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

AB-7593a
File: 20-255297 Reg: 98044555

MOHAMED S. MOHAMED and AHMED M. MURCHED dba Aiban Market
701 - 60th Street, Oakland, CA 94609,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,

Respondent

Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja

Appeals Board Hearing: August 3, 2001

San Francisco, CA

ISSUED OCTOBER 12, 2001

Mohamed Mohamed and Ahmed Murched, doing business as Aiban Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their off-sale beer and wine license for permitting their clerk to sell an alcoholic beverage to a person under the age of 21 years (minor), being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivisions (a) and (b), arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellants Mohamed Mohamed and Ahmed Murched, appearing through their counsel, Beth Aboulafia, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas Allen.

---

[1]The decision of the Department, dated January 11, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 20, 1990. Thereafter, the Department instituted an accusation against appellants charging a sale to a minor on August 4, 1998. Also, the record shows two prior sales to minors, one in 1995 and one in 1997.

An administrative hearing was held on June 29, 1999, at which time oral and documentary evidence was received. Thereafter, the Administrative Law Judge (ALJ) issued his proposed decision which was subsequently rejected by the Department which issued its own decision. The major difference between the two decisions is that the proposed decision called for the conditional revocation of the license thus allowing appellants to sell their license, with the Department's decision being unconditional revocation.

On appeal, the Appeals Board sustained the allegations in the accusation, but reversed the penalty stating:

> "The decision of the Department rejected the proposed decision of the ALJ, copied the ALJ's proposed decision almost in total, excising only that portion of the Penalty Consideration (second paragraph only), which set forth the statute commonly called the '3-strike' rule, with the ALJ noting the Department 'may' revoke the license, but is not required to do so. (¶) The weakness of the Department's penalty is that there are no findings which would explain the reasoning of the Department to take away the license on only the third violation, which absence of explanation are contrary to the holding in Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 516-517 [113 Cal.Rptr. 836]. This Board has oft cited Topanga for the proposition that the Department must give valid reasons for its ruling, or appellate tribunals are 'held captive' - (not from the case), robbing appellate tribunals of the reasons supporting the decisions. The Department continually ignores Topanga, and the Board's multiple requests for clarity of its decisions. (¶) ORDER (¶) The decision of the Department is affirmed, except as to penalty and that is reversed and remanded in accordance with the views of the Board that the Department owes a duty to explain its actions especially when the 'supreme penalty' is inflicted, to allow appellate tribunals the opportunity to understand and effectively consider

Department decisions: clear and fair discretion, or, just arbitrary action."[2]

The Department subsequently issued its Decision Following Appeals Board Decision dated January 11, 2001, again ordering unconditional revocation.

Appellants filed a timely appeal, and allege that the Department did not exercise its discretion to revoke the license, but only followed its policy and standard practice of revoking a license under the statute, in all cases.

DISCUSSION

The Department's decision states the reasons for ordering unconditional revocation of the license, as follows:

"[Appellants'] clerk, Abrahim Algahim, was born on May 29, 1982, making him 17 years old on the date of this violation. He had been placed behind the counter to cover the cash register while the store manager (his uncle) went to the rest room. [see Section 25663(b)] The store manager placed Algahim in an unsupervised position where he could be selling alcoholic beverages (which Algahim did) despite the fact Abrahim Algahim had no training whatsoever concerning sales of alcoholic beverages. The consequences of the store manager's extremely careless and unreasonable action were foreseeable.

"Furthermore, the premises had already suffered two sales to minor violations within the recent past (Findings of Fact V). As in the present case, the record indicates no identification was requested by the clerk during the two prior sale to minor violations (State's Exhibit 2 & 3)."

Business and Professions Code §25658.1, became effective on January 1, 1995. The statute in pertinent part states:

> "Notwithstanding Section 24200, the department may revoke a license for a third violation of Section 25658 that occurs within any 36-month period. This

---

[2]The word "reason" is defined as: "a sufficient ground of explanation or logical defense; esp: a general principle, law, or warranted presumption that supports a conclusion, explains a fact, or validates a course of conduct ... the power of comprehending, inferring, or thinking esp. in orderly, sensible, rational ways ... Syn REASON, GROUND, ARGUMENT, PROOF can mean in common, a point or set of related points offered or offerable to support of something disputed. (Webster's Third New International Dictionary, 1986, p. 1891.)

provision shall not be construed to limit the department's authority and discretion to revoke a license prior to a third violation when the circumstances warrant that penalty."

The statute says "may revoke." The right conferred by the statute is not a valid reason to revoke. It is only the power given to revoke (the powers of discretion).

Prior to enactment of the statute, the Appeals Board found in review of many cases over the years, the Department most often used a graduated and increasing onerous levels of discipline under authority of §24200, generally following somewhat the following progression: 15-day suspension, 25-day suspension, 45-day suspension, revocation stayed with a suspension, and finally, revocation.[3] That progression has almost disappeared in sales-to-minor cases with the advent of the statute referenced above, with a graduation up to the third violation within the period stated, causing revocation.

