

ISSUED MAY 11, 1998

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

ABDELKARIM A. SHEHADEH	)	AB-6870
dba Cobblestone Cafe & Deli)	
910 University Avenue	)	File: 41-311426
Sacramento, California 95825,	)	Reg: 97037679
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Jeevan S. Ahuja
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	March 4, 1998
	)	San Francisco, CA

Abdelkarim A. Shehadeh, doing business as Cobblestone Cafe & Deli (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which ordered his on-sale beer and wine public premises license suspended for 45 days, with 15 days thereof stayed for a probationary period of one year, for his agents and/or employees having violated conditions on his license relating to the furnishing of live entertainment and permitting consumption of alcoholic beverages off the licensed premises, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business

¹ The decision of the Department, dated May 1, 1997, is set forth in the appendix.

and Professions Code §24200, subdivision (a), arising from violations of Business and Professions Code §§23804.

Appearances on appeal include appellant Abdelkarim A. Shehadeh, appearing through his counsel, Richard D. Warren, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert M. Murphy.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public premises license was issued on December 21, 1995. Thereafter, the Department instituted a four-count accusation against appellant charging that appellant, through his agents and/or employees, violated conditions on his license relating to the furnishing of live entertainment, permitting live entertainment to be heard beyond the interior of the premises, and permitting consumption of alcoholic beverages off the licensed premises.

An administrative hearing was held on March 11, 1997, at which time oral and documentary evidence was received. At that hearing, appellant stipulated that the charges of the accusation relating to live entertainment and entertainment audible beyond the interior of the licensed premises (counts I and III) occurred as alleged. Accordingly, the Administrative Law Judge (ALJ) found those violations to have been established. The balance of the hearing addressed the issues involving the alleged sale of alcoholic beverages for consumption off the premises (counts II and IV).

Testimony was presented from Helen Lund Lim, the Department investigator who handled the licensing process on behalf of the Department; from Nabil Shehadeh, the spokesman and brother of Abdelkarim Shehadeh, the licensee; and,

very briefly, from the licensee himself. In addition, documentary evidence was introduced, including the conditional license itself (Exhibit 2); the Department of Alcoholic Beverages form ABC-257 (diagram of licensed premises) submitted to the Department by the licensee (Exhibit 3); a City of Sacramento planning commission resolution and staff report (Exhibit 4); a City of Sacramento police department protest letter and related correspondence (Exhibit 5); and a landscaping plan depicting the premises in question (Exhibit A).

Subsequent to the hearing, the Department issued its decision which determined that the area in question was specifically intended to be off-limits to the sale, service and consumption of alcoholic beverages.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant contends that the Department unreasonably construed the license to prohibit the consumption of alcoholic beverages in the patio areas of the premises.

DISCUSSION

Appellant contends that the Department's decision is based upon an unreasonable interpretation of the condition of his license prohibiting the consumption of alcoholic beverages off the premises. Specifically, appellant contends that it was never the Department's intention during the licensing process to bar the service of alcoholic beverages on the two patio areas of the premises. Further, appellant asserts, the only document which states that the patio areas are not part of the licensed premises was never shown to him until months after his license had issued.

The only issue litigated at the administrative hearing addressed the question whether two outside patio areas where the alcoholic beverages were consumed were part of the licensed premises, as appellant contends, or, on the contrary, whether the licensed premises includes only the interior of the structure, as the Department contends.

The issue was complicated by the use of imprecise and inconsistent terminology in the conditions imposed on the license, and by the Department's reliance upon the content of zoning documents to control the interpretation of terms used in the conditional license.

The Department contended that the licensee was put on notice by the license conditions and by police opposition to consumption on the patio areas that the patio areas were off-limits to alcoholic beverages. The licensee contended that he understood the license conditions banning consumption to apply to outdoor dining areas other than the patio areas in question. The license used both the "sidewalk dining area" and "Patio area" terms, and contained no express prohibition against the sale, service, or consumption of alcoholic beverages in the patio areas. Although the license contains a general condition that prohibits the sale of alcoholic beverages for consumption off the licensed premises, this condition would apply to the patio areas only if, contrary to appellant's contentions, the patio areas were not licensed.

The problems which gave rise to this case began when appellant sought a zoning variance to allow the construction of two patios for outdoor dining. In the planning commission documents, the terms "patio area" and "outdoor dining area"

were used interchangeably, but in all cases the reference appears to have been to the proposed patios.

