

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

AB-9762

File: 41-535215; Reg: 18086735

JOHN ARTHUR REDMOND,
dba Handsome John's
316 Chestnut St.
Mt. Shasta, CA 96067,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: August 16, 2019
Sacramento, CA

ISSUED AUGUST 26, 2019

Appearances: *Appellant:* John Arthur Redmond, in *propria persona*,

Respondent: Alanna Ormiston, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

John Arthur Redmond, doing business as Handsome John's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending his license for 20 days for failing to comply with a condition attached to the license.

¹ The decision of the Department, dated December 4, 2018, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine eating place license was issued on September 27, 2013. Appellant has one prior disciplinary action for violation of a condition placed upon the license.

On April 5, 2018, the Department instituted an accusation against appellant. At the administrative hearing held on September 24, 2018, documentary evidence was received, and testimony concerning the violation charged was presented by Department Agents Keith Roberts and Brett Letendre. Appellant testified on his own behalf.

Testimony established that, some time before March 24, 2017, Agent Roberts received a noise complaint regarding the licensed premises. Agent Roberts reviewed the conditions for the licensed premises. One of the conditions provided that entertainment “shall not be audible beyond the area under the control of the licensee(s)” (Findings of Fact, ¶ 5.)

On March 24, 2017, Agent Roberts visited the licensed premises in plain clothes and observed patrons in the bar being served drinks, including beers. He also noticed a band setting up to perform. Agent Roberts saw that the band’s equipment included amplifiers.

As the band started to play music, Agent Roberts exited the licensed premises to determine how far the amplified sounds carried. Agent Roberts positioned himself across a two-lane street from the licensed premises, and later positioned himself at each end of the alley that runs behind the licensed premises. (Exh. D-4.) From these three different positions, Agent Roberts could clearly hear all aspects of the band’s music coming from the licensed premises.

On September 1, 2017, Department Agent Luke Blehm visited the licensed premises in plain clothes. While inside, Agent Blehm saw patrons being served and consuming alcohol, including beers, and observed a band playing amplified music. Agent Blehm then exited the licensed premises and positioned himself at the same three locations that Agent Roberts made his observations from on March 24, 2017. (Exh. D-4.) From these positions, Agent Blehm could clearly hear the band's music from coming from the licensed premises.

Finally, on October 27, 2017, Agent Letendre went to the licensed premises to investigate the ongoing noise violations. While driving by, Agent Letendre could hear music from his vehicle that was coming from the licensed premises. The licensed premises was open and operating as evidenced by an amplified band performance and multiple patrons going in and out. Agent Letendre parked and went to four different locations on foot to make more precise observations of where the music was carrying. Each of Agent Letendre's pin locations are marked on Exhibit D-4, and were at distances of 32, 42, 42, and 66 yards away from the licensed premises. At each of the four locations, Agent Letendre could hear the band's performance.

Subsequent to the hearing, the Department issued its decision sustaining each count of the accusation and suspended appellant's license for 20 days. Appellant filed a timely appeal, and written notice of the opportunity to file briefs in support of appellant's position was given on April 5, 2019. However, no brief was filed by appellant prior to the Appeals Board hearing.

DISCUSSION

Appellant failed to file a brief in this matter. However, in his Notice of Appeal, appellant contends that the “sounds coming from [his] business may be audible from the street surrounding [his] building from time to time, but [was not] loud enough to disturb the occupants of the Dream Inn.”² (Appellant’s Notice of Appeal, p. 1.)

The Appeals Board is not required to make an independent search of the record for error not pointed out by appellant. It was appellant's duty to show the Board that some error existed. Without such assistance by appellant, the Appeals Board may deem the general contentions waived or abandoned. (*Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 139 [144 Cal.Rptr. 710]; *Sutter v. Gamel* (1962) 210 Cal.App.2d 529, 531 [26 Cal.Rptr. 880, 881].)

Here, the only issue tangentially raised by appellant is whether there is substantial evidence to support the Department’s decision that he violated a condition of his license. Yet, appellant mischaracterizes the license condition, claiming that he did not believe the sound was loud enough to disturb neighboring properties. This is not the condition. Appellant’s license condition only states that entertainment “shall not be audible beyond the area under the control of the licensee(s)” (Findings of Fact, ¶ 5.) Therefore, whether appellant’s entertainment disturbed the residents and occupants of neighboring properties is irrelevant. To violate a condition, the sound only needed to be audible beyond the area under appellant’s control.

