ISSUED JUNE 12, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

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| CENTRAL RESTAURANT, INC.<br>dba Spearmint Rhino and/or<br>Heartbreakers<br>571-573 North Central Avenue<br>Upland, California 91786,<br>Appellant/Licensee,<br><br>v.<br><br>DEPARTMENT OF ALCOHOLIC<br>BEVERAGE CONTROL,<br>Respondent. | ) | AB-6921<br><br>File: 47-273973<br>Reg: 95033937<br><br>Administrative Law Judge<br>at the Dept. Hearing:<br>Rodolfo Echeverria<br><br>Date and Place of the<br>Appeals Board Hearing:<br>April 1, 1998<br>Los Angeles, CA |

Central Restaurant, Inc., doing business as Spearmint Rhino and/or Heartbreakers (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered its license revoked, with revocation stayed subject to a two-year probationary period and an actual suspension of 45 days, for it having permitted the premises to be operated in such manner as to create a law enforcement problem, 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 §24200, subdivision (a).

[1]The decision of the Department, dated July 3, 1997, is set forth in the appendix.

Appearances on appeal include appellant Central Restaurant, Inc., appearing through its counsel, Joshua Kaplan, 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 on October 29, 1992. Thereafter, the Department instituted an accusation against appellant charging that appellant had permitted the premises to be operated as a disorderly house and in such a manner as to create a law enforcement problem.

An administrative hearing was held on February 24 and 25, 1997, at which time oral and documentary evidence was received. Subsequent to the hearing, the Administrative Law Judge (ALJ) issued his proposed decision, which determined that only the count alleging that the premises had been operated in such a manner as to create a law enforcement problem had been established.

The ALJ concluded that the Department failed to establish the disorderly house charge, for a number of reasons: the Department presented limited evidence; appellant employed bouncers to deal with problems; the bouncers were trained to handle problems; and appellant terminated several bouncers who were determined to be unable to control themselves or patrons effectively. However, the ALJ found twelve of the twenty-two subcounts of the disorderly house count, which were realleged in the law enforcement count of the accusation, to have been established, involving a total of eight separate incidents.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the accusation was unconstitutionally vague and

uncertain; (2) the Department illegally accumulated charges; (3) the evidence purporting to show a law enforcement problem is insufficient as a matter of law; (4) the record is devoid of substantial evidence; (5) appellant cannot be held liable for misconduct of those it did not employ nor for misconduct it took every reasonable precaution to prevent; (6) the Department may not litigate private nuisance issues; (7) the penalty is excessive and constitutes cruel and unusual punishment; and (8) Business and Professions Code §24210 is unconstitutional.

## DISCUSSION

### I

Appellant argues that the accusation is so vague that it was unable to defend itself.

There is little merit to this contention. Most of the subcounts of count 1 identified some or all of the persons involved in the incidents in question. The issue in count II was whether the law enforcement contacts were reasonably related to the operation of the premises, and the stipulation that the events occurred and officers were dispatched would seem to contradict any claim appellant was unable to know what was charged.

### II

Citing Walsh v. Kirby (1974) 13 Cal.3d 95 [118 Cal.Rptr. 1], appellant argues that the Department improperly delayed filing its accusation until it had accumulated a number of counts, rather than filing it immediately upon notice of problems in the operation of the premises. Appellant asserts that since the

Department was aware of eleven of the seventeen subcounts of count I nine months before it filed the accusation, it violated the rule laid down in Walsh v. Kirby.

Walsh v. Kirby is inapplicable to these facts. Walsh involved a large fine imposed on a small retailer for cumulative violations of a statute that set minimum prices for alcoholic beverages. The Supreme Court noted the statute established a scheme of progressive penalties designed to induce performance within the mandated pricing provisions. "The statute is ... in character intended to serve as a notice or warning as it provides a relatively light penalty for the initial violation with the threat of more severe penalties should the licensee thereafter fail to conform." (Walsh v. Kirby, supra, 13 Cal.3d at 102.) The Department failed to give the licensee any notice of the initial violation and instead waited until 10 violations occurred. Then the Department filed its accusation, charging the licensee with the whole series of violations.

The Supreme Court held that the Department acted in an arbitrary and capricious manner, in a way not designed to induce compliance with the statutory scheme, and that subverted the purpose underlying the progressive nature of the statutory penalties.

This case is different. The code provisions allegedly violated here do not carry progressive penalties. Moreover, the nature of the violations actually presupposes the accumulation of incidents (disorderly house requires "habitual acts"; law enforcement problem implies an excessive number of police calls). It was not improper for the Department to accumulate a certain number of these

violations. The Department's approach is all the more defensible given that many of the incidents involved third-party misconduct, many were not provable, and the remainder were isolated incidents spread over a long period of time.

In any event, the main thrust of appellant's attack is directed at the disorderly house allegations, which were not sustained. Hence, the issue is essentially moot.

III

Appellant challenges the sufficiency of the evidence in support of the law enforcement charge, contending that the relative infrequency of police contacts over the time period in question demonstrates that the premises did not constitute a law enforcement problem.

The first paragraph of Finding IV of the proposed decision recites:

> "The parties stipulated that the facts in Count II subcount (b) are true and correct, that the incidents listed therein did occur and that law enforcement officials from the San Bernardino Sheriff's Department were dispatched to make the calls, investigations, arrest, or patrols concerning conduct or acts in or about the above-stated licensed premises as indicated in subcounts 1 through 40."

Although both parties appear to be satisfied that the ALJ accurately recorded their stipulation, we are not at all sure we (or they) truly understand its intended breadth.

It does seem to be the case that appellant was not agreeing that the responses were "required," since, as reflected in the transcript, and on the copy of the accusation placed in the record as Exhibit 1, the word "dispatched" in count II was substituted for the word "required." On the other hand, the Department cites

the testimony of Sheriff's Sergeant Merrett that when a deputy is dispatched to a particular location, he is required to respond.

Count II, in addition to realleging the incidents from count I, listed 40 instances of police responses consisting of, in the words of the stipulation, "calls, investigations, arrest, or patrols concerning conduct or acts in or about the above-stated licensed premises." Several of these involve vehicle thefts or burglaries from the parking lot, so one might question whether the police response should be chargeable to the licensee.

On the other hand, a number of the sheriff's deputies who testified said they had been dispatched to the premises on many occasions - Akili Hamid Khalfani had been there six or seven times since 1994; Twila Smith estimated she had 30 contacts with the premises; Robert Pleasant was sent there six or eight times in 1994 and the same number of times in 1995; Kimberly Swanson estimated three or four calls a month in 1994; Malik Jones estimated he was called to the premises once a month; Rosalind Lewis was called there approximately ten times in 1996 - and all these witnesses described their calls as having to do with assaults, fights, disturbances, and public drunkenness.

These numbers are at considerable variance from appellant's claim that while there were 30 calls in 1993, there were none in 1994, and only six in 1995 and three in 1996. There are several possible explanations, the foremost being the fact that appellant totally ignores the 22 contacts alleged in the disorderly house count of the accusation, all of which were in 1994! While it is true that half of these were found not to have been established for purposes of the disorderly house

charge, it was because the evidence which was offered, the testimony of the officers who were called to the premises, was hearsay. That does not, and should not, prevent such instances to be considered when assessing the drain in law enforcement resources as a result of the operation of the premises, and the patron behavior that might reasonably be anticipated from the clientele to which the premises catered.

In addition, Sheriff's Sergeant Virgil Merrett, a 24-year veteran with the San Bernardino Sheriff's Department, and currently the investigative supervisor at the Chino Hills station, the station responsible for the area in which the premises are located, complained to the Department of Alcoholic Beverage Control in November 1994 and again in May 1995, because of what he described [II RT 78] as:

> "The repetitive vast amount of calls for service and crime reports and the nature of the violence taking place at the establishment was beginning to escalate, and I felt that it [was] appropriate to file the complaint with the appropriate licensing agency."

Merrett testified that, based upon a review of statistics covering four years, upon his personal knowledge and his own responses to the premises, and upon a review of in excess of one hundred reports crossing his desk, it was his opinion that the premises constituted a law enforcement problem.

The ALJ's proposed decision includes a more extensive summary of Sergeant Merrett's testimony. His testimony, combined with the testimony of the various deputies concerning their involvement with the premises, and the evidence offered on the count I subcounts, is more than ample to sustain the findings and decision with respect to the law enforcement allegations of count II of the accusation.

Appellant has also challenged the sufficiency of the evidence in support of the subcounts of count I which the ALJ found to have been established. We see no need to review appellant's contentions in any detail, because, as we have said, the ALJ did not sustain count I. Nonetheless, the evidence clearly demonstrates law enforcement contacts related to the operation of the premises, so the subcounts found to be deficient with respect to proof for count I do not suffer the same disability under count II, since all that needs to be shown is that each individual law enforcement contact was related in some way to the operation of the licensed premises. That was clearly the case here.

Appellant also argues that the finding that the operation of the premises created a law enforcement problem must fall because there was no valid comparison between the number of police responses to Spearmint Rhino and a comparable premises.

While that may be true, it is not a complete answer. Although there is some case authority indicating the desirability of such a comparison, there may be, as there are here, circumstances which make such a comparison unnecessary. This can arise from a situation where the sheer numbers of responses are such as to reflect an excessive drain on the resouces of law enforcement. Likewise, the testimony and opinions of police officers and officials regarding the frequency of responses and the kinds of incidents requiring responses can be highly persuasive.

Additionally, any comparison here would be especially lacking in meaning, since the testimony uniformly was that there was no comparable licensed establishment in the area served by the Chino Hills station of the Sheriff's

Department. Under such circumstances, and where the evidence is otherwise so strong, the absence of any precise comparison is not important.

Appellant contends that it did everything reasonably possible to prevent the incidents from occurring, so should not be disciplined, citing Laube v. Stroh (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 781].

There are several reasons why this argument must also fail. First, appellant was placed on notice that there were problems simply by the occurrence of the incidents. Appellant would have been aware that its operation drew a youthful clientele more prone to aggressive, confrontative behavior, and that it needed to do something about the root cause of the problems - greater alertness toward excessive consumption, better crowd control, and, perhaps, more judicious selection of bouncers and bartenders (appellant's manager fired two bouncers and a bartender who, in his words, could not control themselves, but, even so, remained employed for periods ranging from a few months in one case to a year in another).

As a matter of social policy, it does not seem right that a licensee can, with impunity, operate a premises in a manner which is conducive to assaults, fights, violence, and other forms of criminal or quasi-criminal activity that impose a material drain on already overburdened law enforcement agencies, and still escape discipline.

IV

Appellant devotes a section of its brief to an argument that the Department, as a public entity, may not litigate issues which are, at best, a private nuisance.

This issue needs no discussion, since the Department has not proceeded on a nuisance theory.

V

Appellant challenges the penalty - stayed revocation, probation, and a 45-day suspension - as "preposterous," since appellant has been disciplined only once previously (in 1992), and since the evidence "at worst, shows nothing more than a few incidents of overeager, later terminated, security persons acting too energetically in a volatile situation." Thus, appellant argues, the penalty constitutes cruel and unusual punishment.

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].) Where an appellant raises the issue of an excessive penalty, however, 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].) However, it is not the proper function of the Appeals Board simply to substitute its own view of an appropriate penalty for that of the Department.

It is well settled that disciplinary penalties imposed in administrative proceedings are not criminal punishment, and are not subject to the constitutional provisions relating to cruel and unusual punishment. In any event, a 45-day suspension for a once-disciplined licensee which has so operated its business as to create a significant law enforcement problem cannot be said to be clearly unreasonable.

VI

Appellant challenges the constitutionality of Business and Professions Code §24210, which permits the Department to delegate the power to hear and decide to an administrative law judge appointed by the director.

The Appeals Board is deprived by the California Constitution, article 3, §3.5, of the power to declare a statute unenforceable or unconstitutional. Appellant has made no claim of actual bias against the administrative law judge who heard this matter.

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

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[2]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.