ISSUED JUNE 12, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

THE SOUTHLAND CORPORATION dba 7-Eleven #13894 18514 Plummer Street Northridge, CA 91324, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7154a File: 20-247119 Reg: 97040125 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: June 6, 2000 Los Angeles, CA

The Southland Corporation, doing business as 7-Eleven #13894 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked its off-sale beer and wine license for its franchisee/co-licensee having sold an alcoholic beverage to a minor.[2]

Appearances on appeal include appellant The Southland Corporation, appearing through its counsel, Jeffrey A. Vinnick, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

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[1] *The decision of the Department, dated January 25, 2000, is set forth in the appendix.*

[2] *The franchisees surrendered their store to Southland on January 4, 1999, following the granting of Southland's summary judgment motion in a wrongful detainer action premised on the franchisees' breach of their franchise agreement, and withdrew their appeal, leaving Southland as the sole appellant. Southland has operated the store as a company-owned store since its takeover on January 4, 1999, a period of time characterized in Southland's brief as "several years" (App.Br., pages 7, 12). Since Southland also referred several times to the precise date of the takeover, we will read "several years" as an exaggeration rather than a misrepresentation.*

This is the second appeal of an order of revocation in this matter. In the original appeal, the Appeals Board reversed the Department's order of revocation because it appeared to have been based upon an apparently self-imposed and mistaken view on the part of the Department as to the disciplinary tools available to it, and remanded the case to the Department for reconsideration of the penalty. In so doing, the Board made reference to its earlier decision in Southland/Sukhija (1998) AB-6930, in which the Board cited an example of an administrative procedure through which the Department can effectively revoke as to only one of joint licensees. The Board also made it clear that whether the Department might choose to effect such a procedure was a matter within its discretion.

The Department petitioned the Court of Appeal for the Second Appellate District for a writ to review the Board's decision, contending the Board's remand order was itself an abuse of discretion. The court declined to issue the writ, stating:

> "The petition for writ of review filed December 3, 1999, has been read and considered and is denied for failure to demonstrate the need for extraordinary relief at this time. Petitioner has an adequate remedy at law by exercising its acknowledged exclusive discretion on remand.
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> "This denial is without prejudice to the filing of a new petition if the Appeals Board refuses to affirm a determination by the Department upon reconsideration not to impose a lesser penalty against the franchisor."

(Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board, et al., (Case No. B137183, January 21, 2000.)

Upon remand from the appellate court, the Department once again ordered revocation, stating:

> "The above entitled matter is before the Department of Alcoholic Beverage Control (Department) for decision following a decision of the Alcoholic Beverage Control Appeals Board (Board) filed on November 3, 1999, and the ORDER filed by the Court of Appeal, Second Appellate

District, Division 4, on January 21, 2000.

> "The Court in its ORDER ruled that the Department 'has an adequate remedy at law by exercising it [sic] exclusive discretion upon remand' so that there was no demonstrated need for extraordinary relief at present. The Board, in its decision, felt that the Department has 'an apparently self-imposed and mistaken view as to the disciplinary tools available to it." The Board affirmed the decision of the Department except as to penalty which was reversed and remanded for reconsideration.
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> "The Department, having reviewed the entire record including the Decision of the Board, hereby adopts the following as its ORDER in the case.
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> ORDER
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> "Having fully considered the efforts of respondent, the comments of the Appeals Board and the Court of Appeal, and the provisions of Business and Professions Code §25658.1, the license is revoked."

Southland now contends that the Department 's order is again flawed, because: (1) the order was made pursuant to an underground regulation; (2) the Department violated the Board's remand order by not affording it a full opportunity to address its arguments concerning the penalty to be imposed; (3) there is not good cause to conclude that continuation of the license in Southland's name alone would be contrary to the public welfare and morals; and (4) the Department's order of outright revocation is punishment, in violation of legislative intent and public policy.

There is no way to discern merely from the face of the Department's order that it complied with the Board's remand order that it reconsider the penalty in light of the Board's views that it had other alternatives than outright revocation where only one of the co-licensees is a wrongdoer. However, in its brief to the Appeals Board, the Department represents that the order of revocation is based upon "a consideration of all the relevant information specific to this case," and that it "does

not take the position that it is compelled to revoke the license." (Dept. Br. at page 11.)

