

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

AB-9622

File: 47-502020; Reg: 15083381

152 Post LLC,
dba Myth Taverna & Lounge
152 Post Street, San Jose, CA 95113-2107,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: December 7, 2017
Sacramento, CA

ISSUED DECEMBER 27, 2017

Appearances: *Appellant:* Anthony E. Pagkas, as counsel for 152 Post LLC;

Respondent: Sean Klein, as counsel for Department of Alcoholic
Beverage Control.

OPINION

152 Post, LLC, doing business as Myth Taverna & Lounge, appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 15 days—and indefinitely thereafter until it achieves compliance with the conditions on its license—for allowing entertainment to be audible beyond the area controlled by the

¹The decision of the Department, dated October 27, 2016, is set forth in the appendix.

licensee, in violation of Business and Professions Code section 23804,² and for failing to operate as a bona fide eating establishment while serving alcoholic beverages other than beer, in violation of Business and Professions Code section 23396.³

²Section 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.

(Bus. & Prof. Code, § 23804.)

³Section 23396 provides:

Any on-sale license authorizes the sale of the alcoholic beverage specified in the license for consumption on the premises where sold. No alcoholic beverages, other than beers, may be sold or served in any bona fide public eating place for which an on-sale license has been issued unless the premises comply with the requirements prescribed in Section 23038, 23038.1, 23038.2, or 23038.3.

(Bus. & Prof. Code, § 23396.) Section 23038 provides:

“Bona fide public eating place” means a place which is regularly and in a bona fide manner used and kept open for the serving of meals to guests for compensation and which has suitable kitchen facilities connected therewith, containing conveniences for cooking an assortment of foods which may be required for ordinary meals, the kitchen of which must be kept in a sanitary condition with the proper amount of refrigeration for keeping of food on said premises and must comply with all the regulations of the local department of health. “Meals” means the usual assortment of foods commonly ordered at various hours of the day; the service of such food and victuals only as sandwiches or salads shall not be deemed a compliance with this requirement. “Guests” shall mean persons who, during the hours when meals are regularly served therein, come to a bona fide public eating place for the purpose of obtaining, and actually order and obtain at such time, in good faith, a meal therein. Nothing in this section, however, shall be construed to require that any food be sold or purchased with any beverage.

(Bus. & Prof. Code, § 23038.)

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on October 13, 2010, and it has no prior record of disciplinary action. On June 30, 2016, the Department instituted a 6-count accusation against appellant, charging that it violated condition #2 on its license by allowing entertainment to be audible beyond the area under its control, and that it violated conditions #5 and #7 on its license by failing to operate as a bona fide eating establishment while serving alcoholic beverages other than beer—thereby, in essence, operating as a public premises.⁴

At the administrative hearing held on July 6, 2016, documentary evidence was received and testimony concerning the violation charged was presented by ABC Agents Matt Elvander and Brandon Knott; by Issac Barrera, current managing member of appellant 152 Post LLC; and by Anthony Pagkas, a shareholder and former managing

⁴(a) “Public premises” means:

(1) Premises licensed with any type of license other than an on-sale beer license, and maintained and operated for the selling or serving of alcoholic beverages to the public for consumption on the premises, and in which food shall not be sold or served to the public as in a bona fide public eating place, but upon which premises food products may be sold or served incidentally to the sale or service of alcoholic beverages, in accordance with rules prescribed by the department.

(2) Premises licensed with an on-sale beer license, in which food shall not be sold or served to the public as in a bona fide public eating place, and in which sandwiches, salads, desserts, and similar short orders shall not be sold and served, in accordance with rules prescribed by the department.

(Bus. & Prof. Code, §23030(a)(1) and (2).)

member of appellant 152 Post LLC.

On February 12, 2013, appellant executed a petition for conditional license containing nine conditions, three of which are at issue in this appeal:

Condition 2, which provides: "Entertainment provided shall not be audible beyond the area under the control of the licensee(s) as defined on the ABC-257 dated 10-2-12 and ABC-253 dated 10-2012." (Exh. 3.)

