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

AB-9558
File: 40-527681 Reg: 14081710

ENRIQUE GARCIA GONZALEZ,
dba Colima Bar
1718 East Florence Avenue, Los Angeles, CA 90001,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: September 1, 2016
Los Angeles, CA

ISSUED SEPTEMBER 28, 2016
AMENDED JUNE 14, 2017

Appearances: *Appellant:* Armando H. Chavira as counsel for appellant Enrique Garcia Gonzalez, doing business as Colima Bar.
Respondent: Heather Hoganson as counsel for the Department of Alcoholic Beverage Control.

OPINION

Enrique Garcia Gonzalez, doing business as Colima Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] revoking his license, with revocation conditionally stayed for three years provided no cause for disciplinary action arises during that time, and concurrently suspending his license for twenty days for permitting multiple instances of drink solicitation on the licensed premises, in violation of Business and Professions Code sections 24200.5, subdivision (b), and 25657, subdivisions (a) and (b).

1. The decision of the Department, dated November 18, 2015, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on September 19, 2013. On December 9, 2014, the Department instituted a nine-count accusation against appellant charging drink solicitation activity on four separate dates, in violation of Business and Professions Code sections 24200.5, subdivision (b),[2] and 25657, subdivisions (a) and (b).[3]

At the administrative hearing held on October 6, 2015, documentary evidence was received and testimony concerning the violation charged was presented by Supervising Agents

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2. Section 24200.5, subdivision (b), provides:

> Notwithstanding the provisions of Section 24200, the department shall revoke a license upon any of the following grounds:
>
> [¶ . . . ¶]
>
> (b) If the licensee has employed or permitted any persons to solicit or encourage others, directly or indirectly, to buy them drinks in the licensed premises under any commission, percentage, salary, or other profit-sharing plan, scheme, or conspiracy.

3. Section 25657, subdivisions (a) and (b), provide that it is unlawful:

> (a) For any person to employ, upon any licensed on-sale premises, any person for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages, or to pay any such person a percentage or commission on the sale of alcoholic beverage for procuring or encouraging the purchase or sale of alcoholic beverages on such premises.
>
> (b) In any place of business where alcoholic beverages are sold to be consumed upon the premises, to employ or knowingly permit anyone to loiter in or about said premises for the purpose of begging or soliciting any patron or customer of, or visitor in, such premises to purchase any alcoholic beverages for the one begging or soliciting.

Gerardo Sanchez and Joseph Perez, Jr. of the Department of Alcoholic Beverage Control. Appellant presented no witnesses.

The facts supporting the statutory violations are not in dispute. On August 7, 2014, Agents Sanchez and Perez observed drink solicitation activity in violation of sections 24200.5(b) (count 1) and 25657(b) (count 2). On August 15, 2014, Agent Sanchez returned to the licensed premises with another agent, and observed further drink solicitation activity in violation of sections 24200.5(b) (count 3) and 25657(b) (count 4). On September 19, 2014, Agent Sanchez again visited the licensed premises with another agent, and again observed drink solicitation activity in violation of sections 24200.5(b) (count 5), 25657(a) (count 6), and 25657(b) (count 7). Finally, on September 26, 2014, Agents Sanchez and Perez returned to the licensed premises and again observed drink solicitation activity in violation of sections 24200.5(b) (count 8) and 25657(b) (count 9).

After the hearing, the Department issued its decision which determined that all nine counts were proven and no defense was established. The decision imposed a penalty of license revocation, conditionally stayed for a period of three years provided no cause for disciplinary action arises during that time. The decision also concurrently suspended appellant's license for twenty days.

Appellant filed this timely appeal contending (1) the Department abused its discretion by systematically imposing license revocation for a first-time drink solicitation violation without consideration for appellant's disciplinary history, and (2) the Department's selective enforcement and prosecution of Hispanic licensees violates the constitutional guarantee of equal protection.

DISCUSSION

I

Appellant contends the penalty of stayed license revocation for a first-time drink solicitation violation is excessive and represents an abuse of discretion. Appellant argues that revocation is routinely imposed for all first-time solicitation violations, even though the penalty guidelines allow for penalty adjustment. Appellant challenges the Department's decision to impose a stayed license revocation in this case despite the absence of any prior disciplinary history.

