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[2] The license conditions that are at issue provide as follows:

"3. Entertainment provided shall not be audible beyond the licensed premises.

"4. The quarterly gross sales of alcoholic beverages shall not exceed the gross sales of food during the same period. The applicant shall at all times keep records which reflect separately the gross sales of alcoholic beverages and the gross sales of all other items. Said records shall be kept no less frequently than on a quarterly basis and shall be made available to the Department on demand.

"7. At all times when the premises is open for business the sale of alcoholic beverages shall only accompany the sale of food."

Department issued its decision which determined that the charges of the accusation, with the exception of the subcount alleging that appellant failed to maintain adequate records, had been established.

Appellant thereafter filed a timely notice of appeal. In her appeal, appellant raises the following issues: (1) the accusation must be dismissed because there is no evidence the Department had any legal grounds under Business and Professions Code §23800 to impose any conditions on appellant's license; (2) the Department lacked any legal basis for the "micro-management" imposition of conditions 4 and 7; and (3) in any event, the Department abused its authority by interpreting condition 7 to require appellant to sell food with every single purchase of an alcoholic beverage. Issues 1 and 2 are essentially duplicative, and will be discussed together.[3]

DISCUSSION

I

Appellant contends the accusation must be dismissed because there is no evidence the Department had any legal grounds under Business and Professions Code §23800 to impose any conditions on appellant's license.

The conditions in issue were imposed upon appellant's license when it was issued in 1993.[4] Appellant's present challenge to the conditions is untimely. The Appeals Board has ruled in prior cases that a challenge to previously imposed conditions, on the ground they lack a valid basis, must be made during the licensing stage, since it is that decision of the Department that is at issue, and any

[3] *Appellant has not appealed that portion of the order finding that two instances of loud music were violations of condition 3 of the license.*

[4] *The conditions were actually first imposed on the license which preceded appellant's license.*

appeal from that decision must be timely taken in accordance with Business and Professions Code §23805. (See Radmilo Jelicic (1994) AB-6362).

Appellant's remedy, if she has one, is to seek the removal or modification of the conditions pursuant to Business and Professions Code §23803. Whether she is entitled to such relief could then be addressed in a timely manner and with an adequate record. We have neither in this appeal.

II

Appellant contends that the Department abused its authority by interpreting condition 7 to require appellant to sell food with every single purchase of an alcoholic beverage. Appellant argues that the Department has provided no proof that requiring a customer to buy food with every single purchase of an alcoholic beverage will further the public welfare and morals; that, while consuming food with alcoholic beverages may be beneficial and reduce the intoxicating effects of the beverage, it does not mean the sale of food with a drink will promote temperance; that many people can consume alcoholic beverages without eating food at the same time without any intoxicating effects; that in many instances, a customer may have already eaten before coming to appellant's premises; that providing food (chips and salsa) at no extra cost effectively satisfies the condition; that if appellant is forced to require every patron to buy food before he or she can be served a drink, customers will be driven to restaurants which are "without such ridiculous conditions;" and, finally, there is the "threatening vision" that if the Appeals Board upholds the Department's interpretation of condition 7, the Department will impose the condition on every other restaurant-licensee.

While we are not convinced that the concerns expressed by appellant are as disturbing as appellant would have us believe, we are inclined to agree that the condition lacks sufficient clarity to be enforced in this case.

That the condition is ambiguous is reflected in the fact that each of the parties reads it as if words must be added to give it meaning.

The Department interprets condition 7 as requiring that each patron who purchases an alcoholic beverage must, with that purchase, also make a food purchase. Appellant interprets the condition as requiring that, when the premises is open for business, food must be available.

This Board cannot say that either interpretation is unreasonable. It follows that, if it can be said that the language of the condition reasonably lends itself to both interpretations, then it can truly be said that the condition is ambiguous.

Appellant focuses on the process - so long as alcoholic beverages are being sold, food must be available for sale, which, by implication, requires that the kitchen remain open for that purpose. According to appellant, this means that, unlike restaurants without such a condition, she may not discontinue the sale of food after the normal meal hours as defined in the Department's procedures manual.

The Department, on the other hand, focuses on the individual transaction - a patron bought a beer but did not buy any food. Ergo, the condition was violated. Whether the kitchen was open or closed is irrelevant under the Department's interpretation. The Department seems to believe that, no matter the precise wording of the condition, if its overall import is that it in some manner involves both food and alcoholic beverages, there is only one way for it to be interpreted, and

that is, as stated above, a patron who purchases an alcoholic beverage must simultaneously purchase food.

