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

AB-9101
File: 21-280844 Reg: 08070236

MAHLIA MOBAREZ, dba USA Grocery & Liquor, aka Booker's Liquor
1944 90th Avenue, Oakland, CA 94603,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: November 3, 2011
San Francisco, CA

ISSUED DECEMBER 2, 2011

Mahlia Mobarez, doing business as USA Grocery & Liquor, aka Booker's Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended her license for 15 days for her employee or agent selling an alcoholic beverage to a person under the age of 21, a violation of Business and Professions Code section 25658, subdivision (a), and which also suspended her license for 15 days for appellant's failure to produce records demanded by the Department in a timely manner, which constituted a refusal to allow the examination of the records, in violation of Business and Professions Code sections 25753, 25755, and 25616. The two suspensions were ordered to be served concurrently.

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[1]The decision of the Department, dated February 26, 2010, is set forth in the appendix.

Appearances on appeal include appellant Mahlia Mobarez, appearing through her counsel, Rick Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean R. Lueders.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on January 25, 1993. On December 31, 2008, the Department instituted a three-count accusation against appellant, two counts charging sale-to-minor violations and one count for appellant's failure to permit the Department to examine her books and records.

At the administrative hearing held on December 15, 2009, documentary evidence was received and testimony concerning the violations charged was presented by three minors with regard to the sale-to-minor violations, by Department investigator Robert Anderson, and by Safin[2] Mobarez (Mobarez), the licensee's son who worked as a clerk at the premises.

At the hearing, two of the minors described their activities with a group of girlfriends at the licensed premises on July 5, 2008, where they bought snacks and a bottle of Bacardi rum after pooling their money. The third minor told how she rode on top of the trunk of a car in which some of the girlfriends rode, how she fell off and hit her head, and what her resulting injuries were.

Anderson, the Department investigator, testified about visiting the licensed premises on July 23, 2008, and delivering to Mobarez a written demand from the Department for certain records of the business. Anderson was investigating the incident involving the minors on July 5, 2008, but he did not tell Mobarez why the

[2]The Department's decision spells the name "Safian"; appellant's brief spells it "Saifan." We use the spelling Mr. Mobarez gave at the hearing.

records were required. The demand was for time sheets or time cards for July 3 through July 7, 2008; a list of employees and information about the employees; payroll reports for the first and second quarter (i.e., Jan. 1 - June 30) of 2008; copies of the Employer's Quarterly Federal Tax Return for the first and second quarters of 2008; and copies of the W-3 and W-2 forms for all employees for 2007. The documents were to be provided to the Department within 10 days. The sole purpose of the demand for records, according to Anderson, was to establish who was working at the premises on July 5, 2008. Anderson testified that he did not receive the records, nor did he make any further attempt to obtain them. He testified that he received no message or voicemail from Mobarez.

Mobarez testified that the licensed premises is family owned and only he, his mother, and a cousin work in the store. After Anderson gave him the demand letter, Mobarez said, he contacted their CPA about the requested documents. Mobarez testified he received the documents,[3] dated July 25, 2008, and mailed them to the Department. He said he also called Anderson twice thereafter and left messages on Anderson's voicemail, asking if Anderson had received the documents, but he received no reply.

Mobarez spoke with the Department's District Administrator, Justin Gebb, late in October, and Gebb informed Mobarez about the sale-to-minor violation. Mobarez met with Gebb on November 5, 2008, to discuss the case, and he brought copies of the documents previously requested, which Gebb date-stamped.

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[3]The documents he received from the CPA and provided to the Department did not include time sheets or time cards, which are not used, Mobarez said, since only the three family members work at the store.

At the conclusion of the hearing, the Department requested revocation, stayed for one year, along with a 30-day suspension, for the two sale-to-minor counts, arguing that aggravation was appropriate because one of the minors later sustained a head injury. The Department also requested a 30-day suspension for appellant's failure to produce the requested documents within the 10-day period specified in the demand letter.

Subsequent to the hearing, the Department adopted the proposed decision of the administrative law judge (ALJ) and issued its decision dismissing one of the sale-to-minor counts, sustaining the count charging a sale of alcohol to 19-year-old Egypt Noble (Noble), and sustaining the count charging failure to allow examination of records. The decision explained that the penalty was less than that requested by the Department because the subsequent injury to one of the minors was not connected to the sale of alcohol to one of the other minors; the documents were provided to the Department, although not within the time specified; the ostensible purpose of the document demand, to identify who was working at the premises on July 5, 2008, was satisfied about a month after the incident through other, more direct means; and Mobarez cooperated with the investigation in all other respects.

Appellant filed a timely appeal raising the following issues: (1) The evidence does not support the findings and the findings do not support the determination that appellant's clerk sold an alcoholic beverage to a person under the age of 21; (2) there is additional evidence that, if obtained, will support appellant's testimony regarding the production of records; and (3) even if the records violation is sustained, the penalty is unjustified.

DISCUSSION

I

Appellant contends that the evidence does not support the findings and the findings do not support the determination that appellant's clerk sold an alcoholic beverage to Egypt Noble. Appellant objects to all but the last two sentences of Findings of Fact 6:

> 6. Noble stood at the sales counter to purchase the Bacardi rum. The Bacardi rum was located behind the sales counter, so she had to request the product from the clerk. The clerk was Safian [*sic*] Mobarez [Mobarez], the licensee's son. Mobarez retrieved the Bacardi rum and sold it to Noble. Noble placed the money on the sales counter and Mobarez collected it from this spot. Mobarez did not request Noble's identification. While Noble was purchasing the Bacardi rum, Kira McCulley [McCulley] was not at the sales counter. McCulley was in the back of the store.

