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

AB-9008
File: 47-388601 Reg: 08067689

AJDM CORPORATION, dba Casa Tequila AKA "D" Club
975 West Foothill Boulevard, Azusa, CA 91702,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: April 1, 2010
San Francisco, CA

ISSUED JULY 8, 2010

AJDM Corporation, doing business as Casa Tequila AKA "D"Club (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked its license for violations of Business and Professions Code sections 24200, subdivision (a),[2] and 25601,[3] and ordered suspensions of various lengths for violations

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[1]The decision of the Department, dated February 19, 2009, pursuant to Government Code section 11517, subdivision (c), is set forth in the appendix, together with the proposed decision.

[2] Business and Professions Code section 24200, subdivision (a) provides:

> The following are the grounds that constitute a basis for the suspension or revocation of licenses:
>
> (a) When the continuance of a license would be contrary to public welfare or morals. However, proceedings under this subdivision are not a limitation upon the department's authority to proceed under Section 22 of

of Business and Professions Code section 24042 and Rule 64.2, subsection (b)(1).

Appearances on appeal include appellant AJDM Corporation, appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general bona fide public eating place license was issued on December 27, 2003. Thereafter, the Department instituted a multi-count accusation against appellant charging violations of Business and Professions Code sections 24200, subdivision (a); 25601; and 24042; as well as violations of Rule 64.2 (4 Cal. Code Regs., §64.2).

After three days of hearing testimony and receiving documents in evidence on May 29 and 30 and July 23, 2008, the administrative law judge (ALJ) sustained the charges of the accusation, ordered appellant's license revoked for violations of section 25601, but stayed revocation subject to a two-year period of discipline-free operation, and ordered suspensions of various lengths with respect to the other violations found. The Department did not adopt the proposed decision, and after inviting written argument, made its own decision pursuant to Government Code section 11517. In so doing, the Department adopted in their entirety the proposed decision's Findings of Fact

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[3] Section 25601 provides:

Every licensee or agent or employee of a licensee, who keeps, permits to be used, or suffers to be used, in conjunction with a licensed premises, any disorderly house or place in which people abide or to which people resort, to the disturbance of the neighborhood, or in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience, or safety is guilty of a misdemeanor.

I, II (A and B), III (Special Findings A through Q, inclusive), IV (Findings re: Count 1 of the Accusation), V (Findings re: Count 2 of the Accusation, A and B), VI (Counts 3, 4, 5, and 6, A through E, inclusive), VII (Count 7, A through C, inclusive), VIII (Counts 8 and 9, A through F, inclusive), IX (A through C, inclusive), and X; added additional Findings of Fact V-C, and IX, D and E; adopted the proposed decision's Legal Basis for Decision I (A through G, inclusive) and II (A), adopted an additional Legal Basis for Decision I (H); adopted its Determination of Issues I through X; and ordered appellant's license revoked as to Counts 1 and 2, and suspended for various lengths as to Counts 3, 4, 5, 7, 8, and 9.

Appellant filed a timely notice of appeal in which it raises the following issues: the Department violated the principles of *Walsh v. Kirby* in accumulating counts; the proceedings are the result of selective enforcement in violation of the Equal Protection and Due Process clauses of the United States and California Constitutions; the proceedings were motivated by a malicious plan, scheme or design of the City of Azusa to acquire appellant's business for purposes of "redevelopment" without paying a reasonable purchase price; the decision is not supported by substantial evidence; appellant cannot be held liable for misconduct of those it did not employ nor for misconduct it took every reasonable precaution to prevent; and the penalty is excessive.

DISCUSSION

I

Appellant contends that the Department violated the principle established in *Walsh v. Kirby* (1974) 13 Cal.3d 95 [118 Cal.Rptr. 1], by failing to warn appellant of its investigation and the potential for disciplinary action.

In *Walsh v. Kirby, supra*, the California Supreme Court reversed a decision of the Department which found a number of violations of a minimum pricing statute over a period of three months, concluding that the Department's motive for the delay in filing an accusation was to accumulate monetary penalties until they reached a level that would force the licensee into bankruptcy, a result the court equated with revocation, a penalty the statute did not authorize.

