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

AB-9699
File: 41-523972 Reg: 17086273

SUN SALT SAND, INC.,
dba Grill A Burger
73091 Country Club Drive #A2,
Palm Desert, CA 92260-2338,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Appeals Board Hearing: November 1, 2018
Ontario, CA

ISSUED NOVEMBER 29, 2018

Appearances: *Appellant*: Faruk Nurani on behalf of Sun Salt Sand, Inc., doing business as Grill A Burger.

Respondent: Kerry K. Winters and Jennifer M. Casey as counsel for the Department of Alcoholic Beverage Control.

OPINION

Sun Salt Sand, Inc., doing business as Grill A Burger (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for 5 days because its employee, Faruk Nurani, exceeded license privileges by allowing the consumption of beer off the premises, a violation of Business and Professions Code sections 23300 and 23355.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public eating place license was issued on September 26, 2012. On December 27, 2017, the Department filed an accusation

1. The decision of the Department, dated March 21, 2018, is set forth in the appendix.

charging that appellant's employee, Faruk Nurani, allowed the consumption of beer off the premises.

Appellant did not respond to the accusation. On March 21, 2018, the Department issued a Decision Following Default imposing a penalty of five days' suspension.

Appellant then filed this appeal contending (1) the time between the date of the violation and the date of the hearing was excessive; (2) appellant was not notified of the hearing and therefore did not have the opportunity to confront its accuser; (3) appellant was not provided with any documentation about any violation; (4) appellant has been operating for twelve years, including six under the current ownership, with no issues; (5) appellant took positive action to correct the problem immediately; (6) appellant cooperated with the investigation; (7) appellant is looking into official training for management staff; (8) other licensees in the same strip mall engage in the same conduct without reprimand; (9) the penalty does not encourage voluntary compliance with the law.

Many of appellant's contentions overlap. The first, second, and third issues implicate appellant's notice and hearing rights, and will therefore be addressed together. The fourth, fifth, sixth, seventh, and ninth issues implicate the reasonableness of the penalty imposed, and will be addressed together. The eighth issue, regarding inconsistent enforcement, will be addressed separately.

DISCUSSION

I

Regarding notice, appellant contends that it "was not provided with any documentation about any breach of rule" and that it "was not notified about the

hearing . . . [and] thus was not provided the opportunity to confront [its] accuser." (App.Br., at p. 1.) Additionally, appellant suggests a due process violation when it contends that "[t]he time between when the officer visited the restaurant and the time [of] the initial hearing . . . was well beyond a reasonable time period." (*Ibid.*, emphasis omitted.)

As an initial matter, this Board has jurisdiction to review a Department decision even where no administrative hearing has taken place. (See Cal. Const., art. XX, § 22; see also *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (1987) 195 Cal.App.3d 812, 919 [240 Cal.Rptr. 915] [Board's jurisdiction not limited to review of quasi-judicial decisions following formal hearings].)

This Board's review of a default decision, however, is narrow and strictly limited. Where a motion to vacate is filed, a default decision may only be set aside where the licensee shows good cause. (Gov. Code, § 11520(c).) Good cause includes failure to receive notice (Gov. Code, § 11520(c)(1)) as well as mistake, inadvertence, surprise, or excusable neglect (Gov. Code, § 11520(c)(2)). Where good cause is found, the agency may vacate the decision and grant a hearing. (Gov. Code, § 11520(c).) Reviewing courts apply the same good-cause standard. (See, e.g., *Med. Bd. of Cal. v. Superior Ct.* (2018) 20 Cal.App.5th 1191, 1193-1194 [229 Cal.Rptr.3d 784].) We apply the same standard here. Where this Board finds good cause, the remedy is remand to the Department for a hearing on the merits. (See Bus. & Prof. Code, § 23085.)

Section 11503 of the Government Code provides, in relevant part:

> A hearing to determine whether a right, authority, license, or privilege should be revoked, suspended, limited, or conditioned shall be initiated by filing an accusation . . . The accusation . . . shall be a written statement of charges that shall set forth in ordinary and concise language the acts or

> omissions with which the respondent is charged, to the end that the respondent will be able to prepare his or her defense. It shall specify the statutes and rules that the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of those statutes and rules. The accusation . . . shall be verified unless made by a public officer acting in his or her official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief.

(Gov. Code, § 11503(a).)

The Evidence Code provides that "[a] letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail." (Evid. Code, § 641.) The presumption, however, is rebuttable:

> [I]f a party proves that a letter was mailed, the trier of fact is required to find that the letter was received in the absence of any believable contrary evidence. However, if the adverse party denies receipt, the presumption is gone from the case. The trier of fact must then weigh the denial of receipt against the inference of receipt arising from proof of mailing and decide whether or not the letter was received.

