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

AB-9486
File: 47-522282 Reg: 14080578

MASOUD ZAIGHAMI,
dba Pete's Restaurant and Brewhouse
6608 Folsom Auburn Road, Suite 9, Folsom, CA 95630-2147,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: October 1, 2015
Sacramento, CA

ISSUED OCTOBER 22, 2015

Appearances: Appellant Masoud Zaighami, doing business as Pete's Restaurant and Brewhouse, in propria persona. Dean Lueders, for respondent Department of Alcoholic Beverage Control.

OPINION

This appeal is from a decision of the Department of Alcoholic Beverage Control[1] suspending appellant's license for 15 days for purchasing alcohol for resale from a retail vendor, in violation of Business and Professions Code section 23402; for failure to maintain records of expenditures incurred for the purchase of alcohol, in violation of section 25752; and failure to retain a copy of the Petition for Conditional License on the premises as required by a license condition, in violation of section 23804.

[1]The decision of the Department, dated December 5, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on July 24, 2012. Appellant's license included ten explicit conditions. Additionally, the following language appears in bold near the bottom of appellant's Petition for Conditional License: "Petitioner(s) agree(s) to retain a copy of this petition on the premises at all times and will be prepared to produce it immediately upon the request of any peace officer." (Petition for Conditional License, Exh. 2.)

On May 29, 2014, the Department instituted a three-count accusation against appellant charging that appellant purchased alcohol from a retail vendor for resale at the licensed premises, in violation of Business and Professions Code section 23402 (count 1); that appellant failed to maintain a record of expenditures incurred for the purchase of alcohol for resale at the licensed premises, in violation of section 25752 (count 2); and that appellant failed to retain a copy of his Petition for Conditional License on the premises and failed to produce it upon request of a peace officer, as required by a condition on appellant's license, in violation of section 23804 (count 3).

At the administrative hearing held on October 30, 2014, documentary evidence was received and testimony concerning the violations charged was presented by Agent Mathew Moore of the Department of Alcoholic Beverage Control and by appellant Masoud Zaighami.

Testimony established the events underlying the accusation.

Count 1

On February 14, 2014, while conducting an investigation of appellant's restaurant, Department Agent Mathew Moore found two bottles of Bakon vodka behind the restaurant's bar counter, along with a receipt for the purchase of, among other

things, two bottles of Bakon vodka from Total Wine & More, a retail store. The receipt was dated February 2, 2014. Appellant acknowledged to Agent Moore that he had purchased the vodka to sell at his restaurant and had sold some of it at the restaurant.

Total Wine & More does not hold a beer manufacturer's, wine grower's, rectifier's, brandy manufacturer's, or wholesaler's license. (See Bus. & Prof. Code § 23402.)

Agent Moore informed appellant that it was illegal for him to purchase alcoholic beverages from a retailer for resale at his restaurant. Agent Moore also instructed appellant to remove the bottles of Bakon vodka from the restaurant.

On April 14, 2014, the two bottles of Bakon vodka were still behind the bar counter at appellant's restaurant.

On that day, Agent Moore also found a bottle of Mississippi Mud Black and Tan beer, along with a receipt for the beer, in a Trader Joe's bag. The bag was in a storage area next to the bar counter, near the kitchen. There is no evidence, however, that appellant, or anyone on behalf of appellant, had purchased the beer for resale at appellant's restaurant.

Count 2

On April 14, 2014, Agent Moore asked to see receipts for the other bottles of distilled spirits in appellant's restaurant. The receipts were not at the restaurant. Appellant thought that the receipts were at his bookkeeper's office.

Count 3

On June 29, 2012, appellant filed with the Department a Petition for Conditional License in conjunction with his application for an on-sale general public eating place license. The Petition for Conditional License contains, in bold print, the following

sentence: “Petitioner(s) agree(s) to retain a copy of this petition on the premises at all times and will be prepared to produce it immediately upon the request of any peace officer." (Petition for Conditional License, Exh. 2.)

On February 12, 2014, while conducting an investigation of appellant’s restaurant, Agent Moore asked appellant to produce a copy of his Petition for Conditional License. Appellant was unable to do so. Moore then advised appellant on how to obtain a copy of the Petition, and to do so within twenty days.

On April 14, 2014, Agent Moore returned to appellant’s restaurant and asked appellant to produce the Petition for Conditional License. Appellant was again unable to do so.