In this case, the Department's investigation and the actions of the City of Azusa police extended over a 12-month period, from July 2006, through June 2007. Count 1 of the accusation, charging a disorderly house violation (Bus. & Prof. Code, §25601), listed 44 incidents involving arrests or investigations, 35 of which were for public intoxication, 15 of those involving minors, and 176 calls to the Azusa police for service, calls involving: extra patrols (111); fights/disturbances (39); special details (8); suspicious person/vehicle (4); drinking in public (6); urinating in public (9); open container (3); and assault and battery (3).

Count 2, which charged that appellant's business was operated in such a manner as to constitute a law enforcement problem, repeated the charges from Count 1.

The board has ruled in past cases that investigations involving operation of a disorderly house or law enforcement problems by their nature require lengthier periods of investigation before an accusation is filed. (See *Ann Mishew* (2001) AB-7741; *Chavez* (1998) AB-6788). While appellant may not have been given notice that an investigation was underway, the heavy police activity and instances of unlawful conduct should surely have warned appellant that it needed to clean up its act.

The extent to which Department [and police] investigators should have

> contacted appellants concerning the investigation is a matter of discretion within the police powers granted by the Department. In the absence of clearly unreasonable delay, it is not for the Appeals Board to mandate at what point in an investigation the Department must inform a licensee that the licensed premises are under scrutiny. A continuing investigation may very well be needed to determine the existence of violations or the degree to which a law is being, or has been violated. This principle is particularly applicable when the subject premises are suspected of operating a disorderly house, and where violations of a similar nature occur on a repetitive or habitual basis. Where the licensee is aware of the problem-causing activity, he is not in a strong position to complain.

(*Chavez, supra*).

Although a year might seem on the long side, we doubt that it could be said to have taken too long as a matter of law. The ALJ's rejection of the argument is determinative.

II

Appellant claims that it was singled out for enforcement action as part of a plan or scheme on the part of the City of Azusa to acquire ownership of appellant's business without paying a fair market price.

The City of Azusa acquired the real estate on which appellant's business is located as part of a redevelopment plan at or about the time the police activity concerning appellant's business began. Appellant claims that the city conspired with the Department to obtain grant money with which to target appellant. Other than the fact that there was a grant to the city at or about the time of the Department investigation, the evidence of any connection between the grant and the claimed targeting is speculative at best. The evidence showed that the city used the grant money in enforcement actions against several other licensees in the city, actions which resulted in suspensions.

The administrative law judge found as a factual matter that there was no

conspiracy (Finding of Fact X):

> The Respondent's allegation that the premises was deliberately singled out for prosecution by the City of Azusa and its Police Department and/or the Department of Alcoholic Beverage Control is rejected. The preponderance of the evidence did not establish that allegation. Martinez testified that he had to increase the number of security guards around the last quarter of 2005 when the premises got very popular. This is consistent with the testimony from various police officers that they noticed a marked increase in calls for service to the premises in the early months of 2006. As the premises became more popular and attracted larger crowds, the calls for police service to the premises increased significantly.

Appellant's suggestion that the City of Azusa ignore the myriad of problems arising from the operation of appellant's business simply because the city may have had an interest in clearing land it owned for development is unacceptable.

III

Little discussion need be devoted to appellant's claim that the decision is not supported by substantial evidence. The very large number of police calls to the premises, the many instances of offensive behavior by patrons, the inability of appellant to control the crowds of patrons drawn to appellant's business offerings, collectively branded it as a disorderly house - "a place in which people abide or to which people resort, to the disturbance of the neighborhood, or in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience or safety ..." (Bus. & Prof. Code, §25601).

Although appellant's lengthy brief quarrels with some of the Department's reading of the evidence, it does not single out any significant areas of testimony or evidence that would warrant setting aside the decision or any part of it, nor does it explain in any persuasive way why the Department's findings that appellant operated a disorderly house and created a law enforcement are wrong.

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821, 826-827 [40 Cal.Rptr. 666].)

When findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].) 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 unusually large number of arrests, police investigations, and call reports, in the abstract or when compared to the operation of similar businesses in the city, together with the conduct which the 27 witnesses for the Department described, adds up to solid proof of the violations charged.

IV

Appellant argues that it cannot be held responsible for the misconduct of those people it did not employ or for things it took every reasonable effort to prevent.