(*Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416, 421-422 [100 Cal.Rptr.2d 818], emphasis and internal quotation marks omitted, citing *Slater v. Kehoe* (1974) 38 Cal.App.3d 819 [113 Cal.Rptr. 790].)

Appellant claims it "was not provided with any documentation about any breach of rule." (App.Br., at p. 1.)

The accusation in this case is included in the administrative record. (See Exh. 1, Accusation.) It states:

> By reason of the following facts, there is cause for suspension or revocation of the license(s), in according with Section 24200 and Sections 24200(a) and (b) of the Business and Professions Code. . . . The facts which constitute the basis for the suspension or revocation by the Department are as follows:
>
> On or about August 11, 2017, respondent-licensee's agent or employee, Faruk Nurani, exceeded their license privileges by permitting patrons to leave the premises with open containers of alcoholic beverages, to-wit:

> beer, for consumption off the premises, in violation of Business and Professions Code Sections 23300 and 23355.

(Exh. 1, Accusation.) As required by section 11503 of the Government Code, the accusation "set[s] forth in ordinary and concise language the acts or omissions with which the respondent is charged" and "specif[ies] the statutes and rules that the respondent is alleged to have violated." (See Gov. Code, § 11503(a); Exh. 1, Accusation.) Provided the accusation was properly served, there can be no question that appellant was fully apprised of what provisions of the Business and Professions Code it allegedly violated, and how.

Moreover, the record establishes that the accusation was mailed to the correct address. According to the sworn Declaration of Service, the accusation was mailed to 73091 Country Club Dr., #A2, Palm Desert, CA, 92260-2338. (See Exh. 2, Declaration of Service by Mail.) This is the same address from which appellant sent its opening brief. (See App.Br., Proof of Service by Mail.) The record therefore shows that the Department fulfilled its obligations and the accusation was properly served on appellant.

Appellant presents nothing but the barest allegations that it did not receive the accusation. The record establishes otherwise: the Department mailed a clearly articulated, legally compliant accusation to appellant at its correct address. Appellant's third contention therefore lacks merit.

Appellant also contends it "was not notified about the hearing (as confirmed by the ABC office), [and] thus was not provided the opportunity to confront [its] accuser." (App.Br., at p. 1, internal quotations marks omitted.)

Section 11506 of the Government Code provides, in relevant part, that "[w]ithin 15 days after service of the accusation . . . the respondent may file with the agency a

notice of defense . . . in which the respondent may" "[r]equest a hearing." (Gov. Code, § 11506(a) and (a)(1).) Where a licensee fails to file a notice of defense against the accusation, the Department is entitled to proceed without conducting a hearing: "If the respondent either fails to file a notice of defense . . . the agency may take action based upon the respondent's express admissions or upon other evidence and affidavits may be used as evidence without any notice to respondent." (Gov. Code, § 11520(a).)

It is undisputed that appellant did not file a Notice of Defense in this case. Appellant nevertheless alleges that the Department conducted a hearing, and that it was not notified. (App.Br., at p. 1.)

The Decision Following Default, however, expressly notes that "Respondent-licensee has defaulted in this matter and the Department is authorized pursuant to Government Code section 11520 to conduct this default proceeding." (Decision Following Default, at p. 2.) Moreover, the Decision Following Default is signed by Matthew Botting, the Department's General Counsel, and not by an ALJ. (*Ibid.*) The record therefore indicates that no administrative hearing was held; instead, the Department issued a summary decision and imposed discipline without holding an evidentiary hearing, as expressly permitted by law. (See Decision Following Default; Gov. Code, § 11520(a).)

Lastly, appellant contends that "[t]he time between when the officer visited the restaurant and the time the initial hearing was scheduled for was WELL BEYOND a reasonable time period." (App.Br., at p. 1, emphasis in original.)

Appellant cites no law limiting the amount of time that may pass between the discovery a violation and the filing of an accusation. We have been unable to locate any such law.

This Board may not grant relief without a showing of prejudice. The California Constitution provides:

> No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

(Cal. Const., art. VI, § 13; see also *Reimel v. House* (1969) 268 Cal.App.2d 780, 787 [74 Cal.Rptr. 345].)

As discussed above, the record establishes no hearing was held. Several months did pass, however, between the date of the alleged violation and the filing of the accusation. According to the accusation, the violation took place "[o]n or about August 11, 2017." (Exh. 1, Accusation.) The accusation itself was signed by a Department attorney on December 4, 2017 (*ibid.*) and was ultimately mailed on December 27, 2017 (Exh, 2, Declaration of Service by Mail.) In total, four and half months elapsed between the date of the violation and the date the accusation was served. This timeframe is not unusual, and certainly does not violate any law.