Appellant argues that the Department did not establish how the Bacardi got to the counter, that the clerk was aware Noble was purchasing the alcohol, or that none of the other girls with Noble were over 21.

When the Appeals Board considers a challenge to the evidentiary basis of the Department's decision, it is limited to determining "[w]hether the findings are supported by substantial evidence in the light of the whole record," and "[w]hether the decision is supported by the findings." (Bus. & Prof. Code, § 23084.) "Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) In making its determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all

reasonable inferences that support the Department's findings. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826] (*Masani*); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821, 826-827 [40 Cal.Rptr. 666].)

> Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Masani, supra*, 118 Cal.App.4th 1429 at p. 1437.)

There was uncontradicted testimony that Noble purchased Bacardi rum at the licensed premises on the day in question, that the Bacardi was behind the counter, that a clerk was behind the counter while the girls counted out the money on the counter, that Noble put the money to pay for the Bacardi on the counter, that the clerk picked up the money from the counter, and that Noble and another of the minors identified Mobarez in a "photo lineup" as the clerk who sold the alcohol to them.

There were a few conflicts in the testimony about how, when, and where certain things happened during this incident, and there was some testimony that was imprecise or vague. However, the ALJ resolved the conflicts and made reasonable inferences based on the evidence. This was his duty and his prerogative.

The Board's duty is to sustain the findings if there is substantial evidence to support them. In this case, substantial evidence either directly supports the findings or supports the reasonable inferences drawn by the ALJ and incorporated in the findings.

Appellant bears the burden on appeal to show there is no substantial evidence whatsoever to support the Department's findings. (*Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 335-336 [25 Cal.Rptr.2d 842]*; Pescosolido v. Smith* (1983) 142 Cal.App.3d 964, 970 [191 Cal.Rptr. 415].) Appellant's self-serving reinterpretation of the evidence did not carry this burden.

Appellant also had the responsibility to prove any facts that might constitute an affirmative defense to the accusation. Appellant's contention that the Department failed to prove that none of the girls in the group was 21 years old or older is irrelevant; the Department does not have the burden of proof. This is not a criminal case in which the accused need only raise a reasonable doubt to prevail. Proof that someone in the group could have purchased the alcohol legally could be one part of establishing a defense, but it would be appellant's responsibility to prove that fact. Even if appellant had proved that fact, it would not, in itself, be sufficient to establish a defense. In any case, appellant presented no evidence that might establish an affirmative defense.

II

Appellant contends that "production of the phone records verifying the telephone call as testified by Mobarez to investigator Anderson will disprove Anderson's testimony and shift the credibility from the Department investigator to [Mobarez]." (App. Br. at p. 2.) Appellant's counsel has filed a declaration stating that he has been attempting to locate Mobarez's cellphone records for July and August 2008. He believes that, "if they

can be retrieved and show that calls were made to the Department at or about the time Mobarez said" (App. Br. at p. 8), they will support the argument that Mobarez made the calls, and, by implication, that he sent the documents to the investigator when he said he did. (See Decl. of Rick A. Blake at pp. 1-2.)

Appellant and her counsel don't have the records; they don't know if they can get the records; if they get the records, they don't know if they will show that calls were made to the Department; if they get the records, and the records show calls were made to the Department, they still would not be able to show what the calls were about; if they were to get the records, show that the calls were made, and somehow prove that the calls were about providing the documents to the investigator, it would still be the ALJ, not the Board, who would have to make the factual and credibility determinations.

The Appeals Board may remand a case to the Department for reconsideration when the appellant shows there is newly discovered evidence "which, in the exercise of reasonable diligence, could not have been produced at the hearing before the department." (4 Cal. Code Regs., § 198.) Appellant has presented no evidence or argument that the cellphone records could not have been produced at the administrative hearing.

At the hearing, the ALJ gave appellant the opportunity to have the matter continued to a later date because the Department substantially amended the accusation after all the testimony had been presented save appellant's cross-examination of the Department's rebuttal witness. Appellant declined the opportunity. Additionally, nothing in the record suggests that appellant petitioned the Department for reconsideration after the decision was issued. There were obviously opportunities for

appellant to produce the cellphone records previously, but appellant did not do so. Appellant may not use the appellate process to attempt to present evidence that could have, and should have, been presented at the administrative hearing.

We conclude that the many "if's" regarding the cellphone records; the unlikelihood that, if obtained, they would change the ALJ's credibility or factual determinations; and the greater unlikelihood that this would change the ultimate decision, compel this Board to deny appellant a second (or third) bite at the evidentiary apple.

III

Appellant contends that, even without producing additional evidence, further mitigation should be granted because "the records [requested by the Department] were not needed, were not instrumental to proving or disproving the case, and that the licensee did cooperate in all other respects." (App. Br. at p. 9.)

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 though it might be argued that another penalty would be equally, or more, reasonable.

The arguments appellant makes urging further mitigation of the penalty are the same as those already taken into account by the ALJ in his substantial mitigation of the penalty. Appellant has not even alleged that the Department abused its discretion in the penalty it imposed. The penalty imposed is clearly reasonable and must be upheld.

ORDER

The decision of the Department is affirmed.[4]

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

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[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.