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

AB-9599
File: 21-506533 Reg: 15083180

SAL/TAZ, INC.,
dba Tulare Food Mart
1095 East Tulare Avenue, Tulare, CA 93724,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: June 1, 2017
Los Angeles, CA

ISSUED JUNE 29, 2017

Appearances: *Appellant:* Melissa H. Gelbart, of Solomon Saltsman & Jamieson, as counsel for Sal/Taz, Inc.
Respondent: John P. Newton as counsel for the Department of Alcoholic Beverage Control.

Sal/Taz, Inc., doing business as Tulare Food Mart (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] revoking its license because its clerk sold an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a). Appellant has had two previous sale-to-minor violations within 19 months.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on February 7, 2011. On October 23, 2015, the Department filed an accusation charging that appellant's clerk, Reynaldo Arreola (the clerk), sold an alcoholic beverage to 18-year-old Karen Beltran on August

1. The decision of the Department, dated June 22, 2016, is set forth in the appendix.

8, 2015. Although not noted in the accusation, Beltran was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on March 1, 2016, documentary evidence was received and testimony concerning the sale was presented by Beltran (the decoy); by John Acosta, a Department of Alcoholic Beverage Control agent; by Mumtaz Sadruddin, a partner in appellant Sal/Taz, Inc.; and by Alishen Mumtaz, appellant's employee.

Testimony established that on the date of the violation, at approximately 6:00 p.m., the decoy entered the licensed premises after being brought to the location by Acosta and two other Department agents. The decoy went to the refrigerated cases and selected a 25-ounce can of Bud Light beer. She took the beer to the counter and presented it for purchase.

The clerk asked the decoy for identification. The decoy handed her California Identification Card to the clerk, who examined it. The decoy's identification was a portrait-style card because of her underage status and it had the standard "Age 21 in 2018" red band under her date of birth. The identification was not in a wallet or sleeve when it was produced. The clerk returned the identification to the decoy, but did not ask any questions regarding her age. He then allowed the decoy to pay for the beer and completed the transaction after the decoy handed him $20 in cash. The decoy took the beer after the clerk gave her change and handed her the beer in a paper bag. The decoy then left the licensed premises.

The decoy went to the vehicle where the agents were waiting. She reported what occurred to the agents. Agent Acosta reentered the licensed premises with the decoy. At this time, the decoy pointed out the clerk. The decoy was standing approximately six

feet away from the clerk when she identified him to Acosta. Acosta identified himself as a Department agent and explained the violation to the clerk.

Agent Acosta asked the decoy to identify the person who sold her the beer in the presence of the clerk. The decoy pointed to the clerk while they were approximately six feet from each other and said that he had. During a conversation with Acosta, the clerk admitted selling to the decoy. He told Acosta that he mistakenly believed her date of birth on the identification said 1991, not 1997. A photograph of the decoy and the clerk was taken, with the decoy holding the beer she purchased from the clerk. The clerk was cited for the violation. A photo of the beer, the bag it was placed in, and the change given by the clerk was also taken.

After the hearing, the Department issued its decision, which determined the violation charged was proved and no defense was established. Because this was appellant's third such violation within 36 months, the ALJ imposed a penalty of outright revocation.

On March 23, 2016, following submission of the proposed decision, the Department's Administrative Hearing Office sent a letter to appellant and to Department counsel offering both parties the opportunity to comment on the proposed decision. That letter stated:

> Administrative Records Secretary and Concerned Parties:
>
> Enclosed is the Proposed Decision resulting from the hearing before Department of Alcoholic Beverage Control, Administrative Hearing Office in the above entitled matter.
>
> All concerned parties and their attorneys of record are being sent a copy of this Proposed Decision. All concerned parties and attorneys of record are hereby informed that you may submit comments regarding this Proposed Decision to the Director for consideration prior to any action being taken by the Director. Comments to the Director regarding this Proposed Decision shall be mailed to the Administrative Records

> Secretary. Additional comments submitted for review by the Director, if any, must also be submitted to all parties and their attorneys. For the convenience of all concerned, a list of those parties and their addresses is attached.
>
> Pursuant to General Order 2016-02, the Administrative Records Secretary will hold this Proposed Decision until 14 days after the date of this letter. After that the Administrative Records Secretary will submit this Proposed Decision along with any comments received from concerned parties to the Director for consideration.

