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

AB-8425
File: 47-417039 Reg: 04058513
RONALD CARLISI, Appellant/Protestant

v.

3x3x3, INC., dba Martinis Above Fourth
3940 Fourth Avenue, Suite 200, San Diego, CA 92103
Respondent/Licensee

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: November 3, 2005
Los Angeles, CA

ISSUED DECEMBER 30, 2005

Ronald Carlisi (appellant/protestant) appeals from a decision of the Department of Alcoholic Beverage Control[1] which dismissed his protest accusation against 3x3x3, Inc., doing business as Martini's Above Fourth (respondent), for failing to establish grounds for the discipline or modification of respondent's license.

Appearances on appeal include appellant/protestant Ronald Carlisi, appearing in propia persona; respondent 3x3x3, Inc., appearing through its counsel, William R. Winship, Jr.; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

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[1]The decision of the Department, dated April 15, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Respondent applied for the person-to-person transfer of an on-sale general public eating place license, and the required notice (Bus. & Prof. Code, § 23985) was posted on August 24, 2004. Appellant filed a protest which was rejected by the Department because his objections pertained to the operation of the premises by the then-current licensees and were not valid reasons for denying a license to a new, qualified applicant in a person-to-person transfer. The Department issued a temporary permit to respondent on October 19, 2004, and a permanent type 47 license, subject to six conditions, on November 15, 2004. The license was issued within 90 days of the licensed operation of the premises by the prior licensees.

Appellant then filed an accusation with the Department pursuant to Business and Professions Code section 24013, subdivision (b),[2] alleging the grounds of his protest as cause for revocation of respondent's license. At the administrative hearing on the protest-accusation, held on February 23, 2005, oral and documentary evidence was presented concerning the Department's decision to issue the license, appellant's objections to the license, and respondent's operation of the licensed premises.

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[2]Business and Professions Code section 24013, subdivision (b), provides, in pertinent part:

> The department may reject protests . . . if it determines the protests are false, vexatious, frivolous, or without reasonable or probable cause at any time before hearing thereon, notwithstanding Section 24016 or 24300. . . . If the department rejects a protest as provided in this section and issues a license, a protestant whose protest has been rejected may, within 10 days after the issuance of the license, file an accusation with the department alleging the grounds of protest as a cause for revocation of the license and the department shall hold a hearing as provided in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

The premises consists of a restaurant and open-air patio area on the second floor of a building facing Fourth Avenue in San Diego, accessible from the street level only by an elevator that opens onto Fourth Avenue. The premises location has had an on-sale general public eating place license continuously since at least 1997, although the restaurant has had at least three names between 1997 and the hearing date. The area around the premises is zoned for mixed commercial and residential use, and appellant lives in a second-floor apartment facing Fourth Avenue, almost directly across from the licensed premises.

In 1997 the license was held by Care 'N Company, LLC, doing business as Marc's Bar and Grille. The license was issued subject to eight conditions, including number 4 which stated:

> At all times when an alcoholic beverage is sold, served or consumed in the patio dining area, it must be sold or served in conjunction with the sale or service of food in the patio dining area to the person ordering the alcoholic beverage, as depicted in the ABC-257 Diagram of Licensed Premises dated 3-12-97.

and number 7, which prohibited the licensing or operation of the premises as a public premises (i.e., a bar or nightclub).

In 2000, the name of the restaurant apparently changed to Martini's Bar and Grille. In June 2003, a modified petition for conditional license was filed by Care 'N Company, LLC, doing business as Martini's Bar and Grille. The petition contained six conditions that had been on the 1997 petition, but eliminated numbers 4 and 7. The modification was approved, and the six remaining conditions later carried over to the present license held by respondent.

At the beginning of the hearing, before testimony began, respondent asked the administrative law judge (ALJ) to instruct appellant to limit testimony about operation of

the premises to dates on or after October 19, 2004, when respondent's temporary license was issued, because events before that date would not be relevant to this hearing. ALJ Echeverria responded [RT 12-13]:

> Okay. Well, I think that I advised Mr. Carlisi that if he is attempting to have the license of 3x3x3, Inc., revoked, he needs to present evidence, since he has the burden of proof in this matter, that the actions of this licensee warrant a revocation of his license. And this licensee cannot be held responsible for actions of a prior or predecessor licensee.