Additionally, appellant contends that the accumulation of counts over the course of four separate dates—with no notice provided to appellant that the violations were taking place—is unconstitutional. Appellant directs this Board to *Walsh v. Kirby*, arguing that "[t]he Court held the practice of accumulating violations by repeated similar investigations, without the licensee's knowledge, and the imposition of a greater penalty based upon those violations was a violation of the licensee's due process rights." (App.Br. at p. 10, citing *Walsh v. Kirby* (1974) 13 Cal.3d 95 [118 Cal.Rptr. 1].) Appellant contends the situation is analogous in this case, where Departments agents accumulated multiple counts over the course of four separate visits without notifying appellant.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant. (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183].) However, it will not disturb the Department's penalty order absent an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd.* (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 Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Department rule 144, which sets forth the Department's penalty guidelines, provides that higher or lower penalties from the schedule may be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances. (Cal. Code Regs., tit. 4, § 144.) Mitigating factors may include, but are not limited to, the length of licensure without prior discipline, positive action by the licensee to correct the problem, documented training of licensee and employees, and cooperation by the licensee in the investigation. (*Ibid.*)

Rule 144 also addresses the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence.

> **Penalty Policy Guidelines:**
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> The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

(Cal. Code Regs., tit. 4, § 144.)

Rule 144 recommends the following penalties for the undisputed violations in this case:

Illegal Solicitation of Alcoholic Beverages:
Violation of Section 24200.5(b)[:] Revocation
Violation of Section 25657(a)[:] Revocation
Violation of Section 25657(b)[:] 30 day suspension to revocation

(Penalty Schedule, Cal. Code Regs., tit. 4, § 144.) The rule also notes that "[f]or purposes of this schedule of penalties, 'revocation' includes a period of stayed revocation as well as outright revocation of the license." (*Ibid.*)

In *Walsh v. Kirby*, relied on by appellant, the California Supreme Court addressed a case in which the Department "accumulated evidence of recurring sales of distilled spirits below established minimum retail prices, each sale constituting a different but essentially identical violation, before it filed its accusation charging the licensee with the whole series of violations and assessing concomitant cumulative penalties." (*Walsh*, *supra*, at p. 98.) The penalties were monetary; their accumulation resulted in a fine of $9,250—the sum of ten separate distilled spirits pricing fines. (*Id.* at p. 99.) The court found this strategy improper and at odds with the purpose of the pricing statute:

> [S]ection 24744.1[, the fair trade statute at issue,] is not intended merely to exact tribute for the general fund or, by the imposition of insurmountable financial burdens, to punish or eliminate a licensee who is in default. [Citation.] Rather the purpose of the statute is to compel, through the duress of monetary penalties compliance by all licensee with the fair trade provision enacted by the Legislature. The statute thus requires administrative practices which induce conformance with rather than avoidance of the retail price maintenance provisions. The statute is, moreover, in character intended to serve as a notice or warning as it provides a relatively light penalty for the initial violation with the threat of more severe penalties should the licensee thereafter fail to conform.

(*Id.* at p. 102.) It was therefore a violation of due process for the Department to accumulate ten successive violations in order to convert the accumulated "relatively light" monetary penalties into a single massive fine. (*Ibid.*)

The court, however, did not require that the Department *always* notify licensees immediately following the first violation of any statute. In fact, it concluded:

> The particular vice in the instant case . . . lies in the subjective determination by the department that it would seek a penalty beyond that provided for a first violation in light of the licensee's previous good record. We recognize that in order to fortify its evidence of a violation to be later charged in an accusation the department may deem it prudent to obtain evidence of more

> than one sale in technical violation of the statute before filing an accusation. The gathering of such supportive evidence would not in itself, of course, constitute arbitrary or capricious conduct.

(*Walsh*, *supra*, at p. 105.) Thus, it was not the accumulation of multiple *violations*, but the "imposition of cumulative penalties" for each of those successive violations that the court found to be a denial of due process. (See *id.* at p. 106 [observing that cumulative fines resulted in "de facto revocation of the license"].)

In this case, the penalty is neither excessive, nor does the accumulation of violations run afoul of due process. Rule 144 recommends revocation for a violation—singular—of either section 24200.5(b) or 25657(a). It also provides for "30 day suspension to revocation" for a violation—again, singular—of section 25657(b). Had the Department prosecuted appellant after Agents Sanchez and Perez first visited the premises on August 7, 2014, the recommended penalty would have been the precisely the same: count 1, a violation of section 24200.5(b), would have called for revocation, and count 2, a violation of section 25657(b), would have called for "30 day suspension to revocation." Conditionally stayed revocation with a twenty-day suspension was therefore a reasonable penalty, whether for the first two counts or all nine.