Letter from John W. Lewis, Chief Admin. Law Judge, Dept. of Alcoholic Bev. Control, Mar. 23, 2016 [hereinafter "Comment Letter"].) As suggested in the final paragraph, the Comment Letter reflected a comment procedure adopted by the Department pursuant to its General Order 2016-02. (Dept. of Alcoholic Bev. Control, "GO-Ex Parte and Decision Review," Gen. Order 2016-02, at § 3, ¶¶ 5-6 (eff. Mar. 1, 2016) [hereinafter "General Order"].)

On April 5, 2016—thirteen days after the date of the Comment Letter—counsel for appellant submitted "Comments to the Director re Proposed Decision," which challenged the legality of the comment procedure itself. On April 6, 2017—the fourteenth and final day during which review of comments by the Director is guaranteed by the comment procedure—appellant submitted a second comment. (Letter from Melissa H. Gelbart, counsel for appellant, to Mark Kinyon, Admin. Records Secretary, Apr. 6, 2017.) This letter alleged revocation of appellant's license would lead to "financial catastrophe" for appellant and his family, and offered to forego appeal of the proposed decision in exchange for "a stayed revocation of six months . . . to allow [Mr. Sadruddin] to sell the license" and the associated food mart. (*Ibid.* at p. 2.)

The Department approved the proposed decision without changes.

Appellant then filed this appeal contending (1) the Department failed to establish two prior violations of section 25658(a) within 36 months; (2) the ALJ failed to proceed

in the manner required by law by finding cause to revoke appellant's license without proof of prior violations; (3) the Department violated appellant's due process rights by failing to provide appellant with notice of its previous violations; and (4) the Department's comment procedure is contrary to the Legislature's intent, constitutes an underground regulation, and encourages ex parte communications.

In response, the Department contends this Board lacks jurisdiction to review Department procedures, including those outlined in the Comment Letter and General Order.

We will address appellant's three challenges to the prior sale-to-minor violations as a single issue, then resolve the jurisdictional and comment procedure issues together.

DISCUSSION

I

Appellant contends the Department failed to establish the two prior sale-to-minor violations; that the ALJ failed to proceed in the manner required by law by finding cause to revoke appellant's license based on the two prior sale-to minor violations; and finally, that the Department violated appellant's due process rights by failing to provide proper notice of the two prior violations. (App.Br., at pp. 4-11.)

Appellant first contends the Department failed to prove the existence of prior sale-to-minor violations, or that the violations took place in the previous 36 months. (*Id.* at pp. 4-9.) Appellant contends the stipulation and waiver forms entered into evidence only state that "disciplinary action *may* be taken on the accusation and that such discipline *may* be determined on the basis of facts contained in the investigative reports." (*Id.* at p. 5, citing exhs. D-2 and D-3, emphasis added by appellant.) According

to appellant, signing the stipulation and waiver forms was "a far cry from admitting to any specific violation or any facts," and that "[b]y signing the Stipulations, Appellant did not admit to any liability, and the terms of the document itself fail to" reference section 25658(a). (*Ibid.*) Appellant cites previous Board decisions overturning discipline where the Department failed to sufficiently establish prior violations. (*Id.* at pp. 5-7.)

Second, appellant contends "the ALJ improperly considered prior disciplinary actions that had not been proven to be violations of section 25658(a)" and moreover, that the ALJ "used a completely arbitrary date in doing so." (*Id.* at p. 9.) Appellant contends the proposed decision improperly references the filing dates of the prior accusations, rather than the dates of the actual violations. (*Id.* at p. 10.) Appellant therefore calls these prior violations "unproven and unsubstantiated." (*Ibid.*)

Lastly, appellant argues it did not receive notice of the prior violations. (*Id.* at pp. 10-11.) Appellant contends the testimony of Sadruddin, its corporate partner and officer, "reveals his limited understanding of prior violations." (*Id.* at p. 11.) Moreover, appellant claims that the accusations in each prior violation were filed after Sadruddin signed the stipulation and waiver forms, which it contends "raise[s] significant due process concerns." (*Ibid.*)

These contentions were not raised at the administrative hearing and are therefore waived on appeal.

Numerous cases have held that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control* (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; *Hooks v. Cal. Personnel Bd.* (1980) 111

Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Harris v. Alcoholic Bev. Control Appeals Bd.* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].)

