ISSUED SEPTEMBER 26, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

ACME BAR & GRILL, INC. dba Acme Bar & Grill 1250 Prospect Street La Jolla, CA 92037, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6770 File: 47-310475 Reg: 96036048 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: August 6, 1997 Los Angeles, CA

Acme Bar & Grill, Inc., doing business as Acme Bar & Grill (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered appellant's on-sale general public eating place license suspended for 40 days, with 30 days thereof stayed for a probationary period of one year, for appellant having permitted an undercover police detective to consume an alcoholic beverage (beer) in an unlicensed portion of the premises; permitted three undercover detectives to consume

[1] The decision of the Department, dated October 31, 1996, is set forth in the appendix.

alcoholic beverages (beer) after 11:00 p.m., in violation of a condition on the license; and on three different dates permitted noise and music to be audible 100 feet (on one of the occasions, 200 feet) from the premises, in violation of a condition on the license, 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 §§23300, 23355 and 23804.

Appearances on appeal include appellant Acme Bar & Grill, Inc., appearing through its counsel, Ralph Barat Saltsman; 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 27, 1995. Thereafter, the Department instituted an accusation alleging, in five counts, violations involving drinking in an unlicensed portion of the premises and beyond the hours specified in a condition on the license,[2] and violations involving excessive noise and music, also violative of a license condition.[3]

---

[2] Condition 2 states: "Sales, service and consumption of alcoholic beverages on the patio shall be permitted only between the hours of 10:00 A.M. until 11:00 P.M. Monday through Friday, and 8:00 A.M. until 11:00 P.M. Saturday and Sunday."

[3] Condition 10 states: "No noise shall be audible from the exterior of the premises."

An administrative hearing was held on September 25, 1996, at which time oral and documentary evidence was received. Two police detectives testified in support of the Department's allegations, and two officers of defendant corporation also testified.

Khamp Thongrivong, an undercover police officer, testified that he and two other police officers and a Department investigator visited appellant's premises on January 12, 1996, in response to complaints from nearby businesses about people drinking in the common area shared by appellant and other businesses, loud noise, and drinking by minors [RT 7]. Officer Thongrivong purchased a bottle of Corona beer, and then walked outside to the common area which was the source of the complaints [RT 8-9]. While drinking the beer, he saw other patrons in the common area, also drinking beer [RT 12]. At that point, Daniel Snyder, appellant's president, came outside and tried to get everyone back inside [RT 12]. Officer Thongrivong heard one patron claim to Mr. Snyder that he had been told by the owner that he could drink outside; Mr. Snyder told the patron that was untrue, that he himself was the owner, and to go back inside [RT 13]. After the patron asked if he could remain outside, Mr. Snyder "hesitantly let the man drink outside right by the door" [RT 13]. Officer Thongrivong went inside the premises, as requested.

In the course of doing so, officer Thongrivong became aware that, although there was a license condition stating appellant could not serve alcohol on the front patio after 11:00 p.m., patrons on the front patio were drinking what appeared to him to be beer and wine. In addition to these patrons, officer Thongrivong and the other two vice officers were also on the patio and drinking beer [RT 16]. According to Officer

Thongrivong's watch, it was then 11:30 p.m. [RT 13-14]. He observed two employees of appellant in a position to observe the drinking, but neither did anything to stop it [RT 17-18].

On cross-examination, Officer Thongrivong conceded that he did not taste or smell what the patrons on the patio were drinking, and did not see any non-law enforcement person on the patio drinking from bottles labeled as being alcohol. He also acknowledged that he did not see the waitress he observed on the patio serve any drinks; she was cleaning tables [RT 20-21].

Officer Thongrivong testified that subsequent to his visit, he phoned appellant, spoke with Mr. Snyder, and told him of the violations he had observed [RT 18-19, 21-22]. He stated he did not recall saying that the penalty for the violations would probably be a "slap on the wrist" [RT 23]; however, he did recall that the conversation was friendly and Mr. Snyder cooperative [RT 23].

Paul Hayes, a Department investigator, also testified. He and Department investigator Searles remained outside the premises, monitoring noise being emitted from appellant's premises. Investigator Hayes testified that he walked back and forth along the street in front of the premises, and could hear noise as far as 200 feet from the premises [RT 30-31], being broadcast out through the front of the premises [RT 49]. Investigator Hayes testified that after the police officers had gone, he had a conversation with Mr. Snyder and told him he would be receiving a letter from the Department [RT 31-32]. Investigator Hayes also testified, in connection with the

January 12, 1996, visit, he observed the police officers and other patrons on the patio, with bottles of beer and with wine glasses appearing to be full [RT 52-53].

