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

AB-9417
File: 48-509439 Reg: 13078636

TEHACHAPI MOUNTAIN PUB & BREWERY, LLC,
dba Tehachapi Mountain Pub & Brewery, LLC
20717 South Street, Units A & B, Tehachapi, CA 93561-6445,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: November 6, 2014
San Diego, CA

ISSUED DECEMBER 4, 2014

Tehachapi Mountain Pub & Brewery, LLC, doing business as Tehachapi Mountain Pub & Brewery, LLC (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its on-sale general public premises license for 10 days for serving an alcoholic beverage to an obviously intoxicated patron, a violation of Business and Professions Code section 25602, subdivision (a); and for 20 days, with 10 days stayed, for breaching an express condition of its license pertaining to noise, a violation of Business and Professions Code section 23804. The Department imposed the suspensions to run concurrently.

Appearances on appeal include appellant Tehachapi Mountain Pub & Brewery,

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[1]The decision of the Department, dated March 4, 2014, is set forth in the appendix.

LLC, appearing in propria persona through its manager and part owner, Jason Leiva, and the Department of Alcoholic Beverage Control (Department), appearing through its counsel, Kimberly J. Belvedere.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on July 7, 2011. On May 31, 2013, the Department instituted a two-count accusation against appellant charging violations arising from events that occurred on April 5, 2013. The first count of the accusation charged that Caitlyn Seigmund, appellant's employee, sold, furnished or gave an alcoholic beverage to an obviously intoxicated person. The second count charged that appellant allowed for the entertainment provided to be heard beyond the area under its control, a violation of a condition on appellant's license.

The administrative hearing was held on January 8, 2014, at which time appellant was represented by Richard Lubic, appellant's Business Advisor. Near the beginning of the hearing, Lubic stipulated to the facts and charges contained in both counts of the accusation, and opted instead to offer evidence exclusively pertaining to mitigation of the penalty. Counsel for the Department accepted Lubic's stipulation, waived putting on the Department's case concerning culpability, and offered the testimony of Paul Lopez, an agent for the Department, to counter appellant's mitigation evidence. The Department also offered, without objection, documentary evidence concerning the violations charged and appellant's license history.

The evidence and testimony presented at the hearing established that a number of conditions were imposed on appellant's license when it first issued. Among those conditions was number 3, which states: "Entertainment provided shall not be audible beyond the area under the control of the licensee(s) as defined on the ABC-257 dated

3-5-11." (Petition for Conditional License, Exhibit 5.) On December 5, 2011, appellant's license was suspended for 20 days, with 15 days stayed, after it was found to have breached condition number 3 on October 14, 2011 — this, in turn, is a violation of Business and Professions Code section 23804.[2] Following this first violation, appellant modified both its sound system and its juke box to limit the maximum volume at which music could be played.

On the date of the alleged violations in this case, Joey Arthur, another of appellant's owners, was the partner in charge of managing the licensed premises. After the instant accusation was filed, Leiva, who is more strict than Arthur, took over as managing partner. A number of preventative measures have been implemented at the licensed location to ensure that similar violations do not recur.[3] The measures taken to ensure that appellant's entertainment is no longer audible from the area beyond its control include the installation of self-closing mechanisms on all of the doors, and the

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[2]Section 23804 of the Business and Profession Code reads: "A violation of a condition placed upon a license pursuant to this article shall constitute the exercising of a privilege or the performing of an act for which a license is required without the authority thereof and shall be grounds for the suspension or revocation of such license."

[3]It is unclear as to when some of these preventative measures were implemented. Testimony from the hearing suggests that the majority of the measures to reduce sound emitted from the premises were taken after the instant noise violation in order to prevent recurrence. (RT at pp. 21-26, 32-33.) However, in his letter in support of the appeal, Leiva contends "[a]ll of these changes occurred *after the first noise violation* and therefore impacted and reduced the noise being emitted from [appellant's] establishment" on April 5, 2013. (Managing Member Jason Leiva, letter to the Alcoholic Beverage Control Appeals Bd. (hereinafter "Leiva Letter"), Apr. 28, 2014, at p. 2, emphasis added.)