The fact that the Department typically imposes precisely the same penalty for *any* first-time solicitation violation does not constitute an abuse of discretion. As stated in rule 144, the Department seeks to impose "penalties in a consistent and uniform manner." (Policy Statement, Cal. Code Regs., tit. 4, § 144.) That the Department follows through on this policy statement and actually imposes penalties for drink solicitation violations in a consistent, uniform manner is not an abuse of discretion, but an evenhanded application of the law.

Moreover, appellant's disciplinary history in no way mandates a lesser penalty. First, mitigation is purely discretionary. (See Cal. Code Regs., tit. 4, § 144.) While "[l]ength of

licensure at subject premises without prior discipline or problems" is one factor that "may" be considered, even a lengthy period of discipline-free licensure does not *require* a mitigated penalty. (See *ibid.*) In this case, appellant was licensed for less than eleven months before the first violation took place—a wholly unimpressive record at best. There was no abuse of discretion in the ALJ's failure to mitigate the penalty.

Finally, *Walsh* is inapplicable, as there is no evidence in this case that the accumulation of violations led to a more severe penalty. Unlike the appellant in *Walsh*, the present appellant did not incur a separate, cumulative penalty for each individual count. Indeed, for solicitation violations—which typically involve dubious dialogue and the furtive exchange of cash—it is indeed "prudent to obtain evidence of more than one sale in technical violation of the statute before filing an accusation" in order to establish a pattern of conduct and ensure that the initial violations were not simply a misunderstanding or the rogue conduct of a disgruntled employee. (See *Walsh*, *supra*, at p. 105.) Under the facts of this case, the Department's investigational strategy did not violate due process; if anything, it *promoted* due process by ensuring prosecution was based on solid factual evidence.

II

Appellant contends that the Department's selective enforcement of drink solicitation statutes against Hispanic licensees is discriminatory and violates the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. (App.Br. at pp. 15-17, citing *Yick Wo v. Hopkins* (1886) 118 U.S. 356 [6 S.Ct. 1064].) Appellant argues "that 90 to 95% of all [drink solicitation] accusations are directed at Hispanic licensees, an identifiable racial class." (App.Br. at p. 20.) Appellant also directs this Board to the California Supreme Court's decision in *Murgia v. Municipal Court* (1975) 15 Cal.3d 286 [124 Cal.Rptr. 204]. (App.Br. at p. 19.) Although appellant concedes that *Murgia* was superseded by statute, "it is often cited for the

proposition that discrimination is invidious when it is based on race." (App.Br. at p. 20, citing *Murgia*, *supra* [superseded by statute as stated in *People v. Superior Ct.* (*Baez*) (2000) 79 Cal.App.4th 1177, 1187-1188 [94 Cal.Rptr.2d 706] [reiterating rejection of the "plausible justification" standard for discovery requests and holding that "discovery of information pertinent to a discriminatory prosecution claim is no longer authorized in California unless such disclosure is required by the United States Constitution"].)

Appellant also filed a Motion to Augment Record with the results of his Public Records Act (PRA) request. Appellant contends these additional documents are relevant to his appeal and were not available at the time of the administrative hearing. (Motion to Augment Record, at p. 2.)

Notably, appellant does not challenge the fact of the violations in this individual case.

The Board's review is limited by the California constitution and by statute. The Board "shall not receive evidence in addition to that considered by the department." (Cal. Const., art. XX, § 22.) Additionally,

> [r]eview by the board of a decision of the department shall be limited to the questions whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in light of the whole record.

(*Ibid.*; see also Bus. & Prof. Code, § 23084.)

It is outside the jurisdiction of this Board to rule on the constitutionality of a statute. The California Constitution states,

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
>
> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) To declare a statute unconstitutional;

> (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

(Cal. Const., art. III, § 3.5.) A party may, however, raise a constitutional challenge before an administrative agency in order to preserve the issue for appeal in the state courts. (*Delta Dental Plan v. Mendoza* (9th Cir. 1998) 139 F.3d 1289, 1296, citing *Southern Pacific Transp. Co. v. Public Utilities Com.* (9th Cir. 1983) 716 F.2d 1285, 1291.)

