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

**AB-8021**
File: 48-371747 Reg: 02052467

SUSAN WARING KELLEY and LAMONT GEORGE MCKISSOCK
dba Monty's Log Cabin
5755 Highway 9, Felton, CA 95018,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: November 13, 2003
San Francisco, CA

**ISSUED DECEMBER 23, 2003**

Susan Waring Kelley and Lamont George McKissock, doing business as Monty's Log Cabin (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license, conditionally stayed the order of revocation, suspended the license for 10 days, and imposed conditions on the license, for having failed to take reasonable steps to correct objectionable conditions, consisting of excessive loud noise, in violation of Business and Professions Code section 24200, subdivisions (a), (b), and (c).

Appearances on appeal include appellants Susan Waring Kelley and Lamont George McKissock, appearing through their counsel, Stephen G. Wright, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

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[1]The decision of the Department, dated August 29, 2002, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises license was issued on December 26, 2000. Thereafter, the Department instituted an accusation against appellants charging that they failed to take reasonable steps to correct objectionable conditions on the premises, consisting of excessive loud noise, after written notice to correct such conditions.

An administrative hearing was held on June 18, 2002, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Robert Martin, the resident of a home located approximately 75 yards from the premises, concerning numerous instances between August 2001 and March 2002 of loud noise, yelling, screaming, and other disturbances coming from the premises and an outdoor patio. Martin identified logs he kept recording the incidents when noise was at levels that interfered with his quiet enjoyment. He testified that the noise problem began shortly after the bar changed ownership. Denise Kelley, a co-owner of the property on which the premises is located, testified that she resides in a house located approximately 100 feet from the premises, and has not been bothered by noise. Appellant McKissock testified about various steps he took to deal with the noise problem, including closing the patio at 10:00 p.m., installing an awning to block noise transmission, and holding a meeting with nearby residents to explain what he was doing to deal with the noise situation.

Subsequent to the hearing, the Department issued its decision which determined that appellants had failed to take reasonable steps to resolve the noise problem despite oral and written notices from the Department demanding corrective action. In addition to a stayed order of revocation and the suspension, the Department imposed two

permanent conditions on the license, one requiring the closure of the patio at 10:00 p.m. each day of the week, and the other requiring appellant to take steps to assure that noise shall not be audible outside the structure of the premises. The stay was conditioned upon appellants remaining free of discipline during the period of the stay, assuring that patrons when leaving the premises do not create a disturbance or noise that interferes with residents' quiet enjoyment, and taking steps to assure that noise generated in the patio area, when open, again does not interfere with residents' quiet enjoyment.

Appellants have filed a timely appeal, and raise the following issues: (1) the decision is not supported by substantial evidence; (2) the Department letter informing appellants of excessive noise complaints failed to disclose information in the Department's possession regarding the identity of the complaining person and the nature, times, and dates of the complaints; (3) the conditions imposed by the Department's order are unreasonable; and (4) the conditions pursuant to which the order of revocation was stayed are unnecessary and unjustified. Issues 1 and 2 are related, and will be discussed together. Issues 3 and 4 are also related, and will also be discussed together.

DISCUSSION

I

Appellants complain that the Department never disclosed the identity of the complainant, Martin, until it provided discovery following the filing of the accusation, and that Martin's uncorroborated testimony does not constitute substantial evidence. They further claim to have been prejudiced by the Department letter's reference to complaints from "residents," when Martin was the only person who testified regarding

noise complaints.

“Substantial evidence" 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 [95 L.Ed. 456, 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].) When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must 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].) 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].)

The thrust of appellant’s appeal is that the Department abused its discretion by relying solely on the history of noise complaints generated by Martin, who, according to appellants, is determined to force the bar’s closure.

The Appeals Board has uniformly adhered to the established rule that the credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (*Brice v. Dept. of Alcoholic Bev. Contro*l (1957) 153 Cal.2d 315 [314 P.2d 807, 812]; *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].) There is no reason why it should not do so here. Appellants’ challenge to Martin’s veracity was heard and rejected by the administrative law judge (ALJ), and appellants have not presented the Board with any persuasive

reason why the ALJ erred in relying on Martin's documented testimony.