While it is true that much, if not most, of the conduct giving rise to the

Department's charges was committed by appellant's patrons, appellant cannot escape liability while operating a business that attracts those very people. Under appellant's reasoning, it is immune from being charged with the operation of a disorderly house or of creating a law enforcement problem, simply because its business was so successful it was beyond its control.

Appellant operated its business as a night club; its manager admitted that to put tables for dining by guests, which he had not done, he would have to cover the dance floor. Benefitting from his restaurant-type license, appellant's doors were open to anyone 18 or over, necessarily injecting the exuberance, or over-exuberance, of youth into the equation, with less than surprising consequences.

As the Board observed in *Central Restaurant, Inc*. (1998) AB-6921:

> There are several reasons why this argument must also fail. First, appellant was placed on notice that there were problems simply by the occurrence of the incidents. Appellant would have been aware that its operation drew a youthful clientele more prone to aggressive, confrontative behavior, and that it needed to do something about the root cause of the problems - greater alertness toward excessive consumption, better crowd control ... .
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> As a matter of social policy, it does not seem right that a licensee can, with impunity, operate a premises in a manner which is conducive to assaults, fights, violence, and other forms of criminal or quasi-criminal activity that impose a material drain on already overburdened law enforcement agencies, and still escape discipline.

V

The ALJ recommended in his proposed decision that appellant's license be revoked, but that the execution of the order be stayed subject to a two-year period of probation and appellant's acceptance of a number of conditions covering such subjects as hours during which alcoholic beverages may be sold; prohibition of any cover charge, admission fee, or minimum food charge; control of loitering; a prohibition of

consumption in any area adjacent to the licensed premises and under the licensee's control; prohibiting an exchange of the license for a public premises license, or the operation as a public premises; and a ban on the service of alcoholic beverages in glass bottles.

The Department, writing its own decision pursuant to Government Code section 11517, subdivision (c), rejected the ALJ's recommended penalty, and ordered revocation. It added Findings of Fact IX D and E in support of its determination that revocation was appropriate:

> D. The Department has recommended outright revocation of the Respondent's license. The problems found to exist at the premises are excessive and recurring, which have resulted from several factors. First, the Respondent is operating a large "nightclub" which accommodates up to 700 patrons, which features several types of entertainment and which is open until 2:00 a.m. Second, the premises cater mostly to a younger crowd, and many of the patrons are under the age of twenty-one. Third, the Respondent and its security guards have been unable to adequately control the large number of patrons that frequent the premises and this has resulted in excessive calls for police services which have greatly taxed the resources of the Azusa Police Department.
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> E. Prior to the filing of the instant accusation, Respondent was on notice of problems related to the operation of the premises. Respondent presented little or no evidence of efforts taken to alleviate the problems prior to the August 2006 agreement with the Azusa Police Department. While Respondent did incorporate some of the recommendations made by the Police Department following the August 2006 review, there is no evidence of additional efforts to alleviate the problems. In fact, the problems not only continued unabated, the calls for service during the period January through June 2007, following the August 2006 review, were greater than the period prior to the review. Respondent has shown either an unwillingness or inability to control the premises.

Appellant contends that the Department's order is "preposterous as it is unconstitutionally excessive." (App. Br., p. 70). Pointing out that it had suffered no prior discipline, appellant asserts:

> When that factor is coupled with the state of the evidence in this record (which is, at worst nothing more than a few incidents of rather insignificant misconduct by

> appellant, notwithstanding the number of non-linked misconduct of others, it defies reason and conscience to revoke this license.

(*Ibid*. Thus, argues appellant, the order of revocation is a punishment out of all proportion to the offense, and is extraordinarily disproportionate such as to constitute cruel and unusual punishment.

We reject appellant's argument. The Appeals Board may 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].) it is not the proper function of the Appeals Board simply to substitute its own view of an appropriate penalty for that of the Department.

It is well settled that disciplinary penalties imposed in administrative proceedings are not criminal punishment, and are not subject to the constitutional provisions relating to cruel and unusual punishment. In any event, the order of revocation for a licensee which has so operated its business over an extended period of time as to create a significant disorderly house and law enforcement problem cannot be said to be clearly unreasonable.

ORDER

The decision of the Department is affirmed.[4]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[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.