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

AB-9401
File: 48-475425 Reg: 13078902

DIRTY BIRD LOUNGE, LLC,
dba Dirty Bird Lounge
29308 Mission Boulevard, Hayward, CA 94544,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: July 10, 2014
San Francisco, CA

ISSUED AUGUST 1, 2014

Dirty Bird Lounge, LLC, doing business as Dirty Bird Lounge (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days, all conditionally stayed, for a violation of a license condition pursuant to Business and Professions Code section 23804.

Appearances on appeal include appellant Dirty Bird Lounge, LLC, appearing through its counsel, Rick Warren, and the Department of Alcoholic Beverage Control, appearing through its counsel, Heather Hoganson.

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[1]The decision of the Department, dated December 13, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on March 18, 2009. On July 18, 2013, the Department instituted an accusation against appellant charging that, on three dates in 2013, a juke box was playing inside the premises in violation of condition 10 of appellant's license. Condition 10 states "There shall be no amplified music on the premises at any time." (Exhibit 2.)

At the administrative hearing held on November 6, 2013, documentary evidence was received and testimony concerning the violation charged was presented by Department Agent Daniel Louie and by Aric Yeverino, the sole owner of appellant Dirty Bird Lounge, LLC.

Testimony established that on February 16, April 4, and May 3, 2013, a jukebox was playing at appellant's premises. The music was projected through four speakers mounted on the wall.

Yeverino claimed that a Department agent had assured him the condition did not specifically prohibit juke boxes because the speakers were not self-powering — that is, they receive power through the jukebox.

The ALJ, however, accepted the definition of "amplified" presented by the Department — specifically, that "amplified music," unlike acoustic music, is music that is "plugged in" to a sound system. This definition included juke boxes.

Subsequent to the hearing, the Department issued its decision which determined that the condition violation was proven and no defense was established. Because appellant did not intentionally violate the condition, and because the premises, even with the juke box playing, were "relatively quiet" and did not disturb the neighbors, the ALJ determined mitigation was appropriate and imposed a conditionally stayed 15-day

suspension.

Appellant filed a timely appeal raising the following issues: (1) the Department had no authority under section 23800(e) to impose new conditions in the course of a person-to-person transfer, and (2) the grounds recited in the Petition for Conditional License are so vague as to be no grounds at all, and fail to inform the licensee of the reasons justifying imposition of the conditions.

DISCUSSION

I

Appellant contends that section 23800(e) did not grant the Department authority to impose new conditions in the course of a person-to-person transfer. Appellant directs this Board to *Hemani* (2013) AB-9285 and *Hermosa Pier 20, LLC* (2013) AB-9284, in which we held that the language of Business and Professions Code section 23800(e) did not authorize the Department to impose new license conditions in the course of a person-to-person transfer.

The Department points out that this issue was not raised at the administrative hearing. Generally, the failure to raise and issue or assert a defense at the administrative hearing level bars its consideration on appeal. (*See*, *e.g.*, *Hooks v. Cal. Personnel Bd.* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822].)

Appellant is correct, however, that any attempts to "enlarge the scope of administrative powers are void, and that courts are obligated to strike them down." (*AFL-CIO v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1035-36 [56 Cal.Rptr.2d 109]; see also *Morris v. Williams* (1967) 67 Cal.2d 733, 748 [63 Cal.Rptr. 689]; *Dyna-Med, Inc. v. Fair Employment and Housing Comm.* (1987) 43 Cal.3d 1379, 1389 [241 Cal.Rptr. 67]; *Dept. of Alcoholic Bev. Control v. Miller Brewing Co.* (2008)

104 Cal.App.4th 1189, 1198-1199 [128 Cal.Rptr.2d 861].) We agree with appellant's assertion that an enlargement of administrative power is unenforceable as a matter of law. Moreover, a void judgment is subject to collateral attack at any time. (See, e.g., *Talley v. Valuation Counselors Group, Inc.* (2010) 191 Cal.App.4th 132, 149 [119 Cal.Rptr.3d 300].)

