

ISSUED OCTOBER 19, 2000

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

ALFRED P. BALDERRAMA and	)	AB-7519
RAMON F. MALDONADO)	
dba The Brave Bull	)	File: 47-306143
26 1 South Mission Drive	)	Reg: 99046148
San Gabriel, CA 91766,)	
Appellant s/Licensees,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	Ronald M. Gruen
)	
	)	Date and Place of the
DEPARTMENT OF ALCOHOLIC	)	Appeals Board Hearing:
BEVERAGE CONTROL,	)	July 6, 2000
Respondent.	)	Los Angeles, CA
)	

Alfred P. Balderrama and Ramon F. Maldonado, doing business as The Brave Bull (appellants),¹ appeal from a decision of the Department of Alcoholic Beverage Control² which suspended their on-sale general public eating place license for 25 days, with 10 days thereof stayed, conditioned upon a two-year period of discipline-free operation, for having violated a condition on their license, being

¹ Maldonado, who was served with the accusation and notice of hearing but did not appear, is, according to appellant Balderrama, no longer affiliated with the business.

²The decision of the Department, dated October 7, 1999, is set forth in the appendix.

contrary to the universal and generic public welfare and morals provisions 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 Alfred P. Balderrama, appearing through his counsel, Percy Duran III, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public eating place license was issued on August 26, 1996. Thereafter, the Department instituted an accusation against them charging that, on six occasions in 1998 and 1999, appellants allowed entertainment provided by them to be audible beyond the area under their control, in violation of a condition on their license.

An administrative hearing was held on August 20, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by a nearby resident who had complained about late night loud music, consisting, for the most part, of bass vibrations, and by four San Gabriel police officers who had responded to noise complaints by that resident and other nearby residents. Each of the officers testified that he had been able to confirm the existence of the noise. Appellant Balderrama testified about steps he had taken to address the noise problems, which now supposedly have been eliminated. He essentially conceded the existence of the noise problems, attributing them primarily to a change in the style of the operation and a new music format designed to cater to a younger, more active clientele. Appellant, a city councilman for the city of San Gabriel also presented the testimony of another city councilman who described

efforts the city had made, as well as efforts it was unable to make, to assist appellant in addressing the noise problems.

Subsequent to the hearing, the Department issued its decision which determined that five of the six condition violations alleged had been established.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) ownership of the premises has been changed from a partnership to a corporation; the corporation cannot be held responsible for violations which occurred when it did not exist; (2) appellant Balderrama's request for a continuance should have been granted; (3) appellant Ramon F. Maldonado was disassociated from the partnership and the corporation, so cannot be found in violation of the Act; and (4) the charge of a noise violation was based upon an arbitrary standard. Issues 1 and 3 are related, and will be discussed together.

DISCUSSION

I

Appellants contend that, at some time after the violations occurred, the ownership of the premises was transferred to a corporation owned solely by Balderrama. Therefore, they contend, neither the corporation nor Maldonado can be found liable.

The only evidence in the record regarding any transfer of ownership is Balderrama's statement to that effect. Balderrama admitted that the Department had not been notified of any transfer of ownership [RT 5].

It is a moot issue which of the entities, the partnership or the corporation, is chargeable with the violation. The violation is a charge against the license, and will

remain with the license even assuming the Department approves of the transfer.

The same is true of Maldonado's status. If he truly is no longer involved in the ownership of the license, he has no reason to appeal the order.

II

Appellant Balderrama contends that his request for a continuance, on the basis that he was so grief-stricken over his mother's recent death that he was unable to prepare for the hearing, was improperly denied.

The record indicates that appellants' request for a continuance was heard by Administrative Law Judge McCarthy only two days before the hearing, and was denied [RT 16].

Appellant also argued that he had on earlier occasions sought a continuance based upon the unavailability of his attorney, but was unable to produce any evidence of such a request made after a hearing date had been set.

Finally, appellant again requested a continuance on the day of the hearing, this time based upon the alleged unavailability of his attorney, whose absence was unexplained.

The Administrative Law Judge (ALJ) has a great deal of discretion in considering a timely request for a continuance, and almost absolute discretion in considering an untimely request. Here, from all indications in the record, appellants' requests were, in each case, untimely. The rules require that such a request not be made later than ten days before a hearing is scheduled to commence. Appellant was represented by counsel, and there is nothing in the record to suggest that a timely request for a continuance could not have been made. Either of the ALJ's could reasonably have viewed the request as an effort at

delay, and neither can be said to have abused his discretion in denying the continuance.

III

Appellants contend that, since the city of San Gabriel did not use decibel equipment to measure the noise level of the alleged violations, the charges were based upon an arbitrary standard.

This argument is specious. The violations were not based on the decibel level of the noise generated by the premises. They were the permitting of noise to extend beyond the area under the control of the licensee, which a condition on the license prohibited. The test was whether the noise was audible beyond the area under the control of appellants, and it clearly was. The evidence consisted of citizen complaints that the noise penetrated their homes and made sleep impossible.

The record does reveal that appellants made substantial alterations in the premises and its operating practices to control noise levels (see Finding of Fact 9; RT 138-140 and Exhibit B), presumably at some expense.

We do have some concern about the penalty imposed. The proposed decision refers to evidence in the record of riots and altercations at the premises, and in the street nearby, and numerous police calls to the premises. Although acknowledging that these incidents were not alleged in the accusation, and disclaiming them having been given any consideration for any purpose involving penalty, the decision went on to caution appellants to tighten up their security measures and police their patrons and premises, or else suffer the consequences of substantial discipline.

We note that appellants were not represented by an attorney at the hearing. Had they been, it is quite possible, if not probable, that appellants would have been able to contain the evidence to only that charged in the accusation.

While we do not question the sincerity of the Administrative Law Judge, or his disclaimer, we find it impossible to believe that evidence of the type he referred to would not have influenced his impressions of what discipline would be appropriate. In order to be sure there was no such influence, we have concluded that the case should be remanded to the Department for reconsideration of the penalty.

ORDER

The decision of the Department is affirmed with respect to the findings that there were violations of Business and Professions Code §23804, but is remanded to the Department for reconsideration of the penalty in light of the comments herein.³

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

Board Member Ray T. Blair, Jr., did not participate in the deliberation of this matter.

³ 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.