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

AB-7911
File: 47-323376 Reg: 01050925

BILLY T'S OLGAS, INC. dba Rock's Club
10102 Indiana Avenue, Riverside, CA 92503,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: April 3, 2003
Los Angeles, CA

ISSUED JUNE 9, 2003

Billy T's Olgas, Inc., doing business as Rock's Club (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days, and indefinitely thereafter until appellant petitions for a revised set of conditions on its license, for having permitted the premises to be operated in a manner which created a law enforcement problem, contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, section 22, and Business and Professions Code section 24200, subdivision (a).

Appearances on appeal include appellant Billy T's Olgas, Inc., appearing through its counsel, Mark S. Sabbah, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

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[1]The decision of the Department, dated December 6, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on November 5, 1996. Thereafter, on June 5, 2001, the Department instituted a nine-count accusation against appellant, charging a refusal to produce records requested by the Department (count 1); failure to make available to the Department records of quarterly gross sales of alcoholic beverages and food (count 2); permitting the premises to be operated in a manner that created a law enforcement problem (counts 3 and 9); the malicious damaging of an automobile by agents or employees of appellant (count 4); and the willful and unlawful use of force or violence by agents or employees of appellant (counts 5, 6, 7, and 8).

Counts 3 and 9 both are directed at the period between January 1, 2001, and April 12, 2001. Count 3 identifies the law enforcement problem as the Riverside Police Department having been required to make numerous calls, investigations, arrests, or patrols concerning conduct and acts at appellant's premises, while count 9 alleges that the law enforcement problem was that the Riverside Police Department was required to deploy uniformed police officers in marked police vehicles in order to keep the peace and prevent crimes from occurring. Count 9 specifically alleges that officials of the Riverside Police Department were required to deploy at least one police vehicle to the immediate vicinity of appellant's premises between midnight and 2:00 a.m. each and every night the premises was open in order to keep the peace and deter criminal acts from occurring.

An administrative hearing was held on August 22, 2001, at which time oral and

documentary evidence was received. Subsequent to the hearing, the Department issued a decision which sustained counts 3 and 9 (the law enforcement counts), count 4 (malicious damage to vehicle), and counts 6 and 8 (unlawful use of force), and suspended the license for 10 days, the suspension to continue indefinitely thereafter until appellant petitions for a license with new and revised conditions to be imposed upon it.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) there was not substantial evidence to support a finding that the premises were operated in a manner that created a law enforcement problem (Count 3); (2) there was a complete failure of evidence to support a finding that the premises were operated in a manner that created a law enforcement problem (Count 9); (3) there was not substantial evidence to support a finding that appellant permitted the premises to be used in a manner contrary to welfare and morals; (4) the conditions imposed by the Department are arbitrary and unreasonable and not reasonably related to the findings; and (5) the penalty is excessive. The first three issues will be discussed together.[2]

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[2] Appellant has also asked the Board to consider several matters which are not part of the formal record. One of these is a transcript of a hearing on appellant's petition for mandate to stay an order revoking appellant's conditional use permit. The hearing took place after the hearing in this matter. Another is an apparent excerpt from a hearing, also later in time, at which Lt. Cannon testified, apparently offered in an attempt to impeach him. Neither of these qualifies as newly discovered evidence. The third item is the claim by appellant's attorney that a nearby billiard parlor held an alcoholic beverage license, also offered to impeach Lt. Cannon. We have reviewed Lt. Cannon's testimony where, at one point he indicated he had no knowledge as to whether the billiard parlor was licensed, and at another point he said he believed it was. Whether he was mistaken or not in his testimony, we think the point is immaterial to the main issues on which he testified.

DISCUSSION

I

Appellant contends that there was not substantial evidence to support the law enforcement problem charged in count 3 of the accusation, and a complete failure of evidence in support of count 9 of the accusation. Appellant also contends that there is not substantial evidence that appellant permitted the premises to be used in a manner contrary to welfare and morals.

The evidentiary issues which appellant raises require that we review the entire record to determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]), that is, relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [71 S.Ct. 456] and *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

James Cannon, a Riverside police lieutenant, testified that, beginning in August 2000, he was primarily responsible for that area of the City of Riverside where the premises are located.[3] He testified that when he assumed his new position, he was advised that appellant's premises was at the top of the list of places where

[3] Shortly after Lt. Cannon's testimony began, Department counsel advised the ALJ that his testimony "relates to count number 9." [RT 68.]

disturbances, assaults and other difficulties occurred. Shift summaries he received on a daily basis confirmed this.

The decision states that "difficulties of a similar nature appear to have been occurring for some time" at appellant's premises, citing a letter from District Administrator Brewer in February 1998 warning of an excessive number of incidents occurring between February and December 1997 including but not limited to batteries, assault with deadly weapons, drunk in public, and thefts. The record also contains a reply from appellant's attorney a month later to the effect that appellant was taking steps to resolve the District's concerns. The record does not contain any evidence of any further or similar incidents from the time the letters were exchanged until January 2001.

