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

AB-9567
File: 48-474154; Reg: 14081518

THE OFFICE BAR, LLC,
dba The Office Bar
13221 Garden Grove Boulevard,
Garden Grove, CA 92843-2256,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: September 1, 2016
Los Angeles, CA

ISSUED SEPTEMBER 29, 2016

Appearances: *Appellant:* Armando H. Chavira, as counsel for appellant The Office Bar, LLC.
Respondent: Jennifer M. Casey, as counsel for the Department of Alcoholic Beverage Control.

OPINION

The Office Bar, LLC, doing business as The Office Bar, appeals from a decision of the Department of Alcoholic Beverage Control[1] revoking its license[2] and concurrently suspending its license for 45 days[3] because appellant employed individuals for drink

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[1]The decision of the Department, dated January 6, 2016, is set forth in the appendix.

[2]The revocation was conditionally stayed for a period of three years, provided no further cause for discipline arises during that time.

[3]The license was also concurrently suspended for 15 days, 30 days, and 20 days — with 5 days of the 20 day suspension conditionally stayed for a period of one year, provided no further cause for discipline arises during that time

solicitation purposes, in violation of Business and Professions Code section 24200.5, subdivision (b);[4] permitted individuals to loiter for the purpose of drink solicitation, in violation of section 25657, subdivision (b);[5] permitted employees to accept alcoholic beverages for their own consumption, in violation of Department rule 143;[6] purchased alcoholic beverages for resale from a retailer, in violation of section 23402;[7] violated a

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[4]**Section 24200.5(b)** provides, in relevant part:

. . . the department shall revoke a license:

¶ . . . ¶

(b) If the licensee has employed or permitted any persons to solicit or encourage others, directly or indirectly, to buy them drinks in the licensed premises under any commission, percentage, salary, or other profit-sharing plan, scheme, or conspiracy.

[5]**Section 25657(b)** provides, in relevant part:

It is unlawful:

(b) In any place of business where alcoholic beverages are sold to be consumed upon the premises, to employ or knowingly permit anyone to loiter in or about said premises for the purpose of begging or soliciting any patron or customer of, or visitor in, such premises to purchase any alcoholic beverages for the one begging or soliciting.

[6]**Rule 143** provides, in relevant part:

No on-sale retail licensee shall permit any employee of such licensee to solicit, in or upon the licensed premises, the purchase or sale of any drink, any part of which is for, or intended for, the consumption or use of such employee, or to permit any employee of such licensee to accept, in or upon the licensed premises, any drink which has been purchased or sold there, any part of which drink is for, or intended for, the consumption or use of any employee. (Cal. Code Regs., tit. 4, § 143.)

[7]**Section 23402** provides, in relevant part:

No retail on- or off-sale licensee . . . shall purchase alcoholic beverages for resale from any person except a person holding a beer manufacturer's, wine grower's, rectifier's, brandy manufacturer's, or wholesaler's license.

condition on its license prohibiting live entertainment, in violation of section 23804;[8] and permitted an entertainer whose breasts or buttocks were exposed to perform upon a stage that was not at least 18 inches above the floor level and at least six feet from the nearest patron, in violation of Department rule 143.3(2).[9] Appellant's owner and

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[8]**Section 23804** provides:

> 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.

[9]**Rule 143.3** provides:

> Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.
>
> Live entertainment is permitted on any licensed premises, except that:
>
> (1) No licensee shall permit any person to perform acts of or acts which simulate:
>
> > (a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.
> >
> > (b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.
> >
> > (c) The displaying of the pubic hair, anus, vulva or genitals.
>
> (2) Subject to the provisions of subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.
>
> [¶ . . .¶]

(Cal. Code Regs, tit. 4, § 143.3.)

managing member also possessed a cane gun in the licensed premises, in violation of Penal Code section 24410.[10]

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on March 4, 2009, and there is no previous record of discipline against the license.