More importantly, appellant has not shown how it was prejudiced in any way by the delay. Appellant did not respond to the accusation; there is nothing in either the record or in appellant's brief to suggest that had the accusation been sent earlier, appellant would have responded. Again, appellant's claim lacks merit.

II

Appellant contends that it has been in operation for twelve years, including six under current ownership, "without any issues or complaints"; that it immediately took positive action to correct the problem, and is looking into official training for its managing staff; that it was "completely cooperative with the investigation"; and that "[t]he imposed penalty had no goal of encouraging or reinforcing [appellant's] voluntary compliance [with] the law." (App.Br., at p. 1.)

In an appeal on the merits, this Board's review is limited. (See Cal. Const., art. XX, § 22; Bus. & Prof. Code, § 23083.) In such cases, the Board may examine the issue of an excessive penalty if it is raised by the appellant. (*Joseph's of Cal.* v. *Alcoholic Bev. Control Appeals Bd*. (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183].) As this Board has repeatedly stated, findings regarding the penalty imposed are not necessary as long as specific findings are made that support the decision to impose disciplinary action. (*Williamson v. Bd. of Med. Quality Assurance* (1990) 217 Cal.App.3d 1343, 1346-47 [266 Cal.Rptr. 520].)

As noted in Part I, *supra*, however, this Board's authority to review a default decision is further limited. (Gov. Code, § 11520(c).) The Board may ask only whether there is good cause to grant relief from the default judgment. Where good cause is shown, the Board may remand the case to the Department for a hearing on the merits. (*Ibid.*)

Appellant has cited no law granting this Board authority to review the penalty imposed in a default decision. Based on our independent review of the law, this Board lacks such authority. Appellant has shown no grounds on which this Board may grant relief.

III

Appellant contends that "[of] the five restaurants that are present within [its] strip mall, three of them were not approached for the same issue. Three of them have continued their same behavior with no reprimand." (App.Br., at p. 1.) Appellant argues this is not "consistent or uniform." (*Ibid.*)

As noted in Parts I and II, *supra*, this Board's authority to review a default decision is strictly limited. The Board may consider only whether there is good cause to relieve the appellant from the effects of a default. An allegation of inconsistent enforcement speaks to the legal merits of the disciplinary action; it does not constitute good cause to excuse a default.

Moreover, even if the Board had authority to review this case on the merits—and it does not—inconsistent enforcement, without more, does not constitute grounds for reversal. The Department holds broad, albeit not limitless, discretion in choosing when to pursue disciplinary action against licensees. "[C]ourts have uniformly recognized that administrative officials enjoy broad discretion in determining the specific circumstances under which established punitive sanctions should be invoked." (*Murgia v. Municipal Ct.* (1975) 15 Cal.3d 286, 296 [124 Cal.Rptr. 204].) Unless there is evidence of "intentional or purposeful discrimination," "the allegedly 'unequal' treatment which may result from simple laxity of enforcement or the nonarbitrary selective enforcement of a statute has never been considered a denial of equal protection." (*Id.*, at pp. 296-297, emphasis omitted.) "[A]n equal protection violation does not arise whenever officials ‘prosecute one and not [another] for the same act." (*Id.*, at p. 297.)

In other words, unless appellant can establish discriminatory intent, the fact that appellant was disciplined and other licensees in the same strip mall were not merely illustrates the exercise of prosecutorial discretion, and does not constitute a violation of law.

ORDER

The decision of the Department is affirmed.[2]

BAXTER RICE, CHAIRMAN
MEGAN MCGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD[3]

2. 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.

3. Member Peter Roddy is voluntarily recused from this matter.

APPENDIX

BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE ACCUSATION AGAINST:

SUN SALT SAND INC
GRILL A BURGER
73091 COUNTRY CLUB DR # A2
PALM DESERT, CA 92260-2338

ON-SALE BEER AND WINE - EATING PLACE - LICENSE

Respondent(s)/Licensee(s)
under the Alcoholic Beverage Control Act.

PALM DESERT DISTRICT OFFICE

File: 41-523972

Reg: 17086273

AB: 9699

CERTIFICATION

I, Dominique Williams, do hereby certify that I am a Senior Legal Analyst for the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that annexed hereto is a true, correct and complete record (not including the Hearing Reporter's transcript) of the proceedings held under Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code concerning the petition, protest, or discipline of the above-listed license heretofore issued or applied for under the provisions of Division 9 of the Business and Professions Code.

IN WITNESS WHEREOF, I hereunto affix my signature on April 18, 2018, in the City of Sacramento, County of Sacramento, State of California.

Office of Legal Services

BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE ACCUSATION AGAINST:

SUN SALT SAND INC
GRILL A BURGER
73091 COUNTRY CLUB DR
#A2
PALM DESERT, CA 92260-2338

ON-SALE BEER AND WINE - EATING PLACE - LICENSE

under the Alcoholic Beverage Control Act.

FILE: 41-523972

REG: 17086273

DECISION FOLLOWING DEFAULT

This proceeding is conducted pursuant to Government Code section 11520. An Accusation against the above-referenced Respondent-licensee was registered by the Department December 27, 2017.

According to Department records the Accusation, Notice of Defense, Statement re Discovery and Department's Request for Discovery were served on Respondent-licensee on December 27, 2017.

According to Department records, no Notice of Defense has been filed. Accordingly, it is hereby found that Respondent licensee is in default and the Department makes the following Findings of Fact, Conclusions of Law, and Order:

Exhibits:

1. A true and correct copy of the Accusation registered in this matter is identified and admitted into evidence as Exhibit 1. Official Notice is taken of the license history as outlined in said Accusation.

2. A true and correct copy of the Proof of Service of Notice of Defense, Accusation, Department's Request for Discovery and Statement re Discovery, establishing service on Respondent-licensee, is identified and admitted into evidence as Exhibit 2.

3. A true and correct copy of the Department form ABC-333, Report of Investigation, and related documents are identified and admitted into evidence as Exhibit 3.

Findings of Fact:

1. Pursuant to Exhibit 2 as well as Government Code section 11505 and Miller Family Home, Inc. v. Department of Social Services (1997) 57 Cal.App.4th 488, it is found that Respondent-licensee was properly served with the Accusation, Notice of Defense, Statement re Discovery and Department's Request for Discovery in this matter. No Notice of Defense has been received.

2. Pursuant to Exhibits 1 and 3 it is found that Respondent-licensee did violate the Alcoholic Beverage Control Act.

Conclusions of Law:

1. Pursuant to Finding 1 above, Respondent-licensee has defaulted in this matter and the Department is authorized pursuant to Government Code section 11520 to conduct this default proceeding.

2. Pursuant to Finding 2 above, Respondent-licensee did violate the Alcoholic Beverage Control Act as alleged in said Accusation.

3. That by reason of the foregoing Findings of Fact and Conclusions of Law, grounds for suspension or revocation of such license(s) exist and the continuance of such license(s) would be contrary to public welfare and morals, as set forth in Article XX, Section 22, State Constitution, and Section(s) 24200(a) and (b) of the Business and Professions Code.

Order:

WHEREFORE, it is hereby ordered that Respondent-licensee's license number 523972 be, and hereby is, suspended for a period of 5 days. This decision is hereby adopted and is effective immediately. A representative of the Department will call on Respondent-licensee on or after APR 02 2018 to pick up the license certificate.

Dated: March 21, 2018

Matthew Botting
General Counsel

Any Motion to Vacate this decision must be made in accordance with Government Code §11520.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE ACCUSATION AGAINST: SUN SALT SAND INC GRILL A BURGER 73091 COUNTRY CLUB DR #A2 PALM DESERT, CA 92260-2338 ON-SALE BEER AND WINE EATING PLACE - LICENSE under the Alcoholic Beverage Control Act.	File: 41-523972 Reg: 17086273 DECLARATION OF SERVICE BY MAIL

The undersigned declares:

I am employed at the Department of Alcoholic Beverage Control. I am over 18 years of age and not a party to this action. My business address is 3927 Lennane Drive, Suite 100, Sacramento, California 95834. On March 21, 2018, I served, by CERTIFIED mail (unless otherwise indicated) a true copy of the following documents:

DECISION FOLLOWING DEFAULT

on each of the following, by placing them in an envelope(s) or package(s) addressed as follows:

SUN SALT SAND INC
GRILL A BURGER
73091 COUNTRY CLUB DR
#A2
PALM DESERT, CA 92260-2338

Office of Legal Services
Headquarters, Inter Office Mail

and placing said envelope or package for collection and mailing, following our ordinary business practices. I am readily familiar with this department's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, County of Sacramento, State of California, in an envelope with the postage fully prepaid. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 21, 2018 at Sacramento, California.

Mark Kinyon

Mark Kinyon

X PALM DESERT DISTRICT OFFICE (INTEROFFICE MAIL)
___ DIVISION OFFICE (INTEROFFICE MAIL)