Moreover, the Appeals Board falls under the purview of section 3.5:

> In its stricter connotation, an "administrative agency" is a governmental body, other than a court or legislature, invested with power to prescribe rules or regulations or to adjudicate private rights and obligations. [Citations.] While the [Alcoholic Beverage Control] Appeals Board exercises "judicial" power [citation], it is clearly an agency within the executive branch of government and falls within both of the foregoing definitions.

(Applicability of California Constitution Article III, Section 3.5, 62 Ops.Cal.Atty.Gen. 788 (1979), at p. 8.)

This Board may well have the authority, indeed the duty, to rule that a statute is unconstitutional *as applied* in a given case. This Board has, for instance, previously ruled that the Department's investigative procedures can, *under the facts of an individual case*, violate constitutionally guaranteed rights. (See, e.g., *Hussainmaswara* (2014) AB-9402, at pp. 9-22 [holding "inspection" of licensed premises violated constitutional guarantees against warrantless searches].) Appellant is asking us here to determine if the Department's investigatory procedures that result in facially skewed anti-drink solicitation prosecutions against a disproportionately high percentage of Hispanic licensees compared to others renders those very enforcement actions void as outside the Department's jurisdiction. In other words, the Board cannot affirm or give effect to an administrative decision that is the product of

unconstitutional administrative conduct, but must reverse it because such unconstitutional conduct by the administrative agency as prosecutor is beyond its jurisdiction.

For us to consider this argument we must do so in the context of the record before us on appeal. (See Cal. Const., art. XX, § 22.) And in this record it is clear appellant neither raised the equal protection issue nor presented evidence to establish a constitutional violation. Now, appellant instead seeks to augment the record with the results of a PRA request—which, he contends, were "not available at the time of the administrative hearing" and "were too voluminous for quick review." (Motion to Augment Record, at p. 2.)

But in deciding whether to allow such an augmentation, this Board must consider "[w]hether there is relevant evidence, which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department." (Bus. & Prof. Code, § 23084(e).)

"Reasonable diligence" is not defined in the statute, nor is there any case law interpreting that particular subdivision. However, the "reasonable diligence" standard for the introduction of new evidence also appears in the Code of Civil Procedure:

> The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes . . . .
>
> > [¶ . . . ¶]
> >
> > 4. Newly discovered evidence, material for the party making the application, *which he could not, with reasonable diligence*, have discovered and produced at the trial.

(Code Civ. Proc., § 657, emphasis added.)

There are many cases defining "reasonable diligence" in this context. The burden, for example, is on the moving party: "[I]t is incumbent on the moving party to show that he has exercised reasonable diligence to discover before the trial the evidence upon which he relies."

(*Pierce v. Nash* (1954) 126 Cal.App.2d 606, 620 [272 P.2d 938]; see also *Slemons v. Paterson* (1939) 14 Cal.2d 612 [96 P.2d 125] ["It does not appear from plaintiffs' affidavit that they made any effort whatever to obtain the evidence prior to the trial"]; *Edwards v. Floyd* (1950) 96 Cal.App.2d 361, 362 [215 P.2d 117] [general averment of diligence insufficient]; *Foster v. Nat. Ice Cream Co.* (1916) 29 Cal.App. 484, 484-485 [156 P. 985].)

Moreover, the exercise of "reasonable diligence" must take place *before* the trial; it is not enough to commence an investigation after the fact.

> In order to obtain a new trial because of newly discovered evidence, the applicant must show that he used reasonable diligence to discover it prior to the trial and that he failed to discover it and did not, in fact, know of it in time to produce it, or in time to apply for a continuance in order that he might produce it, at the trial.

(*Pollard v. Rebman* (1912) 162 Cal. 633, 636-637 [124 P. 235].) For example, a motion for new trial on the grounds of newly discovered evidence was properly denied where the "new evidence" was "discovered by advertising in newspapers and although the said discovery occurred after the trial, the showing clearly indicates that the advertisements also occurred after the trial." (*Putnam v. Pickwick Stages, Northern Div., Inc.* (1929) 98 Cal.App. 268, 274-275 [276 P. 1055] ["Knowing, as it is admitted it did, of the importance of the testimony, defendant should have moved for a continuance, and, failing to do so, it must be held that it entered upon the trial at its peril."]; see also *Berry v. Metzler* (1857) 7 Cal. 418, 419 ["[W]hen the party discovers new testimony before the trial, but too late to procure it, he should apply for a continuance."].)

