

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

AB-8150

File: 48-362045 Reg: 02054221

JOEL SETH CORENMAN and JASON M. MONTELLO dba Le Cannon
21797 Ventura Blvd., Woodland Hills, CA 91364,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: February 19, 2004
Los Angeles, CA

ISSUED MAY 12, 2004

Joel Seth Corenman and Jason M. Montello, doing business as Le Cannon (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for having allowed patrons to purchase and consume beer in an unlicensed area, a violation of Business and Professions Code sections 23300² and 23355.³

Appearances on appeal include appellants Joel Seth Corenman and Jason M.

¹The decision of the Department, dated May 29, 2003, is set forth in the appendix.

² Section 23300 provides: "No person shall exercise the privilege or perform any act which a licensee may exercise or perform under the authority of a license unless the person is authorized to do so by a license issued pursuant to this division."

³ Section 23355 provides: "Except as otherwise provided in this division and subject to the provisions of Section 22 of Article XX of the Constitution, the licenses provided for in Article 2 of this chapter authorize the person to whom issued to exercise the rights and privileges specified in this article and no others at the premises for which issued during the year for which issued."

Montello, appearing through their counsel, Robert D. Coppola, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises license was issued on February 22, 2000. Thereafter, the Department instituted an accusation against appellants charging that, on or about August 16, 2002, co-licensee Joel Seth Corenman allowed patrons to purchase and consume beer in an unlicensed area.

An administrative hearing was held on April 11, 2003, at which time oral and documentary evidence was received. At that hearing, Los Angeles police officer Anthony Ljubetic testified that, on the night in question, he and his partner entered appellants' bar to conduct a bar check, and to investigate a report he had received that a new area had been opened in the premises. He had checked the license diagram and had spoken to Department investigator Clark and determined that no license had been issued for that area. The area in question, sometimes referred to in testimony as the "back room," was north of the room he was in. The entrance was through two sliding doors, described by him as an open partition. The room contained a bar counter, three tables, and a rear exit door. (See Exhibit 2.) While in the room, Ljubetic ordered a bottle of Corona beer for himself and a Mike's Hard Lemonade for his partner. They took their drinks to a nearby table, where they consumed them. After observing patrons dancing and ordering drinks, he called other officers in, and a citation was issued to Corenman.

Joel Corenman, one of the appellants, testified that the area in question had been a kitchen area, and the kitchen had been removed by the previous owner. Appellants had used the room for storage, refurbishing it over time, and eventually

opening it to the public on or about October 31, 2000. He testified that he went to the City of Los Angeles to obtain permits, and that appellants had intended from the beginning to use the room. After being issued the citation, appellants contacted the Department, submitted a zoning affidavit (Exhibit D), and a diagram of licensed premises (Exhibit F), incorporating the “back room,” on August 19, 2002. As of the time Corenman testified, appellants had yet to obtain the approval of the Department for the entire area depicted in Exhibit F. Corenman admitted that he knew when he signed, under penalty of perjury, the diagram of licensed premises dated January 26, 2000, that the back room was not part of the licensed premises. He said he had not contacted the Department after opening the back room because he had not read the paragraph requiring that be done when he signed the document.

Appellant Jason Montello testified that he prepared the diagram of licensed premises dated January 26, 2000 (Exhibit 1), and made the notation “Bar has been downsized from its original size (kitchen area removed)” appearing on the document below the diagramed area. Montello further testified that he prepared Exhibit 1 in accordance with instructions from a woman at ABC. He said that because he knew the back room was not going to be used until appellants could afford to “put it together,” he asked if he should draw the back room. According to Montello, she told him simply to note on the diagram that the premises were being downsized until appellants could afford to redo the room. Montello testified that it was always appellants’ intent to use the back room, and that he did not believe he needed to re-license the area that had always been there.

Subsequent to the hearing, the ALJ issued his proposed decision, in which he determined that the charge of the accusation had been established. Although the

Department had recommended an all-stayed 15-day suspension, the ALJ declined to include the stay as part of his order stating: “The Complainants’ recommendation of a penalty of a 15 day suspension, all stayed, lacks evidentiary support in the record. This was not a violation borne out of confusion or mistake but one which supports the penalty recommended below.” The Department adopted the proposed decision without change.

Appellants thereafter filed a timely appeal in which they raise three related issues: (1) the serving of alcoholic beverages in the area in question was not contrary to welfare and morals; (2) they acted under a reasonable mistake of fact; and (3) the administrative law judge (ALJ) abused his discretion when he imposed a penalty greater than recommended by the Department. The three issues will be discussed together.