In a recent court of appeal case, Kemmara v. Alcoholic Beverage Control Appeal Board, (case No. B146051, filed May 7, 2001), an unpublished opinion, the Department filed documents with the court, of which we take official notice pursuant to Evidence Code §452, subdivision (d). The documents included a Department memorandum dated December 4, 1996, from the Director of the Department, showing a policy that revocation was to be the rule, with some exceptions which the Director termed "inappropriate" [to revoke] action, and a listing of 42 cases coming within the statute, with revocation being the penalty in all 42 cases. Apparently from the material filed and

[3]While individual cases vary, apparently by the exercise of Department's discretion depending on a case's particular facts, the main approach was a progressive increase most likely to call attention to a licensee that the license is a privilege, not a right, which privilege can be lost.

according to the Department, it could not locate any applicable cases where the penalty was less than revocation. These documents while suggestive of arbitrariness, do not necessarily negate the possibility that careful consideration was given to each case and the resolution thereof, that is, the Department exercised its discretion within the bounds of substantial justice.

The Supreme Court in Harris v. Alcoholic Beverage Control Appeals Board (1965) 62 Cal.2d 589 [400 P.2d 745, 43 Cal.Rptr. 633], at 62 Cal.2d 636, stated:

> "Although the Department's discretion with respect to the penalty is broad, it does not have absolute and unlimited power. It is bound to exercise legal discretion, which is, in the circumstances, judicial discretion [citations omitted]. In Martin this court stated, "'The term "judicial discretion" was defined in Baily v. Taaffe (1866) 29 Cal. 422, 424, as follows: "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in the exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice."'"

Notwithstanding the Harris court's pronouncement, the only manner a reviewing tribunal can determine if the Department has used an impartial and legal discretion and not a capricious arbitrary discretion, is by the use of descriptive terms as to the thought process entered into by the Department, in a word, reasons and grounds usually in the form of findings, that show the reviewing tribunal the process by which the particular facts and applicable law were meshed to produce the decision (the penalty) presented for review and consideration.

With this manifest need for clear and fair reasoning, the case of Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 516-517 [113 Cal.Rptr. 836, 522 P.2d 12], sets forth some fundamental criteria which in

this case, and similar cases, cannot now be ignored. The Topanga case says that there must be reasonable reasons and those reasons are to be spelled out in the decision. The court stated:

> "Among other functions, a findings requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions [citations omitted]. In addition, findings enable the reviewing court to trace and examine the agency's mode of analysis [citations omitted]. (¶) Absent such roadsigns, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency [citations omitted]. Moreover, properly constituted findings enable the parties to the agency proceeding to determine whether and on what basis they seek review [citations omitted]. They also serve a public relations function by helping to persuade the parties that administrative decision-making is careful, reasoned, and equitable."

The reasoning of the Topanga case demands that the Department set forth the reasoning, grounds, and patterns of thought which caused the Department to decide that the penalty levied is rational and legally sufficient under Harris. The term "reason" is defined in footnote 2, supra.

The reasons to revoke are those reasons which would lead a reasonable person to conclude revocation is warranted over any other resolution. If the reasons make rational sense, the exercise to revoke was not arbitrary, but a proper exercise of discretion.

We will now consider the Department's reasoning:

1. The acting clerk was 17 years of age, and under the law, was improperly acting as the sales clerk, concerning the sale of alcoholic beverages. However, this violation was not charged and the decision does not set forth this conduct as a valid

violation. This fact does go to whether the licensees were condoning a laxness as to their duties under the law. We will use a term for this possible laxness, as "aggravation."

2. The acting clerk (the nephew of the manager and sole clerk) is alleged to be without proper training. This acting clerk testified that he helped after school doing jobs, such as stocking the shelves, etc. [RT 94]. We determine that while it is not a violation to use a clerk without training – that is appellants' risk, such possible laxness would go to aggravation.

3. The Department reasons that the manager and sole clerk's actions of needing to use the restroom (for about five to six minutes), and allowing his nephew to act as clerk, was "extremely careless" and unreasonable, and the consequences were foreseeable. We determine such statements are the essence of arrogance born of hindsight, but little to do with realities of humanness and emergencies. Such statements are not from a rational mind balancing the law and human error. Such conclusions are, at best, self serving

At the time the manager left the immediate area, there were no customers in the premises. We determine that created the illusion of security as the manager left the scene [RT 94-95]. Then the record shows this quiet scene is abruptly dismantled. A minor entered to use the phone next to the cash register, three separate customers enter, an elderly lady asks the acting clerk for an item not in stock, and a customer behind her exhibits impatience. The minor on the phone became heated in his words, while three additional minors, his associates, enter the store and mill about. Then the violation sale occurred [RT 95-100].

4. The Department states there were two prior sales to minors. Whether or not the clerks, as alleged, on prior occasions failed to ask for identification (Exhibits), is mainly irrelevant as violations are violations, and the failure to request identification is not unlawful, but such proven failure does tend to show aggravation.

We conclude the manager/sole clerk was unwise, but not extremely careless and unreasonable in his actions as concluded by the Department. If we were to agree with the Department, we would have to bury our rational senses to follow what we determine is an irrational evaluation of this matter based on the record.

We feel the suddenness of the need for relief by the manager and sole clerk, the then quietness of the premises, but shortly to explode in front of the acting clerk, not experienced to cope, balances the aggravation, and should demand of the Department some rational and logical reasoning within its duty to protect the public welfare and morals.

If appellants are not sufficiently concerned with the dangers of alcoholic beverage sales to minors, they will violate again and justice can, then, be administered with decency and rational consideration.

ORDER

While this third violation comes within the statute concerned, we must conclude that the violation, while serious, should not trigger unconditional revocation of the license, as well as for the reasons set forth by the Department. To deprive appellants of their license on the facts of this case would be a miscarriage of justice.

The decision of the Department is reversed.[4]

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

[4]This 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 order as provided by §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 §23090 et seq.