The conditions in the license were modeled, indeed, virtually copied, from language first appearing in the planning commission staff report dated May 11, 1995 (Exhibit 4, pp.1-7), described as recommendations from the Sacramento police department. These recommendations were as follows:

- “1. The sidewalk area outside the patio area between the street and the patio area shall be kept free and clear of tables and chairs.
2. Restaurant windows shall be left unobstructed to all viewing of the interior of the premises by patrolling police and so that the outdoor seating area is visible for monitoring from inside the restaurant.
3. Signs shall be clearly posted and maintained on the premises prohibiting consumption of alcoholic beverages in this and the adjacent public area. The signs shall be worded as follows:

UNLAWFUL TO ENTER, BE OR REMAIN ON ADJACENT PARKING LOT OR ADJACENT PUBLIC SIDEWALK WITH AN OPEN ALCOHOLIC BEVERAGE CONTAINER. C.P.C.647E(A); S.C.C. 26.24(c)

4. Operation of the outdoor dining area shall be limited to the hours between 7:00 AM to 12:00 AM on Fridays, Saturdays, and the nights before holidays; and between 7:00 AM and 10:00 PM on Sundays through Thursdays.
5. Due to the proximity of the adjoining residential units, no outdoor sound amplification equipment shall be installed or utilized. No live entertainment shall be permitted in this area.
6. The area within 100 feet of the restaurant and patio area shall be monitored for trash that may be produced by this establishment. The employees and owners of the establishment shall be responsible for keeping this area clean of trash generated from the restaurant use during and following the hours of outdoor dining.
7. All illegal activities observed on or around the business shall be promptly reported to the police.”

A general comment attributed to the Sacramento police department preceded these recommendations. It stated:

“As this location does not have an Alcoholic Beverage Control license, there is no objection to a patio seating design which is separated from the building by an access way. Should at any point in the future, the management apply for an on-sale liquor license, the area will not meet Police department guidelines for service and consumption.”

The final police recommendation, more an admonition, was set forth in an unnumbered paragraph, and stated: “It is crucial that the applicant understand that no alcohol may be consumed in this area - regardless of where the alcohol was purchased.” Read together with the comment which preceded the seven numbered recommendations, regarding the police department view that the patio seating design, separated from the building by an access way, did not meet police guidelines, it would seem the licensee should probably have been alerted to the distinct possibility that he would encounter problems associated with the service and consumption of alcohol in the patio areas. As will be seen, however, events occurred which made this less than clear.

The resolution of the planning commission itself, granting the permit, reiterated, with slight modification, the seven numbered conditions set forth in the staff report, but omitted the unnumbered paragraph which stated: “It is crucial that the licensee understand that no alcohol may be consumed in this area - regardless of where the alcohol was purchased.” The planning commission resolution recited its findings that the proposed variance would not be detrimental to the public health, safety or welfare, or result in the creation of a nuisance because, among

other things, the hours of operation are restricted and "future alcohol sales will be restricted per the Police Department's recommendations."

The police protest letter to the Department (Exhibit 5-A), dated September 19, 1995, also incorporated six of these same seven conditions, omitting condition 2, which concerned the restaurant windows, and added an entirely new condition: "Sales of alcoholic beverages for consumption off the premises is prohibited." It also repeated the unnumbered paragraph from its recommendations to the planning commission, which began with the words "It is crucial"

The letter also amended the condition which began with "The sidewalk area outside of the patio area" - condition 1 in the staff report, condition 2 in the protest letter - by substituting the phrase "enclosed (fenced) area" for the phrase "patio area." The letter also modified condition 4, relating to hours of operation, by substituting the words "Hours of operation of the sidewalk dining area" for the words "Operation of the outdoor dining area," and added additional conditions not here germane. It was this reference to "sidewalk dining area" which generated the confusion.

Upon being assured the restrictions urged in its protest letter would be imposed as conditions on the license, the police department withdrew its protest.

The petition for conditional license, prepared by Helen Lim, copied the critical conditions from the protest letter almost verbatim, although omitting the unnumbered paragraph referred to earlier herein. A significant alteration was her addition of the word "unlicensed" preceding the words "sidewalk dining area" in condition 4.

As can be seen, the original term, "outdoor dining area," became, in transition, "sidewalk dining area," and then "unlicensed sidewalk dining area." Lim explained why she added the word "unlicensed" [RT 119]:

"Because it was my opinion that it was not clear unless the word unlicensed was inserted. And I discussed it with Ms. Olson of the police department who did agree. And after sending the signed conditions back to her, the protest was withdrawn."

Appellant contends he understood that the area where alcohol consumption was prohibited was an area other than the patio areas. There are two concrete walkways (circled in yellow marker on Exhibit A, a landscaping plan depicting the proposed patios) between the premises structure and the two patios. Abdelkarim Shehadeh testified that when the restaurant first opened for business, meals were served in these areas, and he claims these are the sidewalk dining areas in which he understood alcohol was banned.

