ISSUED SEPTEMBER 25, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

MARY ELLEN and ROBERT PICCONE dba Epicurus 625 Montana Avenue, Suite B Santa Monica, CA 90403, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6776/AB-6777 File: 42-295761/20-301912 Reg: 96036328/96036329 Administrative Law Judge at the Dept. Hearing: John A. Willd Date and Place of the Appeals Board Hearing: July 2, 1997 Los Angeles, CA

Mary Ellen and Robert Piccone, doing business as Epicurus (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which ordered their on-sale beer and wine license suspended for 15 days, and their off-sale beer and wine license suspended for five days, for having permitted the consumption in the off-sale portion of the premises of alcoholic beverages purchased in the on-sale portion of the premises, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of

[1] The decision of the Department dated November 14, 1996, is set forth in the appendix.

Business and Professions Code §§23804 and 25612.5, subdivision (c) (3).[2]

Appearances on appeal include appellants Mary Ellen and Robert Piccone, appearing on their own behalf; and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale public premises and off-sale beer and wine licenses were issued on June 20, 1995. Thereafter, the Department instituted an accusation alleging that appellants had violated a condition of the on-sale license restricting where wine could be consumed after being purchased, and a section of the Business and Professions Code prohibiting the consumption of alcoholic beverages on the premises of an off-sale licensee.[3]

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[2] Business and Professions Code §25612.5, subdivision (c) (3), provides: "No alcoholic beverages shall be consumed on the premises of an off-sale retail establishment, and no alcoholic beverages shall be consumed outside the edifice of an on-sale retail establishment."

[3] Appellants' store is also an art gallery. It has an upper mezzanine or loft level, apparently visible from below, used for theatrical presentations, such as the one presented on the day in question. A small area in the rear of the main floor premises is used for wine tastings, and constitutes that portion licensed for consumption on the premises. Each of the licenses contains a condition which states:

> "Alcoholic beverages purchased by and/or consumed by patrons in the Type '42' licensed portion of the premises as shown on Exhibit 1 shall not be consumed in the Type '20' portion of the premises as shown on Exhibit 2 and a sign shall be posted to this effect on all entrances and exits of this applicant-premises and the area defined on Exhibit 1."

An administrative hearing was held on September 25, 1996, at which time oral and documentary evidence was received. At that hearing, a Department investigator testified that he attended a wine-tasting held on the premises on July 11, 1996, at which time he purchased a tasting, a small, partially-filled glass of wine, for two dollars. After noticing other patrons in the off-sale portion of the premises with glasses in their hands, he walked around that area himself, consuming some of the wine as he went, and then left the premises with some of the wine remaining in the glass [RT 30-34]. He was aware of signs indicating that drinking was to be confined to a specified area [RT 26-27, 52], and he heard verbal instructions to the patrons around him [RT 31], but disregarded both the signs and the verbal instructions, and no one stopped him from leaving.

John Farrell, the producer and a performer in a theatrical event being presented in conjunction with the wine-tasting, testified that the licensees had stressed that the wine-tasting had to be confined to the designated area, and that patrons, including investigator Lundell, were admonished of such a requirement more than once by himself and the licensee on the day in question [RT 74-75]. His testimony was confirmed by that of licensee Robert Piccone [RT 112-114]. Farrell testified that he was stationed near a rear exit when approached by the investigator and asked whether it was required that he remain within a certain area. Farrell understood Lundell and

other patrons to be implying they wished to exit through the rear door for some fresh air. He told them they must remain in the tasting area, and forbade them from using the rear exit. Under the circumstances, the investigator had been admonished to keep alcoholic beverages within the tasting area [RT 74-76, 77-78].

Subsequent to the hearing, the Administrative Law Judge (ALJ) issued his proposed decision in which he determined that appellants had violated the statute and condition in question by permitting the undercover investigator to consume the wine in the off-sale licensed portion of the premises. However, in considering the penalty, the ALJ considered the fact that it was but the single act of the investigator that violated the conditions of the two licenses, and that the investigator had declined to follow the posted signs or the verbal instructions regarding where the wine could be consumed. As a consequence, he proposed a lesser penalty than the one initially sought by the Department. The Department adopted the proposed decision, and appellants have filed a timely notice of appeal.

In their appeal, appellants raise several interrelated issues: (1) they fully complied with the rules and regulations concerning the prevention of a violation, by posting signs and issuing verbal warnings, both of which were disregarded by the investigator; (2) the Department attempted to and did entrap them; (3) the Department did not demonstrate sufficient evidence that a violation occurred; and (4) appellants are the victims of harassment.