After the hearing, the Department issued its decision which determined that all three counts were proven and no defense was established. The ALJ imposed the penalty of fifteen days’ suspension requested by the Department and noted its leniency:

> Pursuant to the Department’s penalty guidelines, the Department could have recommended suspension of Respondent’s license for fifteen days for his violation of Business and Professions Code 23402, plus another fifteen days, with five days stayed, for his violation of Business and Professions Code Section 23084 [*sic*]. The Department could have also recommended a minor penalty for Respondent’s violation of Business and Professions Code Section 25752. Under these circumstances, the Department’s recommendation that Respondent’s license be suspended for fifteen days, for all three violations, is lenient.

(Determination of Issues IV.)

Appellant filed a timely appeal raising the following issues: (1) Appellant made an honest mistake in purchasing alcohol for resale from a retail vendor due to his lack of understanding of the Business and Professions Code, and moreover, Agent Moore did not tell appellant to remove the vodka from the premises after his first visit; (2) again, appellant made an honest mistake in failing to maintain financial records due to his lack

of understanding of the Business and Professions Code as well as a "series of bad hires" (App.Br. at p. 4); and (3) appellant made an honest mistake in overlooking the final paragraphs of his Petition for Conditional License, and now maintains the Petition on the premises, and moreover, appellant objects to the fact that it took twenty months, following appellant's license application, for the Department to verify presence of the Petition for Conditional License within the premises. These issues will be discussed together.

DISCUSSION

Appellant contends that all three counts were the result of an honest misunderstanding of the law. (See App.Br. pp. 2-6.) Appellant notes,

> Pete's Restaurant and Brewhouse (Pete's) is a regional chain with each location independently owned and operated. As a small business owner of this establishment, the task of starting a new business is daunting. There are numerous rules and regulations that are expected to be followed [and] understood. Being a lone owner of the establishment, it is a difficult challenge in understanding and navigating the numerous regulations that is set [*sic*] in California — especially if a person doesn't have background knowledge on how to seek assistance on legal matters.

(App.Br. at p. 2.)

Additionally, appellant pleads fact-based defenses to each count. With respect to count 1, appellant claims the Bakon vodka bottles were present on Agent Moore's second visit because Moore failed to inform appellant that the bottles must be removed. (App.Br. at p. 3.) With respect to count 2, appellant argues that he went through a series of "bad hires" and because of that, "there were no organized methods of record keeping of the receipts until Appellant hired a qualified bookkeeper." (App.Br. at p. 4.) Finally, with respect to count 3, appellant objects to the fact that the Department did not verify presence of the Petition for Conditional License on the premises until twenty

months after appellant applied for the license. (App.Br. at p. 5.)

One of the oldest precepts of law, descended to the United States from Roman law by way of the European legal tradition, is *ignorantia legis neminem excusat*, or "ignorance of the law excuses no one."[2] (See, e.g., *Shevlin-Carpenter Co. v. Minn*. (1910) 218 U.S. 57, 68 [30 S.Ct. 663] [rejecting loggers' argument that they were ignorant of law requiring permit for removal of lumber from state land]; *Central of Ga. Ry. Co. v. Wright* (1907) 207 U.S. 127, 136 [28 S.Ct. 47] [rejecting railway shareholders' argument that they were ignorant of shares' taxability].)

This general rule has, in limited circumstances, been rejected. In *Cheek v. United States*, for example, the U.S. Supreme Court observed that an exception was appropriate where the legislature expressly made willfulness an element of a crime:

> The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system. [Citations.] Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law. This common-law rule has been applied by the Court in numerous cases construing criminal statutes. [Citations.]
>
> The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses. Thus, the Court almost 60 years ago interpreted the statutory term "willfully" as used in the federal criminal tax statutes as carving out an exception to the traditional rule. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws.

(*Cheek v. United States* (1991) 498 U.S. 192, 199-200 [111 S.Ct. 604].) The Supreme Court also explained that due process required notice where a registration law made

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[2]An alternative phrasing, also employed by the courts, is *ignorantia juris non excusat*, or "ignorance of the law does not excuse."

"mere presence in the city" a violation:

> The rule that "ignorance of the law will not excuse" [citation] is deep in our law, as is the principle that of all the powers of local government, the police power is "one of the least limitable." [Citation.] On the other hand, due process places some limits on its exercise. Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act.

