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

AB-8088
File: 21-200859 Reg: 02052600

AMAL VICTOR FADAYEL and VICTOR ISA FADAYEL, dba Jessie's Market
3380-A 20th Street, San Francisco, CA 94110,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Mary-Margaret Anderson

Appeals Board Hearing: November 13, 2003
San Francisco, CA

ISSUED JANUARY 2, 2004

Amal Victor Fadayel and Victor Isa Fadayel, doing business as Jessie's Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license for appellant Victor Isa Fadayel, on six occasions, purchasing goods that he believed to be stolen, and, on November 30, 2001, pleading nolo contendere to a charge of attempted receiving of stolen property, violations of Business and Professions Code section 24200, subdivisions (a), (b), and (d), and Penal Code sections 664 and 496.

Appearances on appeal include appellants Amal Victor Fadayel and Victor Isa Fadayel, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

---

[1]The decision of the Department, dated February 6, 2003, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on December 30, 1987. On March 25, 2002, the Department filed a five-count accusation against appellants charging that, on various dates in 2001, appellant Victor Isa Fadayel (appellant) purchased goods believing them to be stolen. An amended accusation was filed on May 23, 2002, adding a sixth count charging that, on November 30, 2001, appellant pled nolo contendere to a charge of attempted receipt of stolen property.

At the administrative hearing held on August 8 and November 19, 2002, documentary evidence was received, and testimony concerning the violation charged was presented by San Francisco police officers James Lewis and Eric Olsen and by appellant. At the hearing, appellant stipulated that he pled nolo contendere as stated in the accusation.

Officer Lewis, acting undercover, offered to sell appellant cigarettes and/or liquor, telling appellant that he had "taken" or "ripped" or "ripped off" the items. The first four sales were relatively small: five cartons of Marlboro cigarettes for $75; three cartons of cigarettes and two bottles of Glenlivet for $35; two cartons of cigarettes and two bottles of Glenlivet for $40; and one carton of cigarettes, one bottle of Glenlivet, and six packages of AA batteries for $30. The final sale, however, consisted of five cases of Marlboro cigarettes, five cases of Hennessy, and three cases of Patron Tequila, with a total value of about $5,000, for which appellant paid Lewis $2,000.

Appellant testified that he gave money to Lewis in exchange for the items the first four times out of kindness, because Lewis needed the money. In the fifth sale, he said he bought the items because he was told that Lewis bought them at an auction. He denied knowing that "ripped" and "ripped off" are slang for "stolen."

Following the hearing, the Department issued its decision which determined that the charges of the accusation were proven. Appellants have filed a timely appeal, contending that the penalty of revocation is excessive and an abuse of the Department's discretion.

DISCUSSION

Appellants contend the penalty of revocation is excessive considering the circumstances of this case. According to appellants, the Department should have taken into consideration that Victor Isa Fadayel pled nolo contendere to a single misdemeanor count. They argue that the reduction of the criminal charges (from five felony counts to one misdemeanor) is "evidence that this was not an egregious act" by appellant.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. *(Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287 [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 Beverage Control Appeals Bd.* (1965) 62 Cal.App. 2d 589, 594 [43 Cal.Rptr. 633].)

In *Janal's Entertainment, Inc.* (2000) AB-7385, the Board noted that, "because the standard of proof in a criminal matter – beyond a reasonable doubt – is higher than the preponderance-of-the-evidence standard that is applicable in a license disciplinary matter," a dismissal or acquittal in a related criminal case is not "relevant evidence" and

is properly excluded from the record. (See also, *Gikas v. Zolin* (1993) 6 Cal.4th 841 [25 Cal.Rptr. 2d 500]; *Cornell v. Reilly* (1954) 127 Cal.App.2d 178 [273 P.2d 572] [acquittal in criminal case not dispositive in administrative disciplinary proceeding based on same underlying conduct].) "The result of the criminal charge is not persuasive for the same reason that it is not binding: the standard of proof in the criminal case is different from that in the disciplinary proceeding." (*Yankee Doodles, Limited* (2003) AB-7933.) If an acquittal is not relevant or persuasive, we see no reason that a plea-bargained reduction in the criminal charges should be.

Regardless of what may have happened in the criminal case against appellant, the Department found that all five of the sales alleged in the accusation occurred as charged. In the final sale, appellant paid an undercover police officer $2,000 for about $5,000 worth of cigarettes and liquor that the undercover officer told him had been "ripped off" from Webvan. This qualifies, we think, as an egregious act.

In *Rice v. Alcoholic Beverage Control Appeals Bd.* (1979) 89 Cal.App.3d 30 [152 Cal.Rptr.285], the court observed that “moral turpitude is inherent in crimes involving fraudulent intent, intentional dishonesty for purposes of personal gain or other corrupt purpose.” Appellants do not deny that the attempted purchase of stolen goods is an offense involving moral turpitude. The Department, in its protection of public welfare and morals, has an interest in removing licensees who have demonstrated their dishonesty, as in this case, by willingly and knowingly purchasing goods which they believe to be stolen.

In addition, appellant's plea of nolo contendere to an offense involving moral turpitude is an additional, independent basis for imposing a penalty. (Bus. & Prof. Code, § 24200, subd. (d).)

The ALJ included under her Legal Conclusions, a "Discussion and rationale for penalty," in which she stated that appellant:

> fabricated reasons for his conduct and testified falsely under oath. There is no basis in reason to believe that Respondent will follow the laws and regulations required of licensees in the future. [¶] Revocation is the only appropriate penalty.

Under the circumstances, we cannot say that the Department abused its discretion in revoking appellants' license.

ORDER

The decision of the Department is affirmed.[2]

TED HUNT, CHAIRMAN
KAREN GETMAN, 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.

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.