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

AB-8155
File: 47-352401 Reg: 03054326

SAN BERNARDINO ENTERTAINMENT, LLC dba New West Gotham
295 East Caroline Street, San Bernardino, CA 92408,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: February 19, 2004
Los Angeles, CA
ISSUED MAY 12, 2004

San Bernardino Entertainment, LLC, doing business as New West Gotham (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its on-sale general public eating place license for 10 days and indefinitely thereafter until appellant either agrees to a condition limiting its hours of sale of alcoholic beverages or exchanges its license for a general public premises license, for violations of Business and Professions Code sections 23038, 23396, and 23804.

Appearances on appeal include appellant San Bernardino Entertainment, LLC, appearing through its counsel, Roger Jon Diamond, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on June 9, 1999. Thereafter, the Department instituted an accusation against appellant charging

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[1]The decision of the Department, dated June 26, 2003, is set forth in the appendix.

the violations as set forth above.

An administrative hearing was held on May 7, 2003, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the violations had occurred.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the Department violated substantial due process as it ignored the concepts of this particular nightclub setting; and (2) the Department in a discriminatory manner, enforced the law allegedly violated. We will consider the contentions together.

DISCUSSION

Appellant applied for a general public eating place license (a restaurant-type license), which allows for the sale of beer, wine, and distilled spirits. The premises is a 50,000 square foot warehouse-type building [RT 16, 124, 162-163]. The premises caters to youth, generally 18 to 24 year olds, with about 40 - 50% being youth under 21 years of age [RT 159, 169]. The premises has been operating as a nightclub, opening at later hours in the evening.

Prior to the issuance of the license, on April 1, 1999, appellant's representative signed an Acknowledgment as to the good faith responsibility to maintain a restaurant and to provide meals to guests for compensation. The Acknowledgment spoke in terms of real offers of food and actual and substantial sales of meals [Exhibit 3, and RT 174]. Kirby Bond, one of the owners, testified that the premises cannot operate as a restaurant [RT 168].

Bond on May 18, 1999, signed a Petition For Conditional License. Bond, in signing the Petition, acknowledged that "the privilege conveyed with the applied-for

license requires that the petitioner operate the premises, in good faith, as a Bona Fide Public Eating Place," in short a restaurant [Exhibit 2].[2] Two of the conditions imposed on the license state:

> The premises shall be maintained as a bona fide Western food restaurant and shall provide a menu containing an assortment of foods normally offered in such restaurants.
>
> The quarterly gross sales of alcoholic beverages shall not exceed the gross sales of food during the same period. The licensee shall at all times maintain records which reflect separately the gross sale (sic) of food and the gross sales of alcoholic beverages of the licensed business. Said records shall be kept no less frequently than on a quarterly basis and shall be made available to the Department on demand.

On January 22, 2003, the Department filed a five-count accusation charging the violation of the two conditions set forth above, in that from January 1, 2001 through June 30, 2001, appellant failed to maintain separate records of food and alcoholic beverages, and appellant failed to keep the premises open as a restaurant and as such sold alcoholic beverages, except beer[3], illegally.

The very sparse records of appellant for the first and second quarters of the year 2001, show alcohol purchases at $160,294.65 with corresponding purchases of food at $28,990.93 [RT 26]. While appellant's then counsel and representatives promised they would provide records of the gross sales of alcoholic beverages and gross sales of food, these promises were never kept.

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[2]Business and Professions Code section 23038 states: "'Bona fide public eating place' means a place which is regularly and in a bona fide manner used and kept open for the serving of meals to guests for compensation .... 'Meals' means the usual assortment of foods commonly ordered at various hours of the day; the service of such food and victuals only as sandwiches or salads shall not be deemed a compliance with this requirement ...."

[3]Business and Professions Code section 23396, excludes beer from its restriction.