Also, as noted by the Department, because the Leiva Letter was not received by the Department until September 2, 2014, and because appellant filed no other documents following the appeal, presumably the date of "April 28, 2014" printed on the letter is incorrect.

installation of sound-absorbing panels in the ceiling. Those measures taken to reduce the risk of the sale to an obviously intoxicated person include: the installation of signs throughout the premises advising patrons of appellant's policies; the placement of limited-pour spouts on all of the liquor bottles to ensure appellant's bartenders are not pouring excessive amounts of alcohol in drinks; additional training and tighter supervision for appellant's bartenders and staff; and the implementation of a strict no-tolerance policy for patrons who violate appellant's rules of conduct.

After the hearing, the Department issued its decision which determined that the violations charged were proved and no defense was established.

Appellant filed a timely appeal of the Department's decision. In support of the appeal, appellant submitted the Leiva Letter arguing that the noise violation, count 2 of the accusation, should be dismissed.

DISCUSSION

Appellant requests that count 2 of the accusation be dismissed. The Leiva Letter contends that the noise on the night of the operation was "not dramatic and could not be heard while sitting in enclosed car" and therefore "was not audible beyond the area under [appellant's] control." (Leiva Letter at p. 1.) The Leiva Letter alleges that appellant's bar manager and lead bartender recently attended a LEAD seminar put on by the Department where they learned that both elements, (1) dramatic noise (2) heard from a car with the windows and doors closed, must be satisfied before there can be a violation of the noise condition on appellant's license. (*Id.*) The letter also contends that, even if the noise level was excessive on the night in question, there was no violation of appellant's license condition because the proximity of the licensed premises to other businesses and the fact that none of those businesses would have been open

at night suggest that there was "no one to disturb." (*Id*.)

The Department argues that appellant cannot challenge culpability as to count 2 because, during the administrative hearing, appellant stipulated that all of the allegations set forth in the accusation were true. (Dept.Br. at p. 5.) Failure to raise an issue or assert a defense at the administrative hearing level generally bars its consideration when raised or asserted for the first time on appeal. (*Araiza v. Younkin* (2010) 188 Cal.App.4th 1120, 1126-1127 [116 Cal.Rptr.3d 315]; *Hooks v. Cal. Personnel Bd*. (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Bd. of Medical Examiners* (1978) 81 Cal.App.3d 564, 576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]*; Harris v. Alcoholic Bev. Control Appeals Bd.* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].)

In *Harris*, *supra*, the licensee personally stipulated at the administrative hearing that the facts and charges in the accusation against him were true, and the Department waived putting on its case as a result. (197 Cal.App.2d at pp.184-186.) In light of the stipulation, the Department ultimately concluded that the violations charged had been proven and discipline was warranted. (*Id*. at p. 184.) On appeal, however, this Board reversed the Department's decision based on arguments and defenses against the charges that were never raised at the administrative hearing. (*Id*. at 186-188.) The Department's petition for a writ of mandate to vacate the Board's order was granted by the superior court, and the court of appeal affirmed. (*Id*.) The court in *Harris* observed:

> "It was never contemplated that a party to an administrative hearing should withhold any defense then available to him or make only a perfunctory or 'skeleton' showing in the hearing and thereafter obtain an unlimited trial de novo, on expanded issues, in the reviewing court. [Citation.] The rule compelling a party to present all legitimate issues before a tribunal is required in order to preserve the integrity of the

> proceedings before that body and to endow them with the dignity beyond that of a mere shadow-play. Had [the appellant] desired to avail herself of the asserted bar of limitations, she should have done so in the administrative forum, where the commissioner could have prepared his case, alert to the need of resisting this defense, and the hearing officer might have made appropriate findings thereon."

(*Harris, supra*, 197 Cal.App.2d at 187 [quoting *Bohn v. Watson* (1954) 130 Cal.App.2d 24 [278 P.2d 454].)

