

ISSUED OCTOBER 31, 2000

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

| | | |
|-----------------------------|---|--------------------------|
| HOLLYWOOD ENTERPRISES, INC. |) | AB-7529 |
| dba Luxy |) | |
| 3319 Wilshire Boulevard |) | File: 47-276655 |
| Los Angeles, CA 90005, |) | Reg: 99046038 |
| Appellant/Licensee, |) | |
| |) | Administrative Law Judge |
| v. |) | at the Dept. Hearing: |
| |) | Sonny Lo |
| |) | |
| DEPARTMENT OF ALCOHOLIC |) | Date and Place of the |
| BEVERAGE CONTROL, |) | Appeals Board Hearing: |
| Respondent. |) | August 3, 2000 |
| |) | Los Angeles, CA |

Hollywood Enterprises, Inc., doing business as Luxy (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 45 days, with 15 days stayed for a probationary period of one year, for violations of conditions on its license, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §23804.

Appearances on appeal include appellant Hollywood Enterprises, Inc., appearing through its counsel, Rick Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated October 28, 1999, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on December 8, 1992. Thereafter, the Department instituted an accusation against appellant charging that appellant violated conditions on its license prohibiting minimum drink requirements and requiring the provision of menus and signs posted on the premises advertising food service (Count 1), and that appellant violated Penal Code §166, subdivision (a)(4), by using karaoke rooms after a Department decision prohibited use of those rooms until authorized by the Department (Count 2).

An administrative hearing was held on August 26, 1999, at which testimony was presented concerning both counts of the accusation. Los Angeles police officer Susan McDuffie and Department investigators Jerry Garcia and Johnny Tsang testified for the Department. Appellant's president, Mina Hong, and appellant's waitress, Myong Fox, testified on behalf of appellant.

Subsequent to the hearing, the Department issued its decision determining that the allegations of Count 1 had been established and dismissing Count 2.

Appellant thereafter filed a timely notice of appeal in which it raised the following issues: (1) the findings are not supported by substantial evidence, and (2) the penalty is excessive.

DISCUSSION

I

Appellant contends that the testimony of officer McDuffie and investigator Tsang regarding the minimum drink requirement is not logical and that regarding the lack of menus and signs does not show that there were none.

Appellant is essentially asking this Board to re-evaluate the evidence and the credibility of the witnesses. That is not the role of the Appeals Board. The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's 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

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

²The 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].

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].) Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812]; Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

The ALJ accepted the testimony of the officer and investigators and rejected that of appellant's witnesses. The testimony of the officer and the investigators constitutes substantial evidence supporting the findings. None of the testimony is so inherently illogical that the Board can say that the findings are unreasonable.

II

Appellant contends the penalty is excessive since it exceeds the usual penalty imposed by the Department for a first-time condition violation.

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].)

This is actually the second time appellant has been found to have violated conditions on its license. Condition violations were found in a prior disciplinary action (#97040871) as evidenced by the accusation and decision in that matter, which are part of Exhibit 12.

Under the circumstances, it cannot be said that the Department has abused its discretion in imposing the penalty in this matter.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This 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 order as provided by §23090.7 of said code.

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