

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

THE SOUTHLAND CORPORATION	)	AB-6930
dba 7-Eleven Food Store #13891)	
18916 Roscoe Boulevard	)	File: 20-276929
Northridge, California 91324,	)	Reg: 96036451
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	John P. McCarthy
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	February 4, 1998
	)	Los Angeles, CA
)	

The Southland Corporation, doing business as 7-Eleven Food Store #13891 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked the off-sale beer and wine license which had been issued to Southland and its co-licensees, Kuldip S. and Piya Sukhija, for co-licensee Kuldip S. Sukhija having committed the crime of bribery of a police officer, being contrary to the universal and generic public welfare and morals provisions of the California

¹The decision of the Department, dated August 7, 1997, is set forth in the appendix.

Constitution, article XX, §22, and Business and Professions Code §24200, subdivision (a), arising from a violation of Penal Code §67.

Appearances on appeal include appellant The Southland Corporation, appearing through its counsel, Lyn Skinner Foster and Jeffrey A. Vinnick, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on October 22, 1992. Thereafter, the Department instituted an accusation against appellant charging that a co-licensee,² otherwise unidentified in the accusation, committed the crime of bribery, in violation of Penal Code §67.

An administrative hearing was held on March 27, 1997, at which time oral and documentary evidence was received. Pursuant to a stipulation between the parties, a police report describing the circumstances of the crime was submitted in evidence, it being stipulated that the police officers, if called as witnesses, would testify to the facts set forth in the report.

The report described in considerable detail the efforts by co-licensee Kuldip S. Sukhija over a 10-day period to persuade police officers to drop charges of a sale-to-minor-violation. Sukhija's efforts culminated in his delivery to a uniformed police officer a check for \$1000 and an IOU for \$9,000, purportedly in return for the sale-to-minor charge being dropped and Sukhija being forewarned of future

² The co-licensee who was referred to was Kuldip S. Sukhija.

alcoholic beverage control investigations. Sukhija was arrested immediately afterward, the transaction having secretly been recorded by the police. In addition to the police report, copies of the police recording, the check, and the IOU were placed in evidence at the hearing.

The Sukhijas presented no defense to the accusation.

Bryan Wilson, market manager for Southland, testified regarding the franchise relationship between Southland and its franchisees, the substance of which was that Southland had no involvement in the day-to-day operation of the store or control over the activities of the franchisee which might affect the license.

Subsequent to the hearing, the Administrative Law Judge (ALJ) issued his proposed decision, which determined that the payment and promise to pay by Kuldip S. Sukhija constituted a bribe of an executive officer within the meaning of and in violation of Penal Code §67, a crime which, under the circumstances, involved moral turpitude, and ordered the license revoked. The ALJ declined to follow the recommendations of Department counsel that revocation be stayed for 90 days to permit Kuldip S. and Piya Sukhija to be dropped from the license, for them to be barred from any future involvement with the business, either as owners or employees, and for a 30-day and then indefinite suspension until that occurred.³ Instead, he wrote:

³ The Department's recommendations were embodied in a proposed stipulation, placed in evidence as Exhibit 6, and described as the product of extensive discussions. Counsel for Southland indicated his concurrence in the proposed stipulation, but the attorney for the individual co-licensees objected to the requirement that Piya be dropped from the license, since she had engaged in no wrongdoing.

“The Department recommended a penalty short of outright revocation in this matter, a penalty explicitly delineated in Exhibit 6 and one which would recognize that respondent The Southland Corporation played no role in the bribery, and, in effect, revoking the offending partner’s (and, of course, that of his wife), interest in the license, while retaining the license in the name of the non-offending partner, the Southland Corporation. Unfortunately, it is not so easy. In matters of this kind, innocent partners or spouses holding a license with an offending partner or spouse cannot expect the continuation of the license without discipline. In Coletti v. State Board of Equalization (1949) 94 Cal.App.2d 61, 209 P.2d. 984, the Court of Appeal declared:

‘There is, however, no authority in the board to revoke a partnership license as to the interest of one of the partners. There was but a single license, although it stood in the names of the two partners. It cannot be invalid as to one partner and valid as to the other.’”

