ISSUED MARCH 21, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

KOO & HONG ENTERTAINMENT, INC. dba Saga 625 South Serrano Avenue Los Angeles, CA 90005, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6670 File: 47-289651 Reg: 95033162 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: January 8, 1997 Los Angeles, CA

Koo & Hong Entertainment, Inc., doing business as Saga (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked appellant's license, but stayed such revocation for a probationary period of two years, subject to an actual 10-day suspension and an indefinite suspension thereafter pending proof of satisfactory compliance with the provisions of Business and Professions Code

[1] The decision of the Department, made under Government Code §11517, subdivision (c), and dated May 3, 1996, is set forth in the appendix.

§23038 and with certain conditions to be imposed upon the license, for having failed to operate as a bona fide public eating place, contrary to the universal and generic public welfare provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §23038.

Appearances on appeal include appellant Koo & Hong Entertainment, Inc., appearing through its counsel, Rick A. Blake; and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on January 19, 1994. Thereafter, the Department instituted an accusation on June 26, 1995, alleging that since December 10, 1994, appellant had failed to operate as a bona fide public eating place, and alleging that appellant had unlawfully failed to permit inspection of its records by the Department. Appellant requested a hearing.

An administrative hearing was held on October 25, 1995, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the matters alleged in the accusation. Subsequent to the hearing, the Administrative Law Judge issued a proposed decision to the effect that cause for suspension had not been established as to either Count 1 (alleging failure to operate as bona fide public eating place) or Count 2 (failure to produce books and records) of the accusation. Thereafter, the Department issued its decision pursuant to Government

Code §11517, subdivision (c), which determined that grounds for discipline existed by reason of violations of Business and Professions Code §23038, for appellant's having operated as a nightclub, not as a bona fide public eating place. Appellant filed a timely notice of appeal.

In its appeal, appellant raises the following issues: (1) service of meals in a bona fide manner during the lunch hour satisfies the requirements of Business and Professions Code §23038; and (2) the conditions imposed by the Department make no sense in light of the evidence and findings.

DISCUSSION

I

Appellant contends that by operating as a bona fide public eating place during the normal lunch hour, it satisfied the requirements of Business and Professions Code §23038, particularly where the business was not regularly open during the evening meal hours due to a lack of business.

The Department determined that the premises were being operated as a nightclub, with no food other than appetizers being offered to patrons. It based its determination on the testimony of Department investigators who visited the premises during normal dinner meal hours and found it closed, while visits later in the evening found it open and operating as a nightclub, with only a limited assortment of appetizers on the menu. Visits by the investigators during the lunch hour found the premises

serving a variety of hot and cold dishes indicative of a normal restaurant menu.

Appellant argues that since §23038 does not mandate any particular hours of operation, "a full operation during the normal meal hours to patrons for compensation" complies with the statute "particularly when it is not open either for breakfast nor for dinner" (App.Br., p.4). Appellant cites the Department's procedures manual as supportive of its position.

Business and Professions Code §23038 defines a bona fide public eating place as one which is "regularly and in a bona fide manner used and kept open" for the "serving of meals" (defined as "the usual assortment of foods commonly ordered at various hours of the day," specifically excluding sandwiches and salads), to "guests" (defined as persons who, during the hours when meals are regularly served therein, come to order, and obtain, a meal therein). It would follow from this language that the selling and serving of alcohol in a bona fide public eating place is incidental to its being kept open for the service of meals to guests.

We are guided by the California Supreme Court's decision in Covert v. State Board of Equalization (1946) 29 Cal.2d 125 [173 P.2d 145], addressing §23038. The Court there stated:

> "The existence of bona fides is not to be determined merely from the expressed intent of the licensee but ... must be ascertained objectively on the basis of all the physical characteristics and the actual mode of operation of the business. ...
> ...
> It is true, of course, that a restaurant would not be bona fide if it were created or operated as a mere subterfuge in order to obtain the right to sell

> liquor. There must not only be equipment, supplies and personnel appropriate to a restaurant, together with a real or holding out to sell food whenever the premises are open for business, but there also must be actual and substantial sales of food."

(Covert, supra, 173 P.2d at 549-550.)

The Department investigators who visited the premises on two occasions described appellant's business operation as a night club. Conventional meals were not available; instead, there was loud music, dimly-lit lights, and people dancing.

Appellant's argument, viewed in light of the evidence, is that a bona fide public eating place licensee may, upon concluding that there is an insufficient amount of dinner patronage to warrant opening for business for the evening meal, remain closed until the later evening hours and then open and, without serving meals, operate as a nightclub. Appellant offers no standards which would govern such a determination, leaving the decision to the licensee's sole discretion. To state the proposition is to expose its weakness.