DISCUSSION

Although appellants have asserted that the Department entrapped them into a violation, the events which occurred do not readily fit within the traditional bounds of the entrapment defense. That is not to say, however, that appellants' claim lacks merit in a general sense. This is so because what took place involved conduct by a law enforcement officer that, in the view of this Board, exceeded the bounds of proper law enforcement. We reach this conclusion by an analysis of the law of entrapment and its less-frequently encountered corollary, the defense of outrageous police conduct.

In People v. Barraza (1979) 23 Cal.3d 675, 689-690 [153 Cal.Rptr. 459] the California Supreme Court held the proper test for entrapment in California is whether the conduct of the law enforcement agent was likely to induce a normally law-abiding person to commit the offense:

> "For the purpose of this test, we presume that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect - for example, a decoy program - is therefore permissible; but it is impermissible for the police or their agents to pressure the subject by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime."

Thus, in the entrapment defense, the defendant commits acts which are criminal, but he is excused because some unacceptable conduct, i.e., "overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit a crime," was engaged in by law enforcement officers

and generated the otherwise criminal activity.

In explaining the evolution of the entrapment defense, the court in Barraza described "a developing awareness that 'entrapment is a facet of a broader problem,'" citing examples of what it termed "lawless law enforcement." In the court's view, the examples spring from common motivations, each a substitute for skillful and scientific investigation, and each condoned by the "sinister sophism" that the end justifies the means. (People v. Barraza, supra, 23 Cal.3d at 689.) Quoting an observation of Chief Justice Warren in Sherman v. United States (1958) 356 U.S. 369, 372, the court stated that "the function of law enforcement manifestly 'does not include the manufacturing of crime.'"

As Witkin has observed in his criminal law treatise, the defense of entrapment rests on broad grounds of good morals and public policy. (1 Witkin & Epstein, California Criminal Law, 2d ed., §260.) Those broad grounds of good morals are especially important here, where it is the Department, whose primary function is to protect the public welfare and morals of the people of California, that is, through its investigative agent, the motivating force in the creation of the violation for which it now seeks to discipline the licensee.

Appellants stress that appropriate signs were posted at the entrance to the tasting area warning that no alcohol was to be taken from the area. This fact is not in dispute, nor is there any dispute that verbal announcements were made that tasting

was to be confined to the designated area.

The ALJ found that the investigator was not directed to return to the designated portion of the licensed premises, nor was he stopped from attempting to leave the licensed premises with his glass of wine. This finding is not, however, inconsistent with the testimony of John Farrell that he recognized the investigator by his earring, and specifically recalled telling him and others "to keep the wine over by the tasting area."

Appellants assert that short of tackling the investigator, there was nothing more they could do, because he was intent on disobeying their "commands." Appellants argue that the investigator did not enter the store as a normal customer, but was intent on breaking the rules and manufacturing a violation.

While appellants may be somewhat guilty of overstating their case and exaggerating what is in the record, there is, nonetheless, substance to their argument. The investigator's conduct clearly troubled the ALJ, who wrote (Determination of Issues III):

> "In considering the penalty recommended herein, it is noted that in fact there was but a single act which created a violation as to each of the two licenses. Further this single act was committed by a Department investigator who declined to follow either the written instructions on the signs maintained within the premises or the verbal instructions of the licensee. It is further noted that from a description of the customers at the premises they do appear to be a group of well-mannered individuals who pose no appreciable threat to the immediate community."

The investigator's conduct troubles this Board as well. The investigator testified

[RT 55-56]:

> "Q. When you went to the event at Epicures on July 11, 1995, your intention was to determine whether you were going to be able to purchase wine and leave the wine-tasting area in order to corroborate the complaint; is that right?
>
> A. Correct.
>
> Q. You had no intent to stay and enjoy the wine-tasting event?
>
> A. No.
>
> Q. You were working, correct?
>
> A. Yes
>
> Q. And I take it then, when you bought what you claim is wine, you had no intention of following the posted sign that says , No alcoholic beverages outside the wine -tasting area for tasting?
>
> A. Correct."

The investigator's testimony that he was following the lead of other patrons [RT 56-58] is unpersuasive. Even giving the investigator the benefit of the doubt, there is a complete absence of any evidence that other patrons, unidentified in number, were consuming alcoholic beverages outside the licensed area.