Appellant asked to be heard for the record, and explained [RT 13-14]:

> It's our position – my position that the license, the reason we need to go back and look at the history of this license from 2000 is it in fact is an illegal license; that the Condition No. 4, which was removed, okay, one, was illegally removed, and it should have been replaced by something else. But because 61.4[3] made it illegal, the license should have been revoked at that time unless some condition could have been put in to counteract 61.4.
>
> The license is the license, and it goes from person to person. This license as structured allows something to occur that the liquor board in issuing the original license did not allow; that is, a drinking bar on the patio that was not allowed on the original license, as indicated by the conditions.
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> So our point is that the history of misuse and abuse of the license is relevant to what these licensees have now inherited. An illegal license should not be bootstrapped into a new license. Otherwise, you could have, you know, licensees that are committing violations and violations of conditions and they simply change corporation names, and then everything would be wiped out.

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[3]Appellant is referring to Department rule 61.4 (4 Cal. Code Regs., § 61.4.) which provides that a license shall not be issued for a premises where the premises itself, or its parking lot, is located within 100 feet of a residence. The rule is not absolute because the last paragraph of the rule provides that a license may be issued "where the applicant establishes that the operation of the business would not interfere with the quiet enjoyment of the property by residents." The penultimate paragraph, however, provides that "This rule does not apply where the premises have been licensed and operated with the same type license within 90 days of the application." Rule 61.4 is irrelevant in the present case: it is inapplicable in this matter because it only applies to issuance of a license, not to accusations; it only applies to license transfers that are premises-to-premises; and the premises was licensed and operating within 90 days prior to the filing of respondent's application.

> The neighbors have to have access to what the history is in this license so the court can make a decision based upon past experience with this license.

Thereafter, the ALJ identified the following as the issues relevant to the hearing, summarizing the issues as listed in appellant's accusation [RT 15-16]:

> 1) Noise generated by the premises interferes with the quiet enjoyment of nearby residents;
> 2) the premises constitutes a public nuisance;
> 3) the premises creates a law enforcement problem; and
> 4) licensing the premises creates or adds to an undue concentration of licenses in the area.

At appellant's insistence, the ALJ added a fifth issue: "the license is an illegal license."

Department licensing representative Tannie Kelpin testified about her report on the application, which was only one page long because this was a person-to-person transfer. Her testimony established that the six conditions on the prior licensees' conditional license were carried forward to respondent's license.

Appellant and two others who also live across the street from the premises testified regarding noise disturbances from activities at respondent's premises. Appellant described several incidents of noise that had occurred since respondent's license was issued. Some of the noise originated on respondent's patio and some came from people on the sidewalk in front of the elevator to respondent's restaurant. During appellant's testimony, he explained that his goal in filing the accusation was to have the original restrictions reimposed on the license so that the patio area would be used only as a dining area, not a "drinking bar," which, he asserted, "by nature [is] louder than dining areas." [RT 73.]

Respondent's witnesses testified about the mixed commercial/residential nature of the immediate area around the premises and the benefits that they saw from

respondent's operation of the premises. Dale Dubach, one of the principals of the corporate licensee, testified about the changes that had been made in the physical and operational attributes of the premises, such as new acoustical ceilings, additional carpeted areas, dual-pane glass separating the inside from the patio, table signs asking patrons to keep their voices down, periodic noise level checks with a decibel meter, and the presence at almost all times the restaurant is open of one of the owners.

Subsequent to the hearing, the Department issued its decision which dismissed appellant's protest accusation. Appellant thereafter filed an appeal making the following contentions: 1) The matter should be remanded to consider evidence of additional instances of interference with appellant's right to quiet enjoyment since the date of the administrative hearing; 2) relevant evidence was unfairly excluded at the hearing; 3) the findings are not supported by substantial evidence in light of the whole record; and 4) the Department did not proceed in the manner required by law.

DISCUSSION

I

Appellant contends this matter should be remanded to the Department so he can present evidence of respondent's interference with his quiet enjoyment since the date of the hearing. He points out that at the time of the hearing, respondent had been in operation for only four winter months, during which time canvas and plastic curtains enclosed the patio area, presumably muffling the sound. Since that time, appellant asserts, there have been a number of instances when noise from the patio area of respondent's premises interfered with his right to quiet enjoyment.

Business and Professions Code section 23084, subdivision (e), permits the Board to consider "[w]hether there is relevant evidence, which, in the exercise of

reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department."