(*Lambert v. Cal.* (1957) 355 U.S. 225, 231 [78 S.Ct. 240] [addressing defendant's failure to register as a felon with the chief of police, as required by municipal code for stays within city exceeding five days].)

In the context of default judgments resulting from a mistake of law, the California supreme court has observed:

> The issue of which mistakes of law constitute excusable neglect presents a fact question; the determining factors are the reasonableness of the misconception and the justifiability of lack of determination of the correct law. [Citation.] Although an honest mistake of law is a valid ground for relief where a problem is complex and debatable, ignorance of the law coupled with negligence in ascertaining it will certainly sustain a finding denying relief.

(*Ontario v. Superior Ct. of San Bernardino County* (1970) 2 Cal.3d 335, 346 [85 Cal.Rptr. 149]; see also *A&S Air Conditioning v. John J. Moore Co.* (1960) 184 Cal.App.2d 617, 620 [7 Cal.Rptr. 592].)

This Board has, in the past, dealt with appellants pleading ignorance of the state's alcoholic beverage laws and has firmly rejected that defense, though admittedly with little analysis or reference to case law. In *Dhillon*, for instance, appellants argued they were ignorant of the fact that a third sale-to-minor violation could trigger revocation of their license. (*Dhillon* (2001) AB-7434, at p. 3.) The Board rejected that defense and

relied on strong policy reasons for doing so: “This argument, if validated, could cause licensees to feign some ignorance of the law, thereby closing their eyes to the realities of strictly obeying the law.” (*Ibid.*) Similarly, in *Song*, the appellant argued that she could not "knowingly" have permitted solicitation activity in her licensed premises because she did not fully understand what "B-girl problems" were. (*Song* (1996) AB-6657, at p. 6.) The Board rejected appellant's plea of ignorance. (*Id.* at p. 7.) It emphasized, "Ignorance of the law is never an excuse."

In the context of alcoholic beverage licensing, there is little room for flexibility. Both the courts and this Board have repeated, many times over, that licensees have an affirmative duty to maintain and operate their premises in accordance with law. "A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly." (*Laube v. Stroh* (1992) 2 Cal.App.4th 364, 379 [3 Cal.Rptr.2d 779]; see also *CMPB Friends, Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002) 100 Cal.App.4th 1250, 1256 [122 Cal.Rptr.2d 914] ["[L]icensees bear an affirmative duty to ensure that minors are not permitted to enter and remain in their premises in violation of section 25665."]; *Ballesteros v. Alcoholic Bev. Control Appeals Bd.* (1965) 234 Cal.App.2d 694, 700 [44 Cal.Rptr. 633] ["[A]n on-sale licensee has an affirmative duty to maintain a properly operated premises"]; *Morell v. Dept. of Alcoholic Bev. Control* (1962) 204 Cal.App.2d 504, 514 [22 Cal.Rptr. 405] ["The holder of a liquor license has the affirmative duty to make sure that the licensed premises are not used in violation of the law"]; *Munro v. Alcoholic Bev. Control Appeals Bd.* (1960) 181 Cal.App.2d 162, 164 [5 Cal.Rptr. 527]

["The owner of a liquor license has the responsibility to see to it that the license is not used in violation of law"]; *Mack v. Dept. of Alcoholic Bev.* Control (1960) 178 Cal.App.2d 149, 153 [2 Cal.Rptr. 629] ["The licensee, if he elects to operate his business through employees must be responsible to the licensing authority for their conduct in the exercise of his license"]; *Givens v. Dept. of Alcoholic Bev. Control* (1959) 176 Cal.App.2d 529, 534 [1 Cal.Rptr. 446]; *Ramirez* (2015) AB-9441, at p. 12.)

Appellant's appeal depends primarily on his assertion that California's alcoholic beverage laws are complex and difficult to comprehend. (App.Br. at p. 2.) He notes that he had no intent to violate the law. (*Ibid.*) Moreover, he has since "learned that assistance on this matter can be sought by contacting local agencies, departments, and legislative office[s] should he seek to get a better understanding of the comprehensive and concise [Business and Professions Code] regulations." (*Ibid.*)

Appellant's ignorance of the law is no defense. While we sympathize with him regarding the difficulties inherent in running a business, we cannot say that the state's alcoholic beverage law is so complex or opaque that it excuses a licensee from compliance with its provisions. If appellant truly could not comprehend some provision, he could have contacted the Department for clarification, or sought guidance from an attorney or a layperson with knowledge of alcoholic beverage law. He did not; instead, he "relied heavily on his conscientious thinking." (App.Br. at p. 6.) Well-intentioned or not, a licensee cannot escape liability for violations of the Business and Professions Code by pleading ignorance.