Apparently, appellant does not contest the terms of the conditions imposed on the license, the law defining its license, or the facts as to the violations charged. The record shows a clear intent by appellant's owners not to properly do business under the terms of its license [Finding IV A, B, C]. Bond testified that the operation was known to be contrary to law and the conditions [RT 172-174]. The manager of the premises testified that he knew the premises was operating under its license improperly [RT 80], and knew the license would have been denied but for the conditions consented to and imposed [RT 114].

As we proceed with our review and the contentions of appellant, a few basic concepts need to be set forth.

The Department is authorized by the California Constitution to exercise its discretion whether to suspend or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the continuance of such license would be contrary to public welfare or morals. The Department's exercise of discretion "is not absolute but must be exercised in accordance with the law, and the provision that it may suspend or revoke a license 'for good cause' necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare and morals." (*Martin v. Alcoholic Beverage Control Appeals Board* (1961) 55 Cal.2d 867, 876 [13 Cal.Rptr. 513] quoting from *Weiss v. State Board of Equalization* (1953) 40 Cal.2d 772, 775.)

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by

substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[4]

"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 US 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].)

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 credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (*Brice v. Department of Alcoholic Beverage Control* (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

CONTENTION OF A NEW CONCEPT OF NIGHTCLUBS

Appellant does not contest the fact of the violations, but raises defenses concerning the charges, arguing:

> In typical bureaucratic fashion the Department forces licensees to choose between type 47 [restaurant] and type 48 [bar] licenses when licensees are attempting to operate businesses that cater to 18 to 24 years olds. The Department's position is unreasonable....

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[4]The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

> Likewise, the Department has been slow to recognize the concept of a musical venue that attracts 18 to 24 year olds where the 21 through 24 year olds would like to drink [alcohol]....
>
> After all, 18 year olds are adults under California law and they do have a right to go to nightclubs....
>
> [Appellant] has a substantial due process right under the federal constitution to operate its 50,000 sq.ft. warehouse type business in the manner that it has operated it - catering to 18 to 24 year olds and presenting music which they enjoy. The 18 to 24 year olds have a right to come to the venue [appellant's premises] and partake of the music provided by [appellant]. The State of California has no legitimate interest in interfering with the associational rights of the 18 to 24 year olds who frequent the business, and enjoy the music and enjoy each other's company, and partake of beverages.

Apparently forgotten by appellant, is the fact that the Department is the enforcer of the laws as passed and approved by the Legislature, and rules which are adopted by approved processes. Appellant's complaints are directed to the wrong forum.

Also, from a review of the entire record, the Board finds little good faith on the part of appellant in the initial phase of licensing and over the years of operation.

The court in *Covert v. State Board of Equalization* (1946) 29 Cal.2d 125, 133-134 [173 P.2d 545] stated the problem well:

> The existence of bona fides is not to be determined merely from the expressed intention of the licensee but ... must be ascertained objectively on the basis of all the physical characteristics and the actual mode of operation of the business....
> ...
> It is true, of course, that a restaurant would not be bona fide if it were created or operated as a mere subterfuge in order to obtain the right to sell liquor. There must not only be equipment, supplies and personnel appropriate to a restaurant, together with a real offer or holding out to sell food whenever the premises are open for business, but there must also be *actual and substantial* sales of food.[5]

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[5]"In determining whether or not a particular establishment qualifies under the Constitution it is the province of the board [State Board of Equalization] to ascertain the facts, for example, the physical aspects, equipment and supplies, the amount of food and liquor sold, and the manner in which the business is conducted." (*Covert, supra,* 29 Cal.2d at p. 133.)

It is clear that the premises has been run as a nightclub and not a restaurant since the inception of this operation, or since 1999. Apparently the premises opens about 9 p.m. and closes at 1:30 a.m., with service of mainly snack type food.

Appellant argues the Department should make exception to this attempt and possibly to other licensees who cater to the youth crowd. To do this, the Department would have to act outside the law and ignore its duty under the statutes.

As a generality, appellant may operate its premises in any way it pleases. However, when appellant seeks the privilege of providing alcoholic beverages, it must do so under the statutes now presently constituted.