Condition 5, which provides: "During normal meal hours the premises shall be designed and used for and possess the necessary utensils, table service, and condiment dispensers with which to serve meals to the public." (*Ibid*); and

Condition 7, which provides: This license shall not be exchanged for a public premises type license nor operated as a public premises." (*Ibid*.)

Testimony established that Agent Matt Elvander telephoned the licensed premises on Thursday, March 26, 2015, at approximately 7 p.m. No one answered the phone, but the message on the answering machine stated that lunch and dinner were served there Monday through Friday. (RT at p.17.) Agent Elvander went to the premises approximately one hour later and found it closed. He also visited the premises on Friday, March 27, 2015, between 5 and 6 p.m., and Wednesday, May 6, 2015, at mid-day. Both times he visited the premises he found it closed. (RT at pp. 18-20.)

Count 1 (Violation of Condition 2):

On May 8, 2015, Agent Elvander returned to the premises with two other agents

at approximately 11 p.m. He heard loud music emanating from the premises from approximately one block away—a distance he estimated to be between 500 to 600 feet. (RT at pp. 21-22.)

Counts 2 and 3 (Violation of Conditions 5 and 7):

Agent Elvander entered the premises after paying a \$10 cover charge to the security guard. He did not see any evidence of food service, and when he asked an employee whether food was available he was told it was not. (RT at p. 26.) Patrons were observed consuming a variety of alcoholic beverages on this visit, and Agent Elvander ordered and was served a mixed drink containing vodka.

Count 4 (Violation of Condition 2):

On May 21, 2015, Elvander returned to the licensed premises with other law enforcement personnel to continue the investigation. Agent Elvander arrived between 10 and 11 p.m. and parked approximately 500 feet from the premises. He could hear loud music coming from the premises. (RT at pp. 27-28.)

Counts 5 and 6 (Violations of Conditions 5 and 7):

Upon entering the premises, the investigators identified themselves to employees. Agent Brandon Knott asked the bartender if he could order some food and was told no. (RT at pp. 76-77.) An inspection of the kitchen revealed no evidence of food preparation, cold and dusty stoves, dusty dishes, and spoiled and/or expired food. Storage areas did not contain food items that would have indicated food service, but were used instead to store alcoholic beverages. (See RT at pp. 30-32, Findings of Fact, ¶¶ 10-11, and Exhs. D-4 through D-8.)

Shareholder Pagkas arrived at the premises during the investigation. He was

asked for a menu by the investigators but was initially unable to find one. When he did locate a menu it was old and damaged. (RT at p. 34; Exh. D-9.)

Manager Barrera testified that food hours for the premises are 5 p.m to 9 p.m. (RT at pp. 82; 96.) He also testified that the licensed premises was shut down for 30 days in March of 2015,⁵ causing it to lose all of its kitchen staff, and thereafter to experience difficulties in re-staffing—a problem persisting until the time of the investigation in May, 2015. (RT at pp. 84; 96.)

On August 15, 2016, the administrative law judge (ALJ) submitted a proposed decision, finding that three conditions on the license had been violated and recommending a 15-day suspension—with the suspension to continue indefinitely thereafter until compliance is achieved with the conditional license. On August 18, 2016, the Department's Administrative Hearing Office sent a letter from its Chief ALJ to both appellant and Department counsel, inviting the submission of comments on the proposed decision and stating that the proposed decision and any comments submitted would be submitted to the Director of ABC in 14 days. Appellant submitted its comments to the Director on September 1, 2016. The Department did not submit comments. Thereafter, on October 27, 2016, the Department issued its Certificate of Decision, adopting the proposed decision in its entirety.

Appellant then filed a timely appeal contending the decision is not supported by substantial evidence.

⁵Mr. Pagkas later clarified that the premises was closed from March 28, 2015 to April 26, 2015 because the City of San Jose suspended its entertainment permit. (RT at pp. 105-107.)

DISCUSSION

Appellant contends the decision is not supported by substantial evidence.

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.]

We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department.

(*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815].

Therefore the issue of substantial evidence, when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].)

