ISSUED JUNE 23, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

OLÉ MADRID CAFE SAN DIEGO, INC. dba Olé Madrid 751-755 Fifth Avenue San Diego, CA 92101, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6702 File: 47-300288 Reg.: 95034743 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: April 2, 1997 Los Angeles, CA

Olé Madrid Cafe San Diego, Inc., doing business as Olé Madrid (appellant), appeals from a decision[1] of the Department of Alcoholic Beverage Control which ordered its license suspended for 20 days, with 15 days thereof stayed, subject to a one-year probationary period, for having violated conditions of its license relating to crowd control and lighting, and for having sold an alcoholic beverage to a minor, 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

[1] The decision of the Department, dated July 18, 1996, is set forth in the appendix.

Professions Code §§23804 and 25658, subdivision (a).

Appearances on appeal include appellant Olé Madrid Cafe San Diego, Inc., appearing through its counsel, William A. Adams and John B. Barriage; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued December 6, 1994. Thereafter, the Department instituted an accusation alleging that, on August 20, 1995, appellant violated conditions on its license (conditions A and H) by permitting patrons to enter the premises and remain in such numbers as to prohibit reasonable passage in public areas and safe ingress and egress (condition A); by providing insufficient lighting to permit the discerning of the appearance and conduct of persons in the area where alcoholic beverages are sold and served (condition H), in violation of Business and Professions Code §23804; and, on September 12, 1995, selling an alcoholic beverage (beer) to a minor decoy, in violation of Business and Professions Code §25658, subdivision (a).

An administrative hearing was held on May 28, 1996, at which time oral and documentary evidence was presented concerning the matters alleged in the

accusation.[2] Subsequent to the hearing, the Administrative Law Judge (ALJ) issued a proposed decision sustaining the charges of the accusation. Appellant thereafter filed a timely notice of appeal.

In its appeal, appellant challenges only that portion of the decision relating to the findings and determination that appellant violated condition A of its license, and the penalty to the extent it is based on the determination that condition A was violated, contending that the facts do not support such a finding and that no violation occurred.

DISCUSSION

I

Appellant's appeal is directed at that part of the decision finding a violation of condition A, and the penalty to the extent it was based on that violation. Appellant has not appealed those portions of the decision finding a violation of condition H and the sale of an alcoholic beverage to a minor decoy.

Appellant contends that the ALJ's finding of a violation of condition A is not supported by the facts, and that no actual violation occurred.

Condition A provides as follows:

> "A. Petitioner shall employ persons, who shall be distinguished by appropriate uniform or company attire so as to be easily identifiable as

[2] Virtually all of the evidence was presented by way of stipulation, undoubtedly saving a great deal of time and energy for all concerned, for which we commend counsel.

> security persons, at a ratio of one for each fifty persons, from 10:00 P.M. until one-half hour after closing, whose specific duties shall be to patrol the interior of the premises to insure that there is no consumption of alcoholic beverages by minors, service to intoxicated persons, public disturbance or other violations of law within the premises and insure that reasonable passageways are maintained through all public areas of the business to permit easy and safe ingress and egress by employees, patrons and emergency personnel."

The ALJ's determination that condition A was violated (stated in Determination of Issues I as a violation of Business and Professions Code §23804) was as follows:

> "By permitting patrons to enter the premises and remain at a number which prohibited reasonable passageways to be maintained in public areas to allow the easy and safe ingress and egress by employees, patrons, and emergency personnel by reason of Findings III, IV and V;"

Findings III, IV and V summarize the evidence presented by way of stipulation. The evidence relating to what we will characterize as overcrowded conditions consisted of the written report of San Diego Police Officer J.K. Hudgins and the declaration of Stephen Cline, an attorney and officer of appellant, both of which were treated essentially as testimony.

Appellant argues that the condition "is simply an employment requirement with a personnel to patron ratio with duties specified," and contends that there was no evidence of any failure to comply with the employment requirement or that the security personnel were not engaged in the performance of their duties.

Appellant argues that it never agreed to any independent condition relating to

access to aisles, and stresses rules regarding contract interpretation that would preclude isolating only a part of the condition. Appellant also stresses the absence of any findings that there were not the requisite number of security personnel, or that they were negligent or remiss in the performance of their duties.

