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

AB-8159a
File: 21-339987 Reg: 03054577

JAMES NUON, dba Circle D Liquors
2630 Geer Road, Turlock, CA 95832,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jerry Mitchell

Appeals Board Hearing: January 5, 2006
San Francisco, CA

ISSUED MAY 4, 2006

James Nuon, doing business as Circle D Liquors (appellant), appeals from a decision of the Department of Alcoholic Beverage Control after remand[1] which revoked his off-sale beer and wine license for his employee's offer to sell, and sale of, controlled substances and drug paraphernalia, in violation of Business and Professions Code 24200.5, subdivision (a), and Health and Safety Code section 11364.7.

Appearances on appeal include appellant James Nuon, appearing through his 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 after remand, dated April 15, 2005, and the original decision of the Department, dated July 17, 2003, are set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

The Department charged appellant with "knowingly permit[ting]" his employee, Kipp Murphy, to sell narcotics in the licensed premises, in violation of section 24200.5, subdivision (a), of the Business and Professions Code,[2] on various dates in November 2002. He was also charged with furnishing, through Murphy, drug paraphernalia, in violation of the Health and Safety Code.

An administrative hearing was held and the Department issued its decision which found that Murphy made the narcotics and drug paraphernalia sales as alleged, that grounds existed for discipline, and that the license should be revoked. Appellant appealed and the Appeals Board reversed the decision because there was no finding that appellant had "knowingly permitted" the violations, nor a determination that appellant had violated section 24200.5, as charged in the accusation.

After the Board reversed the Department's decision, the Department remanded the matter to the administrative law judge (ALJ) to conduct whatever further proceedings he thought necessary to address the issues referred to in the Appeals Board's decision. After hearing argument from both parties, the ALJ submitted a Proposed Decision After Remand adopting the Factual Findings and Order of the original proposed decision, but substituting new Legal Conclusions.

The Department adopted this new proposed decision as its decision. The new decision determined that grounds existed for discipline under the statutes charged in the accusation. Paragraph 5 of the new Legal Conclusions states:

> 5. In determining the appropriate order to be made herein, consideration was given to the fact that there has been no recent license

---

[2]Unless otherwise indicated, statutory references in this opinion are to the Business and Professions Code.

> discipline and the fact there was no evidence that respondent had actual knowledge of his employee's illegal activities. However, consideration was also given to the language of Business and Professions Code Section 24200.5(a), which provides, in relevant part, that the department ***shall*** revoke a license if a retail licensee has knowingly permitted the illegal sale, or negotiations for such sales, of controlled substances or dangerous drugs upon his licensed premises. That section does not distinguish between actual and imputed knowledge.

Appellant has appealed again, contending that the Department violated his right to due process by an ex parte communication with the decision maker, and the Department violated the law by reimposing the penalty of revocation.

DISCUSSION

Appellant asserts that the penalty of revocation was "re-imposed in violation of state law," but fails to inform the Board what state law the Department's action violates.[3] He argues that the ALJ erroneously believed he had no option but to impose outright revocation in this matter because section 24200.5 states that the Department "*shall* revoke a license" under the circumstances described in the statute. In fact, appellant contends, other penalties are available, as stated in rule 144 (4 Cal. Code Regs., § 144). Because the ALJ found that appellant was not aware of his employee's illegal activities, appellant argues, the Department should have taken into consideration the distinction between actual knowledge and imputed knowledge when deciding the degree of discipline to impose.

---

[3]Appellant states in his brief that, "At this time, Appellant does not concede that the Department had jurisdiction to proceed at all and [*sic*] following the August 19, 2004 outright reversal without remand." In *Circle K Stores, Inc.* (1999) AB-7080a, the appellant (represented by the same counsel as the present appellant) argued that when the Board simply reverses a Department decision, the Department has no jurisdiction to take any further action; its only option is to petition an appellate court for a writ of review. The Board rejected this argument, holding, based on extensive case law, that "the Department does have the power to conduct further proceedings, so long as its action is not inconsistent with the Board's decision." We see no need to address this ambiguous reference to a rejected argument.

Although not explicitly stated as such, appellant's contention appears to be a variation on the theme of excessive penalty. The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [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, 291 [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. 2d 589, 594 [43 Cal.Rptr. 633].)

The Department is authorized by the California Constitution to exercise its discretion whether to suspend or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the continuance of such license would be contrary to public welfare or morals. The Department's exercise of discretion "is not absolute but must be exercised in accordance with the law, and the provision that it may revoke a license 'for good cause' necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare and morals." (*Martin v. Alcoholic Beverage Control Appeals Board* (1961) 55 Cal.2d 867, 876 [13 Cal.Rptr. 513] quoting from *Weiss v. State* Board of Equalization (1953) 40 Cal.2d 772, 775.)

Rule 144, which comprises the Department's penalty guidelines, begins with the Department's "Policy Statement":

> It is the policy of the Department to impose administrative, non-punitive penalties in a consistent and uniform manner with the goal of encouraging and reinforcing voluntary compliance with the law.

At the beginning of the schedule of penalties is a note: "For purposes of this schedule of penalties, 'revocation' includes any period of stayed revocation as well as outright revocation of the license."

