

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

AB-9039

File: 20-427108 Reg: 08069848

BIG PAPPAS OIL, INC., dba Arco AM PM
12931 Garden Grove Boulevard, Garden Grove, CA 92843,
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 22, 2010

Big Pappas Oil, Inc., doing business as Arco AM PM (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for its clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code² section 25658, subdivision (a).

Appearances on appeal include appellant Big Pappas Oil, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated April 30, 2009, is set forth in the appendix.

²Unless otherwise indicated, statutory references in this opinion are to the Business and Professions Code.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on September 30, 2005. On October 17, 2008, the Department filed an accusation charging that appellant's clerk sold an alcoholic beverage to 19-year-old David Chang on December 20, 2007. Although not noted in the accusation, Chang was working as a minor decoy for the Garden Grove Police Department at the time.

At the administrative hearing held on March 24, 2009, documentary evidence was received, and testimony concerning the sale was presented by Chang (the decoy) and by Charles Loffler, a Garden Grove police officer.³

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established.

Appellant filed an appeal contending that the delay from the time of the violation to the time of the hearing violated the doctrine of laches and the Department should have been barred from proceeding with the disciplinary action.

DISCUSSION

Appellant contends the Department "lost [its] jurisdiction to proceed" (App. Br. at p. 2) because it was 15 months from the date of the violation until the administrative hearing. This, appellant argues, constitutes a violation of the equitable doctrine of laches.

Laches is a principle that may apply when a plaintiff has unreasonably delayed in commencing an action, resulting in prejudice to the defendant. Appellant cites the case

³We have omitted stating the facts regarding the violation because appellant does not contest the substantive decision of the Department and the facts are irrelevant for the purposes of this appeal.

of *Green v. Board of Dental Examiners* (1996) 47 Cal.App.4th 786 [55 Cal.Rptr.2d 140]

which discusses the circumstances necessary for a defense of laches:

We address the issue of laches in light of two principles of law: First, "[i]n administrative mandamus actions brought under section 1094.5 of the Code of Civil Procedure, appellate review is limited to issues in the record at the administrative level. *'It is fundamental that the review of administrative proceedings . . . is confined to the issues appearing in the record of that body as made out by the parties to the proceedings,* though additional evidence, in a proper case, may be received. [Citation.] 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.]" (*City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1019-1020 [162 Cal.Rptr. 224].)

Second, "[a]s [determined by our Supreme Court] in *Conti v. Board of Civil Service Commissioners* (1969) 1 Cal.3d 351. . . , *the affirmative defense of laches requires unreasonable delay in bringing suit 'plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay.'* [Citation.] *Prejudice is never presumed; rather it must be affirmatively demonstrated by the defendant in order to sustain his burdens of proof and the production of evidence on the issue.* [Citation.]" (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624 [166 Cal.Rptr. 826, 614 P.2d 258].)

(47 Cal.App.4th at 792-793 [italics added].)

As is obvious from the above quotation, the general rule that an issue may not be raised for the first time on appeal applies to the defense of laches. Appellant points out that the "boilerplate" notice of defense it filed included the allegation that "[t]he accusation was not timely filed, and therefore the Department is divested of its jurisdiction to proceed in that the Department violated the Doctrine of Laches to the manifest detriment of the Respondent(s)."

Simply including an allegation in pleadings does not, by itself, cause that allegation to be considered an "issue" at the hearing. Without facts to support it, the allegation means nothing. (See *Green v. Board of Dental Examiners, supra*, 47

Cal.App.4th at 793.) Appellant did not mention laches at the administrative hearing, much less produce evidence that would support a finding. Appellant is not entitled to urge this issue on appeal, having done nothing to establish it as an issue at the administrative hearing.

Even if appellant had properly raised this issue, it failed to carry its burden on appeal. It was appellant's burden to show affirmatively that the delay was unreasonable and that it suffered prejudice from the delay (*Green v. Board of Dental Examiners, supra*); these will not be presumed from the evidence. (*Conti v. Board of Civil Service Commissioners* (1969) 1 Cal.3d 351, 362 [82 Cal.Rptr. 337, 461 P.2d 617]; *Miller v. Eisenhower Medical Center, supra*, 27 Cal.3d at p. 624.) Appellant has not produced evidence of either unreasonable delay or prejudice.

The Department filed the accusation in the present case about 10 months after the violation. Section 24206 requires that the Department issue an accusation alleging a sale to a minor within 12 months after a violation occurs. While it may be possible to maintain a defense of laches where the relevant statute of limitations is not exceeded, appellant has not provided any shown why, in this case, filing the accusation within the statutory time period was unreasonable or caused prejudice to it. Under these circumstances, we must conclude there was no unreasonable delay or prejudice, and therefore no laches, in filing the accusation in this matter.

Appellant argues that laches existed in the delay between the violation and the hearing. Because laches did not occur with regard to filing the accusation, appellant must show laches in the five months between the time the accusation was filed and the date of the hearing. Again, appellant has not shown any unreasonable delay or prejudice to it in this. In fact, it was counsel for appellant that caused an initial delay of

three and one-half months by being unavailable. (Ex. 1, Notice of Defense (Nov. 7, 2008) - "No dates available until after February 1, 2008 [*sic* ("2009" intended)].")

Therefore, the hearing was originally set for February 20, 2009. Although it was apparently at the request of the Department that the hearing was later postponed from February 20, 2009, to March 24, 2009, appellant does not show how that delay was unreasonable, nor do we believe that it could.

Appellant waived this defense by not raising it at the hearing and, even if it had not been waived, appellant has presented no evidence or argument that supports the defense asserted. Appellant's contention must be rejected.

ORDER

The decision of the Department is affirmed.⁴

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

⁴This 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.