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

AB-8089a
File: 21-352366 Reg: 02052816

GYEONG HWA YUN dba Young Ellis Produce and Grocery
396-398 Ellis Street, San Francisco, CA 94102,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: None

Appeals Board Hearing: October 7, 2004
San Francisco, CA

ISSUED DECEMBER 9, 2004

Gyeong Hwa Yun, doing business as Young Ellis Produce and Grocery (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked her license for her employees having purchased merchandise believed to have been stolen, in violation of Penal Code section 496. This is the second appeal in this matter, and follows the Department's reimposition of an order of revocation after the Department's original order of revocation was reversed by the Appeals Board.

Appearances on appeal include appellant Gyeong Hwa Yun , appearing through her counsel, Richard D. Warren, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

PROCEDURAL HISTORY

The decision of the Department from which this appeal is taken followed a

[1] The decision of the Department Following Appeals Board Decision, dated April 23, 2004, is set forth in the Appendix.

decision of the Appeals Board in *Gyeong Hwa Yun* (February 13, 2004) AB-8089, which reversed a Department order of revocation. The issue in the original appeal was whether the Department had abused its discretion in ordering outright revocation even though there was no evidence that the licensee was involved in the purchases of purportedly stolen property. In ordering the reversal, the Board stated:

> There is no question but that appellant must be held responsible for the acts of her employees. Such vicarious responsibility is well settled by case law. (*Morell v. Department of Alcoholic Beverage Control* (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; *Harris v. Alcoholic Beverage Control Appeals Board* (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; and *Mack v. Department of Alcoholic Beverage Control* (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633].)
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> That being said, the fact is that the Department ordinarily does distinguish, in its choice of appropriate discipline, between acts committed directly by a licensee and acts of employees which are imputed to a licensee. In this case, the only substantial evidence is that appellant was not personally involved, so it cannot be said that her conduct involved moral turpitude. This persuades us that the Department should reconsider its order.

Appellant now contends that the order reimposing the penalty of revocation is an abuse of discretion.

DISCUSSION

I

In its decision from which this appeal is taken, the Department states that it "is not relying on any current guidelines or policies in formulating appropriate discipline," but is relying on its Constitutional grant of authority and the facts in the record. The decision then recites that the licensee stipulated that her employees bought property believed to have been stolen, a crime necessarily involving moral turpitude. There were purchases on nine occasions over a seven week period. The decision then states:

> On three (3) of these nine (9) occasions, the licensee's employees purchased alcoholic beverages. [See Factual Findings 1-9.] On several of these occasions, the licensee was on the premises and witnessed her clerk purchase the

> purportedly stolen property from the undercover officer. The undercover officer was carrying the purportedly stolen property in a black canvas bag.

We do not read the Department's decision as contesting the Board's determination that there was no substantial evidence that appellant was personally involved in the illegal transactions. Although the decision recites that the licensee was on the premises and witnessed her clerk purchasing the purportedly stolen property, neither it nor the original decision included a finding that appellant knew the property was purportedly stolen. Appellant may have unknowingly witnessed purchases of property, but there was no substantial evidence she knew it was stolen. We do not think the addition of a "black canvas bag" adds anything to the Department's case against appellant.

The Department states in its decision that the Board cited no authority for the proposition that the "Department ordinarily does distinguish in its choice of appropriate discipline between acts committed directly by a licensee and acts of employees which are imputed to a licensee." While that is true, it by no means suggests that the Board lacked authority for its statement.

The penalty guidelines in the Department's "L Manual" set forth a schedule of penalties recommended for various violations. The schedule has remained essentially unchanged for many years. And, in recent years, it has been the subject of repeated attack on the grounds that the schedule is an illegal underground regulation. The recommended penalty for receiving stolen property, the violation charged in the original proceeding, provides for outright revocation for the receipt of stolen property by the licensee on the premises, but revocation stayed for three years and a 20-day

suspension for receipt of stolen property by an employee on the premises.[2]

The Department acknowledges that "the Board concluded that since the licensee's conduct did not involve moral turpitude, they were persuaded the Department should reconsider its order of revocation," but adds that "the Board did not conclude the Department had abused its discretion in assessing discipline." The Department has read the Board's decision too narrowly. What the Board said, in so many words, was that the Department abused its discretion in ordering outright revocation rather than the lesser penalty of a stayed revocation accompanied by a suspension.

We do not question the Department's ordinarily wide discretion in its choice of penalty. What we do question is whether it may, in this case, at least without explanation, ignore its own policies and practice when ordering the most severe penalty in its arsenal.[3] As the Supreme Court has said about the Department's disciplinary power:

> Even within its legal limits the power is not unbridled. ... It is ... a legal discretion to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede the ends of substantial justice.

(*Walsh v. Kirby* (1974) 13 Cal.3d 95, 103 [118 Cal.Rptr. 1].)

The Department has treated this case as if the appellant knew what her employees were doing, even though it has not taken direct issue with the Board's

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[2] This same penalty recommendation is set forth in the Department's proposed emergency regulation which would add a Section 144, entitled "Penalty Guidelines" to Title 4, California Code of Regulations, the formal adoption of which would put an end to claims asserting that penalties imposed by the Department were imposed pursuant to an illegal underground regulation.

[3] It should be noted that in *McFarlane v. Dept. Alcoholic Bev. Control* (1958) 51 Cal.2d 84, 91 [330 P.2d 769), the case cited for its contention that a revocation penalty is not an abuse of discretion, the licensee himself had committed the crime upon which the order was based.

determination that there was no substantial evidence of any guilty knowledge on appellant's part.

The Department's brief would have the Board believe that the Department never had a penalty guideline such as one which treats the purchase of stolen property by an employee more leniently than when the licensee is the knowing purchaser. This is simply untrue. We think the Department's failure to offer a satisfactory explanation why appellant's case is treated differently than the norm renders its order an abuse of discretion.

ORDER

The decision of the Department is reversed, and the case is remanded to the Department for further proceedings as may be appropriate in light of our comments herein.[4]

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4] 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.