The record is not clear as to whether appellant ever saw the police department protest letter. Nabil Shehadeh testified that he had never seen it before the hearing [RT 148], and Abdelkarim Shehadeh was not asked whether he had seen it. The letter itself does not indicate a copy was provided to the licensee. However, Investigator Lim testified that she discussed the opposition of the police department to the sale or service of alcoholic beverages, with Nabil Shehadeh during one or two of several telephone conversations she had with him, and even read to him the key paragraphs concerning the restrictions on alcoholic beverage sales.²

² With a single exception, all of the discussions regarding the issuance of the
(continued...)

Lim testified that, between September 6, 1995, when she reviewed the conditional use permit, and September 24, 1995, when the Department received the letter from Police Chief Najera (Exhibit 5), she and Nabil Shehadeh discussed the fact that the patio was not included as part of the licensed premises, as it had not been approved through the conditional use permit for the sale of alcoholic beverages [RT 85-86]. She further testified [RT 90-91]:

"Q. As best you can recall, in the conversation that you had with Bill Shehadeh about the conditional use permit and the expected letter of protest that you were expecting from the police department, what do you remember saying about the patio area?

"A. I remember saying that according to the conditional use permit that he could not have alcoholic-beverage sales in the patio. That if he wanted the alcohol in the patio area that he would have to get a modification of a CUP.

"Q. And what did he say?

"A. In addition, I did recommend that he contact Lynn Olson of the Sacramento Police Department, since she works solely in conjunction with the City of Sacramento planning and zoning department, and he said that he would."

²(...continued)

license were between Lim and Nabil "Bill" Shehadeh, the licensee's brother. In fact, Lim was under the impression from August 9, 1995, when the application was filed, until a meeting in her office on October 18, 1995, that Nabil Shehadeh, who she knew as "Bill," was the applicant. She first met Abdelkarim Shehadeh at the October meeting, and learned then that he was the applicant. Nabil Shehadeh denied holding himself out as the applicant, explaining that he was handling the matter for his brother because of his greater command of the English language. Abdelkarim Shehadeh, of course, is charged with Nabil's knowledge regarding his discussions with Lim and his familiarity with the zoning documents and police protests.

Nabil Shehadeh denied being told by Lim that the patio area could not be used for serving alcoholic beverages, claiming the only thing he discussed with her concerned entertainment [RT 148-149]. He claimed never to have had any understanding that alcoholic beverages could not be served in the patio areas [RT 153]:

“Q. Did you have any understanding that the unlicensed sidewalk dining area, as it’s described in Exhibit 4, was in any way part of patio one, patio two or patio three?”

“A. No.”

There is no single condition which clearly and unambiguously states that alcoholic beverages may not be consumed in the outdoor patio areas. A notation entered on the Department’s copy of the ABC-257 Diagram of Licensed Premises by Helen Lim, the Department licensing representative, states: “Note: Both outside patio areas are not licensed for A/B.” She acknowledged that she had never given the licensee a copy of the document which contained the notation [RT 58]. The licensee claimed never to have seen it prior to the hearing [RT 194], but Department investigator Wilson claimed to have shown him the document, or a copy, with the notation, when he first observed drinks being consumed in the patio areas, and cautioned him that the license did not permit it [RT 17-18].³

³ At the hearing, Wilson testified that the person to whom he spoke identified himself as the licensee, but he did not recognize Abdelkarim Shehadeh as that person. However, Abdelkarim Shehadeh acknowledged he was that person,
(continued...)

The reason there is no specific condition appears to be the consequence of Helen Lim's views that whether appellant would be licensed to sell and serve alcoholic beverages in the patio areas of the premises turned on what the City of Sacramento would allow. Since she read the zoning variance and the police protest letter, in combination, as against service and consumption in the patio areas, she undoubtedly intended that the conditional license she prepared would not affirmatively permit appellant to do that. At the same time, her consideration of the licensee's objectives persuaded her that the license should not include an express condition prohibiting such activity. Her dilemma is succinctly described in the statement of facts in the Department's brief (Dept.Br. 11):

"The investigator [Lim] did not wish to put a specific condition on the license banning the sale, service or consumption of beer or wine on the unlicensed sidewalk dining area (patios) since if the applicant obtained a change in the conditional use permit to allow the sale, service and consumption of beer and wine on the patios, such could take effect immediately rather than having to go through the Department's required modification of condition process."