² Appellant also contends that the subject investigation was the result of an ongoing feud with the owner of the Dream Inn, as well as ulterior political motives within the local community. However, the Board will not discuss these contentions as they are not relevant to whether appellant violated a condition of his license.

In his Proposed Decision, the Administrative Law Judge (ALJ) found the boundaries of the licensed premises were undisputed, and that, based on testimony by Agents Roberts and Letendre, sound emanating from the licensed premises was audible beyond those boundaries. (Conclusions of Law, ¶ 5.) Those findings are supported by substantial evidence, and the Board must uphold the Department's decision. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106, 112 [28 Cal.Rptr.74].) The Board is without power to reweigh the evidence or to substitute its own judgment for the Department's. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].)

ORDER

The decision of the Department is affirmed.³

SUSAN A. BONILLA, CHAIR
MEGAN MCGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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.

APPENDIX

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

JOHN ARTHUR REDMOND
HANDSOME JOHNS
316 CHESTNUT STREET
MOUNT SHASTA, CA 96067-2213

ON-SALE GENERAL EATING PLACE - LICENSE

Respondent(s)/Licensee(s)
Under the Alcoholic Beverage Control Act

REDDING DISTRICT OFFICE

File: 41-535215

Reg: 18086735

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on November 28, 2018. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after January 14, 2019, a representative of the Department will contact you to arrange to pick up the license certificate.

RECEIVED

DEC 05 2018

**Alcoholic Beverage Control
Office of Legal Services**

Sacramento, California

Dated: December 4, 2018



Matthew D. Botting
General Counsel

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION AGAINST:

John Arthur Redmond
DBA: Handsome Johns
316 Chestnut Street
Mount Shasta, CA 96067-2213

Respondent

On-Sale General Eating Place License

} File: 41-535215
}
} Registration: 18086735
}
} License Type: 41
}
} Page Count: 68
}
} Reporter:
} Carol Chase CSR# 13538
} Atkinson Baker
}
} **PROPOSED DECISION**

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Yreka, California, on September 24, 2018.

Joseph Scoleri, Attorney, represented the Department of Alcoholic Beverage Control (Department).

John Arthur Redmond, the Respondent represented himself in this matter (Respondent).

The Department seeks to discipline Respondent's license pursuant to three allegations in the accusation on the grounds that:

1. On or about October 27, 2017, the Respondent-Licensee violated condition #6 on the license which states, "Entertainment provided shall not be audible beyond the area under the control of the licensee(s) as defined on the ABC-257 dated 7-17-13 and ABC 253 dated 7-17-13" in that the licensee and/or licensee's employee or agent did allow entertainment to be audible beyond the area under the control of the licensee as defined on the ABC-257 dated 7-17-13 and ABC 253 dated 7-17-13 in violation of the license condition and grounds for a license suspension or revocation pursuant to Business and Professions Code section 23804,¹
2. On or about September 1, 2017, the Respondent-Licensee violated condition #6 on the license which states, "Entertainment provided shall not be audible beyond the area

¹ All statutory references are to the Business and Professions Code unless otherwise noted.

under the control of the licensee(s) as defined on the ABC-257 dated 7-17-13 and ABC 253 dated 7-17-13” in that the licensee and/or licensee’s employee or agent did allow entertainment to be audible beyond the area under the control of the licensee as defined on the ABC-257 dated 7-17-13 and ABC 253 dated 7-17-13 in violation of the license condition and grounds for a license suspension or revocation pursuant to section 23804, and

3. On or about March 24, 2017, the Respondent-Licensee violated condition #6 on the license which states, “Entertainment provided shall not be audible beyond the area under the control of the licensee(s) as defined on the ABC-257 dated 7-17-13 and ABC 253 dated 7-17-13” in that the licensee and/or licensee’s employee or agent did allow entertainment to be audible beyond the area under the control of the licensee as defined on the ABC-257 dated 7-17-13 and ABC 253 dated 7-17-13 in violation of the license condition and grounds for a license suspension or revocation pursuant to section 23804. (Exhibit D-1)

In each of the above three allegations in the accusation, the Department alleged that there is cause for suspension or revocation of the license of the Respondent in accordance with section 24200 and sections 24200(a) and (b). The Department further alleged that the continuance of the license of the Respondent would be contrary to public welfare and/or morals as set forth in Article XX, Section 22 of the California State Constitution and sections 24200(a) and (b). (Exhibit D-1)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on September 24, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on April 5, 2018 after it was submitted for a recommendation of hearing on February 4, 2017. (Exhibit D-1)
2. The Department issued a type 41, on-sale beer and wine eating place license to the Respondent at the above-described location on September 27, 2013.
3. There was alleged in the accusation the following prior Department disciplinary history against the Respondent’s license:

