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

AB-9805
File: 21-564938; Reg: 18088340

IV ENTERPRISE, INC.,
dba Six Pak Shop
6580 Pardall Road
Goleta, CA 93117,
Appellant/Licensee

V.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge: n/a

Appeals Board Hearing: October 3, 2019
Los Angeles, CA

ISSUED OCTOBER 15, 2019

Appearances: *Appellant:* Joshua Kaplan, as counsel for IV Enterprise, Inc,

Respondent: Joseph J. Scoleri III, as counsel for the Department of Alcoholic Beverage Control.

OPINION

IV Enterprise, Inc., doing business as Six Pak Shop, appeals from a decision of the Department of Alcoholic Beverage Control[1] denying its Petition for Offer in Compromise (POIC) and suspending its license for 25 days pursuant to a Stipulation and Waiver.

FACTS AND PROCEDURAL HISTORY

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[1]The Department's Order Following Petition for an Offer in Compromise, dated April 26, 2019, is set forth in the appendix as is the Certificate of Decision, dated February 26, 2019, adopting the terms of the Stipulation and Waiver signed by appellant on February 21, 2019.

Appellant's off-sale general license was issued on August 8, 2016. There is one instance of prior departmental discipline against the license.

On December 13, 2018, the Department instituted an accusation against appellant charging that on August 23, 2018, appellant's employee sold alcohol to a minor, in violation of Business and Professions Code section 25658, subdivision (a). Counsel for appellant requested an administrative hearing, and one was initially set for March 5, 2019.

Prior to the hearing, on February 21, 2019, appellant entered into a negotiated settlement of the case by submitting a signed Stipulation and Waiver form, setting forth the terms of the pre-hearing settlement agreement, including: a 25-day suspension of the license; a waiver of all rights to a hearing, reconsideration, or appeal; and a checked box indicating appellant's request to pay a fine in lieu of serving the suspension.

The Department sent appellant the paperwork for requesting payment of the fine on February 26, 2019, and the paperwork was submitted on March 7, 2019. On April 26, 2019, the Department issued its Order Following Petition for an Offer in Compromise, advising appellant that the request to pay a fine in lieu of suspension had been denied.

Thereafter, appellant filed a timely appeal raising the following issues: (1) the failure of the Department to make findings in explanation or support of its denial of the POIC denied appellant its due process rights; (2) the Stipulation and Waiver form signed by appellant is void by virtue of its unconstitutionality; and (3) estoppel should prevent the Department from denying appellant's POIC.

DISCUSSION

I

ISSUE CONCERNING FINDINGS

Appellant contends the failure of the Department to make findings in explanation or support of its denial of the POIC denied appellant its due process rights. (AOB at pp. 6-7.)

The rules for petitioning the Department for a POIC are contained in Business and Professions Code section 23095. That section provides:

> (a) Whenever a decision of the department suspending a license becomes final, whether by failure of the licensee to appeal the decision or by exhaustion of all appeals and judicial review, the licensee may, before the operative date of the suspension, petition the department for permission to make an offer in compromise, to be paid into the Alcohol Beverage Control Fund, consisting of a sum of money in lieu of serving the suspension.
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> (b) No licensee may petition the department for an offer in compromise in any case in which the proposed suspension is for a period in excess of 15 days. [Except as provided in paragraph (e), below.]
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> (c) Upon the receipt of the petition, **the department may stay the proposed suspension and cause any investigation to be made which it deems desirable and may grant the petition if it is satisfied that the following conditions are met**:
>
> > **(1) The public welfare and morals would not be impaired by permitting the licensee to operate during the period set for suspension and the payment of the sum of money will achieve the desired disciplinary purposes.**
> >
> > **(2) The books and records of the licensee are kept in such a manner that the loss of sales of alcoholic beverages that the licensee would have suffered had the suspension gone into effect can be determined with reasonable accuracy therefrom.**
>
> (d) The offer in compromise for retail licensees shall be the equivalent of 50 percent of the estimated gross sales of alcoholic beverages for each day of a proposed suspension, subject to the following limits:

(1) The offer in compromise may not be less than seven hundred fifty dollars ($750) nor more than three thousand dollars ($3,000).

(2) If the petitioning retailer has had any other accusation filed against him or her by the department during the three years prior to the date of the petition that has resulted in a final decision to suspend or revoke the retail license concerned, the offer in compromise may be not less than one thousand five hundred dollars ($1,500) nor more than six thousand dollars ($6,000).

