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

AB-7662

BUL YA SONG, INC. dba El Portal Bar
8284 Garden Grove Boulevard, Garden Grove, CA 92844,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 48-260343 Reg: 00048432

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: May 3, 2001
Los Angeles, CA

ISSUED JUNE 21, 2001

Bul Ya Song, Inc., doing business as El Portal Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked its license for various drink solicitation activities in violation of Business and Professions Code §§24200.5, subdivision (b), and 25657, subdivisions (a) and (b); Rule 143 (4 Cal. Code Regs. §143); and Penal Code §303; and suspended its license for 10 days for violations of Penal Code §347, subdivision (b), and Health and Safety Code §§109935, 110545, 110560, and 110620.

Appearances on appeal include appellant Bul Ya Song, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Michele L. Wong.

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[1]The decision of the Department, dated June 29, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on May 29, 1991. Thereafter, the Department instituted an accusation against appellant charging the violations noted above.

An administrative hearing was held on May 16, 2000, at which Larry J. Fees, appellant's corporate president, represented appellant without the assistance of counsel. In his opening statement, Fees said he asked for a hearing "not so much to dispute the Accusations . . . , but to bring to the attention of the Department the conduct in the investigation itself, which I feel was very unprofessional by a certain unidentified individual . . . ." [RT 8-9.] Fees also objected to the penalty proposed by the Department, which he recalled as being "a 30-day suspension and a three-year probation." The 30-day suspension, Fees said, would cost him in excess of $3,000, and he felt this was not equitable when compared to the $270 fine he had to pay as a result of the criminal charges against appellant for the same violations.

The ALJ asked Fees if, since he appeared not to dispute the facts, he was "prepared to agree that those facts [in the Accusation] are true?" [RT 12]. The ALJ explained this would "probably save a lot of time this morning" because then the Department would not have to prove the facts were true and could simply rest its case. [RT 12-13.] He also explained that Fees would be able to present any evidence regarding "the things [he had] already alluded to," and the Department could present rebuttal evidence on those issues. Fees stated he was comfortable stipulating to the facts, and thereafter stipulated "that each and every fact alleged in Counts 1 through 12, inclusive, are true[.]" The Department introduced documentary evidence regarding prior disciplinary actions and rested its case with no witnesses being called on behalf of the Department.

Fees testified regarding the conduct of the Department investigators during the investigation at appellant's premises which led to the Accusation in the present matter. The incidents that he considered unprofessional and necessary to bring to the Department's attention were both done by the same unidentified individual, who was not a uniformed investigator. [RT 18.]

According to Fees, as the uniformed investigators came into the premises, this individual reached over the bar counter and grabbed a sheet of paper with names on it, which he later gave to one of the uniformed investigators. Some time later, Fees said, this same individual went behind the bar counter and, finding some bugs or debris in some bottles, the individual waved the bottles around, telling customers sitting at the bar that there were bugs in the bottles and saying to the customers, "You drink this stuff? This is the kind of thing that's served in this bar." [RT 8-9, 18-19.]

Part of Fees' objection was to the failure of this individual to ever identify himself to Fees as an investigator. Fees said that the individual "left the premises unidentified. I have no knowledge that that individual is an investigator employed by the Department of Alcoholic Beverage Control or a private citizen." On cross examination, counsel for the Department asked Fees if he would recognize this individual, and Fees answered that he didn't know that he would be able to. [RT 20.] Fees also testified that he had not made a complaint to the Department or any of its employees regarding the manner in which the investigation was conducted.

The Department recommended the license be revoked, with the revocation stayed for three years and an actual suspension of 30 days.

The ALJ, however, ordered the license revoked outright as to the drink solicitation counts, and suspended for 10 days as to the "buggy bottle" counts. The Department adopted the ALJ's decision and order as its own.

Appellant thereafter filed a timely appeal in which it raises the following issues: (1) appellant was deprived of due process when its right to a hearing was unknowingly waived, and (2) the penalty was excessive and based, in part, on incompetent evidence. Because both these issues ultimately involve the appropriateness of the penalty imposed, they will be discussed together.

DISCUSSION

Appellant argues that Fees, in stipulating to the facts in the Accusation, unwittingly waived his right to a full and fair hearing on the merits. "Had Mr. Fees known and understood that he faced the possibility of losing the liquor license at this location, his reaction to the ALJ's suggestion may have been quite different. Mr. Fees, and his corporate business fell prey to an unfair procedure therein." Appellant also argues that the penalty is excessive and an abuse of discretion because there was not competent evidence of the activity leading to the prior disciplinary action, and because the penalty appears to have no basis other than the ALJ's "displeasure with Mr. Fees' appearance at the hearing to lodge a complaint about the investigation."

Appellant's "unknowing waiver" issue is an indirect attack on the ALJ's imposition of a much more severe penalty than that recommended by the Department. More direct attacks are made in appellant's argument regarding excessive penalty. 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]), but 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].)

A licensee may waive its right to a hearing, but, for any purported waiver to be legally effective, it must appear "that the party charged with the waiver has been fully

informed of the existence of that right, its meaning, the effect of the 'waiver' presented to him, and his full understanding of the explanation." (B.W. v. Board of Medical Quality Assurance (1985) 169 Cal.App.3d 219, 233 [215 Cal.Rptr. 130].) The California Supreme Court has said, "The waiver of an important right must be a voluntary and knowing act done with sufficient awareness of the relevant circumstances and likely consequences." (Roberts v. Superior Court (1973) 9 Cal.3d 330, 343 [107 Cal.Rptr. 309].) In the present case, it is clear that Fees agreed to the stipulation voluntarily; the question is whether he understood the effect of the waiver and its "likely consequences."

There is nothing in the record indicating that Fees misunderstood the immediate effect of the stipulation: that the Department would not have to prove its case; that Fees would be allowed to present evidence about the issues he had raised – the manner of the investigation and the penalty – but not about the matters alleged in the Accusation; that Department counsel could present evidence in rebuttal; and that each side would "have an opportunity to argue what should happen. And that would be dealing with the penalty recommendation . . . ." [statement of ALJ at RT 13.]

Fees stipulated to the correctness of the facts as stated in the Accusation, knowing that the Department's penalty recommendation was a three-year stayed revocation and a suspension of 30 days. What Fees apparently did not understand was the possibility that the ALJ would revoke his license outright instead of ordering the penalty recommended by the Department at the hearing.

As a general rule, the Department is not estopped from imposing a penalty after a hearing greater than that which it offered as a settlement proposal before the hearing. In Kirby v. Alcoholic Beverage Control Appeals Board (1971) 17 Cal.App.3d 255 [94 Cal.Rptr. 514], the court stated (17 Cal.App.3d at 260-261):

> "Even in cases strictly criminal, there is a public policy in favor of negotiations for compromise . . . ; a fortiori there is an equal policy in cases such as this. The department, acting on the basis of written reports, secures a prompt determination, at little administrative cost; the licensee avoids the risks that testimony at a formal hearing may paint him in a worse light than the reports and, also, avoids the costs and delay of a hearing. The licensee who rejects a proffered settlement hopes that the hearing will clear - or at least partially excuse - him and he hopes that even if he is not found innocent, he will be dealt with less harshly than the department proposes. But if the department can never, no matter what a hearing may develop, assess a penalty greