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

AB-8586
File: 48-408826 Reg: 05060850

YOUNG CHUL YI, dba Club Rendezvous
8610-8612 Garden Grove Boulevard, Garden Grove, CA 92844,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: June 7, 2007
Los Angeles, CA

ISSUED OCTOBER 2, 2007

Young Chul Yi, doing business as Club Rendezvous (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license, but stayed the revocation for a probationary period of one year, and suspended the license for 15 days for drink solicitation activities in violation of Business and Professions Code[2] section 25657, subdivisions (a) and (b), and Department rule 143;[3] and suspended his license for 15 days[4] and indefinitely thereafter until the licensee obtains Department approval for already completed interior modifications to the

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[1]The decision of the Department, dated June 22, 2006, is set forth in the appendix.

[2]Unless otherwise indicated, all statutory references in this opinion are to the Business and Professions Code.

[3]California Code of Regulations, title 4, division 1, section 143.

[4]The 15-day suspensions were ordered to run consecutively.

licensed premises, for an unapproved interior modification to the premises, a violation of Department rule 64.2(b)(1).[5]

Appearances on appeal include appellant Young Chul Yi, appearing through his counsel, Rick Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on February 24, 2004. On October 5, 2005, the Department instituted a 26-count accusation against appellant, 25 of the counts charging various drink solicitation activities. The 26th count charged that appellant had made an unapproved interior modification to the premises.

At the administrative hearing held on March 14, 2006, documentary evidence was received and testimony concerning the violations charged was presented. With regard to count 26, the original diagram of the premises (Ex. 2) showed an open lounge area with no internal structures or walls along the 54-foot west wall. Exhibit 3, a diagram of the premises as the investigators found it on August 5, 2005, showed five rooms taking up the entire west wall. Each room was totally enclosed by walls and a door that could be closed. The rooms were used for karaoke, each one containing a karaoke machine. Appellant did not obtain the approval of the Department before creating the enclosed rooms. The Department asked for a penalty of revocation stayed for three years on probationary conditions, a 60-day suspension to continue indefinitely until compliance with rule 64.2 was accomplished, and appellant's agreement to a set of nine conditions on the license.

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[5]California Code of Regulations, title 4, division 1, section 64.2, subdivision (b)(1).

Subsequent to the hearing, the Department issued its decision which sustained only four of the drink solicitation charges (counts 2, 6, 11, and 15) and the unapproved modification charge (count 26). The ALJ found sufficient mitigation to propose a lesser penalty than that recommended by the Department, shortening the probationary period for the stayed revocation to one year, and the definite suspension time to two consecutive 15-day suspensions. The Department adopted the ALJ's penalty proposal along with his proposed decision.

Appellant filed an appeal contending the decision with regard to count 26 is not supported by the evidence and the penalty is excessive.

DISCUSSION

I

Department rule 64.2(b)(1), provides:

> (b) Substantial Physical Changes of Premises or Character of Premises.
> (1) After issuance or transfer of a license, the licensees shall make no changes or alterations of the interior physical arrangements which materially or substantially alter the premises or the usage of the premises from the plan contained in the diagram on file with his [*sic*] application, unless and until prior written assent of the department has been obtained.
> For purposes of this rule, material or substantial physical changes of the premises, or in the usage of the premises, shall include, but are not limited to, the following:
> (A) Substantial increase or decrease in the total area of the licensed premises previously diagrammed.
> (B) Creation of a common entryway, doorway, passage or other such means of public ingress and/or egress, when such common entryway, doorway, passage or other such means of public ingress and/or egress, when such common entryway, doorway or passage [*sic*] permits access to the licensed premises area from or between adjacent or abutting buildings, rooms, or premises.
> (C) Where the proposed change will create in the licensed premises an area, or room, or rooms, whether or not partitioned, or in some other manner delimited and defined wherein activities of any nature not directly related to the sale of alcoholic beverages will be conducted by a person, persons, or entity not under the direct control, supervision and direction of the licensee.

