ISSUED OCTOBER 13, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

ATTA HILAL dba Greenfield Plaza Liquor Store 1101 Greenfield Drive El Cajon, CA 92021, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7177 File: 21-256105 Reg: 97040832 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: August 12, 1999 Los Angeles, CA

Atta Hilal, doing business as Greenfield Plaza Liquor Store (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 10 days for his failure to have a retail off-sale clerk's acknowledgment on the premises, and for having allowed more than 33 percent of the square footage of the windows and clear doors at the premises to bear advertising and/or signs, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §§25658.4, subdivision (b), and 25612.5, subdivision (c)(7).

[1]The decision of the Department, dated July 16, 1998, is set forth in the appendix.

Appearances on appeal include appellant Atta Hilal, appearing through his counsel, John J. McCabe, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general license was issued on January 21, 1992. Thereafter, on August 18, 1997, the Department instituted an accusation charging, in five counts: an unlawful sale to a minor (count 1); the failure to have a retail off-sale clerk acknowledgment on file (count 2); the failure to post signs regarding prohibited sales of alcoholic beverages (count 3); allowing the windows and clear doors to be covered in excess of 33 percent of their square footage (count 4); and exposing for sale an unlawful switch blade knife (count 5).

Following an administrative hearing held on January 14, 1998, counts 1, 3, and 5 were resolved in appellant's favor. Count 2 was sustained, but the fact that there was such an acknowledgment in appellant's attorney's office was considered an element of mitigation. The only count sustained without qualification was count 4, involving the advertising and signs on the windows and clear doors, and it is solely that count which is involved in this timely-filed appeal.

Appellant raises two somewhat related issues in his appeal. He first contends that the statute in question is vague in content and proscription and so uncertain in its purpose as to make its application unreasonable. In addition, appellant has moved to remand the proceeding to the Department for the taking of additional evidence, the purpose being to demonstrate that there has been no uniformity in the application and enforcement of the statute, arguably because of the imprecise and vague standards contained in the statute. Appellant has also lodged a large number of photographs with the Appeals Board purporting to show

examples of window signage of other licensed premises against which the Department has not taken action, even though, appellant suggests, they are worse violators than appellant. Presumably, appellant would offer these documents in evidence if the matter were remanded to the Department. The Department has opposed the lodging of such documents, primarily on the ground they are not accompanied by any declaration that they constitute relevant evidence which, in the exercise of reasonable diligence, could not have been produced at the hearing or were improperly excluded from the hearing, as required by Business and Professions Code §23084, subdivision (e).

As a practical matter, if the Board were to conclude that a remand was in order, it would not have to address the merits of the decision at this time. For that reason, the issues of lodgment and remand will be discussed first.

DISCUSSION

I

Appellant has filed a motion seeking to have the case remanded to the Department, contending that the materials lodged with the Appeals Board constitute newly discovered evidence which, if considered, would tend to modify the previous decision of the Department. The motion is accompanied by a declaration of appellant's counsel which provides a general description of the documents in question, his opinion that they constitute newly discovered evidence, and his further opinion that their consideration by the Department would result in a different determination, particularly in view of the lack of uniformity in enforcement and the vagueness of the statute in question, Business and Professions Code §25612.5, subdivision (c)(7). In addition, the documents themselves are accompanied by a second declaration of counsel,

describing the circumstances under which the evidence, consisting of photographs of licensed premises, was gathered.

The Department's opposition to the lodging of the documents, filed prior to the filing of appellant's motion for remand, is indicative of the Department's attitude toward the motion. The Department contends that the exhibits are not relevant to any issue, asserting that it is not the Board's function to sustain violations only by weighing the degree of violation against other offending premises. To do so, the Department contends, "would only discipline the worst of the worst offenders."

Only if the Appeals Board finds that 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, may it order a remand to the Department for reconsideration of such evidence. (See Business and Professions Code §§23084, subdivision (e), and 23085.)

The declaration of appellant's counsel does not contend that the allegedly newly discovered evidence, the materials which have been lodged with the Appeals Board, could not, **in the exercise of reasonable diligence**, have been produced at the hearing. Indeed, the photographs lodged with the Board were taken by appellant's counsel on May 30, 1999 (McCabe Declaration, paragraphs 1, 3), more than two years after the date the excessive signage was in place, more than a year after the administrative hearing, and nearly a year after the decision of the Department.