Section 23800 has undergone recent legislative revision. Prior to 2008, the statute read, in pertinent part:

> (e)(1) At the time of a transfer of a license pursuant to Section 24071.1, 24071.2, or 24072 and upon written notice to the licensee, the department may adopt conditions that the Department determines are reasonable pursuant to its investigation, or that are requested by the local governing body, or its designated subordinate officer or agency in whose jurisdiction the licensee is located. The request for conditions shall be supported by substantial evidence that the problems on the premises or in the immediate vicinity identified by its designated subordinate officer or agency, will be mitigated by the conditions.

Section 24070, which governs person-to-person transfers, is notably absent from this version of the statute.[2] In *Hemani* and *Hermosa Pier*, which involved transfers that took place in 2002 and 2008, respectively, the Department exceeded its authority by relying on this version of the statute to impose conditions in the course of a section 24070 transfer. Accordingly, we reversed.

In 2008, however, the legislature amended section 23800 to include a new provision:

> The Department may place reasonable conditions upon retail licensees or upon any licensee in the exercise of retail privileges in the following situations:

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[2]In 2012, section 23800, subdivision (e), was amended to explicitly include section 24070 transfers. (See Bus. & Prof. Code § 23800, as amended by Stats. 2012, ch. 327, § 7.)

¶ . . . ¶

(f) At the time of a transfer of a license pursuant to Article 5 (commencing with section 24070) of Chapter 6.

(Bus. & Prof. Code § 23800, as amended by Stats. 2008, ch. 254, § 1.) The amended statute took effect on January 1, 2009. *(Ibid.)* Thus, as of that date, section 23800, subdivision (f), has granted the Department the authority to introduce new conditions in the course of a person-to-person license transfer.[3]

In the present case, appellant executed its Petition for Conditional License on March 16, 2009 — ten weeks after the effective date of the legislation introducing section 23800, subdivision (f). (See Exhibit 2.) At that point, the Department had authority to impose new conditions in the course of a person-to-person license transfer.

It is true that the Petition itself cites subdivision (e) as the source of the Department's authority to impose the new conditions. (*Ibid*.) We cannot agree, however, that the Department exceeded the scope of its power when it was, at the time, endowed with that very power by another subdivision of the same statute. To reverse based on simple miscitation of otherwise legitimate authority would be to neglect function in favor of pure form.

II

Appellant contends that the grounds the Department cites for imposing the conditions are so vague as to be no grounds at all, and constitute an abuse of discretion. Appellant argues that this makes it impossible to show the change in

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[3]Appellant has requested this Board take judicial notice of the legislative history of subdivision (f). We decline. The plain language of the statute grants the Department authority to impose conditions in the "at the time of a transfer of a license." "When the language of a statute is clear, we need go no further." (*People v. Flores* (2003) 30 Cal.4th 1059, 1063 [135 Cal.Rptr.2d 63].)

circumstances necessary to have the condition modified or removed pursuant to Business and Professions Code section 23803.

Again, the Department asserts that the issue was not raised below. However, during his testimony *in pro per*, Yeverino did attempt to raise a closely related argument — the lack of criminal incidents at the premises — and was soundly shut down by the ALJ:

> [MR. YEVERINO]: Again, I have no further statements other than — aside from — I have the performance standards and crime analysis for my business.
>
> And, again, they state that I've never had any serious violations that would call into question — you know, that would — that would elicit a — a hearing of this sort.
>
> And I can — I have references from Angela — Detective Angela Irizarry. And, also, I could get a reference — I'm sorry — a person from — but there was, prior to having heard of the head of ABC, in the Hayward of the vice unit, was Sergeant Ryan Cantrell. Again, he can also, you know — when if — if you asked him, he'd say I actually run a really well-run business.
>
> ¶ . . . ¶
>
> ADMINISTRATIVE LAW JUDGE: All of the respondent's exhibits are in evidence.
>
> (Whereupon, Respondent's Exhibits A1, A2, A3, A4, B1, B2, and B3 were moved into evidence.)
>
> MR. YEVERINO: Actually, did you get the performance standards and crime analysis?
>
> ADMINISTRATIVE LAW JUDGE: What — what is the significance of that?
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> MR. YEVERINO: That is to — verifies the — that there has been no critical incidence. There hasn't been —
>
> ADMINISTRATIVE LAW JUDGE: There's no allegation that —
>
> MR. YEVERINO: Or that, essentially, that — that the officer hasn't

seen any, like, distress on public safety or anything like that. So it shows there has been no real violations.