At the administrative hearing, appellant repeatedly conceded the fact of prior sale-to-minor violations. During direct examination of appellant's partner and officer Mumtaz Sadruddin, for example, Sadruddin referred at length to the facts of the previous sale-to-minor violations. (See RT at pp. 31-37.) At no point did either Sadruddin or appellant's counsel contend the violations were anything other than sales to minors. (See generally *ibid*.) For example, the following exchange took place between appellant and its counsel regarding the identity of the selling clerks in the previous two sale-to-minor violations:

> [BY MR. WARREN:] So looking at this—I'm looking now at an accusation that was filed against your license earlier. And it would be the second time. Okay. There was a first violation, correct? Sale to minor, correct?
>
> [MR. SADRUDDIN:] Yes.
>
> Q. And that involved only your son, correct?
>
> A. Yes.
>
> Q. And then there was a second violation and that involved Reynaldo Arreola, correct?
>
> A. Yes.
>
> Q. So it's in that second violation. When Reynaldo Arreola made that sale to a minor, what did you do?
>
> A. I fired him.
>
> Q. And when did you fire him?
>
> A. Like immediately, I got—I say you're not supposed to do—sell to the minor, so I just fired him.
>
> Q. Okay. So that was in September of 2014, correct?
>
> A. Yes.

Q. So now—we're now, for today's violation or today's case, we're at August of 2015. Can you explain how Mr. Arreola came to work at the store again?

A. Actually, her mom came to me—

Q. Her mom or his mom?

A. Her mom—his mom. And she say he is jobless and he's doing a lot of bad thing and can you please hire him.

(RT at pp. 35-36.) Similarly, Sadruddin discussed the measures appellant took after each prior sale-to-minor violation. (RT at pp. 41-45 [direct examination]; 63-67 [cross-examination].) Sadruddin openly conceded not only that two prior sale-to-minor violations took place, but that he rehired the clerk responsible for the second violation, who then went on to commit the third violation. (See Proposed Decision.)

Later, during cross-examination, Sadruddin suggested he signed the stipulation and waiver for the second sale-to-minor violation after the Department representative told him she would remove a count from the accusation. (RT at pp. 55-57.) However, Sadruddin also testified that he didn't read the stipulation and waiver for either of the priors before signing them. (RT at pp. 58, 60.)

On recross, counsel for appellant questioned Sadruddin in more detail about the prior stipulation and waiver forms. Sadruddin's testimony—notably, offered on examination by appellant's own counsel—revealed that when he signed the stipulation and waiver for the second violation, he fully realized it was appellant's second sale-to-minor violation, and that a third violation would lead to revocation:

[BY MR. WARREN:] And this is the Stipulation and Waiver, correct?

[MR. SADRUDDIN:] Yeah.

Q. And it's stamped at the very bottom, "Received October 16, 2014," correct?

A. Yes. Yes.

Q. And that's your signature?

A. Yes.

Q. So if I—if I understand correctly, you did not read this at the time you signed it; is that right?

A. That's correct.

Q. Okay. What was—what did you understand when you signed this?

A. I understand she only did talk to me, she says, "It's like your second attempt, suppose it's the third attempt, your license will be revoked and we cannot—we cannot do like the second man for that."

Q. Okay. So—

A. And she—and whenever I explain her, she—she did my fine less instead of she want to put like $9,000 fine. And whenever I explain, we don't want to sell like this, I did like this, this, this, we did the—so instead of 25 days, she put 15 days of my sales.

Q. Does it say 15 days? No, look at the document you are looking at. What does it say? How many days?

A. Twenty days.

Q. And so when you signed this, what were you understanding you were agreeing to?

A. I was agree this is my second violation and I will not do again this thing. And they take out the, whatever the allegation they put, allegation like sell to the minor, but I explained he didn't. And that time we tell them and the lady was here and she told her, to the—

Q. No, let's not have the explanation. Okay. You weren't there when that happened, right?

A. The second one?

Q. Yeah.

A. Second man, no, I wasn't there.

(RT at pp. 74-76.) Based on this exchange, Sadruddin was aware that he was agreeing to a fine for a second sale-to-minor violation, and was further aware that a third violation

could lead to revocation. Neither Sadruddin nor appellant's counsel alleged he was unaware of these facts, or that the grounds for the prior accusations were unclear.

Finally, during closing argument, counsel for appellant emphasized mitigation and did not dispute the two prior violations:

> We have a licensee who completely understands the seriousness of not selling alcohol to a minor, to the degree that they've gotten the training, and after the second violation, he understood from his conversations with the ABC district administrator that a third violation is revocation, he's going to lose his store.

(RT at p. 89.) Throughout the administrative hearing, appellant and its counsel acknowledged the existence of two prior sale-to-minor violations. At no point did they raise the arguments now presented on appeal.

We consider this issue waived. Had appellant disputed the existence or validity of the two prior violations at the administrative hearing, the Department could have cross-examined Sadruddin in greater depth or presented additional evidence and testimony. By presenting these arguments only on appeal, appellant effectively deprived its opponent of the opportunity to factually rebut appellant's claims.