This is nothing more than an eleventh hour attempt to retry appellant's case before the Appeals Board. The motion for remand is denied and the lodged documents are ordered stricken from the record, on the ground the requirements of Business and Professions Code §§23084, subdivision (e), and 23085 have not been met.

II

In challenging the decision on its merits, appellant contends that the statute in question, which limits the degree of window coverage to 33 percent of the surface area, is so vague in content and proscription and so uncertain in its purpose as to make its application in this case unreasonable.[2] Appellant also raises a number of questions intended to demonstrate that the testimony of the Department investigator, which, along with photographs of the premises and the signage in question, formed the basis for the finding of a violation, is itself uncertain and at best only an estimate.[3]

Business and Professions Code §25612.5, subdivision (7) provides:

> "No more than 33 percent of the square footage of the windows and clear doors of an off-sale premises shall bear advertising or signs of any sort, and all advertising and signage shall be placed and maintained in a manner that ensures that law enforcement personnel have a clear and unobstructed view of the interior of the premises, including the area in which the cash registers are maintained, from the exterior public sidewalk or entrance to the premises. However, this latter requirement shall not apply to premises where there are no windows or where existing windows are located at a height that precludes a view of the interior of the premises to a person standing outside the premises."

It is clear from the language of this section of the statute that it applies only to advertising and signage. Presumably, if the windows are obstructed by something other than advertising or signage (which, in a sense, is another form of advertising), the statute would seem to have no application.

The facts upon which the signage violation is based are set forth in their entirety in Finding of Fact VII:

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[2] *The California Constitution denies an administrative agency the power to declare an act of the Legislature unconstitutional. Thus, to the extent appellant's challenge to the decision in this matter can be interpreted as an attack on the constitutionality of the code section at issue, the Board declines to address the issue.*

[3] *Several of the questions appellant has stated in his brief are clearly not relevant to the issues, such as whether it is permissible for a licensee to board up his windows. Others, such as whether the windows on the Front Street side of the premises should be included in the 33 percent computation are clearly relevant, and will be addressed.*

> "On April 12, 1997, Investigator Streeter noticed that the premises windows were almost completely covered by advertising. Two windows are located to the right of the premises front door. Exhibits 5A and 6 depict the window closest to the front door and Streeter estimated that 80 to 90 percent of this window was covered by advertising. Exhibits 5B and 7 depict the second window and Streeter estimated that 80 to 90 percent of this window was covered by advertising. After the Respondent received a citation as a result of the advertising on his windows, he removed most of the advertising on the two windows in question as depicted in Exhibit A. Of the two windows in question, one of the windows is partially blocked from the inside by a pharmacy display case and the second window leads to a store room."

Determination of Issues V states:

> "On April 12, 1997, the Respondent did allow more than 33 percent of the square footage of the windows and clear doors at the premises to bear advertising and/or signs in violation of 25658.4(b) of the Business and Professions Code as set forth in Finding VII.[4]

The ALJ made no finding regarding that portion of the statute which requires the placement of advertising and signage so as to permit law enforcement officers a clear and unobstructed view of the counter area. Department counsel had argued [RT 124] that the purpose of the statute is to permit law enforcement officers driving by or in the parking lot to see through the glass to the counter area. We think this reads the statute as saying more than it does. The statute only requires that "law enforcement personnel have a clear and unobstructed view of the interior of the premises, including the area in which the cash registers are maintained, **from the exterior public sidewalk or entrance to the premises**." (Emphasis added.) There is nothing in this language that suggests it was intended to afford viewing access from anywhere an officer might be parked or driving past the premises. The references to "exterior public sidewalk" and "entrance to the premises" tell us the statute contemplates that the viewing be from a

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[4] *The reference to the code section is incorrect. We think it fair to assume that the Administrative Law Judge (ALJ) intended to refer to Business and Professions Code §25612.5, subdivision (c)(7), just as he did in Determination of Issues V.I.*

closer range than Department counsel urges. While there is no bright line as to where the officer must be, we doubt that where the investigator in this case was standing, in a "parking lot" [RT 61] which he had earlier indicated was across the street [RT 31], was within the intended reach of the statute.