Appellant contends that the rule does not encompass "minor physical interior changes to the premises," such as moving a stage or enlarging a kitchen. It is intended to apply only to "substantial" changes. The only change to the premises was creating five karaoke rooms out of part of the lounge area. Appellant believes that this is not a substantial physical change and is unlike any of the examples in the rule. The character of the premises is not changed by adding the karaoke rooms, appellant asserts, since it was still a cocktail lounge or nightclub, and appellant had included karaoke as part of the entertainment listed on the "Planned Operation" form on the reverse of the premises diagram.

In reviewing a Department decision, the Appeals Board is bound by certain principles:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends*[*Inc. v. Alcoholic Beverage Control Appeals Board* (2002)] 100 Cal.App.4th [1250,] 1254 [[122 Cal.Rptr.2d 914]]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; [Bus. & Prof. Code] §§ 23090.2, 23090.3.) 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. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) 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 Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

While karaoke had been part of appellant's operation from the beginning, we cannot agree that the five rooms did not constitute a substantial physical change. The premises is approximately 38 feet wide from west to east, and the new rooms extend

out from the west wall between 12 and 18 feet.[6] The new rooms comprise well over one-third of the total square footage of the premises.

Given these circumstances, we cannot say that the Department erred in determining that appellant violated rule 64.2(b)(1).

II

Appellant contends the penalty with regard to count 26 is excessive because of its indefinite term of suspension until compliance with rule 64.2. With regard to the drink solicitation penalty, appellant asserts that a stayed revocation and a 15-day suspension is excessive in light of only 4 of 25 counts being established and appellant's prior lack of discipline.[7] Appellant also argues that the ALJ improperly considered the high price charged for alcoholic beverages at the premises as supporting the drink solicitation charges.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971)

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[6]The dimensions of the five rooms are as follows:

Room 1	Room 2	Room 3	Room 4	Room 5
18' x 10'	12' x 9'	12' x 9'	15' x 9'	15' x 14'

[7]Appellant seems to dispute the determination that violation of section 25657, subdivision (a), was established, arguing that no evidence was offered to show that the women were employed "for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages," as the statute requires. The time for making that argument was at the administrative hearing before the ALJ. Not being raised below, we do not consider this argument for the first time on appeal. In any case, the actions of the bartenders could certainly give rise to a reasonable inference that they were employed for that purpose, and we are bound to "indulge in all legitimate inferences in support of the Department's determination." (*Masani*, *supra*, 118 Cal.App.4th at p. 1437.)

19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. *(Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

The penalty for the rule 64.2 violation is a 15-day suspension to continue thereafter until appellant complies with the rule. Appellant pointed out at the hearing that the rooms were fully or almost fully in compliance with the conditions required by the Department, with the only thing lacking being the Department's approval of the existing rooms. The Department agreed that compliance would not require tearing down the walls and rebuilding them, but simply appellant agreeing to the conditions proposed by the Department and then getting the Department's approval of the rooms. It appears that the indefinite suspension may be very short indeed. In any case, that is in appellant's hands.

Two of the counts that were found to be established were violations of section 25657, subdivision (a) and one of the other established counts was a violation of subdivision (b) of that section. The standard penalty listed in the Department's Penalty Guidelines (4 Cal. Code Regs., § 144) for violation of subdivision (a) is revocation and for subdivision (b) it is anywhere from a 30-day suspension to revocation. The fourth count established was a violation of rule 143, the penalty for which is listed as a 15-day suspension. Appellant's penalty was less severe than the standards for section 25657

because his revocation was stayed until he operated for a year without violations and if he does so, his license will not be revoked. The 15-day suspension for the rule 143 violation is the standard.

We do not read the ALJ's reference to the price of the alcoholic beverages at the premises as a factor in his determinations of either violations or penalty. In any case, if the language is stricken, we cannot imagine that the result would be any different. If there was any error in this, which we do not believe, it was harmless error.

The ALJ considered mitigating factors and the penalty he came up with was less than the Department wanted to impose and even somewhat lighter than the standard. The total, combining the separate penalties imposed for the different types of violations, is not light, but neither can we say that it is unreasonable.

ORDER

The decision of the Department is affirmed.[8]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[8]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.