On November 3, 2014, the Department instituted a 21-count accusation against appellant charging that appellant employed individuals for drink solicitation purposes; permitted individuals to loiter for the purpose of drink solicitation; permitted employees to accept alcoholic beverages for their own consumption; purchased alcoholic beverages for resale from another retailer; violated a condition on its license forbidding live entertainment; and permitted an entertainer, whose breasts or buttocks were exposed, to perform upon a stage that was not at least 18 inches above the floor level and at least six feet from the nearest patron. Appellant's owner and managing member also possessed a cane gun in the licensed premises.

At the administrative hearing held on October 13, 2015, documentary evidence was received and testimony concerning the violations charged was presented by Department agents Daniel D. Hart, Benjamin Delarosa, Danny Vergara, Eric Gray, and Vic Duong. Appellant's owner and owner and managing member, Diego Barriga Santoyo also testified.

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[10] **Penal Code section 24410** provides:

> . . . any person in this state who manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, lends, or possesses any cane gun is punishable by imprisonment in a county jail not exceeding one year or imprisonment pursuant to subdivision (h) of Section 1170.

Testimony established that undercover Department agents visited the licensed premises on April 25, 2014, May 2, 2014, June 6, 2014, and June 13, 2014.

Counts 1 through 5:

On April 25, 2014, Agents Danny Vergara and Eric Gray entered the licensed premises and sat at a table. Agent Vergara was approached by a woman named Prima that he knew from another location. She asked if they wanted something to drink and the agents ordered two beers. Prima served them two 12-ounce bottles of Bud Light, and they paid $3.75 for each beer. Vergara paid Prima with a $10 bill and gave her the change as a tip.

Later, Agent Vergara was approached by a woman identified as Isabella who asked if he wanted a dance. He agreed, and she gave him lap dance lasting approximately five minutes. (Count 1.) Vergara tipped her as she danced.

Prima returned and asked Agent Vergara to buy her a beer. He agreed, and she went to the bar where she obtained a 7-ounce bottle of Bud Light beer. She told him the beer cost $7. He handed her a $10 bill and told her to keep the change. (Counts 2-4.)

Isabella returned and told the agents that they needed to leave. She told Vergara to return the following Friday between 10 and 11 p.m. She then went briefly into another room on the other side of the premises. When she emerged, she was given some money by Diego Barriga Santoyo. Then she left.

The agents were approached by Maria Catalan who asked if they wanted anything else. They ordered two more beers, which she obtained from the bar, and Agent Vergara paid for them.

Catalan remained at the table with the agents, and later asked Vergara to buy

her a beer. He agreed. She went to the bar and obtained a can of Clamato. She told Vergara it cost $3, which he paid. (Count 5.)

Counts 6 through 10:

On May 2, 2014, Agent Vergara returned to the licensed premises with two other agents and they sat down at a table. Prima came over and asked them if they wanted something to drink. They ordered three beers. Prima told them it would be cheaper if they ordered a bucket of beers, so they did. She served the bucket of beers to them.

Prima later asked Vergara to buy her a beer. He agreed. She went to the bar and obtained a 7-ounce bottle of Bud Light beer, then returned to the table to drink her beer. (Counts 6-7.)

Prima asked if they wanted a girl to come over, and they said they did. She brought over a woman in a bikini who asked if they wanted a dance. She indicated that for the price of $20 she would dance topless. Agent Vergara agreed and handed her $20. She removed her top and gave Vergara a lap dance which lasted approximately 5 minutes. (Counts 9-10.)

Prima returned and asked Vergara to buy her another beer. He agreed. She obtained a 7-ounce bottle of Bud Light beer which she brought back to the table and drank while she talked to Vergara. (Count 8.)

Vergara told her they had to leave and asked how much they owed. She said the bucket of beers was $18 and her two beers were $7 each. He gave her $32.

Counts 11 through 17:

On June 6, 2014, Agents Vergara and Gray returned to the licensed premises and went to the bar counter where they ordered two beers from the bartender, Silvia Catalina Solano. She served them the beers and they paid $8 total.

Maria Catalan was taking orders, serving drinks, and clearing tables in the premises, and eventually she came over to the agents' table and asked Agent Vergara to buy her a beer. He agreed. She obtained a 7-ounce bottle of Bud Light beer from the bartender then returned to the table to drink her beer. (Counts 11-13.)