The Administrative Law Judge, although concluding that "the condition in the petition for conditional license which prohibits the sale of alcoholic beverages in the outside patio areas does not unambiguously describe the area covered by the prohibition" (Special Finding of Fact C-3), nonetheless found that the license was issued subject to a condition that the outdoor patio areas were not licensed. The

³(...continued)
and explained that he had since grown a mustache.

thrust of the ALJ's decision is that, having been put on notice during the planning process of the police department's concern about the consumption of alcohol in the areas which were the subject matter of the zoning variance, variously referred to as "outdoor dining areas" or "patio areas," appellant knew or should have known that the conditions on the license, ambiguous as they were, meant that the patio areas were unlicensed.

The ALJ appears to have reached the result he did by comparing the terms used in the license itself ("unlicensed sidewalk dining area"), in the police protest letter ("sidewalk dining area"), and in the planning commission resolution granting the zoning variance ("outdoor dining area"), concerning the hours of operation of those areas, and concluding they all were referring to the patio areas which were the subject of the planning commission resolution.

We believe the ALJ reached the proper result insofar as whether or not the patio areas had been licensed. The notation and redlining on the form ABC-257 clearly manifests the Department's intent that those areas were not included in the licensed premises.⁴ Unfortunately, the Department did not see fit to inform the licensee that it was narrowing the scope of the premises being licensed. The

⁴ In addition to the planning commission and police concerns, Lim testified she did not believe the patio areas could be licensed, since they were not contiguous to the licensed structure. Presumably, she was concerned that open containers of alcoholic beverages would have to be transported across unlicensed public sidewalks in order to serve patrons in the patios.

licensee may reasonably have believed he had been licensed for the patios in question, since the form ABC-257 he submitted included the patios in the area to be licensed. As we have shown, he was unaware of the limitations placed on it after its submission to the Department.⁵

Although the ALJ's statement that the licensee had the duty to clarify the meaning of the license agreement before signing it may be true generally, we believe this case is an exception. Here, it appears, the licensee may not have been aware of the discrepancy between his understanding of the license and the Department's understanding. Had the Department simply furnished the licensee a copy of the form ABC-257 containing the Department's annotations, this case probably would not be before the Board.

Nonetheless, we do not believe the Department is estopped to deny that the license it issued permitted the sale of alcoholic beverages in the patio areas because

⁵ The ALJ found that Lim visited the premises on September 1, 1995, and at that time conveyed information to one of appellant's employees to the effect that an outdoor patio could be licensed provided certain conditions were met, including a requirement that the area be fenced. Thereafter, appellant fenced the outdoor patio areas (Special Finding of Fact B-1). Nabil Shehadeh testified that after the patios were fenced, the restaurant began serving customers in the patio areas [RT 134].

Although the record does not so indicate, Lim may have believed that appellant could so enclose the patios and the area by which its employees reached the patios in a manner that would make them contiguous to the interior and avoid the problem of open containers in unlicensed public areas. We express no opinion whether such an approach would be feasible, or acceptable to the Department.

of any injustice to the licensee. The licensee's claim that he spent \$50,000 to build the patios in reliance upon being able to sell and serve alcoholic beverages on them is belied by the fact that the patios were shown on a landscape plan prepared well before any license had been applied for, and had been built even before investigator Lim's first inspection visit.

On the other hand, there is a certain unfairness, in the circumstances of this case, in suspending the privileges that were licensed, where the licensee not only may have justifiably believed he had been licensed for the patio areas, but also was given that advice by attorneys he consulted once the Department informed him of its contrary view. We acknowledge that the ALJ is the judge of witness credibility, but believe, even accepting his findings, that the Department was sufficiently at fault in the licensing process as to entitle the licensee to the limited relief we think essential.

Appellant's license was suspended for 45 days, with 15 days stayed. The ALJ did not indicate what portion of the suspension was attributable to the entertainment and noise condition violations. A reversal of the penalty on the ground it is unfair to penalize the licensee for the patio sales would require a remand to the Department for imposition of a penalty based solely on the entertainment and noise condition violations. This is what we believe must be done.

This case is an illustration of the undesirability of license draftsmanship which makes the interpretation of critical terms of the license dependent upon language in documents extraneous to the license, such as zoning and conditional use permits, which are often prepared without consideration of the Department's licensing policies and objectives. That having been said, we also think it inappropriate to fault the licensing investigator for being conscientious in her attempt to draft a license fair to the licensee.

CONCLUSION

The decision of the Department is reversed as to penalty only, and the case is remanded to the Department for careful reconsideration in light of the views expressed herein.⁶

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

⁶This 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.