

ISSUED DECEMBER 18, 1996

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

KDM ENTERTAINMENT, INC.	)	AB-6606
dba Kokomo's)	
17927 MacArthur Boulevard	)	File: 47-185953
Irvine, CA 92714,	)	Reg: 94029820
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Humberto Flores
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	August 7, 1996
	)	Los Angeles, CA
)	

KDM Entertainment, Inc., doing business as Kokomo's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended appellant's conditional On-Sale General Public Eating Place license for 35 days, with 10 days stayed for a probationary period of 2 years, and imposed various additional conditions, for appellant's employees and agents violating a condition on the license relating to the availability of meals and for not complying with the statutory requirements for a public eating place, being 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 §§23804 and 23038.

¹The decision of the Department dated November 9, 1995, is set forth in the appendix.

Appearances on appeal include appellant KDM Entertainment, Inc., appearing through its counsel, Rick A. Blake; 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 August 21, 1986, with several conditions attached. Thereafter, the Department instituted an accusation on April 4, 1994, alleging violations of license conditions and the statutory requirements for public eating places.

An administrative hearing was held on March 28 and August 8 and 9, 1995, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the availability of food service on the dates that investigators had gone to the premises. The Proposed Decision of the Administrative Law Judge (ALJ) determined that there had been a failure to make a real offering of meals, that meals were offered without actual sales, that adequate staff had not been employed to cook and serve meals, that meals appropriate for the dinner hour were not offered, and that investigators were unable to obtain meals on June 24, July 13, and July 15, 1993.

Subsequent to the hearing, the Department issued its decision which found that violations had occurred sufficient to warrant revocation or suspension of the license and ordered that the license be suspended for 35 days, with 10 days stayed for a probationary period of 2 years, and that additional conditions be imposed. Appellant thereafter filed a timely notice of appeal.

In its appeal, appellant raises the following issues: (1) the decision was not supported by the evidence, (2) the penalty imposed was excessive, and (3) the penalty conditions imposed were ambiguous.

DISCUSSION

I

Appellant contends 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]; Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When, as in the instant 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].)

Where there are conflicts in the evidence, the Appeals Board is bound to resolve conflicts of evidence in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857]--a case where there was substantial evidence supporting the Department's as well as the license-applicant's position; Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control

(1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Appellant has raised questions about the proper interpretation of or inferences to be drawn from evidence presented and evidence not presented. It contends that the investigation was not adequate: that, for instance, the investigators did not actually order a meal and did not stay long in the premises. However, the evidence seems overwhelming and basically uncontradicted that meals were not being served during the dinner hour and that there was not adequate or appropriate staff there to prepare them [RT(3/28) 17-25, 40, 45-52; RT(8/8) 13, 26-29, 34-35]. We also note that appellant failed to produce any evidence to contradict the evidence presented, such as proof that a cook was employed or that food was purchased by patrons of the establishment.

This contention is rejected as without merit.

II

Appellant argues that, even if the violations did occur as alleged, the penalty imposed was 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 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 argues that this penalty is excessive by the Department's own

standards. The Department's Instructions, Interpretations, and Procedures Manual suggests a penalty for not operating as a bona fide eating place of "10 days plus indefinite suspension until compliance" (L228). However, while the Department's guidelines may be some evidence of what the Department might ordinarily impose for certain types of violations, they are not binding on the Department. Each case is properly considered on its own facts with regard to both the determination and the penalty. While this penalty may seem rather onerous to some, the range of the Department's discretion is wide, and does not appear to have been exceeded in this case. Without more, the mere failure of the Department to adhere to its own internal guidelines cannot be said to be an abuse of its discretion.

Appellant also argues that the Department ignored the findings in mitigation and instead aggravated the penalty. The ALJ found some mitigation in the fact that the area did not provide sufficient clientele during the evening hours to support a dinner business. The ALJ also noted that no evidence was presented of prior disciplinary actions against appellant and that the premises now offers a full lunch and dinner service, although he made no specific finding that these circumstances were mitigating.

The finding in mitigation does not negate the findings that the violations were clear and repetitive and that appellant was essentially operating as a bar that admitted minors under the guise of an eating establishment. This latter factor, especially, clearly poses a threat to the public welfare and morals that the Department is mandated to protect. Given the factors the Department was in a position to consider, we are unable to say that the penalty imposed was excessive.

III.

Appellant argues that the additional conditions imposed in the Department's Order are so ambiguous that they are unreasonable.

The authority of the Department to impose "reasonable conditions" on a license is set forth in Business and Professions Code §23800. Where the Department has made findings that justify the imposition of discipline, it may impose conditions on the license "where the imposition of a condition is reasonably related to those findings." (Bus. & Prof. Code §23800, subd. (b).) Section 23801 states that the conditions "...may cover any matter...which will protect the public welfare and morals...." We therefore view "reasonable conditions" as used in §23800 to mean that the conditions imposed must be reasonably designed to remedy the problem which warranted the imposition of discipline.

The additional conditions that the Department's Order imposed on the license are as follows:

"a. At all times during normal meal hours as defined in condition number 9 of its conditional license, respondent must be prepared to serve the food listed in its menu.

"b. Respondent must furnish the premises with tables and chairs at which food may be comfortably consumed and with all utensils, cutlery, condiments, and napkins with which an eating establishment is customarily equipped.

"c. Respondent must inform customers and the general public that the primary business of the establishment is the sale of food, which shall include but not be limited to, asking each customer if he or she wants a menu to order food, and posting signs on the premises which advertise the food service."

Appellant argues that the conditions are overly specific. Perhaps they are.

However, they are clearly designed to address the violation and to correct it. They

appear to offer enough latitude, if interpreted and applied reasonably, to allow appellant to structure its food service as it wishes, but always within the parameters of the license requirements. Appellants are entitled to no more.

CONCLUSION

The decision of the Department is affirmed.²

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

²This 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.