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

AB-8316
File: 21-388040 Reg: 03054466

FADI JARRAH and GEORGE JARRAH, dba Toluca Mart
4310 West Riverside Drive, Burbank, CA 91505,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: September 1, 2005
Los Angeles, CA

ISSUED: NOVEMBER 9, 2005

Fadi Jarrah and George Jarrah, doing business as Toluca Mart (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 25 days for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Fadi Jarrah and George Jarrah, appearing through their counsel, Jeffrey S. Weiss, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

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[1]The decision of the Department, dated June 24, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on January 14, 1999. The Department filed an accusation against appellants charging the sale on November 8, 2002, of an alcoholic beverage to a minor, and appellants filed a notice of defense. Appellants did not appear in person or by a representative at the hearing held on May 12, 2004, even though they had been properly served with notice. The hearing proceeded as a default, oral and documentary evidence was introduced, and the matter was submitted for decision. Subsequently, on June 24, 2004, the Department issued its decision which determined that the violation had occurred as charged.

Appellants' newly retained counsel, Jeffrey Weiss, filed a motion for a new hearing or for reconsideration on July 8, 2004. The Department issued an order denying reconsideration. Appellants filed this appeal, contending that they adequately established good cause and a new trial should have been granted.

DISCUSSION

Appellants contend that they showed good cause for a new trial and the Department denied their right to procedural due process by not granting a new trial. They also charge that the Department has not explained why the request for reconsideration was denied, and has never addressed the issue of a new hearing.

In support of their petition for a new trial, appellants submitted declarations of their counsel, Jeffrey S. Weiss, and of co-appellant George Jarrah. In his declaration, Jarrah states that Ray Santillan[2] was retained to represent appellants with regard to the November 2002 sale-to-minor violation. Santillan had represented appellants in other

[2]Neither Jarrah nor his attorney refer to Santillan as an attorney, and he does not appear as a member of the State Bar (<http://www.calbar.ca.gov/state/calbar/calbar_home.jsp> [as of Aug. 5, 2005]), so we assume that Santillan is not an attorney.

Department disciplinary matters. After meeting with Department representatives, Santillan told Jarrah that the Department would send appellants only a warning letter. However, in February 2003, the Department filed an accusation. Jarrah talked to Santillan, who assured him it had to be a mistake and they would receive only a warning letter. Jarrah talked to Santillan again in May 2003, and was again reassured that only a warning would be issued.

In November 2003, appellants received additional documents informing them that an accusation had been filed with regard to the November 2002 violation. Jarrah was able to talk to Santillan in December 2003, and Santillan said he would go to the Department and "take care of the matter." Jarrah decided he should sign the Notice of Defense "just to be on the safe side" and mailed it on December 3, 2003. In February or early March 2004, Department investigator Tsang spoke with Jarrah. Tsang told Jarrah there was a problem with paperwork that Santillan had sent in and the Department could suspend appellants' license. Tsang also informed Jarrah that a hearing was set for May 12, 2004, and sent Jarrah a copy of the hearing notice. Jarrah was finally able to contact Santillan in April 2004. Santillan told Jarrah he was having personal problems and had not followed through the way he should have, but that he would go to the Department's district administrator and get the hearing cancelled. Jarrah questioned whether he should trust Santillan, but Santillan convinced Jarrah he knew what he was doing. A couple of weeks later, Santillan told Jarrah the hearing was cancelled, there would be only a warning, and Jarrah did not have to worry about it anymore. In June 2004, Jarrah received the Department's decision ordering appellants' license suspended for 25 days. Santillan did not return any of Jarrah's calls. Jarrah then retained Weiss to represent appellants.

Jarrah stated that, had he known Santillan was being untruthful, he would have attended the hearing since he had always believed they had a defense to the sale-to-minor charge.

Government Code section 11520 provides that where a licensee fails to appear at the hearing, "the agency may take action based upon the respondent's express admissions or upon other evidence (§ 11520, subd. (a)); even when the licensee defaults, "the agency or the administrative law judge, before a proposed decision is issued, has discretion to grant a hearing on reasonable notice to the parties" (§ 11520, subd. (b)); and:

> (c) Within seven days after service on the respondent of a decision based on the respondent's default, the respondent may serve a written motion requesting that the decision be vacated and stating the grounds relied on. The agency in its discretion may vacate the decision and grant a hearing on a showing of good cause. As used in this subdivision, good cause includes, but is not limited to, any of the following:
> (1) Failure of the person to receive notice served pursuant to Section 11505.
> (2) Mistake, inadvertence, surprise, or excusable neglect.

Government Code section 11521 provides that the agency "may order a reconsideration of all or part of the case," but "[t]he power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to a respondent, or on the date set by the agency itself as the effective date of the decision if that date occurs prior to the expiration of the 30-day period."

Under Government Code section 11520, appellants had seven days after being served with the decision to request the Department to vacate the default decision and grant a hearing. The decision was filed on June 24 and appellants' petition for a new hearing was filed on July 8. Appellants did not come within the statutory time limit, and, therefore, the Department did not need to address the request for a new trial.

The statute states that the agency "in its discretion may" grant relief from the default and order a hearing, under certain circumstances. Appellants urge that Jarrah's declaration established good cause based on "mistake, inadvertence, surprise and excusable neglect" and it was an abuse of discretion for the Department not to grant a new hearing. We disagree.

Although "excusable" appears only before the word "neglect," mistake, inadvertence, or surprise must also be excusable to justify relief from a default. (*Conway v. Municipal Court* (1980) 107 Cal.App.3d 1009, 1017 [166 Cal.Rptr. 246].)[3] To be excusable, the act or omission must have been that of a reasonably prudent person under the same circumstances. (*Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1602-1603 [265 Cal.Rptr. 719], quoting *Transit Ads, Inc. v. Tanner Motor Livery, Ltd*. (1969) 270 Cal.App.2d 275, 279 [75 Cal.Rptr. 848].)

Even if the Department had considered appellants' request for a new hearing, it would not have abused its discretion in denying appellants' request, based on Jarrah's declaration. Reasonable minds might differ as to whether Jarrah was prudent in trusting Santillan. However, given the indications from the Department, through its

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[3]Case law regarding Government Code section 11520 is very sparse, but we use the analogous situations which arise in civil law under section 473 of the Code of Civil Procedure for guidance. Section 473 provides relief from default judgments in subdivision (b): "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her *mistake, inadvertence, surprise, or excusable neglect*." (Italics added.) Because section 473 uses the same language as that with which we are concerned here and is designed to provide the same type of relief, the case law defining and explaining this section of the Code of Civil Procedure is helpful and appropriate to use in defining and explaining subdivision (c)(2) of Government Code section 11520. (Cf. *Evans v. Dept. of Motor Vehicles* (1994) 21 Cal.App.4th 958, 973 [26 Cal.Rptr.2d 460] [requirements for relief from default due to lack of actual notice; Gov. Code §§ 11506, 11521; Code Civ. Proc. § 473.5].)

notices and its investigator, and even from Santillan himself, that the matter was not being "taken care of" appropriately, there is clearly substantial evidence to support a decision that appellants' failure to verify the status of the matter with the Department directly, was "inexcusable neglect," which does not provide a basis for relief.

Appellants' petition was within the time limit to request reconsideration pursuant to Government Code section 11521, and the Department accepted it as such. Reconsideration is within the discretion of the Department, and we cannot say, on the facts presented, that the Department abused its discretion when it denied the request for reconsideration.

ORDER

The decision of the Department is affirmed.[4]

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

[4]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.