ADMINISTRATIVE LAW JUDGE: There's no allegations that there have been other violations.

MR. YEVERINO: Okay.

ADMINISTRATIVE LAW JUDGE: So you don't — you need not to —

MR. YEVERINO: Okay.

ADMINISTRATIVE LAW JUDGE: What's — I think the term "straw man" — "set up a straw man to knock it down."

MR. YEVERINO: Oh, yeah.

ADMINISTRATIVE LAW JUDGE: And, in fact, the agent testified that your place was pretty well run, other than these — for these alleged violations. So I — I don't think I need letters or recommendations or anything like that.

(RT at pp. 41-42, 47-48.) The ALJ stopped appellant short when he attempted to discuss the character of the establishment or the lack of criminal incidents at the premises — evidence quite possibly relevant in determining whether the Department had grounds to impose the condition. It is possible that appellant might have addressed the lack of grounds for the condition, had the ALJ not curtly labeled his argument a fallacy. We therefore decline to consider the issue waived.

Appellant's Petition for Conditional License states the following grounds:

WHEREAS, petitioner(s) has/have filed an application for the issuance of the above-referred-to license(s) for the above-mentioned premises; and,

WHEREAS, the Hayward Police Department has provided the Department with substantial evidence of an identifiable problem which exists at the premises or in its immediate vicinity; and

WHEREAS, pursuant to Business and Professions Code Section 23800(e) the Department may grant a license transfer where the transfer with condition will mitigate problems identified by the local governing body

> or its designee; and,
>
> WHEREAS, petitioner stipulates that by reason of the existence of substantial evidence of identifiable problems at the premises or it [sic] immediate vicinity, grounds exists [sic] for denial of said license transfer; and,
>
> WHEREAS, transfer of the existing unrestricted license would be contrary to public welfare and moral [sic]. . . .

(Exhibit 2.)

This Board has reversed where a condition cites no grounds and therefore fails to inform the licensee of the problems the condition is designed to mitigate. In *Williams* (2007) AB-8555, the license included a condition requiring that front and rear doors remain closed. (*Id.* at p. 4.) Officers visiting the premises found the doors open. (*Id.* at pp. 2-3.) In the license, the grounds stated were all but indistinguishable from the grounds in this case:

> WHEREAS, the Oakland Police Department, has provided the Department with substantial evidence of an identifiable problem which exists at the premises or in its immediate vicinity: and
>
> WHEREAS, transfer of the existing unrestricted license would be contrary to public welfare and morals;
>
> WHEREAS, pursuant to Business and Professions Code Section 23800(e)[fn] the Department may grant a license transfer where the transfer with condition will mitigate problems identified by the local governing body or its designee; and
>
> WHEREAS, petitioner stipulates that by reason of the existence of substantial evidence of identifiable problems at the premises or its immediate vicinity, grounds exists [*sic*] for denial of said license transfer. . . .

(*Id.* at p. 4.) Inexplicably, the ALJ nevertheless determined that "[o]ne purpose of the condition is . . . to prevent noise from disturbing those in the neighborhood." (*Ibid.*)

On appeal, this Board reversed and observed that the Petition for Conditional

License gave “no clue to the reason for any of the conditions.” (*Id.* at p. 5.) It added:

> The petition gives the "reason" for the conditions as "substantial evidence of an identifiable problem which exists at the premises or in its immediate vicinity" provided to the Department by the Oakland Police Department. There is no indication of what the "identifiable problem" was, what substantial evidence was provided to support the existence of the problem, or even whether the problem existed at the premises or just in its immediate vicinity.
>
> Presumably, the Department, or some person working for the Department, knows the reason for imposition of these conditions. However, the Department has not provided any record of the reason. It is not enough to say that the police have shown the Department that a problem exists. (See *Cho* (2000) AB-7379 ("patently unreasonable to require a licensee to show that protestants were no longer objecting to issuance of the license where there is no indication of the basis for the protests"); *Crenshaw* (1996) AB-6580.) It is fundamentally unfair not to let the licensee, who must comply with the conditions, know what problems the conditions are designed to mitigate.
>
> Of course, it is not just the licensee who is left guessing about the reasons behind the conditions, it is also this Board and any appellate court attempting to review the action of the Department. The Department is accorded great discretion, but keeping fundamental information to itself in a circumstance such as this is not an exercise of discretion. It is not even an abuse of discretion; it is a matter that is not subject to the Department’s discretion.

