

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

|                                 |   |                          |
|---------------------------------|---|--------------------------|
| M.O.D.A., INC.                  | ) | AB-6656                  |
| dba Harley's Coffee & Bean Cafe | ) |                          |
| 166 North Palm Canyon Drive     | ) | File: 41-281905          |
| Palm Springs, CA 92262,         | ) | Reg: 95034297            |
| Appellant/Licensee,             | ) |                          |
|                                 | ) | Administrative Law Judge |
| v.                              | ) | at the Dept. Hearing:    |
|                                 | ) | Rodolfo Echeverria       |
| DEPARTMENT OF ALCOHOLIC         | ) |                          |
| BEVERAGE CONTROL,               | ) | Date and Place of the    |
| Respondent.                     | ) | Appeals Board Hearing:   |
|                                 | ) | November 6, 1996         |
|                                 | ) | Los Angeles, CA          |
|                                 | ) |                          |

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M.O.D.A, Inc., doing business as Harley's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended its on-sale beer and wine public eating place license for 30 days and indefinitely thereafter until appellant complies with the Department's demands for its business records, for (1) permitting the sale of beer for consumption in a patio area not covered by the license, a violation of Business and Professions Code §§23300 and 23355; (2) increasing the area of the licensed premises without notifying the Department or asking for its approval of the change, a violation of Title 4, §64.2, California Code of Regulations (Department Rule 64.2); and (3) violating one of the conditions on the license by failing to maintain

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<sup>1</sup>The decision of the Department dated March 28, 1996, is set forth in the appendix.

alcoholic beverage sales and food sales records for the period of September 1994 to February 1995 at the premises and by failing to make the records available for inspection as requested by the Department, a violation of Business and Professions Code §23804.

Appearances on appeal include appellant M.O.D.A., Inc., appearing through its counsel, Giulio Massi; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

#### FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on March 22, 1993. Thereafter, the Department instituted an accusation against appellant on November 7, 1995, and appellant requested a hearing. An administrative hearing was held on February 21, 1996, at which time oral and documentary evidence was received. Although a notice of hearing was mailed to appellant at its address of record on January 10, 1996, neither appellant nor a representative appeared, and the matter proceeded as a default, pursuant to Government Code §11520.

At that hearing, it was determined that appellant had (1) permitted the sale of beer in a patio area which was not covered by the license; (2) increased the area of the licensed premises by adding a patio area outside the premises and adjacent to the premises' entrance without notifying the Department of the change and requesting its approval; and (3) violated one of the conditions on the license by failing to maintain alcoholic beverage sales and food sales records for the period of September 1994 to February 1995 at the premises, and by failing to make the records available for inspection as requested by the Department.

Subsequent to the hearing, the Department issued its decision which suspended appellant's license for 30 days and indefinitely thereafter until appellant complied with the Department's demand that it produce the records requested. Appellant filed a timely appeal.

In its appeal, appellant raises the following issues: (1) it was not given notice of the date of the hearing, and was, as a result, deprived of due process when the hearing went forward in its absence; (2) the penalty was excessive for the kind of violation alleged and where the licensee has had no prior disciplinary proceedings.

#### DISCUSSION

##### I

Appellant contends that it was not given notice of the date of the hearing, as a consequence of which it was deprived of due process when the hearing went forward in its absence.

The record shows that a formal notice of hearing was mailed to appellant at the address shown on appellant's license (which is the same address reflected on the Notice of Defense filed by appellant in response to the accusation. The Administrative Law Judge so found (Finding of Fact II.) Appellant had previously received mailings from the Department directed to the same address as that on the Notice of Hearing.

Appellant's claim that it never received notice of the hearing date is open to question. A declaration under penalty of perjury was submitted to the Board asserting the lack of any notice of the date of the hearing. On the other hand, the file also indicates that appellant's counsel had, on August 7, 1996, telephonically advised the Board of appellant's intention to withdraw its appeal and seek a settlement with the

Department. A letter from appellant's counsel to the Department, dated August 16, 1996, is to the same effect. No reference is made to any failure to receive notice of the hearing. The Administrative Law Judge found that proper notice of hearing, correctly addressed, was supplied to appellant. We are not convinced otherwise by appellant's declaration, particularly in the absence of any suggestion in prior correspondence with the Board that appellant claimed not to have been notified of the hearing date.

## II

Appellant contends that the penalty, a 30-day suspension and thereafter until the records demanded by the Department have been produced, is excessive in light of the nature of the violations and the fact that appellant had no prior disciplinary record. Appellant has not specifically challenged any of the ALJ's findings and determinations other than with respect to notice and penalty.

The Department contends that the penalty is not excessive in light of the lengthy period between the date the records were demanded and the date of the hearing, when they still had not been produced.<sup>2</sup>

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

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<sup>2</sup> The record does not indicate whether such documents ever were presented to the Department.

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) there was clear evidence that appellant had engaged in the sale of alcoholic beverages in areas beyond those specified in the license; (2) there was also clear evidence that appellant had enlarged its premises without the Department's authorization; and (3) appellant was extremely derelict in responding to the Department's demand for business records, and had violated a condition of the license through its failure to maintain such records. Considering such factors, the appropriateness of the penalty must be left to the discretion of the Department. There is no indication here of any abuse of discretion. While a 30-day suspension may seem harsh, it might be particularly appropriate for appellant's tardiness in complying with the Department's lawful demands. The Department having exercised its discretion reasonably, the Appeals Board will not disturb the penalty.

#### CONCLUSION

The decision of the Department is affirmed.<sup>3</sup>

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

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<sup>3</sup>This 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.