ISSUED JULY 21, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

CHUY'S, INC. dba Chuy's 145 North Maryland Avenue Glendale, CA 91206, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7173 File: 47-251810 Reg: 97041907 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: June 3, 1999 Los Angeles, CA

Chuy's, Inc., doing business as Chuy's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its on-sale general public eating place license for 30 days for appellant having violated a condition on its license prohibiting entertainment to be audible beyond the area under appellant's control, and for having permitted its patrons to consume alcoholic beverages in an unlicensed area adjacent to appellant's premises, such actions being found contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §§23803, 23300, and 23355.

Appearances on appeal include appellant Chuy's, Inc., appearing through its counsel, Gregory D. Wolflick and Wilhelm I. Vargas, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

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

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on December 10, 1990. Thereafter, the Department instituted an accusation against appellant charging the condition violation and that involving consumption in an unlicensed area, and an administrative hearing was held on such charges on March 31, 1998. Testimony at the hearing established that music emanating from a mariachi band at the premises could be heard by a police officer, in a nearby intersection while still in her car, with a window open only a crack. In addition, patrons were observed drinking alcoholic beverages in an unlicensed walkway south of the licensed premises. Subsequent to the hearing, the Department issued its decision which determined that the two violations charged in the accusation had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the entertainment heard beyond the area under appellant's control was that provided by a mariachi band playing unamplified instruments, which was permitted appellant under a different license condition; (2) the penalty for permitting consumption in the unlicensed area is excessive; and (3) past violations should not be considered in determining the penalty when the present violations are not serious violations.

DISCUSSION

I

Appellant contests the finding of a condition violation, contending that the condition permitting appellant to provide a mariachi band playing unamplified instruments and the condition prohibiting entertainment audible beyond the area under

appellant's control must be interpreted in such manner that the latter does not limit the former.[2]

Appellant argues:

> "The conditions are inconsistent with each other since the open air patio is deemed to be under the control of the licensees but if the Mariachi band plays there, the sound is audible off of the patio area. In attempting to synthesize the conditions, according to Condition No. 3, Chuy's can have the Mariachi band play on the open air patio, but according to Condition No. 6, if the band can be heard immediately off the patio, then Chuy's is in violation of its license. Such a result could not have been intended by the Department."

Appellant adds that the Department was aware that a Mariachi band is festive and loud and that Chuy's had an open air patio, as well as the fact that businesses in the area were in close proximity to each other such that there would be some spill over in sound from one business to the next.

From the record, it appears that the band employed by appellant moved back and forth from the interior of the restaurant to the outdoor patio while entertaining on the day in question [RT 17, 19-20], and that in each case the music could be heard beyond the premises. Appellant concedes in its brief (App.Br., p.4), the music must necessarily drift beyond the area under appellant's control when the band plays on the outdoor patio. The testimony of Glendale police officer Misamuzquiz suggests that the band may have been playing inside the premises [see RT 15] when she first arrived and heard the music - "mostly I could hear the sound of the trumpet" - while still in her car.

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[2] *The two conditions which are involved in this appeal provide as follows:*

"3. With the exception of a mariachi band playing unamplified instruments, there shall be no live entertainment, amplified music or dancing permitted on the premises at any time.

"6. Entertainment provided shall not be audible beyond the area under the control of the licensees."

The dictionary definition of the word "mariachi" is "a group of itinerant Mexican folk musicians usually consisting of singers, guitarists, and a violist" and/or "the music performed or sung by a mariachi." (See Webster's Third New International Dictionary (Unabridged), p.1381). While trumpet and trombone players often are members of such a group, there is nothing in the dictionary definition nor in the record evidence in this case that suggests they must be.

It is clear that the Department was concerned about noise from the premises when it imposed the conditions on appellant's license. Except for a mariachi band, live entertainment was banned, as was amplified music, and the mariachi instruments could not be amplified.

Nothing would prohibit appellant's employment of a mariachi band, with or without a trumpet player, inside the premises, playing traditional Mexican folk music at levels below any which might escape the premises. Or, as the Administrative Law Judge (ALJ) put it (Determination of Issues I):

> "If the mariachi band cannot play so as not to be audible beyond the area under the (exclusive) control of [appellant], it may not play at all. That interpretation gives meaning to both condition 3 and condition 6, harmonizing the two."

Thus, there is no inherent and unavoidable conflict between the two conditions. Exercising proper controls, it may be possible for appellant to offer mariachi music without violating the condition regulating the travel of the sound generated. This would mean, of course, that the music must be confined to the interior of the premises. No more is required.

II

Appellant contends that the penalty for permitting consumption in an unlicensed area is excessive.

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, as here, 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].)

Appellant concedes that alcoholic beverages were being served and consumed in an unlicensed common walkway (App.Br., p.5; and see RT 45).

Appellant asserts the area was frequently used by it and by other tenants, and that neither the police nor appellant's owner knew alcoholic beverages were not to be sold or served in that area. Even if this is true, it does not overcome the fact that the license and the accompanying diagram of licensed premises clearly indicated that the licensed area did not include the patio area.

Appellant's complaint that a 30-day penalty is excessive has some merit. There appears to be no contention by the Department that appellant's confusion regarding the extent to which it could offer mariachi music or utilize the walkway adjacent to the patio was less than genuine.

On the other hand, appellant's argument that past violations should not be considered is unsupported by any persuasive or pertinent authority. Appellant cites a criminal proceeding, reported in the Los Angeles Times, where a criminal court judge declined to invoke the "three strikes" law in the case of a minor felony involving the theft of a slice of pizza.

The Department traditionally, and, we think, properly, considers the track record of the licensee in deciding upon what it believes is the appropriate level of discipline.

Here, the previous violations were recent in time and similar in nature, so could properly have been considered.

In conclusion, we are satisfied that there is a clear basis for imposition of some penalty. We think it also quite possible that both violations may have arisen as a result of appellant's good faith, albeit mistaken, understanding of what he was entitled to do under his license. Under such circumstances, a reconsideration of the penalty seems appropriate.

ORDER

The decision of the Department is affirmed with respect to its findings of violations, and remanded to the Department for reconsideration of the penalty in accordance with the views expressed herein.[3]

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

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[3] *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.