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

AB-8905
File: 47-404262 Reg: 07067376

SKORPION ENTERPRISES, dba Hell's Kitchen
32685 Ortega Highway, Lake Elsinore, CA 92530,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: June 4, 2009
Los Angeles, CA

ISSUED AUGUST 19, 2009

Skorpion Enterprises, doing business as Hell's Kitchen (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for having violated a condition on its license, and for 5 days for having violated record-keeping requirements, the suspensions to run concurrently.

Appearances on appeal include appellant Skorpion Enterprises, appearing through its president, Tyler Paulson, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

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[1]The decision of the Department, dated June 24, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on July 26, 2007. Subsequently, the Department instituted an accusation against appellant charging violations of Business and Professions Code Section 23804 for violations, on three occasions in June, July, and August 2007, of a condition on its license requiring supervision of the service and consumption of alcoholic beverages in the patio areas of the licensed premises, and a violation of Business and Professions Code section 25752 for its failure to keep on the licensed premises records of its purchases of alcoholic beverages.

An administrative hearing was held on April 25, 2008, at which time documentary evidence was received and testimony concerning the violations charged was presented by Steven Geertman, a Department investigator. Geertman testified that he observed alcoholic beverages being consumed in patio areas on each of the dates cited in the accusation. He further testified on cross-examination that on each occasion the alcoholic beverages were sold and served at the fixed-bar location in the interior of the premises, and consumed on two separate patio areas, one at the front of the licensed premises, and one at the rear. With respect to the record-keeping charge of the accusation, Geertman testified that when he asked about the invoices for the purchase of alcoholic beverages, he was told by the licensee that they were maintained in an off-site storage unit.

Tyler Paulson, appellant’s president, testified that the premises had three patio areas, one at the rear of the premises, and one on each side of the front of the

premises.[2] Paulson acknowledged that the two patio areas in the front could appear to be a single patio. He testified that, at the time the condition was placed on the license, he was not given any explanation of what it required, and in a subsequent inquiry, was told only that he needed to supervise his customers and be aware of what was going on in the premises. Paulson testified that he understood he was in compliance with the condition by his and his employees' ability to observe the patio areas from the interior of the premises. It was not until he spoke to District Administrator Clark after the fact that he learned that the Department expected him to have a person physically present on each patio area when alcoholic beverages were being consumed, regardless of where served.

Subsequent to the hearing, the Department issued its decision which determined that the charges of the accusation had been established.

Appellant filed a timely notice of appeal in which it raises the following issues: (1) the condition in question is unreasonably ambiguous and unenforceable; and (2) the records were kept in a location adjacent to the licensed premises for reasons associated with health and available space needs.

DISCUSSION

I

Business and Professions Code section 23800 empowers the Department to impose reasonable conditions upon a license in certain prescribed situations. The situation which led to the imposition of the condition in this case was that it was

[2] See Exhibit 3, where Geertman marked a diagram of the premises with the letters A, B, and C, in a manner indicating there were as many as three outdoor patios.

believed necessary to protect the quiet enjoyment of their residences by nearby residents. Section 23804 provides that a violation of a license condition is grounds for suspension or revocation.

The condition in question was imposed on appellant's license when it was originally issued, and again when the license was upgraded from a type 41 on-sale beer and wine public eating place license to a type 47 on-sale general public eating place license. The change in the status of the license permitted appellant to engage in the sale of distilled spirits in addition to wine and beer.

Condition 7 states: "*The licensee(s) or an employee of the licensee(s) will be present on the patio at all times that alcoholic beverages are being served.*"

The administrative law judge (ALJ) concluded that the condition "is fairly ambiguous" but "must have been intended to require an employee to be present on the patio at all times alcoholic beverages *are being served and or consumed*, even though that is not what the condition says." (Emphasis in original.)[3]

The ALJ understood that, without the addition of the words "and or consumed," the condition would not support the Department's charge. The testimony established that the sales of alcoholic beverages took place at the fixed bar in the interior of the premises, and guests took their beverages with them to the patio. There was no testimony by anyone to the effect that alcoholic drinks were being *served* on any of the

[3] Conclusion of Law 3. The ALJ also stated in this conclusion that appellant did not argue the conditions' ambiguity. However, we think Paulson's frequent references to his understanding of what the condition required were sufficient to preserve the issue for this appeal.

two (or three) patios.[4] Of course, there would be technical compliance with the condition as written even if alcoholic beverages were being served on the patio, since that presumes the presence of an employee who is doing the serving. In either case, the condition, as written, is ambiguous. The Department concedes this.

