

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

AB-9205

File: 47-253107 Reg: 10073811

QUYEN INC., dba Can Restaurant & Club
14241 Euclid Street, Suite C101-C106, Garden Grove, CA 92843,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: August 16, 2012
Los Angeles, CA

ISSUED OCTOBER 2, 2012

Quyên Inc., doing business as Can Restaurant & Club (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for violation of two conditions on its license in violation of Business and Professions Code section 23804.

Appearances on appeal include appellant Quyên Inc., appearing through its counsel, Rick A. Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

¹The decision of the Department, dated October 11, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on January 13, 1992. On November 16, 2010, the Department instituted an accusation against appellant charging that two conditions on its license had been violated: 1) "[e]ntertainment provided shall not be audible beyond the area under control of the licensee," and 2) "[t]he side and rear door(s) shall be kept closed at all times during the operation of the premises except in cases of emergency and to permit deliveries"; both violations of Business and Professions Code section 23804.²

At the administrative hearing held on August 17, 2011, documentary evidence was received and testimony concerning the violation charged was presented by Mackenzie Polidori, an investigator with the Department of Alcoholic Beverage Control (ABC); Andrew Scotti, a former security guard at the premises; and Victoria Tieu, corporate president and licensee of the premises.

The testimony established that ABC investigators visited the premises in an undercover capacity on three occasions, in response to a citizen's complaint. The investigators witnessed doors which were open on July 18, 2009, and August 15, 2009, and heard loud music beyond the area under control of the licensee on July 18, 2009, August 15, 2009, and January 23, 2010. On each occasion, the investigators went to locations 58 feet and 70 feet from the premises, where they were still able to hear the music they had heard inside the establishment.

Subsequent to the hearing, the Department issued its decision which determined

² 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."

that the violations charged had been proven, and no defense had been established.

Appellant filed a timely appeal raising the following issues: (1) the evidence does not support the findings and the findings do not support the decision, and (2) the penalty is excessive.

DISCUSSION

I

Appellant contends that the evidence does not support the findings and the findings do not support the decision.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084 & 23085; *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].)

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].)

In the instant case, the administrative law judge (ALJ) made extensive findings of fact (FF) on the events which led to the accusation:

FF 5. On July 18, 2009, Department Investigators Mackenzie Polidori and Vic Duong visited Respondent's Licensed Premises in an undercover capacity. They went to the location in response to a complaint regarding the noise coming from the premises. The investigators entered and sat at the fixed bar. They ordered and were served beer. It was about 10:55 p.m. There were about 10 patrons inside the premises. There was a DJ playing Spanish music that was amplified through speakers.

FF 6. The music was loud. Investigator Polidori observed the north door to be propped open and the sliding glass door that leads to the unlicensed patio to also be open. They exited the premises. Polidori took a photo which shows the door open (See Exhibit 2). Polidori testified that there were no deliveries taking place at this time. Polidori crossed Forbes Street and went to a fire hydrant which was 70 yards from the premises. The measurement was made with a range finder. From this location Polidori could hear the music that was coming from the premises. Polidori then went to the public sidewalk at the corner of Euclid Ave. and Forbes Street. This location was measured to be 58 yards from the premises. From this location Polidori could hear the music coming from the premises.

FF 7. On August 15, 2009, Investigators Polidori and Duong returned to the premises posing as customers. They ordered and were served alcoholic beverages. On this occasion there were about 20 patrons inside. Amplified music was being played and a microphone was being passed among the customers who would sing the lyrics to the songs karaoke style. Polidori observed the north door to be propped open and the sliding glass door that leads to the unlicensed patio to also be open again. She took a photo that shows the north door propped open (See Exhibit 3). The time was approximately 11:30 p.m.

FF 8. Investigators Polidori and Duong then exited the premises. Polidori crossed Forbes Street and went to the same fire hydrant that she had gone to on her prior visit. From this location, a distance of about 70 yards, Polidori could clearly hear the music coming from Respondent's business. Polidori then went to [the] corner of Euclid Ave. and Forbes St. From this location, the same location as the prior visit, Polidori could hear the music coming from Respondent's business. Polidori remained at each of the two locations for approximately five minutes each and heard the music

during that time.

FF 9. On January 23, 2010, Investigators Polidori and Lim went to Respondent's Licensed Premises around 11:45 p.m. Polidori observed a live band playing that consisted on one drummer, 2 guitar players, one keyboard player and one singer (See Exhibits 4, 5 and 6). On this occasion the rear and side doors were closed.

FF 10. Polidori exited the premises, crossed Forbes St., and went to the same fire hydrant she had gone to on her two prior visits. From this location she could hear the music being played by the band. Polidori then went to [the] corner of Euclid Ave. and Forbes St. From this location, the same location as the prior visit, Polidori could hear the music being played by the band coming from Respondent's business. Polidori remained at each of the two locations for approximately five minutes each and heard the music during that time.

FF 11. Polidori then contacted corporate president Victoria Tieu. The music was so loud that they had to go outside to talk. Polidori advised Tieu of the condition violations. Polidori showed Tieu both locations where she had gone to check for audible entertainment, that being the fire hydrant and the street corner.

The ALJ rejected the contradictory testimony of appellant's witness in

Conclusions of Law (CL) 5:

CL 5. Respondent argued, based upon the testimony of security guard Andrew Scotti, that the doors were always monitored and never kept open. This argument is rejected. The testimony of Scotti is not reliable. When questioned about these events his memory was sketchy at best.

It is a fundamental precept of appellate review that it is the province of the ALJ, as trier of fact, to make determinations as to witness credibility and to resolve any conflicts in the testimony. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) The Appeals Board will not interfere with those determinations in the absence of a clear showing of an abuse of discretion.

Appellant argues that the investigator should have verified that the music she heard was not coming from another business and that the investigator should have

gone to the residential area -- presumably where the complaining party resides -- to verify if the noise from the licensed premises could be heard. These arguments are without merit. Appellant has presented no evidence to prove that the music was coming from another establishment, and the second argument is irrelevant. The condition on the license does not state that music shall not be audible in the residential area, it says entertainment provided shall not be audible beyond the area under control of the licensee.

As the Board said in *Guinness UDV North America, Inc.* (2003) AB-7988:

In reviewing this decision to determine whether it is supported by substantial evidence, the Appeals Board "may not confine [its] consideration to isolated bits of evidence, but must view the whole record in a light most favorable to the judgment, resolving all evidentiary conflicts and drawing all reasonable inferences in favor of the decision of the [Department]. [Citation.] . . . [W]e must accept any reasonable interpretation of the evidence which supports the [Department's] decision."

(*Beck Development Co., Inc. v. Southern Pacific Transportation Company* (1996) 44 Cal.App.4th 1160, 1203 [52 Cal.Rptr.2d 518].)

Viewing the record as a whole, substantial evidence supports a finding that both conditions on the license were violated.

II

Appellant contends secondly that the penalty is excessive in light of all the circumstances.

The Appeals Board may examine the issue of an excessive penalty raised by an appellant (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will 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, 291 [341 P.2d 296].)

Appellant objects to the penalty, but has not explained why it feels the penalty is excessive or pointed out any evidence of an abuse of discretion. The Appeals Board is not required to make an independent search of the record for error not pointed out by appellant. It is appellant's duty to show the Board that error exists. Without such assistance by appellant, the Appeals Board may deem the general contentions waived or abandoned. (*Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 139 [144 Cal.Rptr. 710]; *Sutter v. Gamel* (1962) 210 Cal.App.2d 529, 531 [26 Cal.Rptr. 880, 881].)

ORDER

The decision of the Department is affirmed.³

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

³This 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.