(*Id.* at pp. 5-6; see also *Cho* (2000) AB-7379 [reversing a denial of modifications under section 23803 because grounds cited were insufficient and left the licensee with the "impossible burden of showing a change in circumstances"].)

Taken together, the conditions here are extreme — appellant cannot provide live music (see condition 3, Petition for Conditional License, Exhibit 2), nor can he use “amplified” music, which the Department interprets as any music plugged into a sound system. (Determination of Issues II [explicitly accepting Department's definition of amplified].) According to the Department, this includes any music powered by electricity. (See RT at pp. 14-15, 50.) While there is the brief mention of wind-up music

boxes at the administrative hearing, (RT at p. 50), the suggestion is absurd, and leaves appellant with few to no options for music at his establishment. While there may be circumstances that merit such an extreme restriction, the Department fails to cite them in the Petition for Conditional License. In fact, it fails to articulate the grounds for these conditions at any point in its brief, during the course of the administrative hearing, or during oral argument. Instead, the Department argues that, in order to determine the grounds for a condition on its license, appellant has no choice but to petition for modification or removal under section 25803. This Board is left completely in the dark — as was appellant, who could have used the grounds as guidance in determining whether his juke box would constitute a condition violation.

Significantly, the opening sentence of section 23800 contains the adjective "reasonable," which modifies the noun “conditions” to describe and restrict the nature of those the Department is authorized to “place” on licensees such as appellant. (See text of B & P Code § 23800 ante at p. 4.) Whether the specific “condition” at issue here — i.e., “no amplified music” — is “reasonable” and within the purview of the statute depends, of course, on the stated grounds for its imposition. Those grounds, however, are so vague as to permit the imposition of any condition: “an identifiable problem which exists at the premises or in its immediate vicinity.” What “identifiable problem”? We are left to speculate by reasoning backwards from the nature of the “condition” imposed (“no amplified music”) to fill-in the supposed “ground” for its imposition, a form of circular reasoning that swallows itself for lack of any logical nexus between a major premise (e.g., possibly “excessive noise” evidenced from complaints by the public) and an inference made from a minor premise (e.g., that live or amplified music contributes to excessive noise) to the conclusion that is the “condition.” This defies rather than

constitutes “reason,” violating the statute’s requirement that all conditions imposed by the Department on licensees be “reasonable.” Black’s Law Dictionary defines “reasonable” as “fair, proper, just, . . . rational.” (Black's Law Dict. (5th ed. 1979) p. 1138.)

It is the antitheses of “reasonable” to impose on a licensee a specific condition that lacks any logical nexus to an expressly articulated ground for its existence. Indeed, such arbitrary government conduct runs afoul of the guarantee to due process. “The due process clauses, federal and state, are the most basic substantive checks on government’s power to act unfairly or oppressively.” (*Hale v. Morgan* (1978) 22 Cal.3d 388, 398 [149 Cal.Rptr. 375].) Due process requires that legislation (and government actions) be “reasonable and proper,” not “arbitrary and oppressive.” (*Id.* at p. 399.)

Moreover, the language of condition 10 is so vague that the absence of supporting grounds renders it unenforceable. A licensing condition and the stated grounds for its imposition are constitutionally void on their face when, as matter of due process, they are so vague that persons “of common intelligence must necessarily guess at [their] meaning and differ as to [their] application” (*Connally v. General Constr. Co.* (1926) 269 U.S. 385, 391 [46 S.Ct. 126]; *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115 [60 Cal.Rptr.2d 277].) The void for vagueness doctrine is designed to prevent arbitrary and discriminatory enforcement. (*Smith v. Goguen* (1974) 415 U.S. 566, 573 [94 S.Ct. 1242]; *Ketchens v. Reiner* (1987) 194 Cal.App.3d 470, 477 [239 Cal.Rptr. 549].) The problem with a vague condition and purported ground for it is that it “impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis. . . .” (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108-109 [92 S.Ct. 2294].)