I

Appellant contends the finding that it had audible entertainment beyond the area under its control is not supported by substantial evidence. (App.Br. at p. 7.) It maintains the evidence is contradictory. (*Id.* at p. 8) It further maintains that the noise coming from the premises is comparable in level to that coming from the surrounding neighborhood (*id.* at p. 9), so that the Department is penalizing the premises “for having audible noise that is already part of the urban landscape in and around the premise.” (*Id.* at p. 10.)

The ALJ made the following findings on this issue:

7. On May 8, 2015 Elvander visited the Licensed Premises in the evening at approximately 11:00 p.m. As he approached the Licensed Premises, he could hear what he described as loud music from approximately one block away. From a distance of 500-600 feet from the License Premises, Elvander was able to determine that the Licensed Premises was where the loud music was emanating from. Elvander noted that security was at the door of the Licensed Premises and he was charged a \$10 cover charge to enter.

¶ . . . ¶

9. Elvander returned on May 21, 2015 with other law enforcement personnel to continue the investigation. Department Agent Brandon Knott was told that the Licensed Premises was still setting up when he tried to enter at approximately 10 p.m. He was told they would open at 10:30 p.m. Elvander arrived between 10:00 and 11:00 p.m. Elvander approached the Licensed Premises and parked in a vehicle lot between the Licensed Premises and a Greyhound bus stop. He parked approximately 250 feet away from the building that contained the Licensed Premises. Before he approached from his vehicle, Elvander observed that he could hear the music from well beyond the boundaries of the Licensed Premises. It sounded louder than the observation he made on May 8, 2015.

(Findings of Fact, ¶¶ 7-9.) Based on these findings the ALJ reached the following conclusions:

7. . . . In Counts 1 and 4 the Department has established that music was audible beyond the area under the control of the licensee in violation of section 23804 in violation of the specific condition prohibiting entertainment from being audible beyond the area controlled by the licensee. (Findings of Fact ¶¶ 4, 7-10 & 14) The boundaries of the licensed Premises were undisputed. Elvander's testimony to having heard loud music on both of the dates in the allegation from at least 250 feet from the Licensed Premises was found to be credible.

8. Even accepting the Respondent's testimony that music was kept to below 70 decibels from across the street from the Licensed Premises, the Respondent was still in violation of the condition establishing that "[e]ntertainment provided shall not be audible beyond the area under the control of the licensee(s) as defined on the ABC-257 dated 10-2-12 and ABC-253 dated 10-2-12." (Finding of Fact ¶ 4) While the Respondent may have reasonably concluded that acting in this fashion prevented the Licensed Premises from interfering with the quiet enjoyment of the surrounding neighbors' residences, they had an affirmative duty to comply with the condition as set forth in the conditional license until they successfully achieved a modification. No evidence was offered that the Respondent sought or achieved a modification.

(Conclusions of Law, ¶¶ 7-8.)

Appellant's contention that the evidence is contradictory is not supported by the record. Agent Knott did not recall whether he heard music when he arrived at the

premises (RT at p. 78), but this in no way contradicts Agent Elvander's testimony that he heard loud music on two occasions, simply because his fellow agent did not recollect hearing music. Furthermore, even if there had been a contradiction, it is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*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 credibility determinations in the absence of a clear showing of an abuse of discretion. The ALJ here found Agent Elvander's testimony to be credible, as reflected in the findings and conclusions in the decision, and the Board may not re-weigh the evidence to reach a contrary conclusion.

The ALJ specifically addresses and refutes appellant's second contention—that the noise emanating from the premises was no louder than other noise coming from the surrounding neighborhood. As the ALJ explains quite clearly, appellant is attempting to apply the wrong standard. The condition on its license does not state that entertainment shall be no louder than other noise in the neighborhood, it prohibits entertainment from being audible beyond the area under the licensee's control.

Entertainment was clearly audible on two separate occasions from beyond the area defined as appellant's licensed premises. Therefore, the violations of condition #2, alleged in counts 1 and 4 of the accusation, are supported by substantial evidence.