We further observe, however, that even if appellant had not waived the issue, appellant's argument would have no merit. We take issue with one argument in particular, and will therefore address it here.

At oral argument before this Board, counsel for appellant claimed that the grounds for appellant's prior two violations were stated, in their entirety, in the respective decisions. Both these prior decisions make no direct reference to violations of section 25658, but rather state that "[g]rounds for suspension or revocation have been established under Article XX, Section 22 of the State Constitution and Business and Professions Code section 24200(a&b)." (Exhs. D-2 and D-3.). Appellant argues that because there is no mention of section 25658 in the prior decisions, the Department has

failed to prove that appellant has two prior sale-to-minor violations, and therefore cannot impose a penalty of revocation. Moreover, appellant insists this Board may not examine either the prior accusations or the related stipulations and waivers, or rely on any documents other than the actual decisions, in determining the grounds for prior discipline.

Appellant is misguided. Generally, a court will not examine evidence, including documents, falling outside the "integrated" agreement—that is, the "complete and final embodiment of the terms of [the] agreement." (*Masterson v. Sine* (1968) 68 Cal.2d 222, 225 [65 Cal.Rptr. 545]; see also *Pollyanna Homes, Inc. v. Berney* (1961) 56 Cal.2d 676, 679-680 [16 Cal.Rptr. 345]; *Hale v. Bohannon* (1952) 38 Cal.2d 458, 456 [241 P.2d 4].) "The crucial issue in determining whether there has been an integration is whether the parties intended their writing to serve as the exclusive embodiment of their agreement. The instrument itself may help to resolve that issue." (*Masterson*, *supra*, at p. 225.) Thus, if the two prior decisions incorporate by reference other documents—including, for example, the respective accusations or stipulations and waivers—then those documents are part of the integrated agreement, and this Board may review them as an expression of the parties' understanding.

A review of the prior decisions shows that in each instance the parties unequivocally intended to incorporate both the accusation and the stipulation and waiver. Each decision employs explicit language to that effect:

> The above-entitled matter having regularly come before the Department for decision and the respondent(s) having filed a stipulation and waiver, on October 14, 2014 (attached hereto and incorporated by reference herein), in connection with the accusation herein in which respondent(s) waives right to hearing, reconsideration and appeal, and good cause appearing, the Department hereby adopts the terms of the stipulation and waiver as its decision in this matter and further finds, pursuant to said stipulation and waiver, cause for disciplinary action has been established.

(Exh. D-2, Decision; see also Exh. D-3, Decision [employing identical language but referencing stipulation and waiver execution date of January 21, 2014].)

A review of the integrated stipulation and waiver agreements establishes that appellant agreed to pay a fine in lieu of suspension for each of two prior sale-to-minor violations. (Exhs. D-2 and D-3.) In each case the accusation, duly incorporated by reference, alleges a violation of section 25658(a) and supplies the date the transaction took place. (Exh. D-2, Accusation; Exh. D-3, Accusation.) Moreover, in each instance, Sadruddin's signature appears on a stipulation and waiver—also duly incorporated by reference—agreeing to disciplinary action based on the terms of the respective accusation. (Exh. D-2, Stipulation & Waiver for Prehearing Settlement; Exh. D-3, Stipulation & Waiver for Prehearing Settlement.) Based on the complete sets of documents—that is, the integrated agreements between appellant and the Department—it is clear that in both priors, appellant was disciplined for sale-to-minor violations under Business and Professions Code section 25658(a).

II

Appellant contends the Department's comment procedure, implemented pursuant to its General Order 2016-02, violates the hearing and review procedures set forth in the APA, constitutes an underground regulation prohibited by the APA, and encourages illegal ex parte communications. (App.Br., at pp. 12-25.)

The Department responds that the comment procedure does not encourage ex parte communications, as all parties are granted the opportunity to respond. (Dept.Br., at p. 11.) The Department further contends the comment procedure expands the rights of parties, something it argues is allowed under section 11425.10(b) of the Government Code. (*Id.* at pp. 11-12.) The Department also points out that the comments did not

affect the outcome of the case. (*Id.* at pp. 10-11.) Finally, the Department insists this Board is limited to review of the decision itself, and lacks jurisdiction to review the Department's procedures. (*Id.* at pp. 8-10.)