Here, the condition depends entirely on the definition of the term "amplified." The ALJ cites no objective sources in interpreting the word: "According to the Department, 'amplified music,' unlike acoustic music, is music that is 'plugged in' to a sound system. The Administrative Law Judge accepts this simple, and commonly-understood, definition." (Determination of Issues II.) This definition, however, is not recited in the license, nor does it reflect any publicly available dictionary definition.[4] We are left to assume that "amplified" simply means whatever the Department wants it to mean.[5]

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[4]We note that "amplified," as it is used in condition 10, is the past participle form of the transitive verb "to amplify." Merriam-Webster gives the following relevant definitions of the transitive verb:

> 2 a: to make larger or greater (as in amount, importance, or intensity): INCREASE
> b: to increase the strength or amount of; *especially*: to make louder

(Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/amplify> [as of July 14, 2014].) The Oxford English Dictionary offers a similar general definition of the verb:

> *gen.* To make large; in space, amount, capacity, importance, or representation.

(OED Online, <http://www.oed.com/view/Entry/6745?redirectedFrom=amplify&> [as of July 15, 2014].) The definition most similar to the Department's position is a 2004 draft addition to the OED Online:

> To connect (a musical instrument) to an amplifier; to play through an amplifier.

(*Ibid.*) Yet even this definition presumes the amplifier is connected to a musical instrument, and thus provides no guidance in the present case.

[5]At oral argument, counsel for the Department insisted the definition of "amplified" turned on the use of electricity to produce sound. When questioned about the possibility of *architectural* amplification — as in an amphitheater designed to project sound to the audience — counsel did not reject such a definition, but merely responded (continued...)

At oral argument, the Department claimed that if appellant was not clear about the meaning of the word, he should have asked for clarification at the time of licensing. In fact, Yeverino's testimony suggests that he *did* attempt to clarify the condition, and was reassured that use of the juke box would not constitute a violation: "While being read the conditions of the license when first transferred in March of 2009, the ABC officer in charge of the transfer specific — specifically said that the juke- — jukebox would not be considered amplified music." (RT at p. 39; see also Finding of Fact IV.) We need not rely on a hearsay statement from a Department representative to conclude that Yeverino did inquire as to the meaning of the condition at the time of licensing, and the Department failed to provide guidance sufficient to prevent an unintentional violation. Ultimately, appellant had no means by which to reliably determine either the meaning or the purpose of the condition. A violation was all but inevitable.

Finally, the Department contends appellant has not exhausted the administrative process for modifying or removing conditions under Business and Professions Code section 23803. (Reply Br. at p. 5.) The Department claims that "[u]sing an appeal of discipline to bring the matter up deprives the Department [of] the ability to research the matter and the local governing body a voice guaranteed to it by statute." (*Ibid.*) This Board addressed a very similar argument in *Williams*:

> The Department may argue that conditions must be challenged at the time they are imposed, not later, when they are violated or a

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[5](...continued)
that it was irrelevant because appellant's premises could not structurally accommodate an amphitheater. We find this exchange enlightening: the Department's definition of "amplified" is not only exempt from logic, but appears to be premises-specific and therefore illusory.

> modification is sought. But the whole question in this appeal is whether the condition was violated. This Board cannot, it is true, order the condition to be changed or eliminated at this time. However, it can, and does, find that the Department did not proceed in accordance with law when it attempted to enforce a condition based on the reason for its imposition, when no one, except perhaps the Department, knows what that reason is.

(*Id.* at p. 6.) The logic applies doubly here. Even the ALJ acknowledged that appellant's violation was inadvertent and the premises were, in fact, "relatively quiet." (Determination of Issues II.) Had the Department bothered to communicate the grounds for imposing the condition, appellant might have been better equipped to interpret the condition, and thus avoid violating it. Instead, appellant is left with a vague and apparently draconian restriction on virtually all music (save, of course, mechanical music boxes), with no justification whatsoever and no guidance as to what he will need to prove in order to have the conditions removed. This is, unquestionably, an abuse of discretion.

ORDER

The decision of the Department is reversed.[6]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, 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.