Ultimately, the determination is fact-specific. "Diligence is a relative term. It is incapable of exact definition, and depends upon the particular circumstances of each case." (*Parker v. Southern Pacific Co.* (1928) 204 Cal. 609, 618 [269 P. 622]; see also *Heintz v. Cooper* (1894) 104 Cal. 668 [38 P. 511].)

While these cases address "reasonable diligence" in the context of civil litigation and not the Business and Professions Code, we see no reason to do away with over a century of case law clearly and thoroughly defining the term. We therefore evaluate appellant's "reasonable diligence" based on the criteria outlined above.

Here, appellant contends he "did not know what would be the results" of his PRA request; that an ABC Senior Analyst told appellant the records were "voluminous and would take time to produce," and that the records were indeed "too voluminous for quick review." (Motion to Augment Record, at p. 2.)

These facts might be sufficient to support a motion for continuance and, if the continuance were denied, to remand this case. However, the Motion to Augment Record reveals that the PRA request was *not even made* until four months *after* the administrative hearing. As appellant notes, he "made an ABC Public Records request in February, 2016. Appellant's administrative hearing take [*sic*] place on October 6, 2015." (*Ibid.*)

Appellant supplies absolutely no explanation as to why he did not submit his PRA request to the Department *before* the administrative hearing, or why it was appropriate to wait until four months *after* the hearing to do so. This is insufficient to establish the reasonable diligence required by section 23084.

Indeed, appellant cannot contend he simply wasn't aware of a pattern of selective prosecution until February 2016. In April of 2015—six months before appellant's administrative hearing—this Board observed,

> Our second serious concern is about a feature the Board has noticed appears common to drink solicitation appeals—they overwhelmingly involve Hispanic surname licensees. A sampling of cases on our official website involving prosecutions for drink "solicitation" strongly suggests our perception of this skewed enforcement against Hispanic licensees comports with reality[fn.] and raises serious public policy and legal questions.

(*Torres* (2015) AB-9510, at p. 15.) Moreover, counsel for the appellant in *Torres* is *also* counsel for the appellant in the present case, and served as appellant's counsel at the October 2015 administrative hearing as well. (See *id.* at p. 1; RT at p. 3.) It defies belief that appellant's counsel could have failed to read our *Torres* decision. Under the circumstances, we cannot comprehend how it constitutes "reasonable diligence" for appellant to delay the PRA request until four months *after* the administrative hearing.

Appellant's argument that the evidence was "not available at the time of the administrative hearing" is conclusory and insufficient. (See Motion to Augment Record, at p. 2.) Without an explanation as to why the evidence described in the Motion to Augment could not have been produced, in the exercise of reasonable diligence, *before* the administrative hearing, we have no grounds to review it. Appellant's Motion to Augment is therefore denied.

We are, however, sympathetic to appellant's position. We are still troubled by the apparent disproportionate pattern of prosecution we observed in *Torres*. (See *Torres*, *supra*, at pp. 15-16.) We again encourage the Department to examine its internal practices "to assure that our drink solicitation laws are not being administered 'with an evil eye and an unequal hand.'" (*Id.* at p. 17, citing *Yick Wo*, *supra*, at pp. 373-374.) "If a neutral criterion cannot be shown to animate and explain this apparent lopsided disparity in the administrative prosecution of drink solicitation offenses between Hispanic and non-Hispanic licensees, the constitutional guarantee to equal protection of the laws is implicated." (*Id.* at pp. 16-17, citing *Oyler v. Boles* (1962) 368 U.S. 448, 456 [82 S.Ct. 501].)

Nevertheless, appellant's due process and equal protection challenge lacks evidentiary substantiation and was not properly and timely raised below. We are limited to the record before us and that record is not in the shape to permit us to grapple with the important issue appellant belatedly raises.

Accordingly, we decline in this case under the record presented to consider the jurisdictional basis of the Department's prosecution and enforcement of the drink solicitation laws.

ORDER

Appellant's Motion to Augment Record is denied. The decision of the Department is affirmed.[4]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

4. 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.