

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

AB-8555

File: 48-406533 Reg: 05061101

ROBERT JOE WILLIAMS, dba Southern Knights
6041 San Pablo Avenue, Oakland, CA 94608,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Robert R. Coffman

Appeals Board Hearing: April 5, 2007
San Francisco, CA

ISSUED JUNE 12, 2007

Robert Joe Williams, doing business as Southern Knights (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his license for 15 days, with 8 of the days stayed on the condition that appellant operate violation-free for one year, for violating a condition on his license in contravention of Business and Professions Code section 23804.

Appearances on appeal include appellant Robert Joe Williams, appearing through his counsel, George Holland, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

¹The decision of the Department, dated April 13, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on January 14, 2004. On November 17, 2005, the Department instituted an accusation against appellant charging that, on September 17 and 30, 2005, he violated a condition on his license by having the front door of the premises open.

At the administrative hearing held on February 16, 2006, documentary evidence was received and testimony concerning the violation charged was presented by Department investigator Connie Cook and by appellant.

Cook testified that on the two visits made to appellant's premises, the wooden door at the entrance to the premises was open, but a perforated metal security gate or door at the entrance was closed and locked.² Both times, appellant unlocked the security door to allow the investigator in. On neither occasion was music or noise emanating from the premises. Only one patron, at the most, was present in the premises during the visits.

On the September 17th visit, Cook and her partner were working undercover. When they went up to the metal door, Cook could see appellant sitting on a chair inside. She asked if he were open for business and when he said he was, she asked if they could come in. Appellant unlocked the metal door, let the investigators in, and locked the gate behind them. The investigators said they might rent the premises for a party, and they were shown around. They left without revealing that they were investigators.

On September 30th, Cook and another investigator saw the wooden entrance door was open again. They were again let in through the closed and locked security

²The metal door appears to consist of a layer of perforated metal or heavy screening over vertical metal bars. Although the "screening" is heavier than that in a normal screen door, it allows one to see through into the interior of the premises. There is a metal doorknob with a keyed deadbolt below it. (Ex. 3.)

door. They identified themselves as Department investigators, took a photograph of the entrance, and advised appellant that he was violating a condition on his license by leaving the door open.

Subsequent to the hearing, the Department issued its decision which determined that the condition violation occurred as alleged. Appellant filed a timely appeal raising the following issues: 1) The decision is not supported by substantial evidence; 2) the administrative law judge (ALJ) erroneously admitted Exhibit 2 into evidence; 3) the condition is unconstitutionally vague and unreasonable; and 4) the penalty is excessive. The first and third of these contentions are related and will be discussed together.

DISCUSSION

I

Appellant contends there is no substantial evidence to support the finding that the "iron gate" was not a door. He argues there is no evidence supporting the investigator's opinion that the condition was imposed to stop noise escaping from the premises. Appellant also argues that the failure of the Department to establish and communicate to appellant the standard used to judge compliance with the condition is a violation of due process.

Business and Professions Code section 23800 provides that the Department "may place reasonable conditions" on licensees in several situations, including where grounds exist for denying a license or a protest is filed, and the Department finds that imposing the conditions will remove the grounds for denial or protest (subd. (a)), and where a local governing body requests conditions on a license that is transferred under certain circumstances, where the "request for conditions [is] supported by substantial evidence that the problems either on the premises or in the immediate vicinity identified

by the local governing body or its designated subordinate officer or agency will be mitigated by the conditions" (subd. (e)(1)).

Appellant's license was issued pursuant to a Petition for Conditional License (Ex.

2) which states, in pertinent part:

WHEREAS, the Oakland Police Department, has provided the Department with substantial evidence of an identifiable problem which exists at the premises or in its immediate vicinity: and
 WHEREAS, transfer of the existing unrestricted license would be contrary to public welfare and morals;
 WHEREAS, pursuant to Business and Professions Code Section 23800 (e)³ the Department may grant a license transfer where the transfer with condition will mitigate problems identified by the local governing body or its designee; and
 WHEREAS, petitioner stipulates that by reason of the existence of substantial evidence of identifiable problems at the premises or its immediate vicinity, grounds exists [*sic*] for denial of said license transfer; and,
 NOW, THEREFORE, the undersigned petitioner(s) do/does hereby petition for a conditional license, as follows, to-wit:

1. Sales, service, consumption shall not exceed 8:00 A.M. to 1:30 A.M., each day of the week.
2. Front and rear doors should remain closed with the exception of the entering and exiting of patrons, and to permit deliveries & in the case of emergency.
3. There shall be no amplified music.

The Department's decision states, in Finding of Fact (FF) 6 (2d ¶):

Respondent contends that the security gate is in fact the front door that is required to remain closed pursuant to condition number 2. This contention is rejected. One purpose of the condition is, in conjunction with the condition prohibiting amplified music, to prevent noise from disturbing those in the neighborhood.

³Subdivision (e)(1) is limited by its terms to transfers "pursuant to Section 24071.1, 24071.2, or 24072." The first two sections deal with issuance of a new license to a corporate or limited partnership licensee when stock or limited partnership interests are transferred. Section 24072 involves fees for license transfers. There is no apparent reason, nor is any explanation provided, for the petition to refer to this subdivision, since it appears that the license was issued to an individual.

We believe it would be unreasonable and an abuse of discretion if the Department held that the "security gate" is not a "door." We do not believe that the Department made that unreasonable finding; rather, the Department found that the metal door was not the "*front* door" that is required to remain closed.

The finding was based, according to FF 6, *supra*, on the assumption the condition was imposed "to prevent noise from disturbing those in the neighborhood." To determine why the condition was imposed, we look at the Petition for Conditional License. There, however, we find no clue to the reason for any of the conditions.

The petition gives the "reason" for the conditions as "substantial evidence of an identifiable problem which exists at the premises or in its immediate vicinity" provided to the Department by the Oakland Police Department. There is no indication of what the "identifiable problem" was, what substantial evidence was provided to support the existence of the problem, or even whether the problem existed at the premises or just in its immediate vicinity.

Presumably, the Department, or some person working for the Department, knows the reason for imposition of these conditions. However, the Department has not provided any record of the reason. It is not enough to say that the police have shown the Department that a problem exists. (See *Cho* (2000) AB-7379 ("patently unreasonable to require a licensee to show that protestants were no longer objecting to issuance of the license where there is no indication of the basis for the protests"); *Crenshaw* (1996) AB-6580.) It is fundamentally unfair not to let the licensee, who must comply with the conditions, know what problems the conditions are designed to mitigate.

Of course, it is not just the licensee who is left guessing about the reasons behind the conditions, it is also this Board and any appellate court attempting to review

the action of the Department. The Department is accorded great discretion, but keeping fundamental information to itself in a circumstance such as this is not an exercise of discretion. It is not even an abuse of discretion; it is a matter that is not subject to the Department's discretion.

The Department may argue that conditions must be challenged at the time they are imposed, not later, when they are violated or a modification is sought. But the whole question in this appeal is whether the condition was violated. This Board cannot, it is true, order the condition to be changed or eliminated at this time. However, it can, and does, find that the Department did not proceed in accordance with law when it attempted to enforce a condition based on the reason for its imposition, when no one, except perhaps the Department, knows what that reason is.

II

Appellant contends the ALJ erroneously admitted as evidence the picture of the security gate because it was not taken at the time of the alleged violation.

The error claimed does not exist because, among other reasons, appellant did not object when the photograph was admitted into evidence. Appellant argues that its objection to another exhibit should be sufficient to exclude this exhibit. Unless the ALJ is clairvoyant, however, he could not be expected to know that appellant wanted the exhibit excluded.

Even if the Board were to find the exhibit was admitted in error, appellant has not shown how the photograph prejudiced its case. This would not be reversible error.

III

In light of our disposition of this appeal, the penalty issue need not be addressed.

ORDER

The decision of the Department is reversed.⁴

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

⁴This 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.