(e) Notwithstanding subdivision (b), a licensee may petition the department for an offer in compromise for a second violation of Section 25658 that occurs within 36 months of the initial violation without regard to the period of suspension. In these cases, the offer in compromise shall be the equivalent of 50 percent of the estimated gross sales of alcoholic beverages for each day of the proposed suspension, and the offer in compromise may be not less than two thousand five hundred dollars ($2,500) nor more than twenty thousand dollars ($20,000).

(f) (1) The offer in compromise for nonretail licensees shall be the equivalent of 50 percent of the estimated gross sales of alcoholic beverages for each day of the proposed suspension, and the offer in compromise may not be less than seven hundred fifty dollars ($750) and may not exceed ten thousand dollars ($10,000) unless the nonretail licensee has violated Section 25500, 25502, 25503, or 25600 by giving to any licensee illegal inducements, secret rebates, or free goods amounting to more than ten thousand dollars ($10,000) in value, in which case the offer in compromise shall be equal to the value of the illegal inducements, secret rebates, or free goods given.

(2) Notwithstanding paragraph (1), any nonretail licensee who pays an offer in compromise based upon a violation in the exercise of any retail privileges of that license shall have the offer in compromise computed on estimated retail gross sales only pursuant to subdivision (d).

(3) All moneys collected as a result of penalties imposed under this subdivision shall be deposited directly in the General Fund in the State Treasury, rather than the Alcohol Beverage Control Fund as provided for in Section 25761.

(Cal. Bus. & Prof. Code § 23095, emphasis added.) The statute does not explicitly require the Department to make findings in explanation or support of the denial of a POIC.

The Department maintains that the review of a POIC falls outside the Board's jurisdiction (RRB at p. 11) and we agree. Our jurisdiction is defined as follows:

> Review by the board of a decision of the Department shall be limited to the questions whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record.

(Cal. Const. art. XX, § 22.) Additionally, the Constitution provides that "the board shall review the decision subject to such limitations as may be imposed by the Legislature."

The limitations noted in the Constitution are articulated in the Business and Professions Code which provides:

The review by the board of a decision of the department shall be limited to the questions:

> (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.
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> (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.)

Case law further defines the Board's jurisdiction as follows:

> If the Department's administrative action declares or applies legal rules, or sets forth conclusions of law which are drawn from adjudicated or undisputed facts, it is subject to review only for insufficiency of the evidence, excess of jurisdiction, errors of law, or abuse of discretion.

(*Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 95, [84

Cal.Rptr. 113].)

As early as 1959, in AB-1206 (*Tedford*), and in a number of subsequent cases, it was the Board's original position that a denial of a POIC was not appealable. The Board concluded that it lacked jurisdiction to entertain the appeal of a POIC. This conclusion was reinforced by the Second District Court of Appeals, Division Five (2d Civil 53554) in its Order Denying a Petition for Writ of Review in *Nasrallah v. Rice* (5/5/78) which stated: “The board's conclusion that there is no right of appeal from a decision denying an offer of compromise is correct and dismissal of the purported appeal was therefore proper.”

The treatment of appeals from a denial of a POIC then evolved. In *Gill* (1998) AB-7167, the evolution was described as follows:

> The Appeals Board has over the years refused to consider appeals where the issue involves the failure or refusal to grant a POIC: allowing the licensee to pay a fine instead of serving the suspension. The case of *Radtke* (1979) Ab-4617, stated that “This is a discretionary matter vested solely in the department.”
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> However, in the mid-1990's, the Board commenced hearing appeals on the issue of the payment of a fine, with the scope of review limited to that of determining if the Department acted arbitrarily. The reasoning was that, since the discretion is totally within the Department, if it abused that discretion by unjust actions, the Board would intervene.
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> The Board stated in *Meacham* (1997) AB-6111d:
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> > Thus it is no answer for appellant to contend that the Department is required to grant its petition simply because it is willing to pay the maximum monetary penalty that can be required upon acceptance of a compromise. That would merely obviate the need for the licensee's books and records to permit the computation of an appropriate monetary penalty.
> >
> > It is also essential that the Department be satisfied that “the public welfare and morals would not be impaired by permitting the licensee to operate during the period of

> suspension and that the payment of money will achieve the desired disciplinary purposes." (Bus. & Prof. Code §23095, subd. (a)(1).) There are no criteria set forth in the statute to guide or control the Department's determination of whether it is satisfied that the alternative sanction of a monetary penalty will achieve the desired disciplinary purposes. It would seem, then, that this is a determination upon which the Department must bring to bear its considerable expertise in ascertaining what is necessary in order to effect an appropriate discipline, a determination which inescapably rests upon an exercise of discretion.

