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

AB-8589
File: 21-170270 Reg: 05061164

DIETER H. DUBBERKE, INC. dba Yosemite Liquor
5004 Highway 140, Suite A, Mariposa, CA 95338,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: July 12, 2007
San Francisco, CA

ISSUED NOVEMBER 7, 2007

Dieter H. Dubberke, Inc., doing business as Yosemite Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its off-sale general license for 25 days, 10 days of which were conditionally stayed, subject to one year of discipline-free operation, for its clerk having sold a 12-pack of Budweiser beer to Nathan Wass, a 19-year-old minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Dieter H. Dubberke, Inc,, appearing through its owner, Dieter H. Dubberke, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

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[1]The decision of the Department, dated August 17, 2006 , is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on June 28, 1985. Thereafter, the Department instituted an accusation against appellant charging that, through an employee, appellant had made an unlawful sale of an alcoholic beverage to a minor on August 27, 2005. The accusation also alleged a prior violation on February 15, 2005.

An administrative hearing was held on June 7, 2006, at which time oral and documentary evidence was received. At that hearing, the Department presented the testimony of Nathan Wass, the minor decoy, and Deputy Sheriff Christopher Ramirez. Dieter J. Dubberke testified on behalf of appellant.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends that it and other licensees in Mariposa County were subjected to an excessive number of decoy operations, thus resulting in discriminatory prosecution.

DISCUSSION

Appellant asserts in its brief and in oral argument that it and other Mariposa County off-sale licensees were the targets of four separate decoy operations within a period of approximately 10 months. Two of these incidents resulted in violations. Appellant's license was suspended for ten days, all stayed, for a initial sale-to-minor-decoy violation on February 15, 2005, and suspended for 25 days, 10 of which were stayed, for a second violation on August 27, 2005 (the matter now on appeal).

Dubberke represented appellant corporation at the administrative hearing. He

presented no witnesses, other than himself. His testimony consisted of a summary of a two and one-half page statement (Exhibit A) which the administrative law judge (ALJ) agreed to consider subject to the Department's hearsay and lack of foundation objections. According to Dubberke, the nine off-sale licensees of Mariposa County were subjected to an excessive number of decoy operations, out of proportion to the number of such operations in cities, such as San Francisco, where there were far larger numbers of licensees.

Although Dubberke argued at the administrative hearing that his store was visited monthly by decoys, he provided no proof that was the case. In this appeal, appellant asserts only that there were four decoy visits to its store within a ten month period, making it the victim of selective and discriminatory enforcement.[2]

Appellant's brief sets forth what purports to be an informal survey Dubberke conducted in which he visited 12 licensees in Fresno County and Merced County and ascertained that none of them had been subjected to the same number of decoy operations as his store.

None of this information was presented at the administrative hearing. Appellant's brief states that Dubberke was unfamiliar with the requirements of a hearing, and acknowledges that his testimony at the hearing was hearsay and not factual. However, appellant now claims, its brief "supplies the evidence which will

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[2] Appellant has attached to its brief two letters from the Mariposa County Sheriff, congratulating it for successfully preventing a sale to a minor decoy on January 15, 2005, and October 21, 2005. These letters are not part of the administrative hearing record. At best, then, appellant has shown that decoy operations were conducted in January, February, August, and October 2005.

enable the Department to reconsider and to correct its earlier decision."

This appeal suffers from a number of fatal defects. First, appellant is not entitled to a trial de novo before the Appeals Board. The Appeals Board, like an appellate court, may not reweigh the evidence or exercise independent judgment to overturn the Department's findings. Dubberke has not challenged the factual findings that his employee sold an alcoholic beverage to a minor.

Appellant's claim that its licensed premises and others in Mariposa County were subjected to discriminatory and selective enforcement was factually unsupported at the hearing. The survey evidence it now presents in its brief is simply more of the same hearsay, and hardly information that could not have been produced at the hearing. Appeals Board Rule 198, which governs the Board's consideration of new evidence, requires, among other things, a showing by way of declaration or affidavit of the substance of the new evidence, its relevancy, and a detailed statement of the reasons such evidence could not, with due diligence, have been presented at the hearing. Appellant has not made such a showing.

Appellant is not excused from the obligations of Rule 198 simply because Dubberke chose to represent his corporation rather than employ an attorney. Appellant was informed by the "Statement to Respondent(s)" appended to the accusation that it was free to retain an attorney, at its own expense, advice that was reiterated in the Notice of Hearing. Appellant chose not to do so. Having made that choice, it was not entitled to any special consideration simply because Dubberke was not an attorney. (See *Griswold v. Department of Alcoholic Beverage Control* (1956) 141 Cal.App.2d 807,

810 [297 P.2d 762]: "Appellants elected to appear in propria persona. By so appearing, they were not entitled to any special privileges.") Our review of the transcript of the hearing, as well as the remarks in the proposed decision, satisfies us that the ALJ accorded appellant substantial leeway in presenting its defenses to the charge of the accusation.

The ALJ relied on *People v. Battin* (1978) 77 Cal.App.3d 635, 666 [143 Cal.Rptr. 731] for the elements essential to proof of discriminatory or selective prosecution, quoting from that court's decision. The court in *Battin*, citing and quoting from earlier cases, held that a defendant must prove that he has been deliberately singled out for prosecution on the basis of some invidious criterion and the prosecution would not have been pursued but for the discriminatory design of the prosecuting authorities. The discrimination must be "intentional and personal," and the burden of proof is on the defendant.

Even accepting for purposes of discussion appellant's contention that decoy operations were conducted in Mariposa County in 2005 on a more frequent basis than in some other California counties, we cannot agree that such proof meets the requirements set forth in *People v. Battin, supra*. There is no proof that a Department grant of funds to the Mariposa County sheriff was for the purpose of targeting appellant's business to the exclusion of all other licensees in that county. Nor is there any proof as to what the sheriff's department might have been required to do by the terms of such grant. At best, what appears is nothing more than active law enforcement that, as one of its consequences, exposed weaknesses in appellant's

efforts to prevent sales of alcoholic beverages to minors. As a result of the violations it incurred, appellant installed a scanning device to assist its clerks in preventing further sales to minors, tightened its policy of asking for proof of legal age, and arranged for additional training for its employees. This is a considerable transition from its previous manner of operation, and, with careful oversight on appellant's part, should minimize the risk of future violations.

ORDER

The decision of the Department is affirmed.[3]

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

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[3] 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.