Violation Date	Violation	Registration Number	Penalty
February 13, 2015	Section 23804	10072689	15 day suspension

4. Certified documents establishing the violation as described above were received in evidence. (Exhibit D-2)

5. On September 16, 2013, the Respondent, John Arthur Redmond, the owner of the Licensed Premises executed a petition for conditional license. This petition established six different conditions accepted by the Respondent which apply to the Respondent's type 41 on-sale beer and wine eating place license. Condition 6 provides that "Entertainment provided shall not be audible beyond the area under the control of the licensee(s) as defined on the ABC-257 dated 7-17-13 and ABC 253 dated 7-17-13." (Exhibit D-3) An ABC-257, also known as a licensed premises diagram, by its own terms is a "true and correct description of the entrances, exits, interior walls and exterior boundaries of the premises to be licensed, including dimensions." The ABC-257 received as an exhibit in this matter is dated 8-8-13. (Exhibit D-3)

6. Prior to March 24, 2017, Department Agent Keith Roberts (Roberts) had been made aware of a noise complaint regarding the Licensed Premises. Roberts reviewed the conditional license conditions and the premises diagram pertaining to the Licensed Premises. Roberts also reviewed Google Maps information to determine the overall layout and positions of surrounding businesses and residences to determine what impact, if any, noise violations would have on the Licensed Premises' neighbors. (Exhibit D-4) Roberts found that the area directly to the north of the Licensed Premises was residential. Two businesses to the northwest of the Licensed Premises was a bed and breakfast. Directly to the southwest was a thrift store. After obtaining this information, Roberts went with assisting agents to the Licensed Premises to follow through on the complaint.

7. On Friday, March 24, 2017, Roberts, in plain-clothes, visited the Licensed Premises at approximately 7:00 p.m. Roberts parked and walked up the Licensed Premises. Roberts did not hear any significant noise as he walked up to and entered the Licensed Premises. After entering, Roberts saw patrons in the bar being served drinks, including beers. He also noticed a band appeared to be setting up to perform. Their equipment appeared to include amplifiers. At 7:30 p.m. the band began to play. Roberts exited the Licensed Premises to determine how far the amplified music was carrying. Roberts positioned himself at a business across a two lane street from the Licensed Premises. In addition, he later positioned himself at each end of the alley that runs behind the Licensed Premises where the alley connected with the adjacent streets. From these three different positions, Roberts could clearly hear all aspects of the band's music from the Licensed Premises. (Three "24" notations on Exhibit D-4)

8. On September 1, 2017, Department Agent Luke (Luke), in plain clothes, visited the Licensed Premises in the evening during operating hours. Luke entered the Licensed Premises and saw patrons in the bar being served and consuming alcohol, including beers. Luke observed a band performing with amplified music. Luke exited the Licensed

Premises to determine how far the amplified music was carrying. Luke positioned himself at the three locations that Roberts had made his March 24, 2017 observations from. From these three different positions, Luke could clearly hear the band's music from the Licensed Premises. (Three "24" notations on Exhibit D-4)

9. On October 27, 2017, Department Agent Brett Letendre (Letendre) went to the Licensed Premises to determine whether there were any ongoing noise violations. While driving by the Licensed Premises, Letendre could hear music from his vehicle that was coming from the Licensed Premises. The Licensed Premises was open and operating as evidenced by an amplified band performance and multiple patrons going in and out. Letendre parked and went to four locations on foot to make more precise observations of where the music was carrying. Letendre dropped four virtual pins on a Google map to depict the locations he stood while hearing music emanating from the Licensed Premises. The first pin was 32 yards away from the Licensed Premises in the back alley. Letendre could hear the bass effect from the band performance at this location. (Pin #1-Exhibit D-4) The second pin was 42 yards away from the Licensed Premises in the back alley. Letendre could hear the entire band from this location. (Pin #2-Exhibit D-4) The third pin was also 42 yards away from the Licensed Premises but taken to the north where the closest residential street was. Letendre could also hear the band at this location. (Pin #3-Exhibit D-4) The fourth pin was 66 yards away from the Licensed Premises in the back alley. Letendre could hear the band performance at this location. (Pin #4-Exhibit D-4)

10. John Arthur Redmond (Respondent), the owner of the Licensed Premises testified regarding his management of the Licensed Premises and efforts that have been made, since these charges arose, to address noise concerns arising from its operation. The Respondent is aware he agreed to the conditions in the conditional license and he did not challenge that the noise violations had occurred. The Respondent expressed that the investigation was instigated by the business owner of the adjacent bed and breakfast, a person who the Respondent has been having an ongoing dispute with. The Respondent admitted he suffered a prior violation stemming from the noise condition in the conditional license in 2015. The Respondent refrained from scheduling live bands for a short period after the initial violation but returned to doing so again at a later date. The Respondent has ceased scheduling live bands since the accusation was filed in this matter. The Respondent has not sought a modification of the conditional license.

11. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.
2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.
3. Section 23804 provides that the violation of a condition placed upon a license constitutes the exercise of a privilege or the performing of an act for which a license is required without the authority thereof and constitutes grounds for the suspension or revocation of the license.
4. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that, on March 24, 2017, September 1, 2017 and October 27, 2017 the Respondent failed to comply with a condition attached to the license in violation of Business and Professions Code section 23804. In Count 1-3, the Department has established that music was audible beyond the area under the control of the licensee in violation of section 23804 despite the specific condition prohibiting entertainment from being audible beyond the area controlled by the licensee. (Findings of Fact ¶¶ 2-10)
5. The boundaries of the Licensed Premises were undisputed. On all three dates alleged in the accusation, amplified music from live bands was clearly audible well beyond these boundaries and in areas where surrounding residents and businesses would be negatively impacted. (Findings of Fact ¶¶ 2-10) The boundary of the Licensed Premises under the control of the Respondent was clearly defined in Exhibit D-4. The Respondent was aware of this boundary because he prepared it. "Audible" is a term of common usage, as is "entertainment". The Respondent received (and agreed to) clear conditions dictating what was allowed in terms of noise. The duty to comply was clearly set out in both the license and the supporting document that defined the boundaries of the Licensed Premises. (Finding of Fact ¶ 5)
6. It is important to note that the Respondent sought and agreed to a Type 41 on-sale beer and wine eating place license. The Respondent did not seek the licensing of a club, bar or entertainment establishment. The Respondent did not challenge the condition as unnecessary when it was agreed to in 2013, or even after a violation of the condition in 2015 that led to discipline. The Respondent briefly ceased scheduling live bands briefly after the 2015 discipline but then returned to scheduling live, amplified bands as evidenced by the three violations in this case. Given this, it is difficult to give much

weight to the assurance made by the Respondent that he is no longer scheduling live bands.

7. The Licensed Premises is in a mixed use area with residences as close as a half block from the business. The protection of the quiet enjoyment of the residents who live in the immediate area surrounding the Licensed Premises is in the rational interest of the Department and required by the Act. The condition addressed a legitimate interest of the Department and was tailored to accomplish this goal. The Respondent had an affirmative duty to comply with the condition as set forth in the conditional license unless and until it successfully achieves a modification. As noted, no evidence was offered that the Respondent sought or achieved a modification. The duty is to comply and the Department has established clear failures to do so on three separate occasions after a history of non-compliance that led to discipline in 2015. (Findings of Fact ¶¶ 2-10)

PENALTY

The Department requested that the Respondent's license be suspended for a period of no less than 25 days given the prior violation of the same section by the Respondent. Under Rule 144,^[1] the standard penalty for a violation of section 23804 is a 15-day suspension with 5 days stayed for one year.

The Department did present significant evidence of aggravation in that the Licensed Premises was shown to have a prior disciplinary history. The three separate incidents in this matter over a period of multiple months also show a continuing course or pattern of conduct, a separate aggravating factor as set forth in Rule 144.

In mitigation is that the Respondent has made some demonstrable effort to comply by no longer scheduling bands at the Licensed Premises. This mitigation is somewhat blunted by the Respondent's prior history of falling out of compliance after a period of abeyance. The aggravating factors outweigh the mitigation and support the imposition of the discipline under section 23804 with an upward departure from the standard penalty and no stayed time.

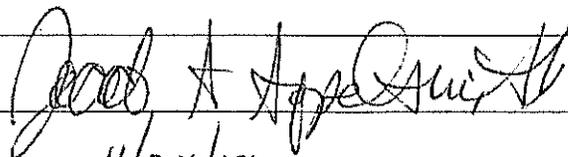
^[1] All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

ORDER

The Respondent's On-Sale Beer and Wine Eating Place License is hereby suspended for 20 days.

Dated: October 17, 2018


Alberto Roldan
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: 11/28/18