Appellant offers other, secondary defenses to the charges. With regard to count 1, for example, appellant contends that he did not remove the bottles of Bakon vodka from the premises after Agent Moore's February 14 visit because Agent Moore did not

tell him to do so. (App.Br. at p. 3.) Section 23402 provides:

> No retail on- or off-sale licensee, except a daily on-sale general licensee holding a license issued pursuant to Section 24045.1, shall purchase alcoholic beverages for resale from any person except a person holding a beer manufacturer's, wine grower's, rectifier's, brandy manufacturer's, or wholesaler's license.

As the language of the statute illustrates, it is the act of purchasing alcohol for resale from a retail vendor that constitutes a violation of section 23402 — not the mere retention of the alcohol after the fact. Appellant concedes that he purchased the bottles from a retail vendor after failing to locate it through several wholesalers. (App.Br. at p. 3.) The violation alleged in count 1 is therefore established regardless of whether Agent Moore was clear in his instructions.

With regard to count 2, appellant claims that he made a series of "bad hires," and that his prior bookkeeper failed to properly manage the establishment's financial records. (App.Br. at p. 4.) Appellant argues that the new bookkeeper has been catching up, but that "working out of the establishment was not an option as Pete's does not host a calm, quiet environment." (*Ibid.*) Section 25752, however, provides as follows:

> No licensee may manufacture, import, sell or distribute alcoholic beverages, except wine, in the State of California unless he keeps records at his licensed premises of such manufacture, importation, sale or distribution of alcoholic beverages manufactured, imported, sold or distributed by the licensee in this State. Such records shall include all expenditures incurred by the licensee in the manufacture, importation, sale or distribution of alcoholic beverages, except wine, in this State.

As discussed above, a licensee has an affirmative duty to ensure that the licensed premises operate in compliance with the law. (See, e.g., *Laube*, *supra*, at p. 379; *Mack*, *supra*, at p. 153.) This includes ensuring, to the extent reasonably possible, that employees comply with the law as well. If appellant did not have within his licensed

premises a suitable location for the management and storage of financial records, it was incumbent upon him to create one. The violation is count 2 is therefore proven.

With regard to count 3, appellant contends that he overlooked the bold language at the bottom of his Petition for Conditional License requiring that a copy be kept on the licensed premises because he felt it was more important to comply with the numbered conditions listed earlier in the document. (App.Br. at p. 5.) Section 23804 provides:

> 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.

It appears that the bolded language requiring appellant to retain a copy of the Petition for Conditional License on the premises and produce it for inspection is, in fact, a boilerplate provision included on most or all Petitions for Conditional License, and not a specific enumerated condition applicable solely to appellant's premises. Nevertheless, there is nothing in the language of section 23804 limiting its applicability to enumerated or premises-specific conditions. By signing the document, appellant agreed to comply with the bolded provision; its violation therefore establishes count 3.

Appellant further objects to count 3 on the grounds that "[i]t took the Department 1 year and 8 months to inspect and investigate the establishment." (App.Br. at p. 5.) Appellant does not explain how this time period is relevant. (See *ibid.*) The premises are subject to inspection for violation of the law, or violations of license conditions, at any time. (Bus. & Prof. Code § 25753.) Moreover, in the case of the license condition violation, Agent Moore was particularly lenient and gave appellant an additional twenty days to obtain and produce his Petition for Conditional License. (See Findings of Fact.) Indeed, Agent Moore did not return to verify appellant had followed through on

obtaining the Petition until two months later. Despite the extra time, appellant failed to produce the Petition for Conditional License. (*Ibid.*) Count 3 must therefore be sustained.

In closing, we note that the ALJ, in his findings of fact, transposed counts 2 and 3. However, apart from the headings listing the count number and the order in which the counts are arranged, there appears to be no error. Moreover, appellant does not state this error as a grounds for reversal; indeed, he largely concedes the facts surrounding the violations alleged. There is certainly no resulting miscarriage of justice. (See Cal. Const., art. VI, § 13; Cal Code Civ. Proc. § 475.) The Board therefore holds the error harmless and affirms all counts.

ORDER

The decision of the Department is affirmed.[3]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3]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.