The testimony of the Department witnesses as to how the condition should be interpreted suggests that if there is a single, uniform interpretation, it is not shared unanimously within the Department. For example, Department investigator Spencer held the view that appellant was obligated to sell food with every alcoholic beverage it sells. Thus, if a customer orders a beer and a hamburger, and consumes both, he cannot order another beer (RT 33]. Investigator Bustamante appeared to share Spencer's view, although his testimony is less than precise. On the other hand, District Administrator Mimiaga offered a different view. Called as a witness by counsel for appellant, Mimiaga first conceded that he did not know what the intent of the condition was when it was first placed on the license [RT 100-101]. He testified, as had investigator Spencer, that a diner who finished his beer before he finished his meal could not order a second beer [RT 103]. Then, when examined by Department counsel, he amended his opinion, stating that a diner who was still eating could order two or three beers without the condition having been violated [RT 104].[5]

Our problem is, as we have indicated, either of the competing interpretations can reasonably be drawn from the language of the condition. Given that view, must the Board choose the interpretation offered by the Department simply because the facts of the case fit within that interpretation? We do not think so. Only if it is first assumed that the Department's interpretation is the correct one

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[5] *The ALJ thought this possibility raised an interesting issue, one he found not necessary to resolve, since the investigator did not buy any food at all. (Finding IV-E). While this may be true, Mimiaga's admission that the condition could be so interpreted is proof that the language of the condition can be read more than one way.*

can it be said that the facts of the case fit within it. It could just as easily be said that the facts of the case do not fit within the correct interpretation of the condition, if appellant's interpretation is assumed to be the correct one. Obviously, what must first be determined is what the rule means; whether the facts fit within the rule comes after. But we are prevented from doing that in this case because of the ambiguity in the language of the condition.

The only competent evidence as to the intended meaning of the condition was given by Emmet Murray, the original licensee. He testified that he had numerous discussions with the Department regarding the license prior to its issuance. He understood the condition to mean "[y]ou could only serve alcoholic beverages while the kitchen was open. You had to have food available when you were serving alcoholic beverages or when the business was open." [RT 71]. As to whether anyone told him he needed to sell food with every single sale of an alcoholic beverage, his response was "Absolutely not" [RT 72]. The Department decision, curiously, makes no reference to Murray's testimony. It would seem, given that he was the original licensee, and no longer has any stake in the matter, that his understanding of the meaning and intent of the condition should be entitled to considerable weight.

The Administrative Law Judge (ALJ) offered only a tautological solution: "The plain meaning language of condition #7 clearly requires the sale of alcoholic beverages to be accompanied by the sale of food." (Finding IV-C). But if, as we believe, the words used are ambiguous, they cannot be said to have a single plain meaning.

The problem for this Board is that it is left with nowhere to turn for an understanding of what was actually meant by the condition other than to when it

was first imposed on the license, since, presumably, that same intention would carry over with the transfer to appellant. If that was not what the Department intended, then it should have chosen its words more carefully. We are not permitted to rewrite the condition for the Department.

The Department's brief offers little assistance. Only one paragraph of the three-page brief is directed at this issue; it simply argues that appellant has not been charged with having violated Business and Professions Code §23038, the provision defining a bona fide public eating place, which specifically says that it shall not be construed to require that any food be sold with any purchase of an alcoholic beverage. That, of course, is true. Nonetheless, when a statute expressly applicable to the type of license involved in this case specifically disavows a particular requirement, a condition intended to require just the opposite should be clear and unambiguous. The condition in this case is not that.

Under these circumstances, we think the only fair solution is to reverse this aspect of the Department's decision. In Hawamdeh (1996) AB-6518, a condition was found to be defective because it was too ambiguous to be applied fairly. The condition in this case is equally ambiguous, and, therefore, equally defective.

ORDER

The decision of the Department is affirmed as to the violations relating to entertainment noise and the failure to meet the required ratio of food sales to alcoholic beverage sales, but is reversed as to the violation of condition 7, and the case is remanded to the Department for reconsideration of the penalty in light of this Order.[6]

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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.*

(continued...)

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

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[6] (...continued)

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.