

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

AB-8084

File: 47-374299 Reg: 02053297

THE TIKI ROOM, LLC dba Tiki Tom's
1535 Olympic Boulevard, Walnut Creek, CA 94596,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Mary-Margaret Anderson

Appeals Board Hearing: September 4, 2003
San Francisco, CA

ISSUED OCTOBER 3, 2003

The Tiki Room, LLC, doing business as Tiki Tom's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 25 days, 20 of which were stayed for a two-year probationary period, for having permitted consumption of alcoholic beverages after 1:00 a.m., for having permitted karaoke singing after 9 p.m., and for having permitted entertainment audible beyond the area under the control of the licensee, all in contravention of conditions on appellant's license, thus constituting violations of Business and Professions Code section 23804.

Appearances on appeal include appellant The Tiki Room, LLC, appearing through its counsel, John A. Hinman and Beth Aboulafia, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on May 29,

¹The decision of the Department, dated January 9, 2003, is set forth in the appendix.

2001. Thereafter, the Department instituted an accusation against appellant charging the violation by appellant of three conditions on its license.

An administrative hearing was held on October 8, 2002, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charges of the accusation had been established, and ordered the suspension from which this timely appeal has been taken.

In its appeal, appellant contends that the penalty is excessive, arbitrary, and capricious, the result of an improper stacking of supposed violations.

DISCUSSION

Business and Professions Code section 23800 provides for the issuance of conditional licenses in various circumstances, including the one in this case, that grounds exist for the denial of an application for a license. Appellant's petition for conditional license recites that grounds for denial exist by reason of over-concentration of licenses as defined in Business and Professions Code section 23958.4, as well as police protests based upon over-concentration in the core of the city. The license conditions involved in this appeal are three of a total of 11 conditions on the license.

Appellant contends that the penalty imposed by the Department is excessive because it is based, in part, on an unsupported legal conclusion that a condition on the license prohibiting entertainment audible beyond the area under the control of the licensee was violated. In addition, appellant contends that the Department improperly aggravated minor incidents occurring months apart into a single accusation in order to support a suspension the length of which precludes payment of a fine pursuant to Business and Professions Code section 23095. Finally, appellant claims that the Department arbitrarily elected to charge a condition violation rather than a statutory violation in order to justify a greater suspension. We will address each of these issues

in turn.

A. Audible entertainment issue

The license condition in question provides that: “Entertainment provided shall not be audible beyond the area under the control of the licensee(s)” Appellant does not dispute the evidence that background music could be heard from a nearby parking lot, 100 feet from the premises, which was not under appellant’s control. Instead, appellant suggests that the background music was not found by the Department to be “entertainment” as required by the condition.

Appellant quotes from the decision - “Whether or not background type music emanating from speakers constitutes ‘entertainment’ as the word is commonly used is a valid question.” - and asserts that the Department did not answer the question. Thus, asserts appellant, there was a failure to find that the background music in question was entertainment.

The Department disagrees, citing Finding of Fact 4 (to the effect that the music was audible) and Legal Conclusion 4 (to the effect that the violation was minimal and had been corrected.)

We are inclined to agree with the Department that the administrative law judge (ALJ) considered the audible background music to be entertainment, and that Legal Conclusion 4 treats it as a violation. However, whether the background music was “entertainment” within the meaning of the condition is another question. Resort to dictionary definitions of the term “entertainment” provides no meaningful answer. The closest definition² - “something that diverts, amuses, or occupies the attention agreeably” - does not, at least in our understanding of the term, reach background

² Webster’s Third New International Dictionary, page 757.

music that does no more than create ambience. We think, given uncertainty in the intended scope of the condition,³ that the finding of violation of this condition, conceding there was such a finding, cannot stand.

B. Aggregating violations issue.

Appellant contends that the Department aggregated three “completely unrelated” violations, occurring over a six-month period, and used these in the aggregate to justify a suspension greater than 15 days, precluding payment of a fine.⁴ Appellant asserts that, as a consequence, it “must close its business for the period of the suspension,” which would result in “tremendous financial hardship.” (App. Br., pages 3-4.)