The following colloquy took place shortly after the commencement of the hearing in the instant case:

> JUDGE AINSLEY [*sic*]: Would either party like to make an opening statement[?]
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> MS. BELVEDERE: The Department waives.
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> MR. LUBIC: Yes, Your Honor.
>
> JUDGE AINSLEY [*sic*]: Go ahead.
>
> MR. LUBIC: I'll read from a document:
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> > The management — the owners of the pub do not deny the accusation of the Alcoholic Beverage Control as the evidence is substantiated by the criminal report. In other words, we have no problem with the accusation by the State of California.

(RT at p. 6.) In light of appellant's opening statement, the ALJ confirmed what he understood to be appellant's position, and asked Lubic if appellant was willing to stipulate that the charges and allegations set forth in the accusation were true:

> JUDGE AINSLEY [*sic*]: All right. I'm not going to tell anybody how to run their case, but I'm not interested in wasting anybody's time either. You indicated that the violation is not at issue, rather the penalty. You think there's [*sic*] grounds for mitigation of the penalty, correct?
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> MR. LUBIC: Yes.
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> JUDGE AINSLEY [*sic*]: Would you be willing to stipulate, and would the Department be willing to accept a stipulation that the allegations set forth in the accusation are true? If you agree to that and the Department is willing to accept

> it, we will just move onto your defense case. If you don't, the Department will still have to put on its case. And I'll do it either way. I'm paid regardless. But like I said, I'm not interested in wasting anybody's time going over something that everyone is already in agreement on. So I'll start with you.
>
> MR. LUBIC: Stipulations are true.

(RT at p. 9.) Following the latter exchange, the Department agreed to the stipulation and waived putting on its case regarding culpability. Appellant then presented its case concerning mitigation, which was based largely on Leiva's testimony. During his direct examination of Leiva, Lubic reiterated appellant's position to the ALJ:

> MR. LUBIC: Basically in our opening statement we agreed that the State —
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> JUDGE AINSLEY [*sic*]: Right.
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> MR. LUBIC: — that the evidence presented was all fair, and we had no problem with that.
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> JUDGE AINSLEY [*sic*]: Right.
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> MR. LUBIC: What I'm trying to present is [*sic*] the changes that have taken place in this small bar that may make the case a little better in the ending so that they can survive and operate. And those are the explanations that we're talking about.

(RT at pp. 20-21.)

Like the licensee in *Harris*, Lubic, acting on behalf of appellant, stipulated to the truth of all of the charges and allegations within the accusation. Also as in *Harris*, the stipulation in this matter prompted the Department to waive putting on its case concerning culpability. Now, for the first time on appeal, the Leiva Letter challenges the allegations made and violation charged in count 2. This is precisely the type of challenge that *Harris, Bohn*, and their progeny militate against. Had appellant wished to avail itself of a defense against count 2, then it should have done so at the administrative hearing, where the Department could have presented its case, alert to

the need of resisting appellant's defense, and the ALJ would have made the appropriate factual findings concerning culpability. (See *Harris*, *supra*, 197 Cal.App.2d at p. 187; *Bohn*, *supra*, 130 Cal.App.2d 24.) Appellant failed to do so in this case, and it therefore cannot raise this argument for the first time here.

The Department is correct that the Board should not extend appellant any special amount of latitude in this regard merely because appellant chose to appear in propria persona and may not have known how to preserve an issue for appeal. (Dept.Br. at p. 5.)

> A party proceeding in propria persona "is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys." (*Barton v. New United Motor Manufacturing, Inc*. (1996) 43 Cal.App.4th 1200, 1210 [51 Cal.Rptr.2d 328].) Indeed, " 'the in propria persona litigant is held to the same restrictive rules of procedure as an attorney.' " [Citations.]

(*First American Title Co. v. Mirzalan* (2003) 108 Cal.App.4th 956, 958 [134 Cal.Rptr. 206]; see also *Taylor v. Bell* (1971) 21 Cal.App.3d 1002, 1009 [98 Cal.Rptr. 855] [in propria persona litigants are to expect and receive the same treatment as if represented by an attorney — no different, no better, no worse].) To find otherwise would be to unjustly reward ignorance. (*Harding v. Callozo* (1986) 177 Cal.App.3d 1044, 1055 [223 Cal.Rptr. 329].)

