ISSUED NOVEMBER 3, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

HOULIHAN'S OF CALIFORNIA, INC. dba Houlihan's Old Place 21420 Hawthorne Boulevard Torrance, CA 90503, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7175 File: 47-84948 Reg: 97041639 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: September 2, 1999 Los Angeles, CA

Houlihan's of California, Inc., doing business as Houlihan's Old Place (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, with 15 days thereof conditionally stayed for one year, for its having violated a condition imposed on the license (by permitting live entertainment in the premises), 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.

Appearances on appeal include appellant Houlihan's of California, Inc., appearing through its counsel, John A. Hinman and Richard D. Warren, and the

[1]The decision of the Department, dated June 18, 1998, is set forth in the appendix.

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 March 12, 1991. Thereafter, the Department instituted an accusation against appellant charging that, in violation of a condition on its license which prohibited live entertainment on the premises at any time, appellant provided live entertainment consisting of a disc jockey and audience participation contests.

An administrative hearing was held on March 6, 1998, at which time oral and documentary evidence was received. The evidence established that, under the guidance of a disc jockey, patrons were selected to participate in several humor-laden, somewhat risque, contests, while other patrons watched. The contests consisted of a “potato race,” in which female patrons competed to first manipulate a potato up a male patron’s pants leg and down the other pants leg; a banana eating contest; and a contest in which female patrons, each concealed from the neck down by a sheet, competed in simulating an orgasm. While these activities occurred, the patrons who formed the audience cheered and encouraged the participants. The contests lasted about 15 minutes, and were part of a promotion being conducted at the premises by a local radio station. The disc jockey and the persons handing out fliers promoting the station were employees of the radio station.

The Department concluded that this activity constituted live entertainment, in

violation of a condition on the license.[2]

While acknowledging that it had no guidelines as to what constitutes "live entertainment," and that a person of ordinary intelligence is entitled to a reasonable opportunity to know what is prohibited, the Department explained why it believes appellant must, nevertheless, be deemed to have violated the condition:

> "The meaning of the word 'entertainment' cannot be answered in a vacuum. In any society, terms and meaning are given definition by custom, culture and life experience. For example, would anyone deny that television shows involving audience participation are entertainment. It is hardly debatable that the contests at the licensed establishment were of the same genre. They may differ in form from the classical definition of a live play or live concert, but in substance it is still a form of entertainment and universally accepted as such by a person of ordinary intelligence.
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> "The term is not an abstraction, but is given defining substance and objective definition by its frequent use with reference to the media, movies, television and other ways in our society. Individuals of ordinary intelligence are sophisticated and do indeed have a notion as to what constitutes entertainment, and within the realm of differing opinions and tastes, we all share that view to a greater or lesser extent.
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> "While there are boundaries as to the ordinary definition of the term, the Respondent [appellant] should be deemed to be a party of ordinary intelligence, and should have reasonably known without shock or surprise that the contests were 'entertainment', and were therefore prohibited under its license. In summary, 'entertainment' is not an exotic term which is beyond the grasp of the average person of ordinary intelligence as to what the term means. It is a sufficiently explicit standard within the context of cultural values to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited conduct under the condition, so he can act accordingly."

Appellant has filed a timely appeal, and raises two issues: (1) The Department's definition of "live entertainment" is impermissibly vague and arbitrary; and (2) because there is no reasonable nexus between the condition and any problem the condition was

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[2] *The condition provides: "There shall be no live entertainment permitted on the premises at any time."*

intended to eliminate, the Department lacks the authority to enforce it.[3]

DISCUSSION

I

Appellant contends the condition is too vague to be enforced. It argues that, because the Torrance police asked to be advised of future promotional events, the Department's decision means a licensee must act with caution if he thinks the police or a Department investigator might find the activity prohibited.

To the ALJ, the issue was whether the Department's evidence was sufficient to constitute "by an objective standard" a violation of the condition [RT 23].

Appellant places a great deal of reliance upon an earlier decision of the Department[4] in which appellant had been accused of violating the same condition by permitting a disc jockey who, in addition to playing records and announcing the songs, also encouraged customers to dance, announced customers' birthdays and other special events, and announced when the buffet was open and encouraged customers to eat. The condition was deemed to be ambiguous when applied to the facts of that case, in that the activities in question could be considered announcements, as the administrative law judge considered them, or entertainment, as Department counsel apparently contended. Guided by contract law principles, and concluding that it was the Department which was responsible for the ambiguity, the decision concluded that

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[3] *Appellant's brief contains a number of contentions that do not fit neatly within appellant's major contentions (which may explain the order in which they appear in the brief). These will be addressed in the course of our discussion of appellant's main points, to the extent they appear pertinent.*

[4] *In the Matter of Houlihan's of California (Registration No. 97039651) (November 20, 1997)*

any uncertainty with regard to the condition's application must be resolved against the Department.

