

ISSUED JUNE 24, 1996

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

ASITH FINENDRA CHANDRASENA,	)	AB-6572
SHYAMA CHANDRASENA, and)	
LILIANI RAJAPAKSE	)	File: 47-291017
dba Fandango's	)	Reg: 95031779
35-756 Date Palm Drive, #B)	
Cathedral City, CA 92234	)	Administrative Law Judge
Licensees/Appellants,	)	at the Dept. Hearing:
	)	Greer D. Knopf
v.)	
	)	Date and Place of the
DEPARTMENT OF ALCOHOLIC	)	Appeals Board Hearing:
BEVERAGE CONTROL,	)	May 1, 1996
Respondent.	)	Los Angeles, CA
_____)		

Asith Chandrasena, Shyama Chandrasena, and Liliani Rajapakse, doing business as Fandango's (appellants), appealed from a decision of the Department of Alcoholic Beverage Control¹ which suspended their on-sale general public eating place license for 30 days with 15 days stayed for a violation of a condition on their license which mandated certain percentages of alcoholic beverage sales to food sales, under authority of Business and Professions Code §23804.

Appearances on appeal included appellants Asith Chandrasena, Shyama Chandrasena, and Liliani Rajapakse, appearing through their counsel, Stephen H.

¹The decision of the department dated September 7, 1995, appears in the appendix.

Leventhal; and the Department of Alcoholic Beverage Control, appearing through its counsel, John P. McCarthy.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public eating place license was issued February 8, 1994. Thereafter, the department instituted an accusation on November 30, 1994, alleging appellants' quarterly gross sales of alcoholic beverages exceeded the gross sales of food in violation of their license conditions.

An administrative hearing was held on June 20, 1995, at which time oral and documentary evidence was received. At that hearing, it was determined that appellants' quarterly gross sales of alcoholic beverages exceeded the gross sales of food in violation of the license conditions. Appellants testified that they had difficulty retaining chefs, opened the restaurant before they were ready to serve a full-course menu, and had tried to conform to the license condition with due diligence.

Subsequent to the hearing, the department issued its decision, which suspended appellants' license for 30 days, with 15 days stayed.

In their appeal, appellants raised the following issues: (1) the findings were not supported by substantial evidence; and (2) the penalty was excessive.

DISCUSSION

I

Appellants contended that the findings were not supported by substantial evidence.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion (Universal Camera Corporation v.

National Labor Relations Board (1950) 340 US 474, 477, 95 L.Ed. 456, 71 S.Ct. 456, and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871, 269 Cal.Rptr. 647).

When, as in the present matter, the findings are attacked on the ground that there is a lack of substantial evidence, the appeals board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874, 197 Cal.Rptr. 925).

Appellate review does not "...resolve conflict[s] in the evidence, or between inferences reasonably deducible from the evidence..." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678, 13 Cal.Rptr. 658). Therefore, the scope of the appeals board's review is limited by the California Constitution, by statute, and by case law. In reviewing a department's decision, the appeals board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the department are supported by substantial evidence in light of the whole record, and whether the department's decision is supported by the findings.²

It is the department, and not the appeals board, which is authorized by the California Constitution to exercise its discretion whether to suspend or revoke an

²See the California Constitution, Article XX, Section 22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85, 84 Cal.Rptr. 113.

alcoholic beverage license, if the department shall reasonably determine for "good cause" that the continuance of such license would be contrary to public welfare or morals.

Appellants argued that they intended to operate as a restaurant and nightclub in accordance with the conditional license; that they were under financial pressures and opened the restaurant before being fully operational; that chefs quit on a weekly basis; and that there was an apparent misunderstanding about the requirements for transfer of this license to a type-48 license.

At the administrative hearing, Dana Saladen, an investigator for the department, testified that he had reviewed the records of appellants' sales and talked with co-appellant Asith Chandrasena, who acknowledged that the premises was selling less food than alcoholic beverages [R.T. 15-16]. At the hearing, Asith authenticated the sales summary of the restaurant (exhibit A), which showed sales of alcoholic beverages in excess of food sales [R.T. 54]. The investigator, using appellants' records, calculated gross food sales at approximately 5% of alcoholic beverage sales [R.T. 19]. Asith acknowledged to the investigator that the restaurant was open from 8 p.m. to 2 a.m. [R.T. 24-25].

We determine that the crucial findings were supported by substantial evidence.

II

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 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).

The department had the following factors to consider: (1) appellants apparently have not conformed to the condition during the time they were licensed; (2) the premises has opened for dinner as late as 8 p.m.; (3) in May 1994, appellants sold no food at all; (4) food sales during the first five months of 1995 substantially improved, but the figures for food sales were sustained by a cover charge which was categorized as food sales, as appellants provided a free buffet; and (5) the operation appeared to be more a nightclub operation than a restaurant.

Considering such factors, the dilemma as to the appropriateness of the penalty must be left to the department's discretion. The department having exercised its discretion reasonably, the appeals board will not disturb the penalty.

CONCLUSION

The decision of the department is affirmed.³

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

³This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.