Catalan asked Vergara to buy her another beer and he said no, he was saving his money for the dancers. She told him he owed her $7 for her first beer. Vergara gave her a $20 bill and she gave him $13 change.

Several women in bikinis began circulating among the patrons. One, named Cece, approached Agent Vergara and asked if he wanted a lap dance. He said yes and she performed a lap dance for him. He tipped throughout the dance.

Isabella later asked Agent Vergara if he wanted a dance. He agreed, and she performed a lap dance for him. He tipped her throughout the dance. (Count 14.)

Martha Famoso approached Agent Vergara and asked him to buy her a beer. He agreed. She obtained a 7-ounce bottle of Bud Light beer which she brought back to the table and drank. She told Vergara the beer cost $7 and he paid her. (Counts 15-17.)

Counts 18 through 21:

On June 13, 2014, Agents Vergara and Gray returned to the licensed premises and sat near the pool tables. Catalan approached Agent Gray and asked him to buy her a beer. He agreed. She went to the bar and obtained a 12-ounce can of Bud Light beer. Agent Gray paid $3.50 for the beer. (Counts 18-19.)

Back-up officers were summoned and they entered the licensed premises. The back-up team included Supervising Agent-in-Charge Daniel D. Hart, Agent Benjamin Delarosa, and Agent Vic Duong.

Agent Duong performed a bar inspection and discovered four bottles of distilled spirits which — he knew from his experience and training — were a size only sold in retail establishments. (See Exh. 16-19.) Diego Barriga Santoyo, when asked about the bottles, admitted that he had purchased them from retailers when he first opened the licensed premises because at that time he did not know where else to purchase these items. (Count 20.) Since that time, he has purchased distilled spirits from a distributor.

Agent Delarosa located what he believed to be a cane gun (Exh. 5-8) in Diego Barriga Santoyo's office, and he notified Agent-in-Charge Hart. Hart examined the item and determined that it was, in fact, a weapon. The item was seized and booked into evidence. (Count 21.) No ammunition for the cane gun was discovered in the premises.

Diego Barriga Santoyo said that he had received the cane gun as a gift and that he knew it was a weapon. Agent-in-Charge Hart later took the cane gun to a firing range, where he successfully loaded the weapon with a .22-caliber bullet and fired it. The test was repeated, and the gun was successfully fired a second time.

After the hearing, the Department issued its decision which determined that all but counts 15 through 19 had been sustained, and no defense had been established. Counts 15 through 19 were dismissed.

The penalty of revocation (conditionally stayed for three years) and 45 days' suspension was imposed for counts 2, 3, 4, 5, 6, 7, 8, 11, 12, and 13 — for drink solicitation, loitering for drink solicitation, and employees accepting drinks for their own consumption. 20 days' suspension (with 5 days conditionally stayed) was imposed for counts 1 and 14 — for violation of the license condition forbidding live entertainment. Count 9 — for violation of the same condition — was sustained, but no penalty was

imposed. 30 days' suspension was imposed for count 10 — for violation of rule 143.3(2). 15 days' suspension was imposed for count 20 — for purchasing alcohol for resale from a retailer. And 30 days' suspension was imposed for count 21 — for possession of a cane gun. All suspensions are to run concurrently.

Appellant filed a timely appeal raising the following issues: (1) the penalty is excessive; (2) the Department illegally accumulated counts to increase the penalty; (3) penalty guidelines are unconstitutional; and (4) the Department's selective enforcement of drink solicitation cases against Hispanic licensees is unconstitutional.

DISCUSSION

I

Appellant contends the penalty is excessive and constitutes an abuse of discretion. (App.Op.Br. at pp. 10-16.)

This Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Rule 144 provides that "[d]eviation from [the Penalty Guidelines] is appropriate where the Department *in its sole discretion* determines that the facts of the particular

case warrant such deviation — such as where facts in aggravation or mitigation exist." (Cal. Code Regs., tit. 4, § 144, emphasis added.) Among the mitigating factors provided by the rule are the length of licensure without prior discipline, positive actions taken by the licensee to correct the problem, and documented training of the licensee and employees. (*Ibid.*)

Moreover, the Penalty Policy Guidelines further address the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

> **Penalty Policy Guidelines:**
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> The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

Appellant's disagreement with the penalty imposed does not mean the Department abused its discretion. This Board's review of a penalty looks only to see whether it can be considered reasonable, and, if it is reasonable, the Board's inquiry ends there. The penalty imposed by the Department is well within the guidelines of rule 144 — which recommend revocation for even a *single* violation of section 24200.5(b). We cannot say that the modified penalty is an abuse of discretion, regardless of appellant's dissatisfaction with it.