(*Gill* (1998) AB-7167, at pp. 3-4, quoting *Meacham* (1997) AB-6111d, at p. 7., emphasis in original.)

In subsequent years, the Board continued to accept appeals regarding the Stipulation and Waiver Form — which contains the POIC request — but only for the limited purpose of reviewing for issues such as fraud, mistake, undue influence, duress, abuse of discretion, or violation of due process. The Appeals Board does not review the underlying facts in such cases.

A stipulation, like other contracts, may be rescinded only if it was procured through fraud, duress, undue influence, or mistake. (See *Frankel v. Bd. of Dental Examiners* (1996) 46 Cal.App.4th 534, 544 [54 Cal.Rptr.2d 128] [holding that a stipulation and waiver is governed by contract principles].) As the Board explained in *Sood* (1999) AB-7404:

> It has been the Board's position in all cases previously decided, that appellants may not, in matters where a stipulation and waiver form waives appeal, raise substantive issues on the merits of the facts of the case. However, appellants may raise the narrow issues of due process and substantial justice: has the appellant been dealt with fairly. . .
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> As stated by the Ninth Circuit:
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> [T]he general rule of law in California is that when a person with the capacity of reading and understanding an instrument signs it, he is, in the absence of fraud and imposition, bound by its contents, and is estopped

from saying that its provision is contrary to his intentions or understanding. (*Dobler v. Story* (9th Cir.1959) 268 F.2d 274, 277.)

It is important to remember that the Department is not required to grant the request for a POIC and allow payment of a fine in lieu of serving a suspension simply because the licensee checks the box on the Stipulation and Waiver form.[2] The Department exercises complete discretion in deciding whether to allow a fine in lieu of a suspension, guided by the language of subdivision (c)(1) of section 23095, which says the Department "**may** grant the petition if it is satisfied that . . . [t]he public welfare and morals would not be impaired by permitting the licensee to operate during the period set for suspension and that the payment of the sum of money will achieve the desired disciplinary purposes." Nowhere in that statute does it state that the Department is required to explain its reason for denying a POIC.

Appellant maintains the Department's denial of the POIC without explanation denies it due process, contending:

> The Due Process requirement of a meaningful hearing clearly means a full and complete opportunity to present the facts and law at issue in a meaningful way, at a meaningful time, with due notice of what the party must rebut or prove. That applies to the summary denial of the P.O.I.C. herein.

(AOB at p. 9.) Appellant therefore asserts that the stipulation and waiver is "void as violative of Appellant's constitutional rights [and that] [a]ny waiver of appeal rights therein is equally void." (*Ibid.*) We disagree. By signing the Stipulation and Waiver form, appellant expressly waived its right to a hearing as part of a settlement

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[2]The Board is most often presented with appeals from a denial of a POIC requested on the Stipulation and Waiver form, but ABC rules also allow licensees to request a POIC after an administrative hearing or even after an unsuccessful appeal.

agreement. Appellant cannot then subsequently claim it is entitled to a hearing as a matter of right simply because its POIC was denied. Appellant cannot have its cake and eat it too.

As explained at length in the Department's Motion to Dismiss Appeal, and as noted above, the granting or denying of the POIC is entirely within the Department's discretion. Subdivision (c) of Business and Professions Code 23095 states:

> Upon the receipt of the petition, the department **may** stay the proposed suspension and cause any investigation to be made which it deems desirable and **may** grant the petition if it is satisfied that the following conditions are met . . .

(Bus. & Prof. Code § 23095, emphasis added.) As such, this entirely discretionary action is only subject to the appeals board process if an appellant brings forth evidence of fraud, mistake, undue influence, duress, abuse of discretion or violations of due process in connection with the POIC procedure. Appellant has presented no evidence of fraud, mistake, undue influence, duress, abuse of discretion or violations of due process — aside from its assertion that the stipulation and waiver form itself is unconstitutional (see discussion, *infra*).

Absent such evidence, we lack jurisdiction to hear this appeal, and, henceforth, it will be the policy of this Board to reject appeals based on the denial of a POIC — except in cases involving fraud, mistake, undue influence, duress, or abuse of discretion.

II

ISSUE CONCERNING CONSTITUTIONALITY OF STIPULATION & WAIVER

Appellant contends the Stipulation and Waiver form signed by appellant is void by virtue of its unconstitutionality. (AOB at pp. 10-11.)

