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

**AB-8129**
File: 41-354958 Reg: 02054030

HOMEROOM ENTERTAINMENT dba Movida Lounge
200 Fillmore Street, San Francisco, CA,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Robert R. Coffman

Appeals Board Hearing: January 8, 2004
San Francisco, CA

**ISSUED MAY 12, 2004**

Homeroom Entertainment, doing business as Movida Lounge (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days, and indefinitely thereafter[2] for having failed to meet the qualifications required of a bona fide public eating place, a violation of Business and Professions Code section 23038.

Appearances on appeal include appellant Homeroom Entertainment, appearing through its counsel, A. Nick Shamiyeh, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

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[1]The decision of the Department, dated April 24, 2003, is set forth in the appendix.

[2] Under the order, the suspension is to continue until appellant provides proof satisfactory to the Department that the licensed premises is equipped and operating as a bona fide eating place establishment in which the sale of alcoholic beverages is incidental to the sale of food, or until such time as the license is transferred from a bona fide public eating place license to a public premises type license.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public eating place license was issued on March 28, 2000. Thereafter, the Department instituted an accusation against appellant charging, in each of three counts, that on specified dates in July and October, 2002, appellant failed to meet the qualifications of a bona fide eating place, in violation of Business and Professions Code sections 23038[3] and 23396.

An administrative hearing was held on March 27, 2003, at which time oral and documentary evidence was received. Department investigator Michelle Holtzclaw testified about what she observed in the course of three visits to the premises, while Kent Ujehara testified on behalf of appellant.

The ALJ concluded in his proposed decision that appellant's operation did not comply with section 23038. The proposed decision, which the Department adopted without change, ordered appellant's license suspended for 10 days, and indefinitely thereafter until appellant proves to the satisfaction of the Department that the licensed

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[3] 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 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.

premises is equipped and operating as a bona fide eating place establishment in which the sale of alcoholic beverages is incidental to the sale of food, or until such time as the license is transferred from a public eating place license to a public premises license.

Appellant has filed a timely appeal, and contends: (1) the evidence clearly established that its premises operated as a bona fide public eating place; (2) the Department is estopped from taking action since it approved appellant's premises in its current state when it issued a license to appellant with knowledge of the facts; and (3) the Department accumulated counts in order to impose an actual suspension when a less severe penalty is appropriate.

DISCUSSION

The Department's decision turned on several grounds: appellant did not serve "meals," but only appetizers, which do not constitute a complete meal within the meaning of section 23038; appellant did not have adequate kitchen facilities; some menu items were prepared elsewhere; appellant had no cook or kitchen staff, and depended upon the bartender to heat catered food.

We are mindful of the Legislature's direction that the provisions of the Alcoholic Beverage Control Act be construed liberally for the accomplishment of its purposes, i.e., for the protection of the safety, welfare, health, peace and morals of the people of the State. We are also mindful of the fact that much has changed in the way food is prepared and served since the time section 23038 was enacted in 1955, and the general language of section 23038 must be read in light of more modern developments in the preparation and service of food.

Frozen foods were relatively new to the consuming public in 1955; microwave

cooking and convection ovens were still somewhere in the future, and food preferences were continually changing and evolving.

The evidence in this case established that appellant, deprived of a stove by order of the San Francisco Planning Department, depended upon a microwave oven and a convection oven to prepare items on its menu, including individual pizzas, empanadas (Spanish filled pastries), and samositas (phyllo wrapped triangles filled with chicken and potato). Appellant also offered additional items, including hamburgers, boca burgers, cheese steak, grilled chicken sandwiches, and chicken club sandwiches. brought in from a nearby café.

The administrative law judge acknowledged that the menu items offered by appellant "could very well be part of a meal," but did not constitute a complete meal within the meaning of section 23038.

We think the ALJ applied too rigid a test under the statute. It is clear to us that appellant was, in good faith and to the extent of its ability under the restrictions imposed by the City of San Francisco, open for the serving of meals to guests for compensation, which is what the statute requires. We also think that the ALJ's conclusion that the "appetizers" offered by appellant cannot constitute a meal is in error. Diners commonly make a meal of appetizers, and there is nothing to indicate that was not the case with appellant's offerings. Additionally, it appears to us that the ALJ put too much emphasis on the fact that appellant's food offerings included sandwiches. While section 23038 states that "service of such food and victuals only as sandwiches and salads shall not be deemed a compliance" with the requirement that the meals offered be "the usual assortment of foods commonly ordered at various times of the day," we do not read it

as disqualifying an establishment because it serves sandwiches and salads along with other kinds and types of foods.

The problems with the Department's case are highlighted by the debate over whether a 12-inch pizza was an appetizer. The standard dinner plate measures 10" in diameter; a 12-inch pizza that would overlap the plate by two inches strikes us as a meal in itself. And we see little difference, from a legal, if not culinary, point of view under the ABC Act, between a frozen pizza cooked on site and one prepared from scratch.

We also know from our own experience that it is not at all uncommon for restaurants and eating places to depend upon outside suppliers for some of the already prepared food they serve. The fact that appellant depends upon an outside provider is not, by itself, enough to justify the harsh sanction imposed upon it.

ORDER

The decision of the Department is reversed.[4]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4] 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.