Investigators Hayes and Searles visited the premises again on January 26, 1996, and again were able to hear noise, consisting of loud conversation, boisterous talking and recorded music, coming from the premises and audible at least 100 feet from the premises [RT 32-34]. On February 23, 1996, while involved in a minor decoy operation concerning a different licensee, investigator Hayes walked near the premises and again was able to hear, from 100 feet away, noise coming from the premises [RT 35-36].

On cross-examination, investigator Hayes acknowledged there were several other licensees in the area, including The Grill at La Jolla, George's at the Cove, and Alfonso's [RT 42-43, 45]. Additionally, he stated that while he mentioned to Snyder the fact that it was extremely loud inside the premises, he did not make reference to any specific violation.

Daniel Snyder testified that while he discussed some of the conditions on appellant's license, condition 10, the noise condition, was not one of them [RT 62-63]. He understood "noise" to mean disruptive, unpleasant, unwanted noise [RT 64]. He also testified that patrons of The Grill at LaJolla also use the common area which was the source of some of the noise [RT 78].

With respect to the January 12 incident involving drinking in an unlicensed area, he confirmed Officer Thongrivong's testimony about the presence of people with drinks in the patio, and his request that they return inside [RT 67]. However, as to the patron

who wished to remain outside, he denied giving him permission to remain outside and retain his beer, stating he would have required him to remain inside the doorway to the premises or surrender his beer [RT 68]. Mr. Snyder testified that since smoking is not permitted inside the premises, many patrons go to the common area to smoke; however, he does not let them take their drinks with them [RT 66-67].

With regard to his conversation with Officer Thongrivong, Mr. Snyder stated that the officer said "You saw me out there. You brought me in. That was good" [RT 69]. He also quoted the police officer as telling him he would probably only get a warning from the Department [RT 70].

On cross-examination, Mr. Snyder conceded that he had read the license conditions before he signed them, and had not asked anyone to discuss condition 10 (the noise condition) [RT 80]. He also stated that the size of the crowd on January 12, 1996, had surprised him, and since that time he has provided an extra doorman; has placed a rope across the garage door entry to the patio so patrons cannot go there after 11:00 p.m. [RT 81]; has posted signs about taking alcohol from the premises [RT 83]; and has turned the speakers to face in a direction where noise will not leave the premises [RT 85-86]. In addition, he and his partner and their employees have arranged to attend LEAD programs [RT 84].

Bradley Young II, the other co-owner, confirmed that appellant's employees have attended LEAD programs [RT 89-90].

Subsequent to the hearing, the Administrative Law Judge (ALJ) issued his proposed decision which concluded that the charges in the accusation had been

proven. Although counsel for the Department had recommended a 45-day suspension, with 30 days stayed, the ALJ imposed the slightly lesser suspension of 40 days, also staying 30 days thereof, treating the compliance steps taken by appellant as mitigation. The Department adopted the proposed decision, and appellant thereafter filed a timely notice of appeal.

In its appeal, appellant raises the following issues: (1) the Department accumulated counts of the same violation, thereby adding to the resulting suspension time; (2) the Department improperly combined a statutory violation with a condition violation, again adding to the resulting suspension time; (3) the Department erred in finding a violation that the licensee specifically disallowed; and (4) the penalty is excessive.

DISCUSSION

I

Three counts of the accusation alleged violations of condition 10 of the license, which provides that no noise shall be audible from the exterior of the premises, on January 12 and 26, 1996, and February 23, 1996. Appellant does not contend the violations did not occur, but, instead, that a Department investigator should have warned appellant at the time of the first violation, so that the problem could have then been eliminated.

Appellant cites Walsh v. Kirby (1974) 13 Cal.3d 95 [118 Cal.Rptr.1], where the California Supreme Court criticized the Department for accumulating a total of 11 violations of the laws regulating minimum retail prices before filing an accusation

against the licensee. While that decision is generally supportive of the contention that accumulating violations in order to be able to impose a greater penalty is arbitrary, and an abuse of discretion, it does not say where the line is between the prompt filing of an accusation which also serves as a warning to the licensee against future violations, and the process of accumulation which the court found offensive. In that case, the court acknowledged that prudence might warrant the Department's obtaining evidence of more than one violation in order to fortify its evidence. It did not say, however, at what point the Department must stop gathering evidence and go forward with an accusation.

In the present case, the Department's decision is somewhat inconsistent. The ALJ found that the Department investigator spoke with Daniel Snyder, appellant's president on January 12, 1996, the night of the first noise violation, and "advised him of what he had heard and of the violations he had observed." (Finding V, first paragraph). The ALJ also stated that Snyder first became aware of a problem with noise outside the premises when he received the accusation (Finding VI, first paragraph), and promptly took remedial action. The ALJ considered Snyder's testimony a mitigating factor in the imposition of the penalty. We think he was correct in doing so, but we do not think the degree of mitigation can be discerned in light of the undifferentiated suspension which he proposed, and which the Department adopted.