II

Appellant contends that substantial evidence does not support the finding that it failed to operate as a bona fide eating establishment. (App.Br. at p. 11.) It maintains the investigating agents visited the premises outside of the hours when food service

would reasonably be expected and therefore it was understandable that the agents did not see evidence of operation as a bona fide eating establishment. (*Ibid.*) Finally, appellant maintains it offered a reasonable explanation for the condition of its kitchen due to a temporary loss of its entertainment permit. (*Ibid.*)

Counts 2 and 5 assert that on two separate occasions the licensee was operating the premises as a public premises, rather than a bona fide eating establishment, in violation of condition #7 on its license. Counts 3 and 6 assert that on two separate occasions the licensee was serving alcoholic beverages other than beer, while failing to operate as a bona fide eating establishment, in violation of condition #5 on its license.

The ALJ made extensive findings on these issues and reached the conclusion that both conditions on appellant's license were violated. As he summarizes:

10. It is clear that, as least, from the reopening of the License Premises after the 30 day suspension of its business license⁶ by the city of San Jose, the Licensed Premises was not regularly and in a bona fide manner used and kept open for the serving of meals to guests for consumption. This period included the dates of May 8, 2015 and May 21, 2015. The kitchen of the Licensed Premises was devoid of any pretense of food preparation having occurred in an extended period. The kitchen was dusty and dirty. The small amount of food that was there was rotting and well past expiration dates on the labels. There was no kitchen staff. Food preparation and storage areas were used for the storage of alcoholic beverages instead. While it is true that both law enforcement site visits occurred outside of hours where food service might reasonably be expected to be offered, the state of the kitchen and food preparation areas, standing alone, more than establishes that the kitchen had ceased operating during the month of May, at the very least. During this same period, all of the credible evidence in this case established that the license Premises was in operation as a night club selling beer, wine and distilled spirit drinks in direct contravention of a condition on their conditional license precluding such operation. (Findings of Fact ¶¶ 2 & 4-13)

⁶The ALJ refers to suspension of appellant's "business license" here, but testimony established that it was appellant's *entertainment permit* which was suspended, not its business license. (See RT at p. 107.)

(Conclusion of Law, ¶ 10.)

The testimony of appellant's witnesses was not particularly helpful to its case. Isaac Barrera testified that they normally serve food from 5 to 9 p.m. but that did not serve food at all during the month of May 2015. (RT at p. 96.) Anthony Pagkas testified that the premises only serves food Thursday through Sunday. (RT at p. 106.) As the Department points out in its reply brief: "the sale of food four hours a day four days a week does not comply with one of the basic requirements of Business and Professions Code section 23038, namely that meals are to be available during the hours in which meals are normally served." (Dept.Br. at p. 5.)

Appellant contends it presented "legitimate and reasonable reasons for not having any type of operation during April, 2015 and part of May, 2015, which provide a reasonable explanation as to why the kitchen was in the state described." (App.Br. at p. 11.) Testimony established that appellant's entertainment permit was suspended by the City of San Jose from March 28, 2015 to April 26, 2015. In response, appellant shut the premises down during this period and, thereafter, had difficulty hiring new kitchen staff. This explanation, however, does not explain the complete lack of food, dusty stoves and dishes, and zero kitchen staff—particularly on the agents' second visit on May 21, 2015, nearly a month after re-opening the premises for business. And, as the ALJ notes: "This suspension did not prevent the Licensed Premises from providing food service during the suspension." (Findings of Fact, ¶ 13.) Appellant has failed to provide an explanation which would excuse its violation of conditions. Loss of an entertainment permit does not require the closing of the kitchen, nor does it permit re-

opening the premises without food service under the terms of appellant's conditional license.

Substantial evidence supports the conclusion that conditions #5 and #7 on the license were violated when appellant failed to operate as a bona fide eating establishment while serving alcoholic beverages other than beer.

ORDER

The decision of the Department is affirmed.⁷

PETER J. RODDY, ACTING CHAIRMAN
JUAN PEDRO GAFFNEY RIVERA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁷This 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.