Without knowing the nature and extent of what may have occurred between January 1998 and January 2001, it is impossible to know whether Lieutenant Cannon's decision to deploy marked police cars on a daily basis was a reasonable response to the situation that then existed. On the other hand, would it not be presumptuous on the part of this Board to assume that an experienced police officer with major supervisorial responsibilities in a large city would deploy his officers at a particular location on a continuous basis in the manner he described without good reason?

We acknowledge that, compared to other police problem cases the Board has seen, the evidence in this case is not particularly impressive. The Department did not offer any police logs, shift reports and the like to bolster Lt. Cannon's testimony. But we, as was the ALJ, are impressed with his testimony, albeit that substantial parts of it could be characterized as administrative hearsay.

Of course, a police official who is in charge of a large number of personnel will necessarily rely on what is reported to him. It would be utterly unreasonable to expect him to have personal knowledge of all the incidents reported to him that led him to make the decision to deploy personnel to appellant's premises. Although such reports, either oral or in writing, will technically be considered hearsay, he necessarily must rely on them in deciding what action must be taken.

Appellant cites *Yu v. Alcoholic Beverage Control Appeals Board* (1992) 3 Cal.App.4th 286 [4 Cal.Rptr.2d 280] for the proposition that 19 incidents over a 14-month period were insufficient to demonstrate an undue burden on law enforcement. Appellant misreads the *Yu* decision. Contrary to appellant's assertion, the court said, with respect to whether a law enforcement problem had been shown: "Here there is ample evidence that the premises have become law enforcement problems ..." (*Yu v. Alcoholic Beverage Control Appeals Board, supra, at p.298.)* We think appellant mistakenly confused what the Appeals Board had said about the insufficiency of that number of incidents, a conclusion with which the court obviously disagreed. (See *Yu v. Alcoholic Beverage Control Appeals Board, supra,* 3 Cal.App.4th at page 293.)

We know of no statistical test for gauging whether a premises is being operated in a manner which creates a law enforcement problem. Much depends upon the nature of the incidents which have occurred, and what has been done to deal with them. Here, even while police have "staked out" the premises, fights, overly aggressive security measures, and the incidence of intoxicated patrons continued.

The ALJ's findings and conclusions reflect his acceptance of Lt. Cannon's description of the problems confronting the Riverside Police Department:

> Based on continued receipt of reports of disturbances at Respondent's licensed premises, among other actions, Lt. Cannon, between January 1, 2001, and April 12, 2001, continuously assigned a Sergeant and two officers to do bar checks and provide a visible presence from 11 p.m. or 12 midnight until closing or as late as 2:30 or 3:00 a.m. This coverage has been in place on the busiest nights of the club, Wednesdays, Thursdays, Fridays, and Saturdays. According to Cannon, even Sunday nights have now become troublesome.
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> The above assignments are intended to have a preventive impact just by having police presence in the immediate area. No incidents attributed to Rocks Club, other than those in Findings of Fact, paragraphs IV, V, VI and VIII resulted in written reports or arrests.
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> Rocks Club consumes an abnormally high amount of police resources. There are a number of other Department-licensed businesses in the area and none of them experience the same level of disturbances as Rocks Club. The other locations include Incahoots, Laws and Spires. Lt. Cannon indicated that the internal security, for example at Incahoots, does a fine job of policing the consumption of alcoholic beverages inside its premises. It nips developing problems before they get out of hand and at a time when they can deal reasonably with the patrons in question. If it becomes necessary to eject a patron, the security cooperates with the police by giving the necessary names and information so effective follow-up enforcement action may be taken.

(Finding of Fact IX, paragraphs D, E, and F.)

> Respondent's licensed premises attracts individuals who are or become intoxicated. Respondent employs security guards that have been instructed to be aggressive late at night in clearing the large parking lot. The combination of inebriated patrons and aggressive security guards has resulted in too many incidents involving violence in a relatively short period of time. These facts establish that a serious law enforcement problem exists that requires immediate attention. ...
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> Nearly all the incidents involving violent behavior occurred late at night. It is quite likely that Respondent's security guards were often provoked by unruly, mouthy and even drunken patrons. Nevertheless, the overly aggressive and inflexible response that seems to be the norm from Respondent's security guards has no place in operating such a licensed premises. Security guards are to maintain the peace and provide for the safety of the patronage. Here, the evidence insists, the security guards did to the contrary.
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> Difficulties of a similar nature appear to have been occurring for some time at Respondent's licensed premises. (Exhibits 2-A and 2-B.) Lt. Cannon was alerted to the police problem at Respondent's premises in August 2000 when he assumed command of the La Sierra-Arlanza area. His deployment, in early 2001, of men to the vicinity of the premises every night the premises is busy likely reduced the number of incidents somewhat. That excessive deployment

cannot continue, however.

