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

AB-9491a
File: 42-526709; Reg: 14080576

IRMA FAJARDO,
dba Barrel House
16005-007 Amar Road,
Valinda, CA 91744-2204,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: August 4, 2016
Los Angeles, CA

ISSUED AUGUST 18, 2016

Appearances: *Appellant:* Armando H. Chavira, as counsel for appellant Irma Fajardo.
Respondent: Kerry K. Winters, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Irma Fajardo, doing business as Barrel House, appeals from a decision of the Department of Alcoholic Beverage Control[1] revoking her license, with revocation conditionally stayed for a period of three years provided no cause for disciplinary action occurs within that time, and concurrently suspended her license for a 30 days for permitting solicitation activity in violation of Business and Professions Code sections

[1]The decision of the Department, dated February 5, 2016, is set forth in the appendix, along with the Appeals Board decision in AB-9491, dated September 28, 2015, and the Department's original decision of February 10, 2015.

24200.5, subdivision (b), and 25657, subdivisions (a) and (b); for permitting patron to leave the premises with an open container, in violation of Business and Professions Code sections 23300 and 23355; for possession on the premises of an illegal slot machine or gambling device, in violation of Penal Code sections 330b, 330.1, and 330.4; and for possession on the premises of a distilled spirit for which a license had not been issued, in violation of Business and Professions Code section 25607.

FACTS AND PROCEDURAL HISTORY

This is the second appeal in this matter. Appellant's on-sale beer and wine license was issued on December 21, 2012. On May 29, 2014, the Department instituted an eighteen-count accusation against appellant. On November 5, 2014, the Department filed an amended accusation, modifying certain language and adding a nineteenth count. Following an administrative hearing on November 12, 2014, the Department issued its decision which determined that counts 1, 2, 3, 5, 6, 7, 8, 10, 12, 13, 15, 18, and 19 had been proven and no defense was established. Counts 4, 9, 11, 14, 16, and 17 were dismissed.

For counts 1, 2, 5, 6, 7, 8, 10, 13, and 15 — all of which involved solicitation activity — the Department imposed a penalty of revocation, conditionally stayed for three years, provided no cause for discipline arises during that time period, along with a 30-day suspension. For count 3 — permitting a patron to leave the premises with an open container, in violation of sections 23300 and 23355 — the Department imposed a penalty of 5 days' suspension. No penalty was imposed for count 12, as it arose from the same facts as counts 5, 6, and 7, and partly duplicated them. For count 18 — possession on the premises of an illegal gambling device, in violation of Penal Code sections 330b, 330.1, and 330.4 — the Department imposed a penalty of 15 days'

suspension. Finally, for count 19 — possession on the premises of distilled spirits for which a license had not been issued, in violation of section 25607 — the Department imposed a penalty of 10 days' suspension. All suspensions were to run concurrently.

Appellant filed a timely appeal, and the first appeal was heard by the Appeals Board on September 3, 2015. The Board issued a decision on September 28, 2015, affirming counts 1, 2, 3, 8, 10, 12, 13, 15, 18, and 19. Counts 5, 6, and 7 were reversed, and the decision was remanded to the Department for reconsideration of the penalty in light of the Board's decision.

After reconsideration, the Department issued its Decision Following Appeals Board Decision on February 5, 2016. This decision imposed a penalty of 10 days' suspension as to count 12. As to the other sustained counts, the Department imposed a penalty of revocation, stayed for a period of three years, and a 30-day suspension. All suspensions were ordered to run concurrently.

Appellant then filed the present appeal contending: (1) it was an abuse of discretion not to adjust the penalty downward in light of the dismissed counts, (2) the Department unlawfully accumulated counts to increase the penalty, and (3) the Department's penalty guidelines and penalty policies are unconstitutional as applied, and this case demonstrates selective prosecution of drink solicitation matters.

DISCUSSION

I

Appellant contends it was an abuse of discretion not to adjust the penalty downward in light of the dismissed counts. (App.Br. at p. 3.) She maintains "[t]he thirty-day license suspension coupled with license revocation imposed by the department on Appellant for a first-time drink solicitation violation is unduly harsh and excessive, and

an abuse of discretion." (*Ibid*.)

This Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of Cal. v. Alcoholic Bev. 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 Bev. 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 its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Rule 144 provides that "[d]eviation from [the Penalty Guidelines] is appropriate where the Department *in its sole discretion* determines that the facts of the particular case warrant such deviation — such as where facts in aggravation or mitigation exist." (Cal. Code Regs., tit. 4, § 144, emphasis added.) Among the mitigating factors provided by the rule are the length of licensure without prior discipline, positive actions taken by the licensee to correct the problem, and documented training of the licensee and employees. (*Ibid.*)

Moreover, the Penalty Policy Guidelines further address the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

Penalty Policy Guidelines:

> The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may

> use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

The Department made the following observations and findings regarding the penalty in this matter:

> Counts 5, 6, and 7 alleged violations of Business and Professions Code Sections 25657(a), 25657(b), and 24200.5(b), respectively. These alleged violations all occurred on November 22, 2013. Counts 8 and 10, which were sustained and upheld by the Board, alleged other violations of sections 24200.5(b) and 25657(b), respectively, on that same date. Given the numerous illegal solicitation violations on multiple dates that were established and upheld by the board, the dismissal of these three counts does not warrant deviation from the penalty originally adopted by the Department with respect to the remaining solicitation counts (Counts 1, 2, 8, 10, 13, and 15).
>
> In addition, count 12, which was sustained and upheld by the Board, alleged a condition violation arising out of the same facts as counts 5, 6, and 7. The penalty initially adopted did not include any specific discipline for the condition violation since it was incorporated in the penalty imposed for all of the solicitation counts, including Counts 5, 6, and 7. For condition violations, rule 144 provides a standard penalty of a 15-day suspension with 5 days stayed for one year.

(Decision Following Appeals Board Decision, at p. 1.)

Appellant is unhappy with the 10 days' concurrent suspension imposed for count 12 — even though it is technically less than the standard penalty prescribed by rule 144 of 15 days' suspension with 5 days stayed — and maintains the 30-day suspension should have been adjusted downward, rather than imposing a concurrent 10-day suspension. Appellant maintains this is an abuse of discretion and "contrary to judicial precedent" (App.Br. at p. 3) yet she cites no authority in support of this position.

Appellant's disagreement with the penalty imposed does not mean the Department abused its discretion. This Board's review of a penalty looks only to see whether it can be considered reasonable, and, if it is reasonable, the Board's inquiry ends there. The penalty imposed by the Department is well within the guidelines of rule 144 — which recommend revocation for even a *single* violation of section 24200.5(b) or 25657(a), and recommend a penalty ranging from a 30-day suspension to revocation for a single violation of section 25657(a).[2] We cannot say that the modified penalty is an abuse of discretion, regardless of appellant's dissatisfaction with it.

II

Appellant maintains the Department unlawfully accumulated counts by visiting the premises multiple times without notifying the licensee. (App.Br. at p. 3.)

Appellant contends that the accumulation of counts in the accusation violated the principles established in *Walsh v. Kirby* (1974) 13 Cal.3d 95 [118 Cal.Rptr. 1]. She maintains that the Department's continuation of its investigation for approximately three months was unreasonable and motivated by a desire to increase the penalty to be imposed on the license rather than to obtain appellant's compliance. Appellant argues that the Department acted unreasonably in that, upon learning of some of the violations alleged in the accusation, it did not move immediately to either counsel appellant or file an accusation.

In *Walsh*, *supra*, the licensee, who had a previously unblemished record, was charged with selling below an established "fair trade" price on a total of ten occasions. The statute involved did not provide for suspension or revocation, but each offense

[2]Counts 2, 8, and 13 are for violations of section 24200.5(b); counts 10 and 15 are for violations of section 25657(b); and count 1 is for violation of section 25657(a).

after the first was punishable by a $1,000 fine. The California Supreme Court concluded that the Department had acted improperly by accumulating violations for the purpose of driving the licensee into bankruptcy.

The Department counters that there is no evidence from which it might be reasonably inferred that its four visits to the premises over a period of three months were for any purpose inconsistent with the provisions of the Alcoholic Beverage Control Act. The Department maintains that the length of an investigation lies within the discretion and expertise of the Department, and prior decisions of the Board have supported that position.

In *Chavez*, this Board summarized what it found to be the court's principal concern in *Walsh*:

> The vice seen by the court was the accumulation of financial penalties to the point where a licensee unable to pay them would be forced into bankruptcy, the equivalent of having his license revoked, coupled with the failure to give the licensee a chance to mend the error of his ways before that occurred.

(*Chavez* (1998) AB-6788, at p. 8.) The Board subsequently confirmed its position with regard to the Department's discretion in conducting investigations:

> The extent to which Department investigators should have contacted appellants concerning the investigation is a matter of discretion within the police powers granted [to] the Department. In the absence of clearly unreasonable delay, it is not for the Appeals Board to mandate at which point in an investigation the Department must inform a licensee that the licensed premises are under scrutiny. A continuing investigation may very well be needed to determine the existence of violations or the degree to which a law is being, or has been, violated.

(*Id*. at pp. 9-10.)

As this Board has stated previously, it is wary of substituting its judgment for that of the Department with respect to when an investigation has reached the point where

an accusation should be filed. (See *Dirty Dan's, Inc*. (2012) AB-9155, at p. 6.) As the Board said in that case, "[i]n the absence of any evidence that the Department intentionally prolonged the investigation for the purpose of obtaining a more severe penalty, it would seem inappropriate for the Board to infringe upon the Department's discretion in its conduct of an investigation." (*Ibid.*)

Appellant has presented no evidence to support the contention that the Department intentionally prolonged this investigation in order to increase the penalty. Appellant's arguments with regard to the unlawful accumulation of counts must fail.

III

Appellant maintains the Department's penalty guidelines and penalty policies are unconstitutional as applied, and that this "case is part of a wide-spread and systematic enforcement program which selectively investigates and prosecutes drink solicitation licensees comprised overwhelmingly of Hispanic-owned licences premises." (App.Br. at p. 4.)

In *Torres*, the Board voiced concerns similar to those of appellant about the possibility of selective enforcement in drink solicitation cases prosecuted by the Department:

> Our second serious concern is about a feature the Board has noticed appears common to drink solicitation appeals — they overwhelmingly involve Hispanic surname licensees. A sampling of cases on our official website involving prosecutions for drink "solicitation" strongly suggests our perception of this skewed enforcement against Hispanic licensees comports with reality[fn.] and raises serious public policy and legal questions.

(*Torres* (2016) AB-9510, at p. 15.) The Board noted its fear that if a neutral criterion could not be shown for what appeared to be a very lopsided disparity in the administrative prosecution of drink solicitation cases — skewing heavily in favor of

targeting Hispanic licensees — the Constitutional guarantee to equal protection of the laws could be implicated.

The elements necessary to prove discriminatory or selective prosecution are as follows:

> To demonstrate that he was the subject of an invidious discrimination, appellant must prove "(1) 'that he has been deliberately singled out for prosecution on the basis of some invidious criterion;' and (2) that 'the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities.' " [Citations.] An invidious criterion for prosecution is "one that is arbitrary and thus unjustified because it bears no rational relationship to legitimate law enforcement interests . . . ." [Citations.] "Unequal treatment which results simply from laxity of enforcement or which reflects a nonarbitrary basis for selective enforcement of a statute does not deny equal protection and is not constitutionally prohibited discriminatory enforcement." [Citation.]
>
> It is not necessary that members of law enforcement harbor "a specific intent . . . to punish the defendant for membership in a particular class . . . ." [Citation.] Appellant must show that he would not have been prosecuted but for his membership in a constitutionally protected, or suspect, class, or his exercise of a statutory or constitutional right. [Citations.]

(*People v. Owens* (1997) 59 Cal.App.4th 798, 801 [69 Cal.Rptr.2d 428].)

Rather than offer evidence to support her claim of selective enforcement, appellant offers only the bare conclusion that:

> the department's imposition of excessive penalties in solicitation cases is the apparent discriminatory practice where Hispanic licensed premises, operating in largely Hispanic neighborhoods, are systematically singled out for selective enforcement.

(App.Br. at p. 10.) No authority or evidence is cited in support of this conclusion, nor any analysis or discussion explaining *why* the appellant believes the Department's penalty guidelines and penalty policies are unconstitutional as applied, or supporting the charge that drink solicitation investigations were selectively enforced in this case and others like it.

In addition, the above quoted phrasing of the purported transgression expressed in appellant's brief — *i.e*., that "the Department's imposition of excessive penalties in solicitation cases is the apparent discriminatory practice where Hispanic license[es] operat[e] — is difficult to comprehend. Did appellant inadvertently omit from this accusation the words "the result of" between "cases is" and "the" so it would read, "the department's imposition of excessive penalties in solicitation cases is *the result of* the apparent discriminatory practice where Hispanic licensed premises, operating in largely Hispanic neighborhoods, are systematically singled out for selective enforcement?" The Board is not clairvoyant; and in matters of this gravity we should neither speculate nor fill in the possible blanks to counsel's argument.

On the other hand, the Department fails to address these issues, except to assert they are beyond this Board's authority, stating:

> The review by the board of a decision of the department shall be limited to the questions:
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> (a) Whether the department has proceeded without, or in excess of, its jurisdiction.
>
> (b) Whether the department has proceeded in the manner required by law.
>
> (c) Whether the decision is supported by the findings.
>
> (d) Whether the findings are supported by substantial evidence in the light of the whole record.
>
> (e) Whether there is relevant evidence, which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department.

(Bus. & Prof. Code, § 23084.)

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
>
> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is

> unconstitutional;
>
> (b) To declare a statute unconstitutional;
>
> (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

(Cal.Const., art. III, § 3.5.)

We are aware of these limitations on our authority, but do not believe — assuming *arguendo* the Department is engaged in the discriminatory enforcement based on an impermissible criterion of anti-drink solicitation laws — that the Board is powerless to provide any relief to a targeted licensee; or to order the Department to provide (in a properly prepared case) information within its custody and control necessary for the Board to address selective enforcement.

Further, failure by a party to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*Hooks v. California Personnel Board* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; *Harris v. Alcoholic Beverage Control Appeals Board* (197 Cal.App.2d 1182, 187 [17 Cal.Rptr. 167].) This extends to issues of administration and enforcement that have constitutional implications, as "[i]t is the general rule applicable in civil cases that a constitutional question must be raised at the earliest opportunity or it will be considered as waived." (*Jenner v. City Council of Covina* (1958) 164 Cal.App.2d 490, 498 [331 P.2d 176].)

While an exception to this rule exists for pure questions of law (see, e.g., *In re P.C.* (2006) 137 Cal.App.4th 279, 287 [40 Cal.Rptr.3d 17].), the allegations by appellant — that the Department's penalty guidelines and penalty policies are unconstitutional as applied, and that there is selective enforcement of drink solicitation laws — necessarily implicate facts as well. Since appellant did not raise these issues at the administrative hearing, the Board is entitled to consider them waived. (See *Brown v. Professional Community Management, Inc*. (2005) 127 Cal.App.4th 532, 537 [25 Cal.Rptr.3d 617]*; Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286 [123 Cal.Rptr.2d 924]*; Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115-1116 [75 Cal.Rptr.2d 27]; 9 Witkin, *CAL. PROCEDURE* (5th ed. 2008) Appeal, §400, p. 458.)

Here, appellant informs this Board for the first time in a footnote to her only brief on appeal that her counsel has made requests of the Department "for drink solicitation information under the ABC Public Act (sic) for the past ten years." (App.Br. at p. 11, fn. 1). (Presumably this is a reference to California's Public Records Act [Gov. Code §§ 6250 *et. seq*.] as no law with the title appellant's brief references exists.) Yet these requests and the Department's response to them were not entered into the administrative record, and no argument about "selective enforcement" was made at the administrative hearing. Licensees cannot and should not expect this Board to do their work for them; that is the job of their counsel.

In sum, appellant counsel's failure to build a record and the brief submitted on her behalf are sufficiently deficient on the issue of selective enforcement as to be unhelpful to this Board and, without that assistance, we should not and cannot weigh-in

to address the issue.[3]

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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[3] The Board is not required to entertain substandard briefs:

> "[A]n appellate brief 'should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.' [Citation.] [¶] . . . This court is not inclined to act as counsel for . . . appellant and furnish a legal argument." [Citation.] (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 546 [35 Cal.Rptr.2d 574].)

[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.