It is true that the evidence appellant wishes to present could not have been produced at the hearing, because it did not exist then. However, this evidence of alleged additional instances of noise from the premises is not evidence that is relevant to the protest-accusation which already had a hearing. That accusation could only deal with violations or interferences up to the date of the accusation, in order for respondent to have a fair opportunity to respond at the hearing. With the Department's permission, appellant could possibly have amended the accusation to allege additional instances of interference, but only before the matter was submitted for decision. (Gov. Code, § 11507.)

At this point, if appellant wishes to present evidence of additional interference from the premises, he must file a new accusation with the Department. Neither this Board nor an appellate court is authorized to take evidence. The administrative hearing before the Department on the present protest-accusation has been held and a decision issued. A remand for appellant to present additional evidence is not appropriate.

II

Appellant contends that relevant evidence was unfairly excluded at the hearing. He states that without prior notice to appellant, respondent made motions at the beginning of the hearing to exclude appellant's evidence of incidents occurring before respondent began operating the premises in October 2004 and of the removal of the original condition 4 from the license. Appellant asserts that the "unfair surprise motion" was a violation of his right to due process and of fundamental fairness.

Appellant's surprise arises not from any violation of fundamental fairness, but from a fundamental misunderstanding on appellant's part. Because appellant's protest was rejected by the Department and the license was issued, his recourse was to file an accusation "alleging the grounds of protest as a cause for revocation of the license." Appellant needed to present evidence that would constitute grounds for revocation *attributable to the present licensee*.

When respondent moved to restrict the evidence appellant could present, the ALJ provided a good explanation of why the evidence appellant wanted to present was not relevant and would be excluded [RT 12-13]: "Mr. Carlisi . . . needs to present evidence, since he has the burden of proof in this matter, that the actions of this licensee warrant a revocation of his license. And this licensee cannot be held responsible for actions of a prior or predecessor licensee."

There was no unfairness or due process violation, and appellant should not have been surprised by having his evidence limited to that which was relevant to the operation of the premises by the present licensee.

Appellant also argues that the evidence regarding the operation of the premises and the modification of the license conditions by the prior licensee is relevant to the issue of an "illegal license," which, he says, ALJ Echeverria accepted as one of the hearing issues. [RT 16-17.] (See p. 5, *ante*.)

The ALJ allowed appellant to explain his belief that the license was illegal because of the removal of condition 4 of the original license, which had been included, appellant asserted, to protect the quiet enjoyment of the residents living within 100 feet of the premises. Without that condition, appellant seems to believe, the license existed in violation of rule 61.4, and was, therefore, illegal.

There is no basis for appellant's assertion that the license is "illegal." A license cannot be "illegal" simply because it does not have the conditions appellant believes it should have. This "issue" is not really an issue at all (see footnote 3, *ante*); therefore, evidence presented in support of appellant's erroneous belief is not relevant and was properly excluded.

III

Appellant contends the findings are not supported by substantial evidence because ALJ Echeverria "unfairly condensed, minimized, and most importantly omitted facts and evidence from these incidents [of interference with residential quiet enjoyment] to the point where they actually seem innocuous and of little consequence." (App. Br. at p. 19.)

Appellant objects to Finding of Fact IV, paragraphs A, B, and C-1, which we set out with italics indicating the specific language to which appellant objects:

Finding of Fact IV.A.

> Mr. Carlisi did not establish that noise generated by the Respondent's premises is unreasonably interfering with the quiet enjoyment of nearby residents. Furthermore, *the six conditions included in the Petition for Conditional License (Exhibit 3) include standard conditions that are intended to alleviate the concerns of nearby residents*.

Appellant contends this is not supported by the record because "The main concern of Protestant and other residents over the last five years has been the use of the originally designated patio dining area as a drinking/party bar." (App. Br. at p. 20.) Appellant's objection, however, misses the point. This finding merely says that some of the conditions are ones that are often included in conditional licenses as a means to reasonably address concerns of nearby residents about noise from a licensed

premises. Just because the conditions did not specifically or completely address appellant's concerns does not mean that the statement is not true.

Finding of Fact IV.B.