The violation for which appellants have been disciplined arose not from an affirmative act on their part, but rather from their inability to prevent the Department investigator from acting in the manner in which he did. The ALJ's observation quoted above (supra, page 7) highlights the situation. It is fair to assume that it was his concern about the way the violation had occurred which led the ALJ to impose a lesser

penalty than that sought by the Department.[4] However, mitigation of an undeserved penalty is an insufficient remedy. The violation would not have occurred but for the conduct of the investigator, conduct which cannot be condoned.

Although it does not appear that a California appellate court has yet found a denial of due process on the basis of outrageous police conduct, the doctrine itself has been recognized. (See People v. McIntyre (1979) 23 Cal.3d 742, 748, n.1 [153 Cal.Rptr.237], where the California Supreme Court stated: "Sufficiently gross police misconduct could conceivably lead to a finding that conviction of the accused would violate his constitutional right to due process of the law," citing the decision of the New York Court of Appeals in People v. Isaacson (1978) 44 N.Y.2d 511 [378 N.E.2d 78].)

In People v. Isaacson, the New York Court of Appeals (that state's highest appellate court) explained how certain police conduct can be violative of due process. While the facts of Isaacson are far more egregious than in the case before the Board, the principles expressed are, nonetheless, instructive:

> "While due process is a flexible doctrine, certain types of police action manifest a disregard for cherished principles of law and order. Upon an inquiry to determine whether due process principles have been transgressed in a particular factual frame there is no precise line of demarcation or calibrated measuring rod with a mathematical solution. Each instance in which a

[4] The Department had recommended a 15-day suspension of each of the licenses [RT 142].

> deprivation is asserted requires its own testing in the light of fundamental and necessarily general but pliant postulates. All components of the complained of conduct must be scrutinized but certain aspects of the action are likely to be indicative ..."
>
> "Illustrative of factors to be considered are: (1) whether the police manufactured a crime which otherwise would not likely have occurred, or merely involved themselves in an on-going criminal activity ...; (2) whether the police themselves engaged in criminal of [sic] improper conduct repugnant to a sense of justice ...; (3) whether the defendant's reluctance to commit the crimes is overcome by appeals to humanitarian instincts such as sympathy, or past friendship, by temptation of exorbitant gain, or by persistent unwillingness ...; and (4) whether the record reveals simply a desire to obtain a conviction with no reading that the police motive is to prevent further crime or protect the populace."

People v. Isaacson, supra, 44 N.Y.2d at __ [378 N.E.2d at 83].

The instant case is clearly not a case where a denial of due process has resulted in a criminal conviction. Nor is it a case where the conduct which took place can be characterized as egregious. It is, however, a case where an apparently overeager investigator, with a predetermined mind set to ignore signs and verbal requests, committed the very act without which the Department has no case.

Appellants should have been entitled to assume that the investigator would conduct himself as a normal, law-abiding person, and that he would comply with a reasonable request, much less a directive, to stay within the licensed area while consuming an alcoholic beverage. In accepting the wine offered to him, he impliedly represented that he would do so.

The situation at issue is clearly distinguishable from one in which an ordinary

patron simply disregards a proprietor's request or directive. The record is devoid of any evidence that any patron disregarded appellants' requests and directives by taking an alcoholic beverage outside the designated area. Indeed, the ALJ's description of appellant's customers as a "well-mannered group of individuals who pose no appreciable threat to the immediate community" suggest they are normally law-abiding citizens who would honor appellants' requests. As a result, this case consists solely of the conduct of the investigator, absent which, there would be no case.[5]

CONCLUSION

We have expressed our concerns about the Department investigator having been overzealous in the performance of his duty. As the record stands, the only evidence of any violation relates to the conduct of the investigator himself. The efforts of the licensees to confine drinking of alcoholic beverages to the limited area authorized by their licenses were reasonable. The overriding question remains, where is the line to be drawn between proper police (or Department) observation of a crime (or license violation) and actual participation in, if not creation of, the wrong-doing. We are satisfied that in this instance the investigator manufactured this violation in spite of the

[5] It is significant that one of the "wines" being tasted was a non-alcoholic beverage called Ariel [RT 72-73, 122]. There would have been no legal limitations on where persons could consume such a beverage.

licensees' reasonable efforts to prevent it.

The decision of the Department is reversed.[6]

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

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[6] 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.