The Department adopted the proposed decision without modification, and subsequently denied Southland’s petition for reconsideration which alleged that Southland had taken over full operation of the store and the Sukhijas were no longer in a position to sell alcoholic beverages to the public.⁴

Appellant Southland thereafter filed a timely notice of appeal. In its appeal, Southland raises the following issues: (1) the denial of its request to present evidence regarding the independent contractor relationship with its franchisee was

⁴ The memorandum filed in support of the motion explained that Kuldip S. Sukhija’s conviction of bribery had been overturned because of juror misconduct, and he was scheduled to be retried in September. It also noted that while the Sukhijas had voluntarily turned the operation of the store over to Southland, they refused to sign documentation required to “sign over” the license to Southland. The memorandum went on to state that, assuming another conviction, Southland would seek court orders terminating its franchise agreement with the Sukhijas and compelling them to sign such documentation placing the license solely in the name of Southland. Southland sought a stay of revocation for six months, to allow time for such to occur.

The record does not disclose whether the retrial took place, or, if so, its outcome.

error; (2) the Department abused its discretion by revoking the license outright rather than staying revocation pending the transfer of the license into Southland's name only; (3) the Department erred in denying Southland's petition for reconsideration.

DISCUSSION

I

Southland contends that evidence of its independent contractor relationship with its franchisees was improperly excluded by the ALJ.

The issue of the relevance of Southland's independent contractor status arose after Southland's general manager had answered approximately twenty questions designed to elicit evidence to the effect that Southland's franchisees, including the franchisees in this case, operated as independent contractors, and that Southland exercised no control whatsoever over the day-to-day operation of the stores. It was only after counsel for the franchisee objected on relevancy grounds that the ALJ cut off further testimony. The following colloquy took place [RT 21-23]:

"MR. TROXELL: Pardon me. I'm going to object to all this evidence. I thought it was just perhaps introductory. I don't know how it has any relevance in this case. It has nothing to do with the ABC violation.

. . .

"MR. VINNICK: Southland's relationship with the franchisee, as an independent contractor, and their inability to control the operations and activities going on in the store is relevant to the termination of the licensing hearing because Southland has no control over the day-to-day operations of the store. They also, as I am going to connect up, had no day-to-day control over what the owner of the store does within the store which might affect the license.

"THE COURT: Let me suggest this. There is only one license; correct?

"MR. VINNICK: There's one license.

"THE COURT: Are you aware of any authority to split the license and retain it with Southland having a licensure and the Sukhijas not?

"MR. VINNICK: I'm not aware of any authority which would enable the court to do that. But in terms of perhaps the reissuance of another license or a transfer in the future, I believe these facts are positive and have bearing on Southland -- that Southland has not committed any type of moral infringement on the public. And that their role in this is that of franchisor. They have no control over the operation of the store on a day-to-day basis.

"THE COURT: Well, this case doesn't have to do with what may or may not happen in the future with another license or another application. This case only has to do with what's pleaded in the accusation, and what's the appropriate discipline, if any.

. . .

"It's nice to know what the relationship is between Southland and it's [sic] franchisees, but I don't think it helps me any. Besides, I think you were just about finished making your point, weren't you?

"MR. VINNICK [counsel for Southland]: Okay."

It is unlikely that Southland was prejudiced by the ALJ's evidentiary ruling. Even after his ruling on relevance, the ALJ permitted Southland to place a copy of its franchise agreement in evidence [RT 24-25]. That agreement sets forth in considerable detail the contractual relationship between Southland and its franchisee. It is difficult to imagine how additional oral testimony would have been anything other than cumulative.

The ALJ clearly believed himself bound by the decision in Coletti v. State Board of Equalization, supra, with respect to the unitary nature of the license. If Southland is entitled to any relief on this appeal, it is because of the ALJ's belief

regarding the import of the Coletti decision, and not his evidentiary ruling. There is no indication in the ALJ's proposed decision that he thought Southland had any involvement in the underlying criminal conduct that provoked the accusation.

The Department argues that it is the relationship of Southland and the Sukhijas as co-licensees that is critical, and not whether they are partners or are in an independent contractor relationship. "It is that relationship . . . that determines to whom the Department looks for the responsibility of the operation of a licensed premises, and where it derives its authority to discipline." (Dept.Br. at 3).

While Southland's relationship with its franchisee may be in the nature of an independent contractor relationship, that is a function of the contract between them. The Department is not a party to that agreement, and is not bound by it. The cases cited by Southland all involve, one way or another, either the relationship between the two parties to the agreement, or the relationship with a third party who dealt with only one of the parties to the agreement.

Here, the Department issued its license to Southland and the franchisees. It is entitled to look to either or both for compliance with the obligations assumed by the acceptance of that license. Whether they be considered partners or joint venturers or something else, the clear fact is that they jointly obligated themselves to comply with all the laws applicable to one who holds a license to sell alcoholic beverages. That a separate agreement between the co-licensees allocates those responsibilities to one or the other has no binding force insofar as the Department is concerned.

The language of the court in Coletti v. State Board of Equalization, supra, 209 P.2d at 286, is pertinent:

“The revocation was effective as to both partners or to neither. It is clear that it was the duty of the board to terminate Gerbosi’s rights under the license. He violated the conditions under which it was held when he engaged in the illegal sale of liquor. It would be a violation of section 3 of the act for him to exercise any of the rights and privileges of a licensee. What he cannot do as an individual, he cannot do through a partnership. Revocation of a partnership license brings about a harsh result as to an innocent partner, but this result cannot be avoided in the present circumstances. The innocent partner must suffer unless the guilty one goes unpunished. Certainly the board does not act arbitrarily in revoking a partnership license where one partner has been found guilty of violations of law which call for revocation. There is no force in the argument that one partner in a liquor license cannot be bound by unauthorized acts of a co-partner which place the license in jeopardy. When two or more persons apply for a partnership license, each of them necessarily assumes responsibility for the acts of the others with relation to the conditions under which the license is held. It is immaterial here that the offenses of Gerbosi were committed at the Atlantic Boulevard cafe in which Coletti had no interest. A violation of law in the sale of intoxicating liquor is a cause for revocation of a license, and it is none the less a cause if it is committed away from the licensed premises. Coletti has suffered an injustice at the hands of Gerbosi, but not at the hands of the board.” (Emphasis supplied.)

The Department also cites Rice v. Alcoholic Beverage Control Appeals Board (1979) 89 Cal.App.3d 30 [152 Cal.Rptr. 285], which sustained an unconditional revocation and rejected the contention that, because of the innocence of the co-licensee spouse, the refusal to stay revocation in order to permit transfer of the license within a reasonable period of time was an abuse of discretion. In that case, the court, citing Coletti, stated [89 Cal.App.3d at 89]:

“The fact that unconditional revocation may appear too harsh a penalty does not entitle a reviewing agency or court to substitute its own judgment therein ... ; nor does the circumstance of forfeiture of the interest of an otherwise innocent colicensee sanction a different and less drastic penalty.”

Southland concedes that the franchise form of business has not yet been analyzed or examined in cases dealing with control of alcoholic beverages, but argues that "the principles endorsed in the cases discussing civil liability are equally applicable to the considerations involved in assessing responsibility for liquor license violations."

Southland relies heavily on the case of Cislaw v. Southland Corporation (1992) 4 Cal.App.4th 1284 [6 Cal.Rptr.2d 386], a case where Southland was exonerated from liability in a civil wrongful death action brought against Southland and one of its franchisees which had sold clove cigarettes to plaintiffs' 17-year-old son, who died of respiratory failure after smoking them. There is nothing in the decision that suggests that Southland's independent contractor status under its franchise agreement, albeit sufficient to immunize Southland against liability for the tort of its franchisee, precludes the Department from exercising its constitutionally-mandated duty and power to suspend or revoke a license when necessary in order to protect the public welfare and morals.

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals. We are aware of nothing in the Department's charter that mandates it to accord special consideration or more lenient treatment to a person or firm merely because that person or firm does business in the mode of a franchisor or franchisee. To the

extent the Department chooses to do so, that is a function of its exercise of discretion, based upon "good cause."

