ISSUED APRIL 29, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

PEDRO SANCHEZ, JR. dba Pasatiempo 126 Main Street Watsonville, CA 95076, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6655 File: 48-279069 Reg: 95033959 Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja Date and Place of the Appeals Board Hearing: February 5, 1997 Los Angeles, California

Pedro Sanchez, Jr., doing business as Pasatiempo (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked appellant's on-sale general public premises license for his having kept, suffered or permitted the premises to be kept, suffered and used as a disorderly house, allowing conditions which created a law enforcement problem, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22,

[1] The decision of the Department, dated March 21, 1996, is set forth in the appendix.

arising from a violation of Business and Professions Code §§24200, subdivision (a), and 25601.

Appearances on appeal include appellant Pedro Sanchez, appearing through his counsel, Stephen G. Wright; and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on or about December 16, 1992. Thereafter, the Department issued an accusation against appellant on September 26, 1995, alleging that appellant had permitted the licensed premises to be operated as a disorderly house and that the premises presented a law enforcement problem. An administrative hearing was held on January 22, 23, and 24, 1996, following a one-day pretrial conference conducted on December 21, 1995. Oral and documentary evidence was received at the hearing and testimony was presented concerning events which occurred on or adjacent to appellant's premises during the years 1994 and 1995. At the administrative hearing it was determined that appellant, through his agents, employees or servants, kept, suffered or used the premises, or permitted them to be kept, suffered and/or used as a disorderly house, in violation of Business and Professions Code §25601, and created conditions contrary to the public welfare and morals, constituting cause for discipline under the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivision (a). The

Department adopted the proposed decision, which ordered appellant's license revoked. Appellant thereafter filed a timely notice of appeal.

In his appeal, appellant raises the following issues: (1) his timely request for a continuance was wrongfully denied, resulting in a denial of due process; (2) the Department presented evidence that was inaccurate, misleading and confusing; and (3) significant relevant evidence was not presented in defense of the accusation.[2]

DISCUSSION

I

Appellant contends that his timely request for a continuance of the administrative hearing was wrongfully denied and, as a result, he was denied due process by having to represent himself at the hearing.

Appellant retained new counsel following a disagreement with his original attorney. He contends that, because of the number and breadth of the charges in the accusation, it was prejudicial error to deny his new attorney sufficient time to prepare a defense. Appellant argues that a review of the hearing transcript demonstrates the extent of the prejudice flowing from the fact that he was without counsel at the hearing.

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[2] Appellant's counsel limited his oral argument to the issue involving the denial of the continuance, and did not address either the issue involving the statistical evidence or that concerning additional evidence which might have been offered. We are satisfied that neither issue warrants reversal.

The grant or denial of a continuance is universally conceded to be a matter of discretion. Consequently, the issue is whether that discretion was abused by Administrative Law Judge (ALJ) Dorais, who first denied the continuance prior to the hearing, or by ALJ Ahuja, who denied the motion when it was renewed on the first day of the hearing. We conclude that appellant has failed to meet his burden of showing an abuse of discretion by either ALJ.

A summary report of a pretrial proceeding held on December 21, 1995, is part of the record on appeal. That summary indicates that, among other things, appellant's then-attorney considered raising several affirmative defenses, including: the failure of one of the counts to state a cause of action; the lack of police cooperation in appellant's attempts to control events taking place in the bar; a possible police plan to eradicate all bars on the main street; and possible civil rights claims under 42 U.S.C. §1983. More importantly, the summary recites that

> "licensee will not claim that the Department may not proceed to hearing on the Accusation. The fact that new police reports or other documentation have been generated since January 30, 1995, regarding the premises was discussed, and it was determined that there would be no continuance of the hearing to add those matters to the existing Accusation."

Thus, it appears that the subject of continuance was discussed as early as the December 21, 1995, pretrial proceeding, and that as part of an apparent trade-off, it was agreed that the matter would not be continued and the Department would not present additional charges gathered after January 30, 1995.

