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

AB-7032a

File: 48-150771 Reg: 96035015

MONTELL R. MEACHAM dba First King
14401-03 S. Western Avenue, Gardena, CA 90249,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: December 6, 2001
Los Angeles, CA

ISSUED FEBRUARY 21, 2002

Montell R. Meacham, doing business as First King (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered revocation of his on-sale general public premises license, but stayed the order conditioned upon a two-year period of discipline-free operation and service of a 60-day suspension, for having permitted the operation of his premises as a disorderly house and in such manner as to constitute a police problem, contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §§25601 and 24200, subdivisions (a) and (b).

Appearances on appeal include appellant Montell R. Meacham, appearing through his counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the

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[1]The decision of the Department, dated April 19, 2001, is set forth in the appendix.

Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

This is the second appeal in this matter. The first appeal followed eighteen days of hearings in 1996 and 1997, in the course of which the testimony of 60 witnesses was heard and numerous documentary exhibits placed in the record. On July 12, 2000, the Appeals Board determined that the record demonstrated an adequate basis for the imposition of discipline, but remanded the matter to the Department for further proceedings. It did so because, despite the fact that appellant had raised an issue of selective enforcement and failure to administer graduated discipline, an issue which was the subject of "considerable testimony and some debate," there was nothing in the Department's decision to indicate the issue had even been considered. The Board stated:

> "We think fairness requires us to remand this case to the Department for it to consider appellant's claim of selective and discriminatory enforcement in light of the evidence in the record, and to make findings on that issue and such other issues as may be implicated therein. If the Department believes the record as a whole demonstrates the absence of selective enforcement, it should say so. If it has doubts, or is not prepared to say so, additional hearings may be required. If it has reasons for not having pursued its customary policy of graduated discipline, it should explain those as well. Without findings that satisfy this Board that appellant's defenses were accorded fair consideration, the decision of the Department is incomplete."

The Board's remand of the case to the Department was followed by a further remand by the Department to the Administrative Law Judge (ALJ) for the purpose of clarifying and making findings and determinations regarding the issues of selective

enforcement and progressive discipline. Thereafter, the Department adopted a proposed decision submitted by ALJ Sonny Lo, in which he rejected appellant's claim that he had been the victim of selective enforcement. In addition, the ALJ reconsidered the penalty order, pursuant to the Appeals Board mandate, and ordered a stayed revocation, a probationary period, and a suspension, in place of the original order of outright revocation.

Appellant has once again appealed, contending that the Department has failed to heed the Appeals Board mandate by failing to conduct a full and fair inquiry into the racial discrimination issue, and by imposing a penalty which, appellant claims, is the equivalent of outright revocation, a penalty out of line with the type of penalties ordered by the Department in similar cases.

DISCUSSION

I

Appellant contends that the Department failed to conduct the inquiry mandated by the Appeals Board as to whether appellant's premises had been targeted for enforcement action on racial grounds. The Department, on the other hand, contends that the Administrative Law Judge (ALJ), on remand, explored in detail the issue of discriminatory enforcement.

In Baluyut v. Superior Court (1996) 12 Cal.4th 826 [50 Cal.Rptr.2d 101], the California Supreme Court discussed at length the concept of discriminatory prosecution, and in so doing, provided guidance of particular utility in this case:

> "Although referred to for convenience as a 'defense,' a defendant's claim of discriminatory prosecution goes not to the nature of the charged offense, but to a defect of constitutional dimension in the initiation of the prosecution. ... The

> defect lies in the denial of equal protection to persons who are singled out for a prosecution that is 'deliberately based upon an unjustifiable standard, such as race, religion, or other arbitrary classification.' ... When a defendant establishes the elements of discriminatory prosecution, the action must be dismissed even if a serious crime is charged unless the People establish a compelling reason for the selective enforcement. ...
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> "Unequal treatment which results 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 discrimination. ...
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> "In *Murgia*[2] this court explained the showing necessary to establish discriminatory prosecution: 'In order to establish a claim of discriminatory enforcement a defendant must demonstrate that he has been deliberately singled out for prosecution on the basis of some invidious criterion. ...'"

The decision of the Department cited and quoted from Baluyut v. Superior Court, supra, and in detailed findings and determinations, concluded that the Department and the City of Gardena "singled out" appellant's bar because, from a study of all bars in the city, his bar had the highest incidence of police response, and that appellant had failed to meet his burden of proving that his bar was singled out for prosecution because of the race of his customers.

In our original decision in this case, we said that it was not our province to analyze the testimony of the various employees of the City of Gardena and make a determination whether the incident study conducted by the city unfairly targeted appellant's premises because of its African-American clientele. We said that was the responsibility of the ALJ, in the first instance, and the Department.

The ALJ and the Department have now reviewed the record and traced the development of the study in question, from its inception to where it was actually completed. We have reviewed the testimony of the witnesses from the City of Gardena

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[2] Murgia v. Municipal Court (1975) 15 Cal.3d 286, 298 [124 Cal.Rptr. 204].

summarized in the findings, and are satisfied that there is no evidence to suggest that appellant was targeted because of the racial composition of his clientele. Whether the study might have included the Normandie Club, which appellant claims is an even worst offender, is no longer a relevant consideration. The study, according to the ALJ's findings and the evidence, appears to have undergone a metamorphosis while traveling the path from design to implementation, one based upon staff interpretation of enforcement objectives, none of which were shown to be racially motivated.

Appellant seems to argue that, simply because the Normandie Club was excluded from the study, he has met his burden. He ignores the further requirement that the exclusion have been based upon racially-motivated grounds. Indeed, appellant has offered nothing in the way of concrete evidence of discrimination, and the inference of such that he would draw is contrary to the ALJ's findings and the record evidence. It is not enough to say merely that First King's clientele was African-American and the Normandie Club's was not.

Nor does appellant's statistical argument withstand analysis. First, the record is devoid of meaningful statistics. Appellant asserts repeatedly that the Normandie Club was a more frequent offender, but has offered no solid statistical evidence to support his claim. Nor has appellant attempted to compare the degree of magnitude of the law enforcement encounters engendered by his premises and the Normandie Club. In this regard, the incident by incident review conducted by the Department in its original decision, and by this Board on the first appeal, has convinced us that the disorderly house and law enforcement incidents are virtually unmatched in any matter this Board has heard in recent memory.

That being said, we are satisfied that the Department has now complied with the mandate of this Board, and that its findings and determinations to the effect that appellant has failed to meet his burden of proving discriminatory prosecution are amply supported by the record.

II

This Board, in its original decision in this case, directed the Department to reconsider the penalty the Department had imposed, and to explain its reasons for not having pursued its customary policy of gradual discipline. In the decision now under review, the Department ordered revocation, as it had done previously, but this time stayed its order for a probationary period of one year, and imposed a substantial suspension. Its reasoning is set forth in the proposed decision (Determination of Issues XVI, which the Department adopted without change:

> "A. In light of the large number of charges against Respondent which were sustained by the Appeals Board, and the seriousness of many of those charges, revocation of [appellant's] license is warranted.
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> "B. On the other hand, many of the counts in the Accusation involved incidents which occurred more than a year prior to the filing of the Accusation. This fact suggests that the Department did not consider the underlying violations for those counts to be very serious. In any event, earlier discipline by the Department, to use the Appeals Board's words, 'might possibly have prevented future incidents.' Since the Department did not provide [appellant] with a more timely, and presumably less severe, discipline for the earlier violations alleged in the Accusation, a partial stay of the revocation is appropriate.

Appellant now contends that the Department abused its discretion by "effectively revoking the license." His attack appears to be directed at the length of the suspension, contending that a 60-day suspension is arbitrary, given the facts of the case.

The Appeals Board will not disturb the Department's penalty orders in the

absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

Admittedly the penalty is severe. Severity alone, however, is an insufficient ground for the setting aside of a penalty order. (See Martin, supra; Macfarlane v. Department of Alcoholic Beverage Control (1958) 51 Cal.2d 84 [330 P.2d 769].) The order is within the discretion granted the Department , and appellant has not persuaded us that it is arbitrary or an abuse of discretion.

ORDER

The decision of the Department is affirmed.[3]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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

Any party may, before this final decision becomes effective, apply to the appropriate district 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.