

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

RAYMOND P. MONASTESSE	)	AB-6615
dba The Main Event)	
2505 South San Jacinto Avenue	)	File: 42-288117
San Jacinto, CA 92583,	)	Reg: 95032617
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Rodolfo Echeverria
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	October 2, 1996
	)	Los Angeles, CA
)	

Raymond P. Monastesse, doing business as The Main Event (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his on-sale beer and wine public premises license for ten days, with five days thereof stayed for a probationary period of one year, for appellant's allowing live entertainment in the licensed premises to be audible outside the premises and beyond the area under control of appellant, being contrary to the universal and generic public

¹The decision of the Department dated November 2, 1995, is set forth in the appendix.

welfare and morals provision of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §§24200, subdivision (a), and 23804.

Appearances on appeal include appellant Raymond P. Monastesse; and the Department of Alcoholic Beverage Control, appearing through its counsel, David Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued June 17, 1994. Thereafter, the Department instituted an accusation against appellant on May 11, 1995. Appellant requested a hearing.

An administrative hearing was held on October 6, 1995, at which time oral and documentary evidence was received. At that hearing, it was determined that appellant permitted the music from a live band performing on the premises to be heard not only outside the premises, but beyond the area controlled by appellant, in violation of a condition on the license.

Subsequent to the hearing, the Department issued its decision which suspended appellant's license for ten days, with five days thereof stayed for a one-year probationary period. Appellant filed a timely notice of appeal.

In his appeal, appellant raises the following issues: (1) he has permission from adjoining commercial tenants; (2) the only complainants, who reside in the mobile home park adjacent to the premises, are moving; (3) the San Jacinto Police Department "has never found the audible to be out of control from the live entertainment;" (4) the area

where the investigators heard the live music was within the bounds of appellant's parking lot; and (5) he has done everything in his power to resolve the problem.

DISCUSSION

Appellant contends that he had permission from adjacent property owners Texaco and Evens Tires to "control the audible coming from the entertainment." This contention was made more specific in appellant's letter of January 14, 1996, specifying the grounds for his appeal, in which he characterized such "permission" as an "inverse easement."

There is no evidence in the record before the Administrative Law Judge (ALJ) showing the existence of such an agreement. Indeed, on this appeal, it is only appellant's unsupported statement that there was such an agreement.

The testimony at the hearing was that the music from appellant's establishment could be heard in several different areas some distance away from appellant's property, including a mobile home park nearby. This testimony was accepted by the ALJ. The issue of permission, then, even if one the Board could properly consider at this time, is irrelevant in light of the fact that the evidence at the hearing established noise violations involving areas and properties other than those for which permission was claimed.

Appellant contends that since the only person who has complained, a resident of the mobile home park adjacent to appellant's premises, is moving from the area, the problem has resolved itself. Again, other than appellant's representation, there is no evidence in the record that this is the case. In any event, a noise violation may not be

ignored because a person who had been bothered by the noise decided to move.

Appellant argues that the San Jacinto Police Department has measured sound levels from the premises and not found them objectionable. However, there is once again, no evidence in the record regarding any determination by the San Jacinto Police Department regarding noise from appellant's premises. The San Jacinto Police Department was not mentioned in the hearing. Thus, any failure on its part to complain about appellant's live music is entitled to no weight in determining the merits of the accusation or the appropriate penalty.

Appellant contends in his brief that his parking lot extends 200 feet to a block wall, impliedly challenging the investigator's testimony that the live music could be heard beyond the area under his control.

The testimony of the investigator was that he and his companion stopped "over by the Mobile Home Park" [RT 9]. The music was audible from that location. The record is not clear whether, with respect to the mobile home park, the investigator was on or beyond appellant's premises. Given appellant's admission that he had received complaints from residents of the park, it is reasonable to infer that the music could be heard beyond the point where the investigator stood.

The ALJ could reasonably have concluded from the investigator's testimony that from where he was located he could determine that the music was extending beyond the premises under appellant's control. The Appeals Board is not in a position to second guess his assessment of the evidence.

Appellant suggests that the Board take into consideration that he has done

everything in his power to cure the problem. It is true that appellant has taken steps to resolve the noise problem; he has made physical alterations to the entry to the building, including a "double entrance" to the foyer. The Department acknowledged that this appeared to solve the noise problems.

While the ALJ made no express reference to appellant's curative measures, the fact that the penalty he assessed was relatively mild (ten-day suspension with five days stayed), and less than that originally sought by the Department, it would appear that he took such measures into account. Given appellant's admission that there had been violations of the condition of his license before the curative measures were taken, some penalty would appear to be in order.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) There has been no such claim. The relatively mild penalty imposed in this case would appear to reflect a certain amount of sympathy with appellant's efforts to control the noise from his place of business. We see no reason to look behind the Department's determination.

CONCLUSION

The decision of the Department is affirmed.²

²This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.

RAY T. BLAIR, JR., CHAIRMAN
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ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD