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

AB-9306
File: 21-408959 Reg: 12076311

NIDAL DURGHALLI DURGHALLI and WASIN HAMAD,
dba Rancho Liquor
75 South Rancho Road, Suite A, Thousand Oaks, CA 91362,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: November 7, 2013
Los Angeles, CA

ISSUED DECEMBER 18, 2013

Nidal Durghalli Durghalli and Wasim Hamad, doing business as Rancho Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 20 days for selling alcohol to a minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Nidal Durghalli Durghalli and Wasim Hamad, appearing through their counsel, Leonard Chaitin, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated August 8, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on March 4, 2004. On January 19, 2012, the Department instituted an accusation against appellants charging that their clerk sold alcohol to a non-decoy minor in violation of section 25658, subdivision (a).

At the administrative hearing held on June 20, 2012, documentary evidence was received and testimony concerning the violation charged was presented by Steven Geertman, a Department Agent; by Skyler Horton, the minor in question; and by George Hamad, appellants' clerk.

Testimony established that on July 14, 2011, Horton entered the premises. Hamad was working behind the counter. Horton approached the counter and asked Hamad for a bottle of Bacardi O orange rum. Hamad asked to see Horton's identification. Horton told him that he had left it in the car, and then exited the premises.

From the car, Horton obtained a driver's license belonging to his older brother, Shae Horton. The license expired in 2006.

Horton reentered the premises and gave Shae's expired identification to Hamad. Hamad examined it and commented on the fact that it was expired. Horton said that he had left his current identification at home. Hamad said "OK" and proceeded with the transaction. Horton paid for the rum and left the premises.

Horton was stopped by Agent Geertman before he reached his car. Agent Geertman determined that Horton had purchased rum at the premises and asked to see Horton's indentification. Horton showed Agent Geertman his actual California driver's license. Agent Geertman asked him if this was the identification he had used to purchase the rum. He admitted it was not and told Agent Geertman that he had used

his brother's ID.

Agent Geertman accompanied Horton inside the premises and asked him to identify the person who sold him alcohol. Horton identified Hamad. Hamad acknowledged making the sale, but said he had asked for and been shown identification. He admitted he was aware the identification was expired.

Subsequent to the hearing, the Department issued its decision which determined that the violation had been proven and no defense had been established. The ALJ observed that it was irresponsible of Hamad to rely on identification which had expired five years earlier, and imposed an aggravated penalty of 20 days' suspension.

Appellants filed this appeal contending that the suspension constitutes an excessive fine as prohibited by the Eighth Amendment of the United States Constitution.

DISCUSSION

Appellants contend that 20 days' suspension is an "excessive fine" or forfeiture prohibited by the Eighth Amendment of the United States Constitution.

The Eight Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." (U.S. Const. 8th Amend.) Appellants rely on a United States Supreme Court case, *Bajakajian*, to justifying inclusion of forfeitures under the clause.[2] (App.Br. at p. 2, citing *United States v. Bajakajian* (1998) 5224 U.S. 321 [118 S.Ct. 2028].) The Court in that case noted that

[2]Though it is still useful for illuminating the boundaries of the Eighth Amendment, *Bajakajian* was largely superseded by statute following the September 11, 2001 terrorist attacks. (See *United States v. Jose* (2007) 499 F.3d 105, 108-111 [discussing relevant legislative changes].) Regardless, both the *Bajakajian* decision and subsequent changes in forfeiture law are fundamentally inapplicable in this case.

the clause "limits the government's power to extract payments whether in cash or in kind, as punishment for some offense." (*Id.* at p. 325.) "Forfeitures — payments in kind — are thus 'fines' if they constitute punishment for an offense." (*Ibid.*)

Appellants assert that the 20-day suspension is a forfeiture constituting a fine under the Eighth Amendment, and must therefore be subjected to the "proportionality determination" employed in *Bajakajian* — that is, an assessment of whether the fine is in proportion to the wrongdoing.

We are confident the excessive fines clause of the Eighth Amendment does not apply, as a matter of law, to the suspension of an alcoholic beverage license in the state of California.

Appellants' argument depends entirely on the assumption that their alcoholic beverage license is property, and that the Department's suspension of it constitutes extraction of payment in kind. The assumption is incorrect; appellants have no property right to an alcoholic beverage license. The California Constitution provides that the Department "shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals." (Cal. Const. art. XX, § 22.) Moreover, case law has established that

> [l]iquor licensing is unique. While a license to practice a trade is generally considered a vested property right, a license to sell liquor is a privilege that can be granted or withheld by the state. (Hutchinson, *The Alcoholic Beverage Control Administration of the State Board of Equalization* (1945) 20 State Bar J. 59, 64.) The revocation, as expressly stated in the Constitution, may be based on protecting the public welfare and morals, quite independently of any showing of fault of the licensee.

(*Yu v. Alcoholic Beverage Control Appeals Board* (1992) 3 Cal.App.4th 286, 297 [4 Cal.Rptr.2d 280]; see also *Farah v. Alcoholic Beverage Control Appeals Board* (1958)

159 Cal.App.2d 335, 339 [324 P.2d 98] ["A licensee has no inherent right to sell liquor and his engaging in the business may legitimately be subject to rigid conditions which will limit the possibilities of sales to children under the age of 21 years"].) While appellants are certainly entitled to due process in the course of any Department action, the disciplinary suspension of a license cannot be characterized as a forfeiture of property falling under the Eighth Amendment.

The Department presents an alternative argument that the Eighth Amendment does not apply to civil cases, and is therefore irrelevant in the present case. The United States Supreme Court has indeed held the "Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties" and "does not constrain an award of money damages in a civil suit *when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.*" (*Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.* (1989) 492 U.S. 257, 260, 264 [109 S.Ct. 2909] [emphasis added].) While this action is certainly administrative, and therefore civil, the prosecuting party is unquestionably a governmental agency. We are therefore reluctant to conclude that the Eighth Amendment could never apply in Department disciplinary actions. This Board need not settle the question, however; the Excessive Fines Clause is inapplicable in this case for the simple reason that appellant was not fined.

Ultimately, appellants are attempting to add constitutional weight to the argument that the aggravated 20-day penalty is excessive. 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 Board* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183].) However, it will not disturb the Department's penalty order in the absence of an

abuse of discretion. (*Martin v. Alcoholic Beverage Control Appeals Board & 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 Board* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

The penalty imposed in this case is reasonable. The ALJ examined the facts, determined there were aggravating circumstances, and imposed a suspension in line with the guidelines supplied by rule 144.[3]

Appellants, however, would have this Board compare the criminal fine for a misdemeanor violation of section 25658, subdivision (a), to the 20 days' suspension imposed here, and presumably lead this Board to the conclusion that the suspension represents a much more onerous penalty for the same violation.

The comparison is inapposite. As the California court of appeal has observed:

> [T]he relative harshness of administrative sanctions compared to criminal penalties for the same conduct is common. The criminal sanction available for a regulatory violation may only be a small fine for an infraction or misdemeanor, while the corresponding administrative penalty might be the loss of a lucrative liquor license or the right to practice a profession such as law or medicine. The explanation for the difference is obvious. Criminal penalties are designed to punish the offender. Administrative penalties may also be punitive, *but they are primarily designed to protect the public from the practices of the offender*.

(*Gordon J. v. Santa Ana Unified School Dist.* (1984) 162 Cal.App.3d 530, 545-546 [208 Cal.Rptr. 657] [emphasis added].) The misdemeanor penalty for a violation of section

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[3]See Cal. Code Regs., tit. 4, § 144.

25658, subdivision (a), is a criminal fine payable, following conviction, by the individual directly responsible for the single sale in question. The present suspension, on the other hand, temporarily withholds a commercial privilege granted by the government to appellants, who were responsible for training and supervising employees and for ensuring adherence to all applicable alcoholic beverage laws. The assigned penalty derives from powers explicitly granted to the Department by the state Constitution and is intended to protect the health and welfare of the California citizens. (Cal. Const. art XX, § 22.)

Appellants have not been fined, nor have they been stripped of any property. The penalty in this case is reasonable and within the guidelines. We find no abuse of discretion.

ORDER

The decision of the Department is affirmed.[4]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, 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.