> The Riverside Police Department's resources that were required to be allocated to Respondent's premises adversely affected the ability of the Riverside Police Department to respond to other calls and to otherwise carry out its normal law enforcement duties. Riverside Police Department lacks sufficient resources to continue the present allocation.
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> It has been suggested that Respondent's licensed premises differs from other similar nearby Department-licensed premises in the degree of problem prevention carried out by the on-site security forces. Were Respondent's security to intervene to prevent excessive drinking of alcoholic beverages before intoxication reaches a level where the patron response becomes belligerent, the number of incidents might diminish. Were the premises to operate more in the manner of the restaurant its license intends, the levels of inebriation might reduce, thereby reducing the number of incidents.

(Determination of Issues III, unnumbered paragraphs 2 through 6.)

We are satisfied that the incidents which were shown with respect to counts 4, 6, and 8,[4] with Lt. Cannon's assessment of the situation, are sufficient to support the Department's determination that the existence of a law enforcement problem had been proven.

II

The 10-day suspension ordered by the Department is to continue indefinitely until appellant petitions for a revised set of conditions to be imposed upon his license. The new set of conditions is to include the existing 17 conditions, number 13 thereof to be revised by the addition of a second sentence, and a new condition to be added.

Condition 13, with the added sentence in italics, would read as follows: "No 'happy hour' type of reduced price alcoholic beverage promotion shall be allowed. *This*

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[4] The evidence upon which the findings with respect to counts 4, 6, and 8 were based consisted of the testimony of the three patrons involved. Appellant offered a different version of each of the three incidents upon which the counts were based, but the ALJ chose to rely on the testimony of the three patrons. Since the ALJ is the primary trier of fact, his findings of credibility are binding on the Board.

prohibition includes any and all promotions, such as a 'Dollar Drink Night,' where the price of alcoholic beverages is temporarily reduced."

Condition number 18, the new condition, reads as follows: "Sales, service and consumption of alcoholic beverages shall be permitted only between the hours of 11:00 a.m. and 12 midnight each day of the week."

Appellant contends that the new and revised conditions are arbitrary and unreasonable, and not reasonably related to the findings.

The Department may impose "reasonable conditions" on a license under the authority of Business and Professions Code section 23800, subdivision (a), which provides that "If grounds exist for the denial of an application for a license or where a protest against the issuance of a license is filed 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 that the conditions "may cover any matter . . . which will protect the public welfare and morals . . . ."

We view the word "reasonable" as set forth in section 23800 to mean reasonably related to resolution of the problem for which the condition was designed. Thus, there must be a nexus, defined as a "connection, tie, link," in other words, a reasonable connection between the problem sought to be eliminated, and the condition designed to eliminate the problem.

It is clear that the major concerns of the Riverside Police Department were the problems associated with excessive consumption of alcohol by patrons, and the manifestation of that excessive consumption in the late hours the premises operated. Both conditions appear to be directed at those problems.

Condition 13, in its original form, was directed at the dispensation of drinks at

reduced prices during the late afternoon, early evening "happy hour." Given the concern over late night consumption and its consequences, a prohibition of low-priced drinks during all hours of the evening does not appear to us to be unreasonable.

The new condition, number 18, is directed at controlling the problems associated with excessive drinking and parking lot problems in the early morning hours. It does so by simply eliminating those hours from the equation.

The Department asked the ALJ to cut back to 10:00 p.m. each night of the week the time during which the sale, service, and consumption of alcoholic beverages could take place. The Department's recommendation traces to its concern that the premises had been operated principally as a nightclub rather than as a restaurant. That appellant was licensed as a restaurant was a consideration in the ALJ's thinking:

> The Order that follows appears warranted by the evidence and by Determination of Issues, paragraph III. It is hoped that Respondent will gain control of its premises and its patrons, *without using any violence on them*, so that it may continue to exercise the privileges of its restaurant license for a long while to come." (Determination of Issues III, italics in original.)

The ALJ's recommendation, which the Department ultimately adopted, was not as severe, limiting the sale, service and consumption of alcoholic beverages to the hours between 11:00 a.m. and 12 midnight. We cannot say this is unreasonable, since it appears that most of the problems which generated the concerns on the part of the Riverside Police Department arose during the hours after midnight.

III

Appellant challenges the penalty as excessive, arguing that it was intended to preclude appellant from operating the premises as a nightclub.

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].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

The order, by its terms, does not prohibit appellant from operating as a nightclub. It simply precludes the sale, service, and consumption of alcoholic beverages after midnight.

We have already indicated that we do not find the restriction imposed by the new and modified conditions to be unreasonable. If appellant believes the effect of the limitation on hours of operation is to preclude its operation as a nightclub, it has only itself to blame. We cannot say that the Department has abused its discretion.

ORDER

The decision of the Department is affirmed.[5]

TED HUNT, CHAIRMAN

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[5] 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.

E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD