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

AB-8607
File: 20-403497 Reg: 05061002

KAYO OIL COMPANY, dba Circle K 76 # 2705696
1445 West Channel Islands Boulevard, Oxnard, CA 92022,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: September 6, 2007
Los Angeles, CA

ISSUED DECEMBER 13, 2007

Kayo Oil Company, doing business as Circle K 76 # 2705696 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for appellant's 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 appellant Kayo Oil Company, appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

[1]The decision of the Department, dated August 24, 2006, is set forth in the appendix.

Appellant's off-sale beer and wine license was issued on October 15, 2003. On October 27, 2005, the Department filed an accusation against appellant charging that, on April 1, 2005, appellant's clerk, Jose R. Medina Urrutia (the clerk), sold an alcoholic beverage to 17-year-old Solyvette Martinez. Although not noted in the accusation, Martinez was working as a minor decoy for the Oxnard Police Department at the time.

At the administrative hearing held on June 21, 2006, documentary evidence was received and testimony concerning the sale was presented by Martinez (the decoy), by Oxnard Police officer Luis McArthur, and by appellant's district manager, James Dao.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established.

Appellant has filed an appeal making the following contentions: (1) The Department violated the prohibitions against ex parte communication found in the Administrative Procedure Act; and (2) the Department abused its discretion by not considering mitigation when determining the penalty.[2]

DISCUSSION

I

Appellant contends the Department violated due process and the APA by transmitting a report of hearing, prepared by the Department's advocate at the administrative hearing, to the Department's decision maker after the hearing but before the Department issued its decision, citing the California Supreme Court's holding in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals*

[2]Appellant also filed a motion asking the Board to augment the record with any Report of Hearing for this case in the Department's file. Our decision regarding ex parte communication makes augmentation unnecessary, and the motion is denied.

Board (2006) 40 Cal.4th 1 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*). Appellant argues that this violation of the APA is ipso facto a violation of due process. Due process was also violated, appellant asserts, because the Department's attorney assumed the roles of both advocate and advisor to the decision maker.[3]

We agree with appellant that transmission of a report of hearing to the Department's decision maker is a violation of the APA. This was the clear holding of the Court in *Quintanar*, *supra*.

Whether a report was prepared and whether the decision maker or his advisors had access to the report are questions of fact. This Board has neither the facilities nor the authority to take evidence and make factual findings. In cases where the Board finds that there is relevant evidence that could not have been produced at the hearing before the Department, it is authorized to remand the matter to the Department for reconsideration in light of that evidence. (Bus. & Prof. Code, § 23085.)

In the present case, evidence of the alleged violation by the Department could not have been presented at the administrative hearing because, if it occurred, it occurred *after* the hearing. Evidence regarding any Report of Hearing in this particular case is clearly relevant to the question of whether the Department has proceeded in the manner required by law. We conclude that this matter must be remanded to the Department for a full evidentiary hearing so that the facts regarding the existence and

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[3]In *Quintanar*, *supra*, on page 17, footnote 13, the Court stated:

> Because limited internal separation of functions is required as a statutory matter, we need not consider whether it is also required by due process. As a prudential matter, we routinely decline to address constitutional questions when it is unnecessary to reach them. [Citations.] Consequently, we express no opinion concerning how the requirements of due process might apply here.

We also decline to address appellant's due process contention.

disposition of any such report may be determined.[4]

II

Appellant contends that the Department erroneously failed to consider the mitigation evidence that the decision acknowledges was presented, thereby abusing its discretion in ordering a 15-day suspension.

Penalty considerations are discussed in Conclusion of Law 8:

> 8. ON PENALTY: It is also argued on the part of the licensee that evidence presented by the licensee's district [manager], established a robust training program for all its clerks with respect to training and refresher training designed to prevent sale to minor violations from occurring. Strong sanctions are used to deter employees from such violations and other measures are also used to insure compliance with the laws governing licensure. The licensee is to be commended for its efforts.
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> In this case however, the clerk had all the evidence he needed to determine that the minor was under 21 years of age at the time of the sale and yet proceeded to commit a violation. There appears to be a disconnect between the licensee's efforts and the results.

The effect of this language, appellant asserts, is to preclude consideration of a licensee's training programs and policies as factors in mitigation if a violation occurs in spite of these efforts. This, appellant argues, "guts the very concept of mitigation and mocks the mitigation language in Rule 144." (App. Br. at p. 15.)

The Appeals Board may examine the issue of excessive penalty if it is raised by

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[4]The Department has suggested that, if the matter is remanded, the Board should simply order the parties to submit declarations regarding the facts. This, we believe, would be wholly inadequate. In order to ensure due process to both parties on remand, there must be provision for cross-examination.

The hearing on remand will necessarily involve evidence presented by various administrators, attorneys, and other employees of the Department. While we do not question the impartiality of the Department's own administrative law judges, we cannot think of a better way for the Department to avoid the possibility of the appearance of bias in these hearings than to have them conducted by administrative law judges from the independent Office of Administrative Hearings. This Board cannot, of course, require the Department to do so, but we offer this suggestion in the good faith belief that it would ease the procedural and logistical difficulties for all parties involved.

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].)

While the language criticized by appellant may mean what appellant says it does, that does not mean that the penalty is unreasonable or excessive. The Department is not required to reduce a penalty in every case in which some mitigating factors exist.

Regardless of what may or may not have been taken into consideration in reaching this penalty, this Board is bound to uphold it if it is not unreasonable. Just as a court will not reverse a decision where the right result is reached for the wrong reason as long as there is any legal theory to support the result, we do not believe a penalty may be interfered with as long as the penalty itself is in fact reasonable.

Certainly the "mitigation" referred to by appellant in the present case is not so compelling that the standard 15-day penalty imposed can be considered unreasonable or an abuse of the Department's discretion.

ORDER

The decision of the Department is affirmed as to all issues raised other than that regarding the allegation of an ex parte communication in the form of a Report of Hearing, and the matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing opinion.[5]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[5]This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.