While in the vast majority of these types of violations there is little, if any, cause to question the penalty, this matter appears to the Board to be different. In the usual case involving subdivision (a) of section 24200.5, there have been findings of either knowledge by the license, transactions so blatant or continuous that the licensee's knowledge could be inferred, or sales made by an employee to whom the licensee had delegated significant authority over the operation of the premises. (See, e.g., *Ewdish* (2005) AB-8312 (drug sales by licensee's brother; over 100 baggies of cocaine and methamphetamine found); *Bertolucci and Holmes* (2002) AB-7840 ("blatant" sales made with "tacit knowledge and consent of the bartenders" [stayed revocation imposed]); *Inman* (2002) AB-7804 (denials of knowledge not credible; "continuous ease of obtaining" drugs); *Cianciola* (2002) AB-7382 (drugs sold by bartender left in charge and by patrons [revocation stayed to allow sale of license]); *Gutierrez* (2000) AB-7188 (employees turned "blind eye" to "narcotics convenience store" in premises).) Here, the Department's decision makes an explicit finding that the licensee had no actual knowledge of the illegal transactions. There was no finding that the three sales made during the two-week undercover operation were open or obvious or that they were made by an employee who was, either actually or ostensibly, in charge.

While we acknowledge that the Department has a great deal of discretion when it comes to determining what is an appropriate penalty, license revocation under the

circumstances presented in this case does nothing to protect the welfare and morals of the citizens of California. Imposing outright revocation in this case appears to be arbitrary, punitive, and unreasonable, and to violate the policy statement in rule 144. For these reasons, we believe the penalty of revocation was an abuse of discretion, and that some lesser penalty is more appropriate.

II

Appellant asserts the Department violated its right to procedural due process when the attorney representing the Department at the hearing before the ALJ provided a document called a Report of Hearing (the report) to the Department's decision maker (or the decision maker's advisor) after the hearing, but before the Department issued its decision. Appellant also filed a Motion to Augment Record (the motion), requesting that the report provided to the Department's decision maker be made part of the record.

The Appeals Board discussed these issues at some length, and reversed the Department's decisions, in three appeals in which the appellants filed motions and alleged due process violations virtually identical to the motions and issues raised in the present case: *Quintanar* (AB-8099), *KV Mart* (AB-8121), and *Kim* (AB-8148), all issued in August 2004 (referred to in this decision collectively as "*Quintanar*" or "the *Quintanar* cases").[4]

The Board held that the Department violated due process by not separating and screening the prosecuting attorneys from any Department attorney, such as the chief

[4]The Department filed petitions for review with the Second District Court of Appeal in each of these cases. The cases were consolidated and the court affirmed the Board's decisions. In response to the Department's petition for rehearing, the court modified its opinion and denied rehearing. The cases are now pending in the California Supreme Court and, pursuant to Rule of Court 976, are not citable. *(Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 127 Cal.App.4th 615, review granted July 13, 2005, S133331.)

counsel, who acted as the decision maker or advisor to the decision maker. A specific instance of the due process violation occurs when the Department's prosecuting attorney acts as an advisor to the Department's decision maker by providing the report before the Department's decision is made.

The Board's decision that a due process violation occurred was based primarily on appellate court decisions in *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575 [5 Cal.Rptr.2d 196] (*Howitt*) and *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81 [133 Cal.Rptr.2d 234], which held that overlapping, or "conflating," the roles of advocate and decision maker violates due process by depriving a litigant of his or her right to an objective and unbiased decision maker, or at the very least, creating "the substantial risk that the advice given to the decision maker, 'perhaps unconsciously' . . . will be skewed." (*Howitt*, *supra*, at p. 1585.)

Although the legal issue in the present appeal is the same as that in the *Quintanar* cases, there is a factual difference that we believe requires a different result. In each of the three cases involved in *Quintanar*, the ALJ had submitted a proposed decision to the Department that dismissed the accusation. In each case, the Department rejected the ALJ's proposed decision and issued its own decision with new findings and determinations, imposing suspensions in all three cases. In the present appeal, however, the Department adopted the proposed decision of the ALJ in its entirety, without additions or changes.

Where, as here, there has been no change in the proposed decision of the ALJ, we cannot say, without more, that there has been a violation of due process. Any communication between the advocate and the advisor or the decision maker after the hearing did not affect the due process accorded appellant at the hearing. Appellant has not alleged that the proposed decision of the ALJ, which the Department adopted as its

own, was affected by any post-hearing occurrence. If the ALJ was an impartial adjudicator (and appellant has not argued to the contrary), and it was the ALJ's decision alone that determined whether the accusation would be sustained and what discipline, if any, should be imposed upon appellant, it appears to us that appellant received the process that was due to it in this administrative proceeding. Under these circumstances, and with the potential for an inordinate number of cases in which this due process argument could possibly be asserted, this Board cannot expand the holding in *Quintanar* beyond its own factual situation.

Under the circumstances of this case and our disposition of the due process issue raised, appellant is not entitled to augmentation of the record. With no change in the ALJ's proposed decision upon its adoption by the Department, we see no relevant purpose that would be served by the production of any post-hearing document. Appellant's motion is denied.

ORDER

The decision of the Department is reversed, and the matter is remanded for reconsideration of the penalty.[5]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

---

[5]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.