We recently addressed an identical argument in *7-Eleven, Inc./Gupta* (2017) AB-9583. In that case, we reviewed the California Supreme Court's decision in *Quintanar* and found that this Board does indeed have jurisdiction to review the Department's comment procedure as part of its authority to determine whether the Department "proceeded in the manner required by law." (*Gupta*, *supra*, at pp. 6-11.) We observed:

> In *Quintanar*, the Court reviewed and rejected internal Department procedures through which Department counsel routinely submitted secret ex parte hearing reports—including a recommended outcome—to the Department Director in his decision-making capacity. (*Quintanar, supra*, at pp. 6-7.) The Supreme Court concluded the ex parte hearing reports violated the administrative adjudication bill of rights provisions of the APA. (*Id.* at p. 8.) The court's decision turned on *exactly the same scope of review* constitutionally granted to the Appeals Board: "whether the Department proceeded in the manner required by law." (*Id.* at p. 7, citing Cal. Const., art. XX, § 22 and Bus. & Prof. Code, § 23090.2(b)].)
>
> More importantly, the Supreme Court explicitly observed that the Board does indeed have jurisdiction to review procedural issues for compliance with applicable law:
>
> > The Board is authorized to determine "whether the [D]epartment has proceeded in the manner required by law" (Cal. Const., art. XX, § 22, subd. (d); Bus. & Prof. Code, § 23084, subd. (b)); as such, it has jurisdiction to determine whether the Department has complied with statutes such as the APA.
>
> (*Quintanar*, *supra*, at p. 15 [overruling a pre-APA case that held the Board could not examine decision makers' reasoning].) Indeed, according to *Quintanar*, the Board may even review documents outside the record in order to ascertain compliance with applicable law. (*Id.* at p. 15, fn. 11.)

(*Id.* at p. 9-10, emphasis in original.) While we acknowledged that the holding in *Quintanar* is dicta, we also noted that subsequent cases have followed suit. (*Id.* at pp. 10-11.) We held,

> *Quintanar* therefore affirms the Board's authority to review the Department's comment procedure and whether it complies with applicable law including, but not limited to, the APA. In so doing, the Board has the authority to review documents establishing the Department's comment procedure, including the General Order.

(*Id.* at p. 11.) We adopt that holding here.

In *Gupta*, we also concluded the Department's comment procedure, as outlined in the General Order, constitutes an unenforceable underground regulation. The comment procedure was identical in this case. We therefore reach the same legal conclusion here, and refer the parties to *Gupta* for our complete reasoning. (*Id.* at pp. 12-25.)

Finally, as in *Gupta*, we find that the two comments submitted by appellant—the only comments in this case—had no effect on the outcome, and therefore, that the comment procedure did not materially undermine appellant's due process rights. While appellant argued in favor of a reduced penalty, the proposed penalty was approved without changes. We therefore see no grounds to reverse.

This case, however, highlights two of the many potential pitfalls of the comment procedure. In its comment submitted April 6, 2017, appellant introduced facts not in evidence at the administrative hearing, including appellant's immigration and employment history as well as his son's educational accomplishments. (Appellant's Second Comment Letter, at p. 1.) Appellant used these new facts to argue mitigation. It is facially improper for either party to supply facts outside the record in order to persuade the Director in her decision making capacity—and yet, neither the General Order nor the Comment Letter limit the content of parties' comments.

Moreover, appellant appears to make a settlement offer in its second comment: "In order to avoid financial catastrophe, Mr. Sadruddin is asking the Department for a stayed revocation of six months in order to allow him to sell the license with the Tulare

Food Mart itself. If the Department is agreeable, Mr. Sadruddin will withdraw the matter and forego an appeal." (*Id.* at p. 2.) While a settlement offer may be made "before, during, or after the hearing" (Gov. Code, § 11415.60(b)), settlement offers are ordinarily confidential and inadmissible in later proceedings "whether as affirmative evidence, by way of impeachment, or for any other purpose." (See *id*.; see also Evid. Code § 1152.) It is therefore unclear what authority, if any, this Board or a court might have to review the contents of comments submitted pursuant to the comment procedure if all or part of a comment constitutes a settlement offer.

While we decline to reverse in the present case, it is clear the comment procedure creates a minefield of due process issues. As we have noted elsewhere, had the Department chosen to adopt the comment procedure through the formal APA rulemaking process, these issues could have been discovered and resolved well in advance of the procedure's implementation. (See *Gupta*, *supra*, at p. 29.) We therefore repeat our intentions as stated in *Gupta*: "we shall remain particularly vigilant in future cases, and will not hesitate to reverse where the Department's improperly adopted comment procedure materially infringes on an appellant's due process rights." (*Gupta*, *supra*, at p. 29.)

ORDER

The decision of the Department is affirmed.[2]

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
JUAN PEDRO GAFFNEY RIVERA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

2. 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.