The distinction between that case and this is suggested in the recognition in the prior case that "a fine line separates the disc jockey's actions from being either entertainment or announcements" (Determination of Issues IV-B).

The line in this case is much broader. By all accounts, the activities in question were conducted to amuse and entertain patrons who made up the receptive and enthusiastic audience, which, without serious question, was entertained [see RT 12]. The condition, as applied to these facts, is not at all ambiguous. The potato race, banana eating, and orgasm contests in no way resembled announcements such as were involved in the earlier Houlihan's matter.[5]

Appellant's argument that it was improperly prevented from exploring Torrance police officer Anderson's opinion of why the contests violated the condition is unpersuasive. The police were no more than reporters of the facts; it was the Department which determined that the condition was violated, and it is the reasoning of the Department that is relevant to this appeal.

We have no trouble understanding the phrase "live entertainment." The adjective "live" undoubtedly is meant to mean something that involves living persons, and not taped or filmed performances. A stage play is a live performance; cinema is not. An opera is a live performance; a juke box is not. The noun "entertainment"

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[5] *Nor do we think they are comparable to the issues in Bill Baxter (1990) AB-5836, where the issue was the extent to which a proscription against live entertainment might apply to as-yet unspecified activities which might include matters clearly entitled to First Amendment protection. We do not find that case helpful. Nor do we think the views expressed in Mangold (1995) AB-6492, apply to the relatively unique facts of the present case. The entertainment in Mangold (lingerie modeling during the luncheon hour) had commercial as well as entertainment aspects.*

encompasses all these activities and more. Indeed, the term is broad enough to capture any activity which might have the capacity to "divert, amuse, or occupy someone's time agreeably or cause it to pass in such manner."[6] The activities in this case clearly were encompassed by the term "live entertainment."

Appellant also alleges that Torrance police requested that Houlihan's get prior approval of any future promotions or activities that might be prohibited by the entertainment condition, arguing that this magnifies its difficulties in knowing what is permitted and what is not. However, two of the three transcript references to which appellant points, both consisting of the recollection of appellant's general manager, James Kong, indicate rather plainly that the concern of the police officer was the possible overcrowding of the premises [RT 58, 64], rather than the content of the event. The testimony of officer Anderson also demonstrates that the police concern had more to do with overcrowding than a condition violation [RT 11].

It is not difficult to understand why police might be concerned about an activity that might attract large crowds in excess of the premises' ability to safely accommodate them. Any views the police may have had as to whether the license condition was violated seem to have been only incidental to their principal concern regarding overcrowding. Experience has taught, sometimes in bitter fashion, that a fire or structure collapse, accompanied by overcrowding, in a nightclub or restaurant, can result in the tragic loss of human life, and that overcrowding can seriously aggravate an emergency situation. For these reasons, we entertain considerable doubt that the Torrance police were engaged in any attempt at prior censorship of appellant's

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[6] *See Webster's Third New International Dictionary (Unabridged) at page 757 (excerpt attached).*

activities; instead, it would appear that they had legitimate reasons for requesting advance notice of promotions likely to be as popular as the one then in progress.[7]

II

Appellant also contends that the Department lacks authority to enforce the condition. It argues there is no reasonable nexus between the condition and any problem the condition was intended to eliminate.

The time has long passed for a challenge to the condition itself. The time for challenging the condition was at the time the Department made the decision that issuance of the license would be conditional, the live entertainment condition being one of the conditions to be imposed.

Had the issue been raised timely, a record might have been developed as to why the condition was deemed necessary, even though, as appellant contends, there were no nearby residences, and noise was no problem.

For example, there may have been a law enforcement concern associated with potential overcrowding of the premises during events which involved live entertainment.

Indeed, overcrowding was a matter of concern to the Torrance police in connection with the very events presently in issue on this appeal. (See text, supra, at pages 7-8).

For these reasons, we deem appellant's challenge to the condition in question

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[7] *Indeed, it appears that the concern of the police with respect to the earlier proceeding involving appellant, the matter ultimately dismissed by the Department, was overcrowding in that case as well [see RT75].*

We acknowledge that detective Anderson believed the contests to be violative of the condition. However, as the ALJ recognized, his views are not controlling.

untimely.

ORDER

The decision of the Department is affirmed.[8]

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

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[8] 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.