There was no testimony from any Department representative familiar with the circumstances at the time the condition was placed on the license as to its intended scope. Paulson's undisputed testimony was that, if he had known that the Department expected him to have an employee on each patio whenever drinks were being consumed, such an interpretation would have been in such conflict with the reality of his operation, and he would have appealed from the imposition of the condition.

The Board has ruled in a number of cases that the failure to challenge a condition as unreasonable and unenforceable at the time it is imposed is a bar to a later challenge when an accusation is filed charging a violation of that condition. (See, e.g., *Shehadeh* (1998) AB-6869; *Stathoulis and Vlachopolos* (1998) AB-6924.) This case is different, however, because in this case there is no evidence that the contested interpretation was ever communicated to the appellant until after the charges were filed. (Compare *Naemi* (1997) AB-6566.)

The Department argues that the condition, "although ... imperfectly worded," is very reasonable and the only means to insure that nearby residents would be protected. The Department argues that appellant cannot monitor the "serving or consumption of drinks on the patio from inside the premises," disagreeing with Paulson's testimony that

[4] The Department acknowledges in its reply brief that there are three patio areas.

he and his employees could in fact do so.

The Department argues that appellant was not "blind-sided," because Paulson accepted the condition so he could open the premises on the date he had set to open his establishment. That may well be true. But it does not necessarily follow that Paulson's reluctant acceptance of the condition, as written, is the same as an acceptance of the condition as interpreted. Indeed, the ALJ seems to have concluded even before the hearing was over that the condition should be interpreted to require an employee on each patio when drinks were being consumed, as reflected in his comment, "Well, I heard the testimony, and frankly, the distinction you are making, whether or not somebody can see [the investigator on the patio] from inside the establishment is not really helpful to you because that is not what the condition requires, okay."

There is no evidence to contradict Paulson's understanding of what the condition required, and what it did not. No Department representative involved in the licensing process testified that the Department's interpretation of the condition was explained to Paulson. It appears from Paulson's testimony it was a "take it or you won't be licensed" situation.

The acceptance by a would-be licensee of the imposition of a condition on a license is essentially contractual in nature. It is an agreement by the licensee to abide by the terms of the condition. If the condition is in fact ambiguous, as everyone agrees, it seems to us unfair to rewrite it on a subsequent date, in the context of a disciplinary proceeding, to substantially broaden its literal scope simply because the condition will not otherwise achieve the Department's intended scope. Lapses by the Department's

licensing representatives in the drafting of conditions that result in ambiguities should not be resolved by blaming the licensee. The Department was in a position to communicate exactly what it expected, and did not do so.

The Department's interpretation of the condition would require appellant to employ two or three additional persons. Surely, a condition that exposes a licensee to a potential expense of that magnitude should be more precise in its terminology. Indeed, the condition was so imperfectly drafted that it would be unreasonable to enforce it as interpreted by the Department.

II

Section 25752 is very specific and clearly written. It requires a licensee to keep "at his licensed premises" for a three-year period, records which include "all expenditures incurred by the licensee in the manufacture, importation, sale and distribution of alcoholic beverages, except wine, in this State." The licensee, a seller of alcoholic beverages kept his records in a storage unit adjacent to, but not within, the premises. By doing so, he violated the statute.

This was not a case where a licensee failed or refused to maintain records. There was no testimony by the investigator or claim by the Department that the records required by the license condition records did not exist. Indeed, once the investigator learned they were not inside the premises, he abandoned any interest in reviewing them.

It appears to us that the investigator's request for records of the licensee's purchases of alcoholic beverages was an afterthought, and did not have any real connection with the purposes of his visit - the focus on consumption of alcoholic

beverages in the patio areas. In these circumstances, we think the imposition of a penalty more than token in nature was inappropriate, and an abuse of discretion.

ORDER

The decision of the Department is reversed as to counts 1, 2, and 3 of the accusation, and the case is remanded to the Department for reconsideration of the penalty imposed in connection with count 4 of the accusation.[5]

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

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[5]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.