In a declaration in support of appellant's request for a continuance submitted shortly before commencement of the administrative hearing, appellant's original attorney indicated that his withdrawal was the result of a disagreement with appellant over the handling of the case. Although not stated explicitly, the only inference which can be drawn is that appellant did not approve of his then-attorney's handling of the case. Thus, the fact that he was without an attorney as the hearing date approached was the result of appellant's own actions.

On January 9, 1996, only 13 days before the hearing was to commence, attorney Richard A. Wood wrote a letter to the Department requesting a continuance of the hearing. His letter set forth three purported reasons for the continuance: (1) appellant, through no fault of his own[3], found it necessary to retain new counsel; (2) he, Wood, had a "number of calendar conflicts" for the week of the hearing; and (3) he, Wood, needed additional time because of the large number of incidents alleged in the accusation. Wood's letter did not identify his "calendar conflicts."[4]

A telephonic hearing was held on December 11, 1995, and Administrative Law Judge Michael Dorais denied the continuance. According to counsel for the

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[3] Despite this disavowal of any fault on appellant's part, this Board is left with the belief, in the absence of any other explanation, that appellant made a strategic decision to change counsel at the eleventh hour. Since the burden is on appellant to show a genuine need for a continuance, the fact that neither ALJ who ruled on the request for a continuance appears to have been given a concrete and explicit explanation of why appellant was changing counsel, they were justified in concluding that he had not met his burden.

[4] The nature of these conflicts was never made known.

Department, Judge Dorais denied the request on the ground appellant should have retained someone available on the dates of the hearing [RT 12]. The record is silent as to what showing was made to Judge Dorais. Thereafter, appellant represented himself at the hearing, and his renewed request for a continuance on the first day of hearing was denied by the ALJ presiding over the hearing [RT 10, 13].

According to appellant (App.Br., p. 5), his original attorney was forced to withdraw because appellant was dissatisfied with the way he was handling the case. Thus, appellant is not in a position to blame anyone but himself for being without counsel as the hearing date loomed. Given the dilatory effect of the belated substitution of counsel, the apparent conflict between the explanations given by former and present counsel regarding the need for new counsel, and the failure of attorney Wood's letter to explain the nature of his "calendar conflicts," we cannot say that the denial of the continuance was an abuse of discretion.

Appellant has not raised the issue of whether there is substantial evidence to support the charges. Nevertheless, where, as here, appellant was not represented by an attorney at the administrative hearing, this Board will itself review the record in order to determine whether there is sufficient evidence in the record to support the charges in the accusation and to ensure that appellant received a fair hearing. We have done so, and have satisfied ourselves that there is substantial evidence in the record to sustain the findings and determinations.

Count 1 of the accusation set forth 20 separate incidents in support of the disorderly house allegation. These included ten incidents involving intoxicated persons being permitted to remain in the premises; six incidents involving patrons in possession of or under the influence of controlled substances while in the premises; two assaults; a battery; and a robbery.

The Department presented the testimony of a number of police officer witnesses in connection with the incidents alleged in count 1, alleging that the premises were permitted to be operated as a disorderly house. The ALJ found that, with one exception, each of the incidents there alleged had been established. As to count 2, the ALJ relied on the entries of police activity listed in the police computer printout (Exhibit 3), and, in conjunction with the incidents found to have been shown under count 1, found that appellant had permitted the premises to be operated in a manner which created a law enforcement problem for the Watsonville Police Department.

Appellant aggressively defended himself during the three days of hearings, engaging in extensive cross-examination of witnesses and frequent dialogues with the ALJ. Unfortunately for appellant, the evidence offered in support of the accusation was overwhelming. With respect to the disorderly house claim, the ALJ found, and our review of the record confirms, that 19 of the 20 subcounts of the accusation had been proven. These incidents involved such things as robbery, assaults, fights, intoxication, and possession and use of controlled substances, and were ample support for the disorderly house determination. The amount of police activity related to

appellant's premises reflected in the incidents listed in the findings for Count 2 amply demonstrated that the premises presented a police problem.

II

Appellant contends that, with respect to count 2 of the accusation, charging appellant with having created a law enforcement problem, the Department introduced certain evidentiary exhibits and elicited testimony which produced faulty conclusions resulting from an improper comparison of statistical information on the documents. Appellant contends further that, because of the complexity of the documents and his inability to understand them, appellant was prevented from objecting to the prejudicial manner in which the documents were used.