Nor do appellants explain how knowledge of Martin's identity would have made a difference in the way they responded to the noise complaints. They were informed more than once that noise complaints had been registered with the Santa Cruz Sheriff's Department; not until they were informed that the Department intended to bring charges with respect to noise complaints did they address a major source of noise, the outside patio, which they began closing at 10:00 p.m. nightly.

We are unaware of any duty on the part of the Department to disclose the identity of a person who has complained to it about noise emanating from a licensed premises. Indeed, it is commonly the case that a complainant's identity is protected up to the point where that person's testimony in an open hearing may be required. That appears to have been the case here.

However. it does appear to us that had Mr. Martin advised appellants directly that something needed to be done about the noise level, appellants might sooner have acted to remedy the situation.

II

The Department ordered two conditions permanently imposed upon appellants' license:

1. The patio seating area shall be closed at 10:00 p.m. each day of the week.

2. Respondents shall take steps to assure that noise shall not be audible beyond the premises' structure.

The conditions were imposed pursuant to the authority granted the Department by Business and Professions Code section 23800, subdivision (b), which permits the Department to place conditions upon a retail license where findings are made by the

Department which would justify a suspension or revocation of the license and the conditions are reasonably related to those findings.

Appellants complain that the first condition is unreasonable because Martin is the only person impacted by noise from the outside patio, and the second because it would require soundproofing that could alter the premises "charm and character." They do not challenge either condition as unrelated to the findings, and seem to suggest that the noise problems would go away if Martin himself went away.

The absence of any claim that the conditions are not reasonably related to the findings dooms appellants' objections to the conditions.

In *Kirby v. Alcoholic Beverage Control Appeals Board & Schaeffer* (1972) 7 Cal.3d 433, 441 [102 Cal.Rptr. 857], the Supreme Court upheld the Department's determination that issuance of a license sought therein would, inter alia, interfere with nearby residential quiet enjoyment even though no nearby resident had voiced opposition to the license. In this case, a nearby resident complained, documented his complaints, and faced extensive cross-examination about those complaints. It makes no sense to suggest that, since he was the only person subjected to the noise, there is no basis for a noise-abatement condition.

It may well be, as appellant contends, that steps taken to assure that noise does not escape the premises' structure might alter the structure's "charm and character." We do not know whether this is the case. What we do know is that the Department presented evidence sufficient to convince an ALJ that remedial steps were necessary if objectionable noise was to be controlled. The noise-abatement condition does not confine appellants to any particular solution - whatever action that is taken will be measured by its results.

Admittedly, appellants are in a difficult situation, confronted by an unhappy neighbor, and faced with an uncertain future. If it proves necessary to alter the "charm and character" of the log cabin housing the premises in order to solve the noise problem, appellants have little choice but to do so.

Much of what has been said applies with equal force to the conditions of the stay of the order of revocation - that appellants assure that patrons leaving the premises not create a disturbance or generate noise that interferes with residents' quiet enjoyment of their property, and take steps to assure that noise from the patio, when open, will not similarly interfere.

One of the implications of the stayed order of revocation is that the conduct in question is of such magnitude as to warrant revocation if it were to continue unabated. The stay of the order is, in effect, little more than a temporary reprieve, a warning to appellants that any action they take to resolve the noise problems must be as effective as possible, or the Department will revoke the stay.

We acknowledge the Department's broad discretion in its choice of discipline. Nonetheless, we think it has abused that discretion by its imposition of an order of revocation, albeit conditionally stayed, where the noise complaints were uncorroborated, where residents even closer to the source of the noise were not bothered by it, and where appellant had no proven record of noise violation prior to the accusation in question. Appellants are aware of the problem, and motivated by the newly-imposed license conditions, violation of which will invite further suspensions. In these circumstances, we think the stayed order of revocation was unreasonable, and must be set aside.

ORDER

The decision of the Department is affirmed except as to penalty. The penalty is reversed and the case is remanded to the Department for reconsideration of the penalty.[2]

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[2] 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.