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

AB-9596
File: 48-516041; Reg: 15083214

WAYDE ELDON TROXELL,
dba Paddy's
2 West Main Street, Ventura, CA 93001-2508,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: June 1, 2017
Los Angeles, CA

ISSUED JUNE 29, 2017

Appearances: *Appellants:* Melissa Gelbart, of Solomon, Saltsman & Jamieson, as counsel for Wayde Eldon Troxell, doing business as Paddy's,

Respondent: Jonathan V. Nguyen, as counsel for Department of Alcoholic Beverage Control.

OPINION

Wayde Eldon Troxell, doing business as Paddy's, appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending his license for 15 days (with 5 days conditionally stayed subject to one year of discipline-free operation) because he violated a condition on his license mandating that entertainment not be audible beyond the area under the control of the licensee, in violation of Business and Professions Code section 23804.

[1]The decision of the Department, dated June 10, 2016, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on October 21, 2011. Previously, appellant was a co-licensee at the same premises with another individual, from 2006 to 2011, and an employee at the premises for ten years prior to that time. Appellant has no record of prior discipline.

On October 23, 2015, the Department instituted a two-count accusation against appellant charging that, on two separate occasions, he violated a condition on his license mandating that entertainment not be audible beyond the area under his control.

At the administrative hearing held on March 17, 2016, documentary evidence was received and testimony concerning the violations charged was presented by ABC Agent Brian Parsons, and appellant Wayde Eldon Troxell, owner and licensee of the premises.

Testimony established that Department Agent Brian Parsons visited the area adjacent to the premises on June 11, 2015, and June 19, 2015. On the first visit, he arrived at approximately 10:30 p.m., and parked roughly 150 feet away from the licensed premises, where he could hear music emanating from the premises during the half hour he was there. (Count 1.) On the second occasion, Agent Parsons first parked at the same location as the first visit, then at a location approximately 350 feet from the premises. (See Exh. 2.) He could hear music coming from the premises at both locations. (Count 2.) On neither occasion did the agent enter the licensed premises.

Appellant testified about a series of sound-proofing measures he undertook after learning of the investigation, including covering some windows, walls, ceilings, and a fan with sound-deadening foam, and posting signs inside and outside the premises asking patrons to keep the noise down and the door closed.

Following the hearing, the Department issued its decision which determined that the charges had been proved and no defense had been established. A penalty of 15-days' suspension was imposed, with 5 days conditionally stayed, subject to one year of discipline-free operation.

Appellant then filed a timely appeal raising the following issues: (1) condition #2 is vague as written and fails to provide notice as to what might constitute a violation, (2) condition #2 is unreasonable and unenforceable because the Department failed to justify its imposition, (3) the accusation fails for vagueness because it conflates two separate conditions on the license, and (4) the administrative law judge (ALJ) committed reversible error by sustaining the accusation despite the Department's failure to prove the allegations regarding "amplified music." Issues 3 and 4 will be discussed together.

DISCUSSION

I

Appellant contends condition #2 is vague as written and fails to provide notice as to what might constitute a violation. (App.Op.Br. at pp. 4-5.)

Condition #2 on appellant's license provides: "Entertainment provided shall not be audible beyond the area under the control of the licensee(s), as defined on the ABC-257 dated 11-2-06." (Exh. 3.) Appellant maintains a license condition "must provide a licensee with sufficient guidance as to what actions or omissions would constitute a violation" to be enforceable. (App.Op.Br. at p. 4.) Appellant notes that the "Board has held conditions to be void as a matter of law where the terms used in conditions were construed to mean whatever the Department wanted them to mean." (*Ibid*., citing *Dirty Bird Lounge* (2014) AB-9401 at p. 12.)

Appellant contends condition #2 fails for vagueness because of the difficulty of defining what is meant by the "area under the control of the licensee." He maintains the ABC-257 form (exh. 4), which is a diagram of the premises to be licensed, inadequately defines the area under the control of the licensee, and points out that the form does not contain the word "control." (*Ibid*.)

The Department contends exactly the opposite—that the ABC-257 itself defines the licensee's area of control, and that condition #2 restricts entertainment from being audible beyond the areas depicted on that form. (Dept.Br. at p. 4.) It maintains that appellant himself defined the boundaries depicted on the ABC-257, and therefore he cannot claim ignorance of the area covered by this condition. (*Ibid*.)

Similarly, the ALJ rejected appellant's claim of vagueness:

> 10. The Respondent focused its defense on the word "defined" as used in the petition for conditional license, arguing that the ABC-257 did not contain any definition of the area under the control of the licensee. This argument is rejected. The rules of statutory construction are clear that words are to be given their everyday meaning. In the present case, while it is true that the ABC-257 does not contain a dictionary-style definition, the word "define" has other meanings. Among them are "to make clear the outline or form of" and "to determine the boundary or extent of." "Delineate" is listed as a synonym.[fn.] The ABC-257 clearly defines the boundaries of the Licensed Premises, i.e., the area under the Respondent's control.

(Conclusions of Law, ¶ 10.)

We agree that condition #2 neither vague nor does it fail to provide notice of what would constitute a violation. The premises themselves—as drawn on the ABC-257—are the area under the control of the licensee. The agent was beyond that perimeter when he heard the music, thereby establishing a violation.

II

Appellant contends condition #2 is unreasonable and unenforceable because the

Department failed to justify its imposition. (App.Op.Br. at pp. 6-9.)

The Department's authority for the imposition of conditions on a license, and the procedures for imposing, modifying, or removing such conditions are contained in Business and Professions Code sections 23800 through 23805. The section alleged to have been violated in the accusation is section 23804:

> A violation of a condition placed upon a license pursuant to this article shall constitute the exercising of a privilege or the performing of an act for which a license is required without the authority thereof and shall be grounds for the suspension or revocation of such license.

Appellant maintains condition #2 is unreasonable and enforceable because it does not have a nexus to the resolution of a problem articulated in the preamble of the Petition for Conditional License which states:

> WHEREAS, petitioner(s) has/have filed an application for the issuance of the above-reffed-to license(s) for the above-mentioned premises; and,
>
> WHEREAS, pursuant to Section 23958 of the Business and Professions Code, the department may deny an application for a license where issuance would result in or add to an undue concentration of licenses; and,
>
> WHEREAS, the proposed premises are located in Census Tract 0023. Where there presently exists an undue concentration of licenses as defined by Section 23958.4 of the Business and Professions code; and,
>
> WHEREAS, the petitioner(s) stipulate(s) that by reason of the aforementioned over-concentration of licenses, grounds exist for denial of the applied-for license(s); and,
>
> WHEREAS, petitioner(s) intend to exercise privileges of the license in an exterior patio area; and,
>
> WHEREAS, the issuance of an unrestricted license would be contrary to public welfare and morals . . .

(Exh. 3.) Appellant maintains the conditions on the license were imposed because of the undue concentration of licenses in the census tract but that "[t]here is no logical

explanation or reasonable interpretation which permits Condition No. 2, a limitation on audible entertainment, to mitigate the issue of undue concentration of licenses in the area . . ." (App.Op.Br. at p. 8.) Because it is unclear what the Department sought to address by imposing condition #2, appellant claims, the condition is unreasonable. (*Ibid.*)

The ALJ addressed this issue at length:

> 11. The Respondent also argued that the condition was unenforceable since there was no basis for imposing the condition in the first place. The burden of proof on any issue is on the party asserting the issue. In this case, the Respondent bears the burden of establishing that there was no basis for imposing the condition at issue. The Respondent failed to meet its burden.
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> 12. The Respondent did not simply fail to meet its burden but, in fact, presented absolutely no evidence on this issue. Instead, the Respondent noted that the whereas clauses referred to over-concentration, an exterior patio, and public welfare or morals. In the Respondent's opinion, an anti-noise condition is unrelated to any of these issues. While an anti-noise condition does not bear any obvious relation to over-concentration, the same cannot be said of the other two issues. For example, the testimony and the areal map clearly establish that an apartment building is located across the street from the Licensed premises' parking lot. Since the petition for conditional license does not refer to rule 61.4, it seems likely that these residences are more than 100 feet away. As such, they would not have been entitled to the special protection which rule 61.4 provides to such residents. It does not follow, however, that they are entitled to no protection, particularly in light of the patio. Accordingly, there is an arguable basis for the condition.
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> 13. The discussion in the last paragraph relies, in part, on speculation. Just because there is an arguable basis for imposing a condition does not mean there is an actual basis for imposing a condition. This highlights the problem arising from the Respondent's failure to present any evidence on the issue—the only way to determine if such a basis exists it re-examine the Department's investigation at the time the license was issued. Such a re-examination would have to include, at a minimum, the report prepared in connection with the application. In this case, it would necessitate examining three such reports—the report prepared when Frank Roedel filed his original application, the report prepared when the Respondent was added as a co-licensee, and the report prepared when Roedel was dropped as a partner. Yet the Respondent failed to produce any of these

> reports. Further, the Respondent failed to present any testimony concerning the issuance of any of these licenses. In short, the record is devoid of any evidence to support the Respondent's claim.

(Concl. of Law, ¶¶ 11-13.)

The condition in question, "Entertainment provided shall not be audible beyond the area under control of the licensee," is found in many of the licenses issued by the Department, and is no stranger to this Board. (See, e.g., *Big Billy, Inc.* (2010) AB-9006; *Pittera* (1999) AB-7170; *Fahime, Martin, etc.* (1997) AB-6650; *Wichman* (1997) AB-6637.) The condition, as written, appears to be fairly straightforward—if entertainment noise reaches beyond the area under the control of the premises, the condition is violated. Many previous appellants have asserted that this condition is arbitrary or unreasonable, and that the Department is free to charge a condition violation even if the noise that "escapes" can be heard only a few feet beyond the area under control of the licensee, or barely heard at all. But that is not this case.

In *Wichman*, *supra*, the licensees contended that the condition was ambiguous. The Board acknowledged that it could be abused, but held it had not been abused in that case. The Board's language is instructive:

> The arguments of appellants as to the arbitrariness of the conditions are unpersuasive. The condition clearly states the noise restriction. While penalizing noise heard a few feet from the premises could be arbitrary, music and lyrics heard from 100 to 150 feet from the premises is a clear violation of the condition.
>
> [¶ . . . ¶]
>
> We are of the opinion that the condition is clear on its face and the enforcement one of extreme importance to the quiet enjoyment of the residents. Thus, appellants' contention that the condition is ambiguous and unreasonable is rejected.

(*Wichman*, *supra* at p. 4.)

The authority of the Department to impose conditions on a license is set

forth in Business and Professions Code Section 23800, subdivision (a): "If grounds exist for the denial of an application . . . and if the department finds that those grounds may be removed by the imposition of those conditions . . ." the Department may grant the license subject to those conditions. Section 23801 states, further, that the conditions ". . . may cover any matter . . . which will protect the public welfare and morals. . . ."

The ALJ identified the arguable grounds for the imposition of this license in the conclusions of law cited above, and appellant did not present any contrary evidence. While we do not believe condition #2 is unreasonable or unenforceable, appellant should petition for removal of this condition if he believes the reasons for the original imposition of the condition no longer exist.

III

Appellant contends the accusation must fail for vagueness because it conflates two separate conditions on the license, thereby failing to sufficiently notify him of the charges against him. (App.Op.Br. at pp. 9-11.) Appellant contends the ALJ committed reversible error by sustaining the accusation despite the Department's failure to prove the allegation regarding "amplified music." (*Id.* at pp. 12-13.)

In the accusation, each of the two counts alleges:

> [Appellant] violated condition #2 on the license which states, '**Entertainment** provided shall not be audible beyond the area under the control of the licensee(s), as defined on the ABC-257 dated 11-02-06' in that the licensee and/or licensee's employee or agent did allow **amplified music** to be audible beyond the area under the control of the licensee, such being a violation of the license condition and ground [sic] for license suspension or revocation under business and Professions code Section 23804.

(Exh. 1, emphasis added.) Appellant maintains this wording conflates the acts

prohibited by condition #1 involving "amplified music" and condition #2 which prohibits "entertainment" from being audible beyond the area under the licensee's control.

Appellant contends:

> By accusing Appellant of violating Condition No. 2 by allowing 'amplified music', the Department either, (1) conflated two different conditions, alleging a violation of Condition 2 based on acts proscribed by Condition 1 (which was not alleged); or, (2) unilaterally and unofficially modified Condition 2 to include the amplification of music within the ambit of the term 'entertainment'. Either way, the Department's Accusation was so vague as to violate Appellant's due process right to notice.

(App.Op.Br. at p. 11.)

The ALJ further muddies the waters by stating:

> 14. Finally, the Respondent noted that Agent Parsons did not testify that the music was amplified. The Respondent further argued that the only way to determine if the music was amplified would have been for Agent Parsons to have entered the Licensed Premises. The Respondent has mixed up two different requirements set forth in two different conditions. Condition 2, the condition at issue here, does not contain the word "amplified." Condition 1 refers to the "use of any amplifying system or device." But the Department has not alleged that condition 1 was violated. Hence, whether the music was amplified or not is irrelevant.

(Concl. of Law, ¶ 14.) Blaming appellant for the Department's poorly-worded accusation is hardly helpful or instructive, and this entire conclusion contains only one pertinent phrase: "whether the music was amplified or not is irrelevant." We agree with that assessment.

While appellant would have us believe the accusation is fatally flawed because it recites that *amplified music* was audible beyond the area under control of the licensee, rather than saying that *entertainment* was audible beyond the area under control of the licensee, we believe this is a difference without a distinction. Surely the word *entertainment* encompasses many things—including music of all types, amplified or otherwise.

Appellant further alleges that the ALJ committed reversible error by sustaining the accusation despite the failure of the Department to prove that "amplified music" was audible, or that such amplified music constituted entertainment so as to be a violation of condition #2. (App.Op.Br. at p. 12.) He goes on to state:

> Appellants [*sic*] do not dispute Agent Parsons' testimony that he heard music coming from Appellant's premises on June 11 and 19 of 2015: Appellants [*sic*] submit, rather, that this testimony was wholly and completely insufficient to demonstrate a violation of Condition No. 2, which relates to *entertainment* rather than mere music. The Department produced no testimony of the music's volume; the type or genre of music that was heard; or whether there was any dancing or singing observed or heard. The Department made no effort to establish that the music Agent Parsons heard constituted entertainment, and the Administrative Law Judge likewise made no findings to that effect.

(*Id.* at p. 13.)

In practical terms, there is no difference in our mind between saying: entertainment was audible—music was audible—amplified music was audible. As stated above, this difference without a distinction makes no difference in our final analysis as they are interchangeable. Appellant concedes that Agent Parsons heard music coming from the premises—this constitutes a violation. To allege that music is not entertainment is simply absurd.

Having reached the conclusion that we must affirm the Department's decision in this matter, we nevertheless wish to express our disapproval of the Department's approach in this case. Why, for example, did the agent not enter the premises, talk to the owner, and perhaps issue a warning? For a licensee with no prior discipline to be given no opportunity whatsoever to fix a newly-noted problem seems draconian at best. Were there complaints from nearby residents? The record contains no evidence of any. If there were no complaints, why was this licensee singled out? In other words,

what was the goal here? If compliance with conditions, and the protection of public welfare and morals are the goals of enforcement, then it seems to us that working with the licensee to achieve compliance, rather than simply issuing an accusation after rolling down the window in the parking lot, would be a far better way to reach these goals than the way this matter was handled.

ORDER

The decision of the Department is affirmed.[2]

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
JUAN PEDRO GAFFNEY RIVERA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[2]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.