Appellant contends the current process is unconstitutional, describing it as follows:

> When the Department invites a licensee to execute a Stipulation and Waiver to resolve a pending Accusation and indicates to the licensee that it may pay a fine in lieu of serving a suspension, that is frequently a very attractive offer. However, in order to take advantage of that offer, the licensee must waive its rights to an Administrative Hearing to present a defense and thereby the licensee must waive its Due Process rights. When, as in this case, the Department thereafter summarily denies the Petition to Make an Offer in Compromise, the licencee is left in an impossible and constitutionally violative position. The licensee has waived its Due Process rights to present a defense in contemplation of paying a fine in lieu of a suspension. The Department's summary denial of that opportunity which it invited, leaves the licensee subject to an actual suspension with no opportunity whatsoever to present any defense.

(*Id.* at p. 10.)

Appellant has cited no legal authority for its position that the Stipulation and Waiver form and procedure are unconstitutional. To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. Where a point is merely asserted without any argument or support for the proposition, it is deemed to be without foundation and requires no discussion by a reviewing authority. (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 [199 Cal.Rptr. 72].) Appellant has provided no support for its opinion that this procedure is unconstitutional, and we know of none.

Furthermore, unless evidence is presented to the contrary, there is a rebuttable presumption that statutes are constitutional.

> In determining a statute's constitutionality, we start from the premise that it is valid, we resolve all doubts in favor of its constitutionality, and we uphold it unless it is in clear and unquestionable conflict with the state or federal Constitutions. [Citation.] A challenge to a statute's constitutionality must demonstrate that its provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions. [Citations.]

(*Kyle O. v. Donald R.* (2000) 85 Cal.App.4th 848, 860 [102 Cal.Rptr.2d 476].) Appellant has not presented any evidence to rebut the statute's constitutionality.

III

ISSUE CONCERNING ESTOPPEL

Appellant contends estoppel should prevent the Department from denying appellant's POIC because appellant reasonably relied on the Department's offer of the opportunity to pay a fine in lieu of the suspension in exchange for appellant's waiver of its right to a hearing, reconsideration and appeal. (AOB at pp. 12-14.)

We find guidance on this subject from the California Supreme Court:

> The modern doctrine of equitable estoppel is a descendent of the ancient equity doctrine that "if a representation be made to another who deals upon the faith of it, the former must make the representation good if he knew or was bound to know it to be false." (Bigelow on Estoppel (6th ed. 1913) p. 603; see *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 488-489 [91 Cal.Rptr. 23, 476 P.2d 423].) We have described the requirements for the application of equitable estoppel as follows: "'Generally speaking, four elements must be present . . . : (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.'" (*Mansell, supra*, 3 Cal.3d 462, 489, quoting *Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305 [61 Cal.Rptr. 661, 431 P.2d 245].)
>
> At common law, estoppel was unavailable against the government. We have long held, however, that estoppel may be asserted against the government "where justice and right require it" (*City of Los Angeles v. Cohn* (1894) 101 Cal. 373, 377 [35 P. 1002]), and we have applied the doctrine against government entities in a variety of contexts. At the same time, our cases recognize the correlative principle that **estoppel will not be applied against the government if to do so would effectively nullify "a strong rule of policy, adopted for the benefit of the public**." [Citation.]

(*Lentz v. McMahon* (1989) 49 Cal.3d 393, 398-400 [261 Cal.Rptr. 310], emphasis

added.)

In its brief, the Department maintains that appellant waived its equitable estoppel claim by failing to raise it earlier, i.e., by failing to submit a request for reconsideration. (RRB at p. 18.) It also notes that the stipulation and waiver paperwork makes clear that the Department could either grant or deny the POIC request — that the POIC request was not guaranteed to be granted. (*Id.* at p. 19.)

We find that appellant's estoppel argument unavailing. Whether or not the four elements of equitable estoppel were established, which is questionable, and whether or not this argument was waived by appellant, which is also questionable, the fact remains that case law has established that "estoppel will not be applied against the government if to do so would effectively nullify "a strong rule of policy, 'adopted for the benefit of the public.'" (*Lentz, supra.*)

In the instant case, we believe a strong rule of policy, adopted for the benefit of the public, supports the argument that stipulation and waivers must be binding on the parties. As noted in section I, "Stipulations in administrative proceedings would not serve the purpose for which they are intended if they were voidable at the option of the licensee . . ." (*Stermer v. Bd. of Dental Examiners* (2002) 95 Cal.App.4th 128, 133 [115Cal.Rptr.2d 291].) Accordingly, appellant cannot now assert that the Department should be estopped from denying its POIC request.

ORDER

The Department's Motion to Dismiss the Appeal is granted.[3]

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3]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.