Another reason the Department must be able to discipline Southland derives from the fact that Southland's "7-Eleven" service mark is the name by which the retail business is held out to the public. When there is a violation of the Alcoholic Beverage Control Act by that business, the public (including the police) will inevitably associate the illegal activity with that store and the name by which that store is held out to the public. If the business then continues without interruption, as Southland seeks in this case, the public could be led to think the store has some sort of immunity, and could lose respect either for the Alcoholic Beverage Control Law or for the ability of the Department to enforce that law.

Nonetheless, we are persuaded by the arguments that the relationship between franchisor and franchisee with regard to the co-holding of an alcoholic beverage license may be such as to warrant the future adoption by the Department of special rules governing the consequences of disciplinary action initiated against a license where the franchisor, in compliance with the obligations of its franchise agreement, has neither been involved in the violation alleged nor has permitted it by any practices or policies it has implemented pursuant to that agreement. The Department is in the best position to determine whether such rules would in fact be useful, and consistent with its enforcement obligations, and, unlike this Board, has the requisite jurisdiction to do so.

Appellant contends the Department abused its discretion by revoking the license, rather than staying revocation for a period of time while Southland effectively divorced itself from its franchisee.⁵

The Department initially recommended to the ALJ that the order of revocation be stayed for a period of time to permit what would effectively be a transfer of the license to Southland. The ALJ, however, declared himself powerless to do so. In this respect, we think the ALJ erred.

The Department clearly has the power to stay an order of revocation for a period of time in order to permit the transfer of a license to a person or persons acceptable to the Department, and has done so frequently. While the decision whether to do so is discretionary, the procedure to effect such a result is purely administrative - a matter of structuring the transaction in such a way as to assure the Department that the disciplinary order of revocation has its intended effect on the intended target.

On its face, the decision of the Department in this case appears to be one controlled by the erroneous conclusion of the ALJ that the Department was

⁵ In its motion for reconsideration, Southland pointed out that almost immediately following the administrative hearing, the Sukhijas voluntarily surrendered the store to Southland, at which time the store operated as a Southland corporate store, staffed with Southland employees. The Sukhijas, however, had refused to relinquish the license to Southland, and Southland represented that it intended to seek a court order terminating the franchise agreement when and if Kuldip S. Sukhija was convicted of the bribery charge (his earlier conviction was overturned for juror misconduct), but does not indicate in either of its briefs to the Board whether this has occurred. The record does not indicate whether the Department's action in adopting the proposed decision without change was in any way predicated on the unsettled situation regarding the franchise agreement.

powerless to do anything other than order outright revocation. If this is true, then the order is flawed. On the other hand, the Department may have had valid reasons for adopting the decision as written, unrelated to the issue whether it had the power to order a stay of some kind pending a severance of the franchisee's involvement in the license arrangement.

Since it cannot be discerned from the decision itself which of these alternatives was the case, it appears to the Board that its only recourse is to order the case remanded to the Department, and direct the Department to reconsider its revocation order in light of our comments. In this way, the Board can be assured the decision is the product of an exercise of the Department's discretion, rather than its concurrence in what the Board believes was an erroneously narrow reading of the law with respect to the Department's ability to afford the manner of discipline initially recommended by Department counsel at the administrative hearing.

III

Southland also contends that the Department erred in denying its petition for reconsideration.

The thrust of the petition for reconsideration was that the Sukhijas had surrendered possession of the store to Southland, so there was no longer a need for discipline. The declaration in support of the petition disclosed an uncertain and unsettled state of affairs regarding the manner in which the Sukhijas's rights under

the franchise agreement hinged on the success or failure of the forthcoming criminal retrial of Kuldip S. Sukhija.

Presumably, with a remand of the case to the Department for further consideration, the matters addressed in the petition for reconsideration will necessarily be considered by the Department. Whether the facts set forth therein are such as to influence the Department's ultimate determination is a subject for the Department to consider, and not the province of the Board. (See Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].)

CONCLUSION

The case is remanded to the Department for further consideration in light of the Board's comments herein.⁶

BEN DAVIDIAN, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS

⁶This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.