The decision whether or not outright revocation should be ordered is a matter well within the discretion of the Department. That is not in dispute. But where there are alternatives, and the Department refuses to even consider them, that is an unwillingness to exercise discretion, and an abuse thereof. Similarly, if the Department acted in the manner it did because it felt compelled to by an internal policy such as that reflected in the 1996 memorandum cited by appellant, an abuse might be found to exist.

As the discussion which follows indicates, we do not believe that the Department's most recent order can be said to be an abuse of discretion.

DISCUSSION

I

Southland contends that the Department's order reflects its adherence to an "underground regulation," and, for that reason should be set aside. Southland asserts that §25658.1, by its use of the word "may," expresses a legislative intent that revocation not be automatic on a third strike case. Rather, Southland says, the facts and circumstances must be evaluated on a case-by-case basis to determine whether or not revocation is necessary to protect the public safety, welfare, and morals. Southland relies for its contention on a memorandum (App.Br., Exhibit A) prepared over the name of the Director of the Department. We quote the parts we think are pertinent to the issue before the Board:

> "In carrying out the legislative intent of Section 25658.1 of the Business and Professions Code, it will be our policy that a penalty of revocation for a third violation of Section 25658 that occurs within 36 months of the initial violation of that section will be the rule rather than the exception. While there are several forms of license revocation, the significant impact that repeated sales of alcoholic beverages to minors can have on society by a retailer who is either unwilling or unable to prevent them clearly justifies an outright revocation of the privilege of selling alcoholic beverages.
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> "There may be instances where an outright revocation may be inappropriate as a matter of discretion where significant mitigating circumstances were present in any or all of the violations, but those instances should be fairly rare.
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> "The passage of omnibus legislation enacted in 1994, which expanded the powers of the Department to help it address and eliminate locations that pose an immediate and continuing threat to public welfare, safety and morals makes it clear that this policy is warranted and consistent with the intent of that legislation."

Southland contends that such a "policy" is an "illegal underground regulation" because it is "a standard of general application ... to implement [and] interpret the law enforced or administered ... by the Department." As such, Southland contends, the Department may not utilize, enforce, or attempt to enforce such a policy unless and until it has been adopted as a regulation. Finally, Southland argues that proof of its contention lies in the fact that the Department's Decision Following Appeals Board Decision does not comment on the abundant evidence in support of mitigation nor does it discuss the rationale for the required finding that revocation is necessary to protect the public welfare.[3]

The Department contends that Southland should not be permitted to rely on the so-called policy statement, since, among other things, it was not offered into

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[3] *Southland also contends that, since the three strikes law has gone into effect, the Department has "routinely and automatically revoked the license in every instance where a third strike was found to have occurred. Southland has not cited to its source, so we have no way, short of an admission by the Department, of knowing whether the claim is true.*

evidence at the administrative hearing, is unsigned and is unauthenticated.

We believe that the Department's objections to the Board's consideration of the 1996 memorandum are without merit. The Board has been exposed to this same memorandum in other cases, and the Department has made no attempt to disown it.

This does not mean, however, that appellant is correct in its contention that the order of revocation issued by the Department was a product of the policy reflected in this memorandum. The Department insists that its order was based upon the facts of this case, stressing the licensees' five previous sale-to-minor violations at the store location.

The statutory provisions relevant to appellant's underground regulation argument are found in Government Code §11340.5, subdivision (a), and §11342, subdivision (g).

Section 11340.5, subdivision (a), provides:

> "No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (g) of section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

The definition in §11342, subdivision (g), reads, in pertinent part, as follows:

> "'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of the agency."

The issue, as presented by appellant, is whether the "policy" expressed by

the Director of the Department is a guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, and as such, a regulation, invalid for failure to comply with the requirements of the Administrative Procedure Act regarding its adoption (See Ligon v. State Personnel Board (1981) 123 Cal.3d 583, 587, 588 [176 Cal.Rptr. 717]; Government Code §§11340.5 and 11342, subdivision (g)), or a matter of "internal management of the agency," outside the scope of the code provisions.

We are not prepared to say that the memorandum should not be considered an illegal underground regulation. It may well be. But appellant has not demonstrated any real link between the content of that memorandum and the order entered by the Department.