Appellant's irrational theory is found in one of the many arguments made by counsel for appellant:

> It's our theory, in this case, that this particular business, like many others, has developed over time, it satisfies a need, there is a demand for it, it's a legitimate business that causes no harm to the community, and there is no rational reason why there can not be such a business. Simply because it does not strictly comply with a Type 47 or Type 48 is not a reason to put them out of business, to suspend them, or to deprive them of their right to do business. [RT 56.]

It appears to the Appeals Board that such negation of the rules of law would bring to this state a degenerating process of anarchy. The rules and regulations of the state must be adhered to by all people, whether it is to their own convenience and liking. Appellant is no exception.

CONTENTION AS TO DISCRIMINATION IN ENFORCEMENT

Appellant contends that the Department refused to consider the defense of discriminatory law enforcement. Appellant argues:

> In this particular case the Department apparently was of the view that discrimination was irrelevant in this case. It did not want any evidence presented as to whether it was allowing a predominately White club to operate while simultaneously pursuing [appellant]....

> ....
> The Department discriminates against appellant as appellant's operation draws Hispanic and Black customers....
> ....
> While [appellant] contends in this appeal that the evidence itself does show discrimination it is clear that the Department acting through the Administrative Law Judge did not allow a complete record to be presented.

Matthew Hyder, a Department investigator, testified that he had investigated other operations similar to Appellant's, seeking compliance to the statutes [RT 48-54].

Appellant called Lloyd Harris, second in command at the local Department office and the one who called for the investigation of appellant's operation [RT 85-121]. Harris testified that there were other licensed businesses that do not fit the 47 or 48 requirements [RT 104]. An objection was sustained as the testimony was not relevant to the issues before the ALJ.

Mark Gado, general manager for appellant, testified that ethnicity of the crowds differs from night to night depending on the type of music for that evening, which different types of music attracts either Blacks, Whites, or Hispanics [RT128]. He was aware of the conditions attached to the license [RT 132]. Gado testified that the police "sting" appellant's business by patrolling the parking lot and stopping persons there from looting and drinking in public. He did not believe the other same type businesses were "observed" to have such "stings." [RT 144.]

Gado explained that he has sent people to one establishment to observe police conduct. That business has a similar makeup but caters to Whites only [RT141]. But Gado does not know the conditions of that other establishment's license. Gado admitted he is speculating when he thinks the other establishment has similar conditions [RT 144-149].

Bond testified that the type of music offered by appellant created an ethnic draw,

either White, Black, or Hispanic [RT 166].

From a reading of the entire record, it appears to the Board that the Offers of Proof made during the hearing were inadequate [RT 105-106, 175-176, 186-196]. The shallow Offers of Proof failed to show that the proofs would be admissible and not conjectural. [California Evidence, Witkin, 4th edition, pp. 490-495.]

It is difficult to find real discrimination on the part of the Department from this record. Counsel for appellant complains on a very selective basis that the Black and Hispanic clientele are being discriminated against. However, such arguments ring hollow where Appellant's own testimonies showed that white persons are selectively, catered to and drawn to the programs of Appellant.

CONCLUSION

It appears to the Board that Appellant has sought to decoy away all parties from the real issues before the Board. The fundamental issues are the failure of appellant to abide by the conditions on its license. From a reading of the record, it is obvious that good faith was absent from the operation even from the beginning. The issue before the Board is the violation of two conditions on its license:

> The premises shall be maintained as a bona fide Western food restaurant and shall provide a menu containing an assortment of foods normally offered in such restaurants.
>
> The quarterly gross sales of alcoholic beverages shall not exceed the gross sales of food during the same period. The licensee shall at all times maintain records which reflect separately the gross sale (sic) of food and the gross sales of alcoholic beverages of the licensed business. Said records shall be kept no less frequently than on a quarterly basis and shall be made available to the Department on demand.

There certainly was no evidence presented in mitigation of these requirements. The defenses alleged are found to be based on factually irrelevant issues without

foundation in the record.

ORDER

The decision of the Department is affirmed.[6]

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

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[6]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.