II

Appellant contends the Department illegally accumulated counts to increase the penalty. (App.Op.Br. at pp. 11-12.)

Appellant maintains the Department unlawfully accumulated counts by visiting the premises multiple times without notifying the licensee. Appellant contends this practice violates the principles established in *Walsh v. Kirby* (1974) 13 Cal.3d 95 [118 Cal.Rptr. 1]. It maintains that the Department's multiple visits to the premises were unreasonable and motivated by a desire to increase the penalty to be imposed on the license rather than to obtain appellant's compliance. Appellant argues that the Department acted unreasonably in that, upon learning of some of the violations alleged in the accusation, it did not move immediately to either counsel appellant — so that appellant could address the issues — or file an accusation. (*Ibid.*)

In *Walsh*, *supra*, the licensee, who had a previously unblemished record, was charged with selling below an established "fair trade" price on a total of ten occasions. The statute involved did not provide for suspension or revocation, but each offense after the first was punishable by a $1,000 fine. The California Supreme Court concluded that the Department had acted improperly by accumulating violations for the purpose of driving the licensee into bankruptcy.

The Department counters that there is no evidence from which it might be reasonably inferred that its four visits to the premises over a period of two months were for any purpose inconsistent with the provisions of the Alcoholic Beverage Control Act. The Department maintains that the length of an investigation lies within the discretion and expertise of the Department, and prior decisions of the Board have supported that position.

In *Chavez*, this Board summarized what it found to be the court's principal concern in *Walsh*:

> The vice seen by the court was the accumulation of financial penalties to the point where a licensee unable to pay them would be forced into bankruptcy, the equivalent of having his license revoked, coupled with the failure to give the licensee a chance to mend the error of his ways before that occurred.

(*Chavez* (1998) AB-6788, at p. 8.) The Board subsequently confirmed its position with regard to the Department's discretion in conducting investigations:

> The extent to which Department investigators should have contacted appellants concerning the investigation is a matter of discretion within the police powers granted [to] the Department. In the absence of clearly unreasonable delay, it is not for the Appeals Board to mandate at which 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.

(*Id*. at pp. 9-10.)

As this Board has stated previously, it is wary of substituting its judgment for that of the Department with respect to when an investigation has reached the point where an accusation should be filed. (See *Dirty Dan's, Inc*. (2012) AB-9155, at p. 6.) As the Board said in that case, "[i]n the absence of any evidence that the Department intentionally prolonged the investigation for the purpose of obtaining a more severe penalty, it would seem inappropriate for the Board to infringe upon the Department's discretion in its conduct of an investigation." (*Ibid.*)

Appellant has presented no evidence to support the contention that the Department intentionally prolonged this investigation in order to increase the penalty. Appellant's arguments with regard to the unlawful accumulation of counts must fail.

III

Appellant contends "[t]he department Penalty Guidelines (Rule 144) are unconstitutional on their face, and as applied." (App.Op.Br. at p. 5; also see p. 10.)

Appellant asserts the "penalty guidelines are unconstitutional as applied in Appellant's case since they assign a minimum 30-day license suspension along with a minimum three (3) year revocation for a first time violation of solicitation statutes Sections 24200.5(b), 25657(a) and *Penal Code*, Section 303(a)." (*Id*. at p. 13.) Appellant contends these guidelines are contrary to the holding in *Walsh, supra*, and therefore "[t]he penalty of revocation is an abuse of discretion, and denial of due process, since the guidelines do not authorize a graduated series of enhanced penalties for purposes of compliance, but, instead, a minimum license suspension of 30 days, coupled with revocation of the license." (*Id.* at pp. 14-15.)