Appellant questions whether the double glass doors that were either open or closed on the night of investigator Streeter's investigation were included in his measurements. Appellant argues that, if they are, then the amount of advertising is less than 16 percent, citing the 3' by 7' dimensions of each door, and what he claims was Streeter's testimony that the advertising took up "14 area feet" of window space.

Although appellant has misstated Streeter's testimony, which, according to the transcript, was that "the advertising on both windows took up approximately 14 area feet of window space for both windows, 14 square feet of window space each," he has raised a point that may have eluded Department counsel and the ALJ. Streeter appears to be referring only to the windows that are pictured in Exhibits 5, 6, and 7. None of the three photographs shows the 3' by 7' double glass doors referred to in appellant's brief (or an additional window, which is discussed in the paragraph which follows). The statute is clear that clear glass doors are to be taken into account in any calculation made to determine whether there was a violation. Yet, although the glass doors were referred to in several of the questions Streeter was asked on cross-examination, he never testified that the doors bore any advertising or signage,[5] and

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[5] *In fact, his testimony tends to suggest the doors may well have been relatively free of advertising or signage.*

"Q: But you do in this particular case - - in the photographs, or at least in your recollection of this store, you did have two glass doors through which you could see the general area of the counter, could you not?

A: Yeah, I'm sure if you stood in the doorway, you could see in, yes."

there is no evidence that he took into account the dimensions of these doors when he made his estimates of the degree the windows were covered.

Compounding the problem, Exhibit A shows another window that does not appear to have been included in Streeter's calculations. This window appears to be located to the right of the window depicted in Exhibit 5B, just beyond the sign indicating reserved handicapped parking. Although the photograph was made some time after the date of the violation, and is not claimed to be representative of the window's appearance at the time, the absence of any testimony about its then condition demonstrates still another evidentiary gap that weakens the Department's case.[6]

Finally, Streeter admitted not including in his estimates the extent or percentage of advertising from windows on the First Avenue side of the store. Although the record contains no photographs of these windows, or even any evidence of the existence of any such windows, other than whatever inference can be drawn from Streeter's apparent agreement with counsel that there were such windows, the impression is that still another void in the Department's case has been exposed.

All of this convinces us that, as blatant as the advertising and signage may have been on the windows upon which the Department based its case, there is insufficient evidence that the same or similar conditions prevailed with respect to other windows and doors of the premises to a sufficient extent as to exceed 33 percent coverage of all windows and clear doors. Since we do not read the statute as applying to doors and/or

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At least one of the doors appears in the photograph marked as Exhibit A. A variety of small decal-type emblems cover a portion of the glass.

[6] *There is a suggestion in one of the questions appellant's counsel directed to Streeter that this window is outside a storage room. Since the statute does not specify that only certain windows are to be considered, we are inclined to think it must be included in any percentage calculation.*

windows on an individual basis, we conclude that the Department failed to prove a violation of the statute.

The Department suspended appellant's license for 10 days. This was based, at the time of the Department's decision, on two distinct violations, one of which we now reverse.

Appellant has not challenged the Department's determination that appellant was in violation of the code provision requiring a retail off-sale clerk's acknowledgment on the premises. Consequently, our determination that the advertising and signage violation be reversed is not the end of the case.

The ALJ found that the clerk's acknowledgment existed, but was in appellant's counsel's office, and considered this mitigation. However, the order did not indicate how much of the 10-day suspension, if any, was attributable to this violation, and how much to the apparently more serious window coverage matter. It would seem, therefore, that the appropriate thing for this Board to do is to affirm the decision as it relates to the clerk acknowledgment violation, reverse as to the advertising and signage violation, and order the case remanded to the Department for reconsideration of the penalty.

ORDER

The decision of the Department is affirmed as to its finding of a violation of Business and Professions Code §25658.4 (retail clerk acknowledgment), reversed as to its finding of a violation of Business and Professions Code §25612, subdivision (c)(7) (window signage), and remanded to the Department for reconsideration of the penalty.[7]

[7] *This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §23090.7 of said code.*

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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 §23090 et seq.