The statistics contained in Exhibit 5, those challenged by appellant, were collected by a statistical analyst employed by the Watsonville police department. These statistics formed the basis for testimony by Police Chief Carter that Pasatiempo was drawing more of the police department's resources than the other establishments in Watsonville, and, as noted above, his conclusion that Pasatiempo was a "problem" [II RT 186].

Appellant argues that the statistical analysis was flawed, asserting that the tables on Exhibit 5 set forth data from January 1, 1994, through January 31, 1995, while the data for each of the other establishments in the charts covered only the four-month period running from October 1, 1994, through January 31, 1995.

The reason for this shorter period, according to Linda Peters, the statistical analyst who prepared Exhibit 5, was that the statistics for previous months had been "archived," and were no longer available "on disk" [II RT 146]. While the questions posed by Department counsel, and her responses, indicated that the figures for Pasatiempo reflected the same four-month period,[5] appellant contends this is not true.

The Department contends that appellant misunderstands Exhibit 5 both in its detail and in its purpose. The Department contends that it is simply a coincidence that the number of police calls listed in Exhibit 5 and Exhibit 3 (the source of the police call incidents in the accusation) are only one digit apart (171 vs. 170). The explanation

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[5] "Q. When you accessed the data. did you have any specific reference to the defendant's [sic] accusation in this case, what it was alleging for any given time frame?

A. I -- if -- you're asking me why I chose that time frame?

Q. No. Let me start again.

You accessed data for the given time frame, in one case the calendar year, in another case three months plus one month. When you were accessing that data, did you have in front of you any reference to the department's pleading in this case?

A. No.

Q. Okay. So, the numbers you got came from the police department system?

A. Yes.

for this, the Department suggests, is that Pasatiempo uses two addresses, 124 and 126 Main Street. Exhibit 3 drew entries only for 126 Main Street, one of Pasatiempo's street addresses, while Exhibit 5 drew entries for both 124 and 126 Main Street.

However, there is no indication in the ALJ's decision that he relied on the statistical information offered by the Department. Count 2 alleged that appellant permitted the premises to be operated in a manner which created a law enforcement problem for the law enforcement officials of the City of Watsonville. This count set forth 171 instances of police activity relating to the premises over a 13-month period, and was based on a computer listing (Exhibit 3) drawn from records maintained by the Watsonville police department.[6] The ALJ based his determination that the premises presented a law enforcement problem on these incidents. His proposed decision made no reference to the other statistical data nor to any of the opinions offered by the Department witnesses.

Appellant's counsel did not address the issue concerning the statistical data in his reply brief or at the oral hearing. While we do not consider appellant to have abandoned the issue by his silence, we do feel that he has failed to refute the

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[6] The record is silent as to the discrepancy between the number of incidents listed in count 2 (171) and the number itemized by Department counsel (149). By our own examination, we have determined that the breakdown is as follows: 99 bar, parking lot or area checks; 21 peace disturbances, 14 incidents involving intoxicated persons; 23 incidents involving suspicious circumstances or persons; 5 involving warrants; and 12 miscellaneous, including theft, auto burglary, assault, battery, and probation/resisting arrest. These incidents led to 20 written reports and 21 arrests.

Department's explanation of the way in which the statistical data was derived and its overall accuracy.

III

Appellant contends in his brief (appellant's counsel did not raise this issue at the oral hearing) that significant relevant evidence was not presented in defense of the accusation, arguing that cultural testimony could have been offered to help explain and to put the crime figures into perspective. Appellant's brief does not explain what the cultural evidence is that would have demonstrated this, or why it was unavailable to him, or to his counsel prior to the severance of their relationship. This argument is, in part, a further appeal of the issue involving the denial of a continuance, and, in part, an attack on the weight to which the statistical evidence is entitled. In both cases, our discussion of the first two issues adequately addresses this issue.

CONCLUSION

The decision of the Department is affirmed.[7]

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

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[7] This final order is filed as provided in 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.