

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

AB-9029

File: 47-389905 Reg: 08069332

KAHUNA RESTAURANT GROUP, LLC, dba Fiesta Cantina
8865 Santa Monica Boulevard, West Hollywood, CA 90069,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: May 6, 2010
Los Angeles, CA

ISSUED JULY 26, 2010

Kahuna Restaurant Group, LLC, doing business as Fiesta Cantina (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for having engaged in activity prohibited by a condition on its license, a violation of Business and Professions Code section 23804.

Appearances on appeal include appellant Kahuna Restaurant Group, LLC, appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general bona fide public eating place license was issued on

¹The decision of the Department, dated April 16, 2009, is set forth in the appendix.

February 28, 2003. Thereafter, the Department instituted an accusation against appellant charging that appellant violated a condition² on its license prohibiting any "happy hour" type of reduced price alcoholic beverage promotion.

An administrative hearing was held on March 4, 2009, at which time documentary evidence was received and testimony concerning the violation charged was presented. Department Supervising Investigator Jerry Garcia testified that he and another investigator visited the premises after receipt of a complaint of a violation of a condition on the license that prohibited two-for-one price drinks. When there, he observed paper, colored, advertisements of two-for-one price drinks. He identified Exhibit 3 as one of those advertisements.³ Garcia further testified that he and fellow investigator Bullock went to the fixed bar and Bullock ordered two Miller Genuine Draft beers from a bartender named Shannon. The price was \$5.75, which Shannon explained was a two-for-one price.

Appellant called no witnesses and presented no evidence.

Subsequent to the hearing, the Department issued its decision which determined that the condition had been violated. Additional charges that appellant gave a premium, gift or free goods in connection with the sale of alcoholic beverages were dismissed. This timely appeal of the decision followed.

Appellant posits four questions raised by its appeal (App. Br., p. 2):

² The condition in question states: "14. No 'happy hour' type of reduced price alcoholic beverage promotion shall be allowed."

³ Exhibit 3 contains bold text stating, in its upper portion, LATE NIGHT HAPPY HOUR 10:30 - 12:30 7 DAYS A WEEK 2 FOR 1 PRICES and in its lower portion, HAPPY HOUR 4PM - 8PM 7 DAYS A WEEK ALL DRINKS 2 FOR 1 PRICES

- 1) Is the condition reasonable pursuant to statute; did grounds exist for the denial of the application for licensure absent imposition of this condition?
- 2) Was the condition imposed by the Department without a statement providing grounds for such condition imposition?
- 3) Is the condition vague and unintelligible and therefore unenforceable?
- 4) Did the Department fail to prove that the condition was, in reality, and according to fact, violated?

Questions 1 and 2 are related, and will be addressed as if a single question.

Additionally, appellant asserts that the Department is jurisdictionally estopped from imposing discipline because the decision itself dismissed the accusation before purporting to impose a suspension.

DISCUSSION

I and II

Appellant contends the condition is unreasonable and was imposed without grounds therefor. Appellant's brief quotes the "whereas" clauses of the petition for conditional license, pointing out that none of them relate in any way to happy hour as a concept or happy hour promotions as a resolution to an existing problem. Without a statement of statutory grounds for the imposition of the condition, says appellant, the condition itself is not valid.

Appellant's license, with a total of 18 conditions, including the condition in question, was issued on February 28, 2003, approximately seven months after the execution of a petition for conditional license in July 2002 (see Exhibit 2).

Business and Professions Code section 23800 authorizes the Department to place reasonable conditions on a license in five specified circumstances (subdivisions (a) through (e)). Subdivision (a) provides that "If grounds exist for the denial of an

application for a license or where a protest against the issuance of a license is filed and the department finds that those grounds may be removed by the imposition of those conditions."

Section 23805 provides, in pertinent part:

The proceedings specified in Section 23800(a), (b), (c), (d), and (e) shall be conducted in the same manner as is required for other proceedings involving petitions, protests or accusations, and *the right of a respondent in the proceedings to appeal shall include the right to appeal from an order imposing conditions upon the licenses involved in the proceedings.* (Emphasis supplied.)