The Department argues that "the bottom line here is that there is no question what the intent of condition A is," and to accept appellant's argument "would ultimately lead to an absurd conclusion." The Department argues that "[s]ecurity cannot stand around and do nothing and comply with the condition," so that if circumstances which the condition was intended to prevent occur, it necessarily follows that the condition is being violated.

The condition is clearly focused on staffing requirements in relationship to the number of people in the crowd which is to be controlled. The condition sets forth an objective measure, i.e., "one [security person] for each fifty persons." There is no evidence in the record of the number of security persons on duty at the time Officer Hudgins made the observations that led to the accusation. Appellant's administrative hearing brief states that several security staff members were visible in the area being observed by Officer Hudgins, and infers that they were pointed out to him.[3] There is no evidence that the security personnel were not performing

[3] The declaration of Stephen Cline states that the facts set forth in the hearing brief with respect to this subject are true, based upon his personal knowledge. In that brief it is pointed out that appellant's policies provide that no

their duties, and we do not believe that crowded conditions necessarily imply an absence of crowd control.

Thus, we believe It is a tortured construction of condition A to focus on the result the security is expected to achieve rather than the mechanism the condition creates to achieve a goal identified only in general terms. For example, some of the other expected duties of security personnel referred to in the condition are to insure against consumption of alcoholic beverages by minors, or service to intoxicated persons. Assuming that staffing requirements were otherwise met, would it be reasonable to charge a violation of condition A if appellant makes a sale to a minor? We think not. We think the Department would first have to show some deficiency in the staffing requirements. It has not done so here.

It is clear that appellant takes its duties as a licensee seriously. Of course, given its popularity as a nightspot, and the large numbers of patrons it attracts, it has no choice but to do so. Nonetheless, it should not be faulted for violating a condition regulating staffing simply because a police officer observed what in his opinion was an overcrowded situation in one part of appellant's operation.[4]

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less than 10 to 12 security persons be scheduled for Friday and Saturday nights. The ALJ appears to have accepted this representation and incorporated it into Finding V. Officer Hudgins' visit came on a Sunday morning, shortly after midnight Saturday.

[4] There is no evidence that occupancy limitation imposed by the Fire Marshal were exceeded on the night in question. Indeed, the ALJ noted that appellant has a

II

Appellant asks that, in the event its challenge to the finding that it violated condition A of its license is sustained, that the matter be remanded to the Department for reconsideration of the penalty.

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].)

Counsel for the Department recommended a suspension of 30 days, with 15 days thereof stayed for a one-year probationary period. In response to a question from the ALJ, Mr. Wainstein explained that ten days of the total suspension would be allocated to the sale-to-minor violation, since that was the standard penalty in a decoy operation [RT 26]. Wainstein acknowledged that evidence had been introduced, which he did not identify, which might be relevant as to mitigation, but also pointed out that appellant had been cited for a condition violation on an earlier occasion. He further argued that the sale to the minor had an aggravating factor

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self-imposed maximum occupancy level below that set by the Fire Marshal.

associated with it, since the bartender looked at identification disclosing that the patron was a minor, but made the sale anyway.

The ALJ, however, found several factors which he concluded warranted a lesser penalty. These consisted of the nature of the long-strained relationship between the Vice Section of the San Diego Police Department and appellant, the subjective nature of the particular conditions he found had been violated, and the significant efforts made by appellant to operate within the law and to comply with the conditions. He ordered only a 20-day suspension, and stayed enforcement of 15 of the 20 days, leaving a net suspension of only 5 days.

The ALJ did not specify how much of the penalty was attributable to the individual violations, and this Board has no way of itself doing so. Nonetheless, considering that one of the violations involved a sale to a minor, the resulting penalty is relatively mild. This is especially so in light of the Department's standard 10-day penalty for a sale to a minor decoy. Also, the mitigation factors which impressed the ALJ related only to the condition violations. (See Determination of Issues IV.) For these reasons, even though this Board believes that the ALJ's determination that condition A was violated must be reversed, we are satisfied that there is no need to remand this case to the Department for reconsideration of the penalty. We therefore decline to do so.

CONCLUSION

That portion of the decision of the Department consisting of Determination of Issues I-1, relating to license condition A, is 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.