

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

AB-8108

File: 20-380586 Reg: 02053851

JASWINDER GHOTRA and NIRMAL SINGH dba Lilac Market
1377 South Lilac Avenue, Rialto, CA 92376,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 2, 2003
Los Angeles, CA

ISSUED FEBRUARY 11, 2004

Jaswinder Ghotra and Nirmal Singh, doing business as Lilac Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their license for having bought or received property represented as having been stolen, a violation of Penal Code sections 664 and 496, subdivision (a).

Appearances on appeal include appellants Jaswinder Ghotra and Nirmal Singh, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 1, 2001. On October 15, 2002, the Department instituted an accusation against appellants charging

¹The decision of the Department, dated February 27, 2003, is set forth in the appendix.

that on March 28 and April 11, 2002, they purchased cigarettes represented to them as having been stolen, in violation of Penal Code sections 664 and 496, subdivision (a).

An administrative hearing was held on January 15, 2003. At that hearing, San Bernardino County sheriff's detective Robert Pleasant testified that on March 28, 2002, he sold 19 cartons of cigarettes to appellant Singh for \$200, and on April 11, 2002, he sold 90 cartons of cigarettes to Singh for \$900. Pleasant testified that he told Singh on March 28 that the cigarettes had been stolen, and that in a telephone conversation preceding the April 11 transaction he told Singh additional cigarettes could be stolen. Pleasant could not recall whether he stated on April 11 that the cigarettes being sold at that time had been stolen. Pleasant testified that the normal price for a carton of cigarettes was approximately \$30. The cigarettes had been secretly marked with an ultra violet pen by Department investigator Dawn Richardson, and were seized from appellant's store after the April 11 transaction by Department investigator Van Putnam.

Detective Pleasant testified that he wore a "wire" that permitted his conversations with Singh to be monitored. Department investigator Brad Beach testified that he monitored the conversations on both March 28 and April 11, and that he recalled hearing Pleasant say on March 28 that the cigarettes had been stolen, but could not recall hearing him say that on April 11.

No one testified on appellants' behalf.

Subsequent to the hearing, the Department issued its decision which determined that the charges of the accusation had been established, and ordered appellants' license revoked.

Appellants thereafter filed a timely appeal, and challenge the order of revocation as one based upon guidelines which were never properly adopted pursuant to the

provisions of the Administrative Procedure Act.² The Department contends that appellants did not raise the issue at the administrative hearing, so are precluded from raising it for the first time on appeal.

DISCUSSION

Appellants contend that, because they did not know of the existence of the Department's "General Guidelines" at the time of the hearing on this matter, they are now entitled to raise the issue on appeal because "it does not involve adjudication of facts but simply an application of the guidelines previously kept secret by the Department." (App.Br., page 2.)

It may well be true that appellants were unaware of the Department's guidelines, but it is a stretch to say the guidelines were kept secret by the Department. The Department has utilized guidelines in one form or another for many years. (See *Harris v. Alcoholic Beverage Control Appeals Board* (1965) 62 cal.2d 589, 595 [43 Cal.Rptr. 633].) We have no doubt their existence was well known to those practitioners practicing ABC law on a regular basis.³

But the issue is not really whether such guidelines have been kept secret. The

² Government Code section 11425.50, subdivision (e), provides as follows:

A penalty may not be based on a guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule subject to Chapter 3.5 (commencing with Section 11340) unless it has been adopted as a regulation pursuant to Chapter 3.5 (commencing with Section 11340).

³ The attorneys who are representing appellants in this appeal routinely include in a special notice of defense a contention to the effect that any penalty imposed by the Department will have been based upon an unlawful underground regulation. These attorneys did not represent appellants at the administrative hearing, and the attorney who did represent them did not raise the issue at that hearing, and in the Notice of Appeal that he filed on their behalf contended only that the decision was not supported by substantial evidence.

issue is whether this Board can conclude, from the record before it, that the penalty which was imposed was based upon those guidelines.

Department counsel argued at length in support of his recommendation that appellants' license be revoked. He stressed the serious nature of their conduct, stating, in part: "There is nothing other than revocation that is acceptable to the Department based on the seriousness of the allegations involved here." It is on the basis of this comment that appellants assume Department counsel was "apparently" acting in accordance with the Department's internal guidelines.

Department counsel made no reference to any guidelines. Instead, his comments were focused entirely on appellants' conduct, and the perceived need for license revocation to protect the public.

The Department derives its power to deny, suspend, or revoke an alcoholic beverage license directly from article XX, section 22, of the California Constitution:

The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude.

(See *Martin v. Alcoholic Beverage Control Appeals Board* (1959) 52 Cal.2d 287

[341P.2d 296, 299]: "viewing the propriety of the penalty as a matter vested in the department under our constitutional provision (art. XX, §22), and considering the rule that its determination of the penalty will not be disturbed unless there is a clear abuse of discretion")

We see nothing in the record that persuades us that the order in this case was based on the Department's guidelines. The ALJ made no reference to any guidelines, and neither Department counsel nor defense counsel suggested to the ALJ that

guidelines controlled his decision. Given the acts of dishonesty established by the evidence, revocation would seem well within the discretion vested in the Department by the Constitution.

ORDER

The decision of the Department is affirmed.⁴

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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.