

ISSUED JUNE 24, 1996

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

YELDA H. ATTISHA	)	AB-6555
dba Attisha's Handy Market)	
215 South 30th Street	)	File: 20-134145
San Diego, CA 92113	)	Reg: 94030793
Licensee/Appellant,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Alan S. Meth
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	May 1, 1996
	)	Los Angeles, CA

Yelda H. Attisha, doing business as Attisha's Handy Market (appellant), appealed from a decision of the Department of Alcoholic Beverage Control¹ which revoked appellant's off-sale beer and wine license for allowing the premises to be operated in a manner which created a law enforcement problem and violated two conditions on his license, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, Article XX, §22, and in violation of Business and Professions Code §§23804 and 24200(a).

Appearances on appeal included appellant Yelda H. Attisha; and the Department

¹The decision of the department dated July 6, 1995, is set forth in the appendix.

of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on February 1, 1983. On February 22, 1993, the department sent a letter to appellant warning him that complaints had been received concerning loitering and sales and possession of drugs and paraphernalia in and about his premises and the area under his control. On August 24, 1994, the department sent another letter to appellant, again warning him of intoxication and public drinking in front of his premises, as well as narcotic problems on property under his control. The letter advised appellant that an accusation would be filed against his license.

Thereafter, the department instituted an accusation on August 23, 1994, alleging 74 sub-counts in count 1 that the operation of appellant's premises had created a law enforcement problem, and in count II that appellant had violated two conditions on his license concerning the removal of graffiti and removal of the pay phones in front of the premises.

An administrative hearing was held on May 31 and June 1 and 2, 1995, at which time oral and documentary evidence was received. At that hearing, the administrative law judge (ALJ) determined that four of the sub-counts of count I should be dismissed, that the remainder of the sub-counts be found as true, and count II be found as true.

Subsequent to the hearing, the department issued its decision which revoked appellant's license.

In his appeal, appellant raised the following issues: (1) the ALJ's proposed decision was invalid due to an improper date of issuance; and (2) the department's interference with a private citizen's operation of his business was unconstitutional.

DISCUSSION

I

Appellant contended that the ALJ's proposed decision was invalid due to an improper date of issuance. The ALJ's proposed decision shows that the administrative hearing was held on May 31, June 1, and June 2, 1995. The parties presented their views of the matter through oral and documentary evidence. A proposed decision was dated June 16, 1994, with a date-stamp of June 20, 1995, as the date the department received the proposed decision. The department accepted the proposed decision and issued it as the department's decision on July 6, 1995.

The use of the incorrect year of 1994 by the ALJ on his proposed decision does not nullify that proposed decision. The department's decision date is the date the department issued its final decision. That date is the effective date of the department's decision. Non-critical clerical errors patently on the document do not negate the efficacy of a document. Appellant has not submitted any authority for his contention, and the appeals board knows of no law or authority that would support appellant's contention. Additionally, appellant has not shown that the incorrect date prejudiced appellant's rights.

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II

Appellant contended that the department's interference with a private citizen's operation of his business is unconstitutional.

The California Constitution, Article 3, §3.5, prevents this board from declaring any statute unconstitutional or refusing to enforce the laws of the State of California. However, a question of due process of law was sufficiently raised that review of that question will be considered.

Count I of the accusation alleges that appellant's operation had created a law enforcement problem. During the three-day hearing, police officers testified concerning citations issued to persons in the vicinity of the premises, or who were the subjects of written police reports.

The premises was shown to be located in a law enforcement problem area, where intoxicated persons and drug abusers abound. The police testimony concerned the large number of police contacts with persons in front of or near the premises.

Appellant had not been helpful to the police. The problems shown occurred mostly on the public sidewalks. The police made 75 contacts. Of that number, 44 contacts resulted in loitering arrests. In 25 of these contacts, the police questioned loiterers and asked if they had any illegal materials on their persons; the majority of the loiterers were cooperative and affirmed the illegal possession of narcotics or paraphernalia. Most of the loiterers were well known to the police from prior contacts; nine had outstanding warrants for their arrest. Ten were arrested for actual loitering in

front of the premises. Appellant had placed the required sign that prohibited loitering, thus allowing the police to make arrests for this violation of the city code.

There were 15 additional police contacts concerning loiterers standing in front of the premises. In an additional nine contacts, arrests were made for the same loitering violation, but the loiterers stood within 50 to 75 feet of the premises (RT 5/31, 11-12). Apparently the police used two different municipal code sections in filing charges against the loiterers, one section for those loitering in front of the premises, and another section for those loitering near the premises. There was one vandalism call for theft of coins from the outside telephones, and one call involving assault with a knife.

In the matter of Gray (1996) AB-6502, the board detailed the fact that a public sidewalk was an area over which a licensee had no legal control. In the Gray matter, the premises was at a corner, and people loitered in front of and at the side of the premises. The board concluded that the loiterers were a community and police problem, and appellant had no legal duty, or right, to remove the loiterers from a public sidewalk.

In the present matter, the department's decision, at page 8, stated that the department had the power to declare a premises a nuisance and revoke the license on that basis. While this may be true, in the present matter the department did not allege nuisance in the accusation, and the department may not revoke the license on a non-alleged basis.

We conclude that one of the 75 counts alleged had a sufficient nexus to the operation under the license to say that appellant, by his actions or inactions, either

created or aggravated the police problem.² Aggravation in the present matter was based more on speculation than a valid connection between the premises and the deteriorating community area. More of a showing of some culpability on appellant's part must be shown in order to revoke the license. The desire to rid the community of a source of its problems is not sufficient in itself without some connection to the mismanagement of the license.

We also conclude that the allegations alleged in count II were properly shown. Notwithstanding, unconditional revocation of the license would be abusive and without reasonable cause.

CONCLUSION

The decision of the department concerning determination of issues II is affirmed, but the decision concerning determination of issues I and III is reversed, and remanded with instructions to reconsider the penalty in accordance with the views set forth in this decision.³

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE
CONTROL APPEALS BOARD

²The September 26, 1993, contact was with a loiterer who was standing in the premises' doorway drinking an alcoholic beverage.

³This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.