DISCUSSION

Appellants argue that their placement of a bar in the unlicensed area has no effect on welfare and morals. They suggest that the passage of time between the signing of the statement on the diagram of licensed premises (Exhibit 1) that the Department would be contacted before any change was made in the “above-described boundaries, entrances and planned operation,” and the refurbishing of the area in question (January 26, 2000 to October 31, 2000), coupled with their belief the area was licensed, explains and excuses their failure to notify the Department.

Only licensees can sell alcoholic beverages, and they can sell them only on licensed premises. (See Business and Professions Code sections 23300 and 23355.) The Department is charged by the Constitution and by statute to regulate the licensing and sale of alcoholic beverages, and it is elementary that it know to whom it grants a

license and where alcoholic beverages will be sold by the person or persons to whom that license is granted. In the case of a retail license, the Department is informed of the proposed dimensions of the proposed licensed premises by a diagram of licensed premises contained on Department form ABC-257. Although there is little, if any, evidence of conduct suggesting moral culpability in this case, it is not difficult to imagine situations where misrepresentation of the physical dimensions of the area to be licensed could have moral overtones. For such reasons, any misrepresentation of the area to be licensed seems to us necessarily to implicate welfare and morals.

The sketch of the premises in the form ABC-257 in this case (Exhibit 1) did not include the back room. Appellant Montello's explanation for its omission was that when he prepared the diagram while in the lobby of the Department office, he was simply following the instructions of a Department spokesperson after telling her they would not be using the room. Exhibit 2 contains the same sketch of the diagram portion of the form ABC- 257, but with a lined out appendage representing the kitchen area. There is a notation on Exhibit 2 of an "unlicensed area" with arrows pointing to the lined out appendage. The record does not indicate who added this notation or when it was added.

The ALJ rejected appellants' claim that they believed the area in question to be licensed. Since his findings of fact (Findings 4 through 11) and conclusions of law (Conclusions 4 through 6) are important with respect both to his rejection of appellants' defense that they had simply made a mistake in believing the area to be licensed and his rejection of the Department's recommended stay of the entire recommended 15-day suspension, we have set them out at length:

In January, 2000, the respondents purchased the licensed premises and

commenced operations. The licensed portion then consisted of a public area for patrons and a kitchen. The respondents decided to close down the kitchen area which they planned to renovate and reopen in due course as part of the licensed premises. (Finding 4.)

In applying for the transfer of the license in January 2000, the licensees filed a diagram of licensed premises with the Department, indicating that the licensed portion had been downsized from its original size by eliminating the kitchen from its ambit. This was in accordance with advice from Department personnel who advised the respondents that this change was necessary until they had completed the renovation of the kitchen area for use as part of the licensed premises. (Finding 5.)

The respondents signed off on the application for transfer of the license on the downsized premises and the license was issued in accordance with the downsized restrictions. (Finding 6.)

Unfortunately for the respondents, in filing the application with the Department to downsize the licensed premises, they ignored and disregarded that part of the application immediately above the signature box, explicitly cautioning the respondents in pertinent part that the described boundaries will not be changed without first notifying and securing prior written approval of the Department. The licensees signed the application under penalty of perjury. (Finding 7.)

The respondents claim confusion in not understanding the concept that once the kitchen area originally became part of the licensed establishment, how it could suddenly become unlicensed.

Without being too harsh, this explanation stretches credulity in the face of evidence which shows that the respondents in their application for licensure, reduced in their own handwriting the size of the area of the premises to be licensed; prepared the actual diagram which graphically reflects the area of the premises to be licensed; had in front of them the cautionary language above the signature box advising them in plain English the consequences of their action in signing the document, and finally the respondents without as much as a question or a clarification, did affix their signatures to the Diagram of Licensed Premises.

Further, these licensees appear to be rather sophisticated individuals with a firm grasp on the realities of the business world and the defense of confusion or innocent mistake is taken at less than full value. The respondents never notified the Department of their intent to use the unlicensed area to sell and serve alcoholic beverages even though they promised to do so under penalty of perjury. (Finding 8.)

On August 16, 2002, Department undercover investigators visited the premises and observed behind a partition to the unlicensed room illegal activity therein, consisting of patrons ordering alcoholic beverages at a bar fixture and sitting at

booths consuming such beverages. The Department investigators ordered beer from a fixed bar and took a seat and consumed their beverages. One investigator also observed other patrons entering the unlicensed area from the main premises who ordered and consumed alcoholic beverages, partitioned off from the unlicensed area. (Finding 9.)

Respondents' testimony and conduct are inconsistent with one another in that if they truly believed that the entire establishment continued to remain licensed, it is puzzling as to why they did not permit the unlicensed area to be open to plain and public view instead of having the sale and service of alcoholic beverages to take place behind the partition in the unlicensed area. At the time of the violation on August 16, 2002, the Department investigator had gone through an open door in the partition to reach the unlicensed area.

This conduct further undercuts the claim of the respondents with respect to confusion and innocent mistake. (Finding 10.)

Subsequent to the violation, the respondents commenced the process to expand the licensed premises to include the present unlicensed area. As of the date of this hearing, the process has not been completed. (Finding 11.)

The respondents upon filing their initial application for a licensed [sic] prepared a diagram of licensed premises clearly delineating that portion of the establishment which was to be licensed and that portion which would not be. They even noted in handwriting on the diagram that the bar had been downsized from its original size (kitchen area removed)[“] to signify their intent that the kitchen area would no longer be part of the licensed premises, until they further obtained approval from the Department.” (Conclusion 4.)

These were individuals who spoke fluent English and had a fair degree of sophistication. It is determined that with knowledge of the violation, they performed an act for which a license is required, without privilege to do so as set forth in findings of fact 3 through 10, in contravention of Sections 23300 and 23355 in conjunction with Section 24200(a) and Article XX, Section 22 of the California Constitution. (Conclusion 5.)

The [Department] recommendation of a penalty of a 15 day suspension, all stayed, lacks evidentiary support in the record. This was not a violation borne out of confusion or mistake but one which supports the penalty below. (Conclusion 6.)

In its brief to the Appeals Board, the Department does not defend its original penalty recommendation, indicating its agreement with the ALJ that a harsher penalty was supported by the evidence. The brief was written by the same attorney who, at the

close of the hearing, when all the evidence was in, said to the ALJ:

I don't think that his mistake that [he] could serve there was reasonable. I think there's extensive mitigation in this record which is why I'm asking for an all [stayed] penalty. This is not an egregious violation. This is not the sort of thing we should be coming down on hard or trying to put somebody out of business.

The purpose of an all [stayed] penalty is to – in reflection of the mitigation which you've heard here. And in reflection of the fact that they are trying to get the proper approvals to be able to use the back room. That's what the Department really cares about. We would be looking at a much harsher penalty if they were sitting here saying we don't have to do anything. They are not saying that. And that's why we're asking for an all [stayed] penalty.

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, as here, 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 Board has traditionally viewed the Department's penalty recommendation at the time of the hearing as reflecting its best thinking, and has required the Department to justify an upward departure from that recommendation. In this case, the ALJ appears to have been influenced by several considerations: the fact that appellants were aware when they submitted the diagram of the licensed premises that the back room was not part of the licensed area; that appellants promised under penalty of perjury that they would seek Department approval for any future alteration of the licensed premises; that, as sophisticated and knowledgeable business men, it is unlikely they would have forgotten that the back room had been excised from the licensed area or have believed it was still licensed; and, in the only finding suggesting

any moral culpability, that the sale and service of alcoholic beverages in the back room took place behind a partition rather than in plain and public view.

But for this latter finding, we see little in the ALJ's findings that justify an outright rejection of the Department's initial penalty recommendation. Further, we think the finding is unsupported by substantial evidence and should be set aside.

Police officer Ljubetic testified that after entering the premises on the night in question, he looked toward the north wall and noticed an open partition - "there was two sliding doors that were open" - that led to another room. Ljubetic did not describe the dimensions of the sliding doors. Nothing in Ljubetic's testimony suggests any belief on his part that appellants were attempting to conceal the activities in the back room.

Although the sketch on the ABC-257 form (Exhibit 1) does not show any doors, Exhibit 2, also from the Department's files, does show a door. Similarly, Exhibit F, a revised ABC-257 form submitted to the Department on August 21, 2002, five days after the citation was issued, shows the door. None of the drawings appear to be to scale, so the dimension of the door or doors cannot be determined.

There is no evidence, other than the ALJ's surmise, that appellants wished to conceal the activities in the back room. Further, there is no evidence that appellants had any motive or reason to conceal from the Department their intention to expand the premises to its original dimensions. Although it appears that appellants have encountered difficulty in obtaining zoning approval for the expanded area in the time following August 16, 2002, there is no evidence that their actions at the time the license was issued in the year 2000 were influenced by any zoning considerations. Appellant Montello's explanation that he drew the diagram to reflect the current state of the bar, and added the note about downsizing, in accordance with what he was told by a

Department representative, and yet continued to believe the back room remained part of the licensed area, strikes us as reasonably plausible. That said, however, the Board's power to reverse an ALJ's credibility findings is severely limited, and he did not believe appellants' explanation.

Nevertheless, the ALJ's ultimate determination, that the evidence did not support the Department's penalty recommendation, rested in part upon a finding a key portion of which is unsupported by substantial evidence. Therefore, we think the penalty should be reversed and the case remanded to the Department for reconsideration of the penalty without consideration of that part of Finding 10 discussed above.

ORDER

The decision of the Department is reversed and the case is remanded to the Department for reconsideration of the penalty.⁴

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

⁴ 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.