

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

AB-8699

File: 48-99940 Reg: 06063541

EARL G. McNEILLY and JOHN P. McNEILLY
380 Verano Avenue, El Verano, CA 95433,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: April 3, 2008
San Francisco, CA

ISSUED: JULY 10, 2008

Earl G. McNeilly and John P. McNeilly appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their license for, through their agent or employee, having permitted gambling activities at their premises, violations of Penal Code sections 337a, 337j, 330b, 330.1, and 330.4.

Appearances on appeal include appellants Earl G. McNeilly and John P. McNeilly, appearing through their counsel, John F. LemMon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew Botting.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general license was issued in 1980. On July 25, 2006, the Department instituted an accusation against appellants charging that appellants, through their agent or employee, engaged in various kinds of gambling activity on eight

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The decision of the Department, dated April 6, 2007, is set forth in the appendix.

separate days in January 2006, in violation of provisions of California's Penal Code.

At the administrative hearing held on January 30, 2007, appellants, through their counsel, stipulated to the violations alleged in the accusation and that the Department's reports could be received as direct evidence of the violations. Appellants Earl McNeilly and John McNeilly testified that they had no knowledge any gambling had taken place.

Subsequent to the hearing, the Department issued its decision which determined that Hugh McNeilly had permitted the illegal gambling activity on the premises, and appellants had failed to comply with their duty to maintain a lawful establishment.

Appellants have filed an appeal and asked that it be considered on the record. Appellants have not filed a brief.

DISCUSSION

Written notice of the opportunity to file briefs in support of the appellants' position was given on January 7, 2008. No brief has been filed by appellants. We have reviewed the notice of appeal and have found insufficient assistance in that document which would aid in review.

Appellants' counsel advised the Appeals Board by telephone of appellants' desire that their appeal be based on the record from the administrative hearing. The Appeals Board is not required to make an independent search of the record for error not pointed out by appellants. It was the duty of appellants to show to the Appeals Board that the claimed error existed. Without such assistance by appellants, the Appeals Board may deem the general contentions waived or abandoned. (*Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 139 [144 Cal.Rptr. 710] and *Sutter v. Gamel* (1962) 210 Cal.App.2d 529, 531 [26 Cal.Rptr. 880, 881].)

Nonetheless, we have examined the transcript of the administrative hearing and

the exhibits placed in evidence at that hearing, and are satisfied that the record supports the findings, conclusion and order of the proposed decision which the Department adopted. The appellants stipulated that the gambling incidents alleged in the accusation, including the conduct of betting pools dependent upon the outcome of certain athletic events, had occurred, and offered as their defense their claimed lack of knowledge of such incidents, and that the video machine involved in one of the counts of the accusation was not inherently a gambling device.

This defense was rejected by the administrative law judge who presided over the hearing, and for good reason, as explained by his findings of fact (FF), to which appellants stipulated, and his determination of issues (DI):

FF III: Respondents are brothers and have lived in the area all their lives. Earl purchased the building in 1980 and received help from John in operating the premises. Earl describes the building as initially being in disrepair and the clientele rough. John managed of [sic] the premises until 1985. Respondents decided they did not wish to continue operating the premises on a daily basis. In April of that year, respondents executed a management agreement with their younger brother, Hugh, to serve as manager of the premises.

FF IV: Hugh submitted a "Personal Affidavit in Support of Application" as manager to the Department. His application shows that he had been working as a bartender in various premises since October 1983. The management agreement provided, in part, that he receive compensation of \$1,200 monthly plus 20% of the profits, that he have full control and authority in the hiring and firing of staff as well as ordering all merchandise and that "... the conduct of the business shall be the sole responsibility of the manager."

FF V: Initially, John advised Hugh that he could run the operation as long as he performed his duties properly. After approximately six months, respondents, satisfied with his efforts and wanting him to remain as manager, agreed to let Hugh run the business as he saw fit. He was their brother, and they trusted him. Respondents visited the premises occasionally, or, as they testified, "popped in" briefly during the week but did not stay for any length of time. As Earl testified, Hugh was running the place and did not want his two brothers there "for people to look at the boss." Hugh's compensation, according to respondents, was changed so that he paid rent each month to respondents and, in return, kept whatever was left after payment of bills and wages to his employees. Respondents were simply interested in receiving their monthly rent, the latest of which was \$1,400.

DI I: A licensee has a general, affirmative duty to maintain a lawful establishment. If the licensee, through an employee, has knowledge that unlawful activity is occurring on the premises, the licensee has an active duty to prevent such activity. Failure to do so constitutes permitting the unlawful activity

(*Marcucci v. Board of Equalization* (1956) 138 Cal.App.3d 605 and *Reilly v. Stroh* (1984) 161 Cal.App.3d 47.)

DI II: In this case, it is clear that respondents' employee, Hugh McNeilly, permitted the illegal activity on the premises. It is also clear that respondents' arrangement with their manager amounted to a lease of their license for the monthly payment of what they describe as rent. The manager, in return, was entitled to retain all income generated above that figure, operate the business as he saw fit, order all items, including alcoholic beverages, and hire and discharge all employees as he saw fit.

DI III: Respondents sought to support their claim of lack of knowledge by asserting that they visited the premises and, when there, observed none of the conduct found hereinabove. John testified that he knew of the Super Bowl pools but that all the money placed into them was returned to those in the pools. He failed to indicate how he knew this. Earl testified he never reconciled the books. It is clear that respondents were solely interested in receiving the monthly rent and allowed their younger brother to operate the premises as a licensee. Their trust in him, while commendable from a brotherly point of view, did not relieve them from the legal responsibility of assuring that the premises was operated lawfully. This, the evidence shows, they failed to do

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DI IX: Although the management agreement under which Hugh was operating the business was nothing more than a rental of the license to him and in violation of the Alcoholic Beverage Control Act, it was not charged in the accusation. However, respondents raised the issue as a defense. The Department is using evidence of the contract as an aggravating factor that demonstrates respondents' lack of oversight to assure the lawful operation of the premises. This is supported by evidence that shows Hugh and his employees carried on the illegal betting activity in an open manner for all to see and, according to Ligouri, for the three years he had been an employee. The investigators had no difficulty in placing bets and observed other patrons doing so openly.

The Department's evidence, much of which was supplied by respondents themselves, overwhelmingly supported the decision and findings. There is no basis for any relief to respondents.

ORDER

The decision of the Department is affirmed.

FRED ARMENDARIZ, CHAIRMAN
SOPHIE WONG, MEMBER
TINA

FRANK, MEMBER ALCOHOLIC
BEVERAGE CONTROL APPEALS
BOARD