In this case, appellant opted to forgo representation by an attorney, both at the administrative hearing and here on appeal. By doing so, appellant assumed the risk that an issue it wished to litigate would be waived, inadvertently or otherwise. Moreover, it is not as if appellant simply *failed to raise* its issue with count 2 at the administrative hearing. Rather, appellant commenced its opening statement by volunteering, without prompt or elicitation, that it *had no issue* with the entire

accusation, including count 2. (See RT at p. 6.) This Board would not entertain a similar appeal by a represented party under such circumstances, and it cannot do so here.

On a final note, however, it is unfortunate that the Board lacks the legal basis to formally rule on the merits of this case, particularly as they relate to count 2, because the limited facts available in the record suggest that condition 3 of appellant's license itself warrants reevaluation. Subdivision (a) of Business and Professions Code section 23800 provides that the Department may "place *reasonable*[4] conditions upon retail licensees or upon any licensee in the exercise of privileges . . . [i]f grounds exist for the denial of an application for a license or where a protest against the issuance of a license is filed and if the department finds that those grounds may be removed by the imposition of those conditions." (Emphasis added.) Section 23801 further provides that conditions may cover any matter which will protect the public welfare and morals.

Condition 3 on appellant's license reads: " "Entertainment provided shall not be audible beyond the area under the control of the licensee(s) as defined on the ABC-257 dated 3-5-11." Identically worded license conditions have, on multiple occasions, been challenged before this Board on ambiguity, arbitrariness, and vagueness grounds, and those challenges have generally failed. (See, e.g., *Big Billy Inc*. (2010) AB-9006;

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[4]This Board has previously interpreted "reasonable" as set forth in section 23800 to mean:

> . . . reasonably related to resolution of the problem for which the condition was designed. Thus, there must be a nexus, defined as a "connection, tie, link," in other words, a reasonable connection between the problem sought to be eliminated, and the condition designed to eliminate a problem.

(*Zankel Restaurant Group One, Inc*. (2001) AB-7885 at p. 5.)

Pittera (1999) AB-7170; *Fahime, et al.*. (1997) AB-6650; *Wichman* (1997) AB-6637.) However, this Board has also expressly acknowledged the potential for abuse in enforcement of such a broadly worded license condition. (*Big Billy Inc.*, *supra*, at p. 8; *Wichman*, *supra*, at p. 4 ["While penalizing noise heard a few feet from the premises could be arbitrary, music and lyrics heard from 100 to 150 feet from the premises is a clear violation of the condition"].) Based on the very limited record we have available, the facts of this case suggest that it lies dangerously close to the line where such potential for abuse in enforcement is actually realized, and where this otherwise reasonable condition becomes unreasonable.[5]

Obviously, we cannot and do not rule on this issue here, and any analysis would likely change if the Department were given the opportunity to present evidence supporting the imposition of condition 3 on appellant's license. That said, either appellant or the Department may petition to have the condition removed from appellant's license if the grounds for imposition of the condition no longer exist — which we suspect may be the case. (See Bus. & Prof. Code § 23803.) In the event that such a motion is brought, in light of the unfortunate disposition of this case, the Board *strongly* encourages appellant to seek representation from competent counsel.

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[5]Those facts include: that the petition for conditional license is silent as to the reason for imposition of the condition (Petition for Conditional License, Exhibit 5); that Agent Lopez approximated during the administrative hearing that the nearest residence was a quarter-mile away from the licensed premises (RT at p. 38); and that the premises is supposedly primarily surrounded by businesses and the investigation commenced at approximately 8:45 p.m. when all of the surrounding businesses were closed. (Supplemental Diagram ABC-253, Exhibit 4; RT at p. 36; Leiva Letter at p. 1.)

ORDER

The decision of the Department is affirmed.[6]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[6]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.