

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

AB-8081

File: 47-365257 Reg: 02053419

WILLIAM PAUL JOHNSON dba Shakers
2130-B Country Club Boulevard, Stockton, CA 95204,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Spencer A. Joe

Appeals Board Hearing: November 13, 2003
San Francisco, CA

ISSUED DECEMBER 23, 2003

William Paul Johnson, doing business as Shakers (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked his on-sale general public eating place license for failure to regularly serve meals for guests, a violation of Business and Professions Code sections 23038 and 23396, and for violation of a condition on his license requiring food service during normal meal hours, a violation of Business and Professions Code section 23804. The order of revocation was conditionally stayed, subject to service of a 15-day suspension and an indefinite suspension until appellant is able to comply with the food service condition of his license.

Appearances on appeal include appellant, William Paul Johnson, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean

¹The decision of the Department, dated December 26, 2002, is set forth in the appendix.

Lueders.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on May 23, 2000. On July 25, 2002, the Department instituted an accusation against appellant charging that appellant failed to provide meals for guests as required by statute and by the condition on his license.

An administrative hearing was held on October 1, 2002, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established. Appellant thereafter filed a timely notice of appeal. In his appeal, appellant contends that the investigation was unfair and unjustified, and that even though he had a fire in the kitchen, he did offer in the way of food service what was being offered in other similarly licensed establishments.

DISCUSSION

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 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. The Board may not consider evidence other than that considered by the Department.²

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 Bev. Control App. Bd.* (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. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Business and Professions Code section 23038 provides:

"Bona fide public eating place" means a place which is regularly and in a bona fide manner used and kept open for the serving of meals to guests for compensation and which has suitable kitchen facilities connected therewith, containing conveniences for cooking an assortment of foods which may be

²The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

required for ordinary meals, the kitchen of which must be kept in a sanitary condition with the proper amount of refrigeration for keeping of food on said premises and must comply with all the regulations of the local department of health. "Meals" means the usual assortment of foods commonly ordered at various hours of the day; the service of such food and victuals only as sandwiches or salads shall not be deemed a compliance with this requirement. "Guests" shall mean persons who, during the hours when meals are regularly served therein, come to a bona fide public eating place for the purpose of obtaining, and actually order and obtain at such time, in good faith, a meal therein. Nothing in this section, however, shall be construed to require that any food be sold or purchased with any beverage.

Conditions 1 and 2 on appellant's license provide:

The licensee shall comply with the provisions of Section 23038 of the Business and Professions Code and acknowledges that incidental, sporadic or infrequent sales of meals or the mere offering of meals without actual sales shall not be deemed sufficient to consider the premises in compliance with the aforementioned code section.

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., Dinner, 6:00 p.m. to 9:00 p.m.

The administrative law judge (ALJ) found that Department investigator Alma Yamada visited appellant's premises on three occasions in February, March, and April, 2002, and on each occasion she was unable to order any food, the offering of food was only incidental and not sufficient to constitute the service of meals, or she was referred to other restaurants in the area. In addition, the ALJ found that an inspection of the premises on the occasion of the third visit indicated no recent food preparation or food service activity in the kitchen area.

Appellant does not directly dispute these findings. Instead, he appears to blame his failure to provide meals on a kitchen fire, and contends he was offering food service equivalent to that of other similarly licensed premises. He produced menus showing that he had served food in the past, but admitted he had not offered food service "on a

consistent basis since the Mexican guy left.” He claimed that he was now in compliance, offering food during lunch and dinner.

Appellant’s claim that he was offering food service equal to that of other establishments is directly contrary to the experience of the investigators, and was implicitly rejected by the ALJ.

The only aspect of the allegedly unfair investigation singled out by appellant was that the investigators supposedly went door to door to solicit complaints. The record is silent whether any investigator interviewed nearby residents, but even if one did, we see no impropriety. Appellant’s “restaurant” was located within 100 feet of residences, and its operation as a bar instead of as a restaurant could well have generated legitimate complaints of which the Department would want to be aware.

The decision does not refer to any fire, but appellant’s testimony that there was a fire was not disputed. Some of the photographs offered in evidence by the investigators seem to show evidence of a fire. In addition, there was reference to chemical powder covering the stove.

Our review of the record satisfies us that the decision of the Department was a reasonable exercise of discretion, consistent with the record as a whole. It would not be consistent with welfare or morals for appellant to be permitted to operate inconsistently with statutory and license obligations. The stay of revocation and a suspension that should cease once appellant demonstrates to the Department that he is in compliance with his food service obligations accommodates the interests of appellant and those of public welfare and morals.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³ This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district 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.