Appellant cites *Harris v. Alcoholic Beverage Control Appeals Board* (1965) 62 Cal.2d 589 [43 Cal.Rptr. 633], a case in which the Supreme Court sustained the Appeals Board’s reversal of an order of the Department revoking a license for a series of violations occurring over a span of eight days, none of which independently would have supported such an order.

The Department stresses that, unlike the *Harris* case, no more is involved in this case than a short, actual suspension, coupled with a period of probation “to ensure continued compliance.”

This case is similar to *Harris*, in that several violations have been charged in a single accusation, only one of which, standing alone, would seem to justify a meaningful suspension. The karaoke singing after 9:00 p.m., admittedly a condition violation, does not strike us as a significant threat to welfare and morals, especially in the absence of

³ The condition in question is preceded by two other conditions, one of which prohibits “live entertainment” after 9:00 p.m., and the other of which limits “live entertainment” to karaoke and small bands.

⁴ Business and Professions Code section 23095, by its terms, precludes the payment of a fine in offer of compromise where the suspension exceeds 15 days.

any complaint from the general public. The same is true of the background music. Had not the three alleged violations been aggregated into a single accusation, it is conceivable that one or more of them might not have warranted a formal accusation, but could or would have been resolved informally, especially in light of the evidence that appellant has been open and cooperative with the Department.

C. The “standard penalty” issue.

Business and Professions Code section 25632 treats as a misdemeanor any permitting on licensed premises of consumption of an alcoholic beverage by any person during any hours in which it is unlawful to sell, give, or deliver any alcoholic beverage for consumption. For a retail license without conditions, the hours are those between 2:00 a.m. and 6:00 a.m. In appellant’s case, a condition on its license limited the sale, service and consumption of alcoholic beverages to the hours between 10:00 a.m. and 1:00 a.m. The police officer who issued the citation testified that it was after 2:00 a.m. when he entered the premises after observing persons appearing to be consuming alcoholic beverages. He issued a citation for violation of section 25632.

Appellant contends the Department has exalted form over substance by treating the after-hours sale and consumption of alcoholic beverages as a condition violation rather than as a statutory violation, in order to justify a longer suspension. It is appellant’s position that the penalty should be no more than 10 days, the period which is set forth in the Department’s penalty guidelines for after-hours sale or consumption. Appellant argues that the Department instead adopted a penalty based on that part of the penalty schedule which prescribes a 25-day suspension, with 10 of those days stayed, for a condition violation.

The Department maintains a schedule of penalties based upon the type of offense in its Instructions, Interpretations, and Procedures Manual, pages L-226-L229.

(Exhibit 4.) The Department considers a condition violation a serious matter; for example, its standard penalty for such a violation (25 days, with 10 days stayed) exceeds that for sales to minors (15 days), and the relative placement of the condition violation in the Department's penalty hierarchy reflects the importance the Department places upon the subject. If not the intent of the Department's penalty schedule to preclude a licensee from resolving a condition violation by payment of a fine, it is certainly its effect.

The ALJ did not indicate what portion of either the entire 25-day suspension or the unstayed portion should be allocated to each of the condition violations found to have occurred. In the absence of any indication in the decision to that effect, we can only presume that some part of the suspension was based upon the existence of those violations, as trivial as they appear to have been - the decision clearly reflects the Department's recognition that the karaoke and background music violations were "minimal and ... addressed and corrected."

Viewing the record as a whole, we are persuaded that the penalty is an abuse of discretion, in part because one of the alleged violations is unproven, and in part because the Department appears to have accumulated alleged violations in order to justify a more substantial suspension.

ORDER

We reverse the Department's order as to penalty, and remand this case to the Department for reconsideration of the penalty in light of our comments herein.⁵

⁵ This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.