Appellant elected to accept the license, with the 18 conditions, and operated its business under the authority of that license to and including May 16, 2008, the date of the charged violation, never once having sought to exercise the appeal rights set forth in section 23805. Appellant is now barred from challenging the license condition by the passage of time and its failure to raise any question about the condition until charged with violating it. This is a clear case of waiver of the right to appeal in a timely fashion.⁴

III

Appellant contends that the condition, as written, is vague and unintelligible. "There is nothing in the Department's lexicon that appears to define "happy hour." (App. Br., p. 14.) "While 'happy hour has no definition within the Department of Alcoholic Beverage Control dictionaries of definition, tying 'happy hour' to 'type of reduced price alcoholic beverage promotion' only aggravates the vagueness of the condition." (*Ibid.*)

⁴ It may be noted that the Department's reliance on the second sentence of section 23805 is misplaced. That sentence applies where a license transfer or a petition for removal or modification of a condition is involved. (*"If the department gives notice of conditions pursuant to subdivision (e) of Section 23800 or denies a petition filed under Section 23803, the licensee or transferee may, within 10 days after the mailing of the denial, make a written request for a hearing."*) (Emphasis supplied.)

This Board does not know the content of any Department "lexicon" or "dictionaries of definition," but it does know when an argument exaggerates. Appellant is comfortable in using the term "happy hour" in its point-of-sale advertising materials (e.g., Exhibit 3), we think because "happy hour" is a term familiar to probably anyone who has patronized an establishment, bar or restaurant, where alcohol is sold and served.

Common experience tells us that "happy hour," as used in the restaurant and bar trade can mean a number of things, each dependent upon the meaning attributed to it by the particular establishment. In some cases, it can mean the furnishing of inexpensive snacks, not conditioned upon the purchase of an alcoholic beverage. In others, it could mean a reduction in the regular price of bar drinks, perhaps including non-alcoholic as well as alcoholic beverages. In almost every case, some incentive is offered to attract customers to the establishment.

None of the terms in condition 14 are foreign to the business in which appellant is engaged, or to English language usage generally. The word "promotion," in a sales context, is readily understandable, as are the terms "reduced price" and "two-for-one." Although the administrative law judge (ALJ) saw an unspecified ambiguity in condition 14, one not apparent to this Board, he had no difficulty in finding the condition enforceable. (See Section IV, *infra*.) Nor do we.

IV

The ALJ rejected appellant's argument that there was insufficient evidence of a condition violation, and we share his view. Addressing appellant's arguments, which he summarized in the first paragraph of Conclusion of Law 5, Administrative Law Judge McCarthy wrote, in that same conclusion of law:

When one looks at condition 14, the ad copy contained in Exhibit 3 and the comment made by bartender Shannon at the time he sold two beers to Investigator Bullock, the price of one beer hardly matters when considering whether Respondent was violating the condition. Exhibit 3 and Shannon's comment appears [sic] to establish clearly that the \$5.75 paid by the Investigators for the two beers was not the price available at any and all times. Again, Exhibit 3 and Shannon's comment appears [sic] to establish beyond doubt that the price paid by the Investigators was reduced. Finally, while there may be some ambiguity in the abstract language of condition 14, its specific prohibition, the ad copy of Exhibit 3 and the comment made by bartender Shannon overcomes [sic] any ambiguity. In this proceeding that alleges a violation of condition 14, the reason behind imposition of the conditions is not in issue.

In this case the evidence rather clearly demonstrates that appellant was promoting a "happy hour" that involved a reduction in the regular price of its bar drinks, perhaps including non-alcoholic as well as alcoholic beverages. The combination of the point of sale promotional cards (Exhibit 3), and the bartender's statement to the investigator that the price he charged for the two beers was a "2 for 1" price, is sufficient to show a condition violation.

V

The decision recites in its Order:

1. (Conclusion of Law, ¶ 7) The First Amended Accusation is dismissed.
2. (Conclusion of Law, ¶ 6) Respondent's On-Sale General Bona-fide Public Eating-place License is hereby suspended for fifteen (15) days, with execution of five (5) days of the suspension stayed ...

Appellant, pointing to the apparent inconsistency between the two paragraphs of the order, argues that, since paragraph 1 dismisses the accusation, there is nothing upon which paragraph 2 of the order can be based.

Upon analysis, it becomes obvious that there is no conflict between the two paragraphs of the order. Appellant ignores the reference in paragraph 1 to Conclusion of Law 7, which recites that the evidence fails to support counts 2 and 3 of the First

Amended Accusation. Similarly, appellant ignores the reference in Paragraph 2 to Conclusion of Law 6, which describes the condition violation. Reading each of the paragraphs and the decision as a whole, they are in complete harmony.

In either case, the inclusion of the reference to a conclusion of law is, as we read the proposed decision and recommendation, an implicit limitation on the words which follow.

ORDER

The decision of the Department is affirmed.⁵

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

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.