At the conclusion of the administrative hearing, Department counsel recommended a 45-day suspension, with 30 days stayed for one year. When asked for a breakdown of the recommendation, counsel allocated 15 days to each of counts 1

and 2, and 15 days to counts 3, 4 and 5 collectively [RT 104-105]. The ALJ, by imposing a 40-day suspension, with 30 days stayed, departed only modestly from the Department recommendation, without indicating which count or counts was being accorded the benefit of the mitigation.

Had appellant understood investigator Hayes' comments on January 12, 1996, to be a warning of a noise condition violation, and immediately taken the remedial action that he did eventually, there may well have been no basis for a suspension relating to a violation of the noise condition. This being the case, it would follow, in our thinking, that the degree of mitigation should be more than mere token in nature.

II

Appellant contends that the Department improperly combined a statutory violation and a condition violation to again enhance the penalty to be sought. Appellant cites Cohan v. Department of Alcoholic Beverage Control (1978) 76 Cal.App.3d 905, 910-911 [143 Cal.Rptr. 199] in support of its contention. The Cohan case involved an accusation which, in two counts, charged the licensee with the single act of having shown sexually explicit films. One count charged a violation of a condition of the license which contained a prohibition against doing so; the other count charged a violation of Rule 143.4, subdivisions (1), (2) and (3). The court there held the Department could impose discipline for one violation or the other, but not both.

This case is distinguishable from the Cohan case. In the Cohan case, there was only a single act, which consisted of a showing of sexually explicit films on a specific

date. In the present case, there were separate acts in separate locations. The statutory violation was based on the sale and consumption of beer by a police officer in an unlicensed portion of the premises, a common area adjacent to the premises. The condition violation was based on appellant having permitted the service and/or consumption of alcoholic beverages (by the same police officer and his two partners) on a patio portion of the premises, after the hours during which the service and consumption of alcoholic beverages was permitted. The first police officer had joined his fellow officers on the patio after having taken his beer outside the premises and being told by Snyder to go back inside.

Since the two violations were separate and distinct, appellant's argument should be rejected as lacking merit.

III

Appellant challenges the finding that police officer Thongrivong was permitted to consume beer in the unlicensed portion of the premises. It is appellant's position that once Thongrivong exited the premises into the unlicensed area, he was ordered to return inside.

The issue here is whether appellant "permitted" the consumption of an alcoholic beverage in the unlicensed portion of the premises. There is no dispute that the police officer was told to return to the premises. The question, then, would seem to turn on how long a patron was permitted to remain outside with his or her drink before being ordered back inside. Ideally, there would be a doorman who would bar anyone from leaving the premises while holding a drink. Indeed, appellant has since employed a

doorman for just that purpose. However, on the night in question, it was apparently left to appellant's president to maintain control over patrons who left the premises while still in possession of their drinks.

The ALJ found that after the police officer took his beer outside, he was told to return inside "a few minutes later," a time estimate given by officer Thongrivong [RT 23]. The record does not otherwise disclose how long it took Snyder to notice that Thongrivong had taken his beer to the unlicensed area. However, Snyder testified that Thongrivong complimented him on the action Snyder took to direct him to return inside the premises [RT 69].

Snyder testified that the business had only been open a short time, and there was an unexpectedly large crowd on the night in question. Presumably this was one of the factors taken into consideration by the ALJ as mitigation. Nonetheless, the absence of a doorman resulted in a patron being permitted to leave the premises with an alcoholic beverage and remain outside "several minutes." The record is sufficient to support the finding of a violation.

IV

Appellant's criticism of the penalty was premised on its contentions that one of the counts of the accusation had not been established, that a single act had been made the basis of two violations, one statutory, the other of a condition, and that the Department had accumulated violations to enlarge the penalty it could impose. While we find no merit in these claims, as presented by appellant, we do believe a reconsideration of the penalty is appropriate. A 40-day suspension is, we think, clearly

abusive in the circumstances, where a clearly communicated warning might well have prevented any future noise violations, and where the other violations were in large part attributable to the activities of the Department investigators and police officers rather than members of the general public.

CONCLUSION

The decision of the Department, except as to penalty, is affirmed. We remand this case to the Department for reconsideration of the penalty.[4]

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

---

[4] Having recused himself, Ben Davidian, Chairman, did not participate in the oral hearing of this matter or in the decision of the Board.

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 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.