No authority or evidence is cited in support of these assertions, nor any analysis or discussion explaining *why* the appellant believes the Department's penalty guidelines and penalty policies are unconstitutional as applied

The Board is not required to entertain substandard briefs:

> "[A]n appellate brief 'should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.' [Citation.] [¶] . . . This court is not inclined to act as counsel for . . . appellant and furnish a legal argument." [Citation.]

(*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 546 [35 Cal.Rptr.2d 574].) This argument must fail.

IV

Appellant contends the Department's selective enforcement of drink solicitation cases against predominantly Hispanic licensees is unconstitutional. (App.Op.Br. at pp.

16-17; App.Cl.Br. at pp. 2-3.)

Appellant recently obtained from the Department — pursuant to a California Public Records Act (CPRA) request[11] — a list of 158 accusations involving solicitation activity brought by the Department during the period from January 1, 2005 to February 21, 2016. According to appellant, nearly 95% of the accusations on this list involved a licensee with a Hispanic surname. (App.Cl.Br. at pp. 2-3.)

The Department asserts this issue was not raised at the administrative hearing, and was therefore waived. (Reply to App.Cl.Br. at p. 1.) Failure by a party to raise an issue or assert a defense at the administrative hearing level ordinarily bars its consideration when raised or asserted for the first time on appeal. (*Hooks v. California Personnel Board* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Board 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]; *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; *Harris v. Alcoholic Beverage Control Appeals Board* (197 Cal.App.2d 1182, 187 [17 Cal.Rptr. 167].) This extends to issues of administration and enforcement that have constitutional implications, as "[i]t is the general rule applicable in civil cases that a constitutional question must be raised at the earliest opportunity or it will be considered as waived." (*Jenner v. City Council of Covina* (1958) 164 Cal.App.2d 490, 498 [331 P.2d 176].)

While an exception to this rule exists for pure questions of law (see, e.g., *In re P.C.* (2006) 137 Cal.App.4th 279, 287 [40 Cal.Rptr.3d 17].), the allegation by appellant

[11]Gov. Code §§ 6250 *et. seq*.

— that there is selective enforcement of drink solicitation laws — necessarily implicates facts as well. Since appellant did not raise this issue at the administrative hearing, the Board is entitled to consider it waived. (See *Brown v. Professional Community Management, Inc*. (2005) 127 Cal.App.4th 532, 537 [25 Cal.Rptr.3d 617]*; Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286 [123 Cal.Rptr.2d 924]*; Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115-1116 [75 Cal.Rptr.2d 27]; 9 Witkin, *CAL. PROCEDURE* (5th ed. 2008) Appeal, §400, p. 458.)

The Department maintains the CPRA evidence — which appellant attached to its closing brief — is evidence which was not admitted at the administrative hearing and therefore may not be considered by the Board. (Reply to App.Cl.Br. at p. 2, citing *Martin v. Alcoholic Beverage Control Appeals Board* (1959) 52 Cal.2d 238 [340 P.2d 1].)

While it is true that the Board may not consider evidence not admitted at the administrative hearing, Business and Professions Code section 23085 provides:

> In appeals where the board finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department, it may enter an order remanding the matter to the department for reconsideration in the light of such evidence.

(Bus. & Prof. Code, § 23085.) According to appellant, the CPRA information was provided to appellant two weeks prior to the writing of its closing brief — dated June 20, 2016 — long after it could have been offered at the administrative hearing held on October 13, 2015. Without getting into the question of whether appellant acted with "reasonable diligence" to get the statistical information from its CPRA request and enter it into the record, or whether appellant should have requested a continuance of the

administrative hearing for this purpose, the Board finds it advisable in this case — in light of the recently-acquired CPRA information and pursuant to section 23085 — to remand the matter to the Department for reconsideration of the selective enforcement issue.

Upon remand, it is the Board's expectation that an evidentiary hearing will be held and developed before an ALJ — on the issue of selective enforcement — sufficient to afford appellant a fair opportunity to properly enter the CPRA information into evidence, and to afford all parties and any amici an opportunity to fully brief and advise the Board on this issue should it come before us again in this case.

ORDER

The decision of the Department is remanded for further proceedings in accordance with the above discussion.[12]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[12]This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.