> Mr. Carlisi resides on the second floor of an apartment building that is located within 100 feet of the premises. *Mr. Carlisi's noise complaints are primarily against the previous licensee*. As far as noise complaints against the present licensee, Mr. Carlisi testified that he was *bothered for a few minutes on the night of November 19, 2004* at approximately 8:15 p.m. when he heard customers of the premises singing happy birthday on the premises patio followed by loud cheering. *On the night of January 21, 2005 at approximately 8:35 p.m., Mr. Carlisi heard loud laughing and talking at the premises and this lasted about five to ten minutes.*

Appellant objects to the first italicized sentence because, he says, "My complaint is against the Department and the illegally modified license . . ." (App. Br. at p. 21.) The ALJ's statement is clearly based on appellant's testimony and documents indicating at least 79 incidents recorded by appellant during the prior licensees' tenure, and two during the four months of operation under the present licensees.[4]

Appellant's objection to the next italicized language appears to be that it makes the incident appear less egregious than it actually was. He points out his testimony that, even with background noise, a loud exclamation or "noise spike" will "startle you in your living room . . . and I can hear it in my bedroom." [RT 66-67.]

Appellant faults the third italicized sentence because ALJ Echeverria recounted only the first of three instances of noise that night that appellant mentioned in his testimony.

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[4]Appellant refers to six incidents, but the ALJ differentiated between those clearly associated with the licensees' premises and customers (two), and those that occurred in front of or near the elevator doors at street level. There was no evidence that these latter acts, occurring two floors below the premises on a public sidewalk, were ones for which respondent should be held responsible.

All of the statements that appellant criticizes in Finding IV.B. are supported by the record -- specifically, by his own testimony. That the ALJ may not have placed the same emphasis where appellant might have or may have failed to include every reference appellant made to a particular instance of noise, does not mean that the finding lacks the support of substantial evidence.

Finding of Fact IV.C.1.

> Mr. Carlisi is also concerned about noise from people who congregate on the first floor sidewalk by the elevator that leads to the premises.
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> *1. On the night of January 21, 2005 at approximately 10:15 p.m., he heard loud talking and laughing and he observed four people by the entrance to the garage of the building where the premises are located and two people in front of the elevator.*

Appellant criticizes this finding because he feels ALJ Echeverria did not consider everything in the record about these incidents and thus failed "to understand and appreciate the actual impact of the licensee's business activities on Protestant's right to quiet enjoyment." (App. Br. at pp. 22-23.) Here, again, appellant's complaint is not about a lack of evidence to support the finding, but about the ALJ's failure to convey, to appellant's satisfaction, the egregiousness of these incidents. This does not impugn the support in the record for the finding.

Appellant again attempts to have the pre-licensing problems included as evidence in the record, saying that the ALJ should have considered the noise incidents in the "Noise Nuisance Log" that, he says, was entered into evidence without objection as part of the Department's Exhibit 1. He is correct that the document is included in Exhibit 1, but only as an exhibit that appellant attached to the accusation he filed. When the log itself was offered, it was not accepted into evidence because 79 of the 80 incidents listed dealt with events that preceded respondent's licensing. [RT 78.]

Contrary to appellant's contention, the findings complained of were supported by substantial evidence.

IV

Appellant contends that the Department did not act in good faith in its dealings with him during this proceeding, because it did not appear to be entirely neutral at the hearing and because it has been "arrogant[ly] indifferen[t]" to the residents' rights to quiet enjoyment and due process for the last five years.

However, we find nothing that amounts to bad faith on the part of the Department during the present proceeding. Appellant states that the Department was not acting as a neutral party when its attorney, Jonathon Logan, "joined in" motions made by respondent regarding jurisdiction and limiting evidence to the period after October 19, 2004. However, when asked by the ALJ what the Department's position was on the first motion, Logan said, "We'll submit it, Judge." [RT 11.] This response is akin to "no comment" or taking a neutral stance rather than joining in the motion.

Appellant is obviously frustrated with what he sees as the Department's lack of support for the residents living near respondent's premises. His frustration arises, however, not from the license being transferred to respondent, but from the earlier removal of conditions and the manner in which the condition modification was achieved.

Unfortunately for appellant, these issues are not properly before this Board, just as they were not properly before the Department at the administrative hearing. The question before the administrative law judge was whether appellant pled and proved a basis for revoking the license issued to respondent. The question before this Board is

whether appellant has shown that the Department's decision is not supported by the findings or the findings are not supported by substantial evidence, or that the Department failed to proceed in accordance with law in making that decision. Appellant's complaints regarding the removal of conditions must be addressed to the Legislature, since the removal or modification of conditions is governed by statute. (Bus. & Prof. Code, § 23803.) On the record and the issues properly before us, we must sustain the Department's decision.

ORDER

The decision of the Department is affirmed.[5]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[5]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.