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing a Department 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. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[2]

We cannot say that the Department has abused its discretion in its determination that appellant was operating its premises as a nightclub rather than a bona fide public eating place. There is substantial evidence in the record which supports that determination: the loud music, dimly-lit lights, people dancing, minimum drink orders, non-availability of hot meals, hours of operation, all collectively support the Department's decision. If there were any doubt as to this, it is dispelled by appellant's concession (App.Br., p.6) that:

> "Yes, the premises was, as the Department states, operating as a nightclub after 9:00 p.m. on certain nights, but that was after it complied with §23038 during the daytime and after the normal mealtime hours, and at a time when there was still some business in the nightclub portion of that business."

There would appear to be little doubt that what the licensee has attempted is to operate a mid-day luncheon business, depending upon the office workers in the area

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[2]The California Constitution, article XX, § 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].

during the day, and a nightclub business in the evening when a different patronage base exists, but without the need for a kitchen staff. Although the Department made no express finding, it is apparent that it rejected the explanation of appellant that it was closed during the dinner hour because of lack of patronage.

The Department's objective is to correlate the licensee's exercise of the privilege of selling alcoholic beverages with its service of meals, and thus ensuring that the licensee's operation is consistent with the statutory obligations imposed on its class of license. In other words, the Department is attempting to prevent the licensee from operating as a nightclub. Instead, it expects appellant, when it is open for business, to operate as a restaurant, and have personnel, tables and food available to be served to customers. That expectation does not seem unreasonable. This is not to say that the approach the Department took to resolve the problem was itself entirely reasonable.

II

Appellant contends that the conditions imposed by the Department do not make sense and are unreasonable, offering several arguments in support of its position.

Citing the condition in subdivision 5 of part A of the Department's order, appellant asserts that had such condition been in force during December 1994, it would not have been in violation of it, simply because it was not open during the dinner hour at that time, and, therefore, not exercising the privilege of its license. Condition 5 states:

> "5. At all times during normal meal hours, during which the licensee is exercising the privileges of the applied-for license, said licensee shall offer meals consistent with what is customarily offered during said meal period. Normal meals are considered to be at least, but not limited to: Breakfast, 6:00 a.m. to 9:00 A.M., Lunch 11:00 a.m. to 2:00 p.m., and Dinner 6:00 p.m. to 9:00 p.m.

The Department views its objective to be the correlation of the service of meals with the sale of liquor. Given our view that this is a reasonable objective, we think the requirement in the first sentence of condition 5 is a proper means of pursuing it.

Appellant contends that the requirement under Paragraph B, item 2 of the order, that appellant open for business no later than 6:00 p.m., when coupled with the condition set forth in Paragraph A, item 5, to the extent it can be read to require that meals must be served during the time periods defined by the Department, is unreasonable, in that it requires appellant to open for business at a time when there may be no patronage.

As we observed earlier in this opinion, we view the language of §23038 to mean that the serving of alcoholic beverages is incidental to the service of meals. The section does not attempt to define what normal meal hours are for every restaurant, and we are not prepared to accept the notion that the Department can do so. If appellant elects to open later than other restaurants, and expects to serve alcoholic beverages, it may do so, but when it does, it must also be able to offer meals, if it is to

operate lawfully under a public eating place license.[3] That it has not done so here is, we think, established by the evidence. Nonetheless, we do not believe the solution is to dictate when appellant must open for business. It is enough to say that when appellant expects to sell and serve alcoholic beverages, it must also be able to provide meals consisting of "the usual assortment of foods commonly ordered at various hours of the day."[4]

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[3] It is commonplace for restaurants to close their kitchens in advance of the closure of the restaurant, and to continue to serve alcoholic beverages during the interim. We do not believe that this practice contravenes §23038, so long as it is not merely a subterfuge to enjoy the benefits of a public eating place license without the obligations thereof.

[4] The authority of the Department to impose conditions on the license in this case is set forth in Business and Professions Code §23800, subdivision (b). The test of reasonableness as set forth in §23800(b) is that "where findings are made by the department which would justify a suspension or revocation of a license, and where the imposition of a condition is reasonably related to those findings." Section 23801 states that the conditions "...may cover any matter...which will protect the public welfare and morals...."

We therefore view the word "reasonable" as set forth in §23800 to mean reasonably related to resolution of the problem for which the condition was designed. Thus, there must be a nexus, defined as a "connection, tie, link," in other words, a reasonable connection between the problem sought to be eliminated, and the condition designed to eliminate the problem.

The problem, as seen by the Department, is the operation of a nightclub in the guise of a restaurant. We cannot say that the conditions it seeks to impose, except for the two as to which we have expressed our disapproval, are unreasonable in light of that perception, one this Board believes is justified by the facts of record.

Appellant contends that the 10-day suspension is unreasonable, arguing that it was in fact serving meals when it was open during meal hours (lunch) and closed during the dinner hours for lack of patronage. However, given our acceptance of the Department's determination that the premises were being operated as a nightclub, and not a bona fide public eating place, we do not find this to be unreasonable. 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].) We do not find such abuse.

CONCLUSION

To the extent the conditions sought to be imposed in the second sentence of paragraph A, item 5, and in paragraph B, item 2, mandate specific hours of operation of appellant's business, they are reversed. In all other respects the decision of the Department is affirmed.[5]

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

[5] This final order is filed as provided in 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.