The revocation order originally entered by the Department was premised upon its reading of Colletti v. State Board of Equalization (1949) 94 Cal.App.2d 61 [209 P.2d 984], to the effect that it had no alternative but to order revocation. The Department tells the Board now that it does not take the position revocation was mandatory, but defends its order on what it contends is a long history of sales to minors - six violations since the issuance of the license, four of which were committed in a two and one-half year period between July 1994 and December 1996.

It is well accepted that the Department possesses broad discretion in the imposition of an appropriate disciplinary penalty. (See Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) The exercise of this discretion, it seems to us, is peculiarly a matter of internal management - a weighing of the gravity of a violation, as reflected by the unique

factual record of a given case, against similar, but rarely identical, cases where discipline has been imposed or is under internal consideration.

However, there being no evidence in the record from which the Board could conclude that the Department's action was compelled by the policy statement contained in the 1996 memorandum, we see no need to decide the question whether that memorandum constitutes an illegal regulation.

II

Southland claims that the Department violated the Board's remand order and abused its discretion by failing to solicit or accept briefs from Southland concerning the matters remanded for reconsideration. Southland cites language from the Board's decision which it claims imposed that duty on the Department:

> "... Southland's arguments concerning the special nature of a franchisor-franchisee relationship are addressed at some length in Southland/Tolentino and Southland/Sukhija. We refer to those decisions for the Board's general views on the issue and the reasons why Southland's independent contractor status does not immunize it from discipline. Since this case is being remanded to the Department, we are confident the Department and Southland will have full opportunity to address the extent to which those views affect their relative positions."

Southland argues that, because the Department acted within days of the appellate court's denial of Southland's writ application, allowing no time for Southland to present its views, the order necessarily violated the Board's remand order.

Southland contends that the combination of its contractual inability to take action against its franchisee until after a third strike sale-to-minor violation, its status as an independent contractor rather than a partner, its operation of the store without a violation since its takeover, and the prophylactic measures it takes and has taken toward preventing future violations, all preclude revocation as an appropriate disciplinary measure. Presumably, these are the views it would have expressed to the Department, had time permitted.

The first two of these arguments have been presented to, and rejected by the Board on several occasions. (See Southland/Tolentino (1998) AB-7035; Southland/Sukhija (1998) AB-6930.) The latter two arguments were presented to the Department in the course of the hearing, as well as when they were set forth in

Southland's briefs to the Board in its earlier appeal. Thus, Southland is claiming that it was prevented from presenting to the Department little more than what had already been presented to the Department in briefs and extensive testimony.

Nor can it be said with any certainty that the Department ignored Southland's contentions. It is equally possible that it was simply unpersuaded by Southland. We know from the Department's original decision that the Department was not at that time swayed by Southland's arguments:

> "All other contentions on the part of Respondents have been considered and are rejected as they are deemed to be without merit. A revocation of the license under the circumstances does not constitute an abuse of discretion and there is ample evidence that continuation of the license would be contrary to the public welfare and morals based upon the disciplinary history of the license."[4]

III

Southland also contends that its takeover from its franchisees, and its operation of the store without incident since the takeover, demonstrates that the public welfare and morals have been protected, and therefore, there is no good cause for terminating the license as to it.

These arguments are simply a rehash of Southland's basic position that, as a franchisor, it enjoys a favored position under California law. The Board has previously rejected the argument that the franchise relationship is a bar to the imposition of an order of revocation of a license or other discipline against a franchisor as well as a franchisee, the issue having been considered at length in Southland/Tolentino (1998) AB-7035, and Southland/Sukhija (1998) AB-6930. We see no reason to repeat what was said in those decisions, and appellant has provided us with none.

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[4] *In Supplemental Finding of Fact 4.*

IV

Finally, appellant contends that the order of revocation amounts to punishment.

There is no doubt that the consequences of the order may be severe. That, in and of itself, does not mean that the order is improper. The cases are many which hold that the Department has considerable discretion when it comes to imposition of penalty, and its orders not to be set aside in the absence of an abuse of discretion. Whether the Appeals Board would have entered the same order under the same circumstances is not the test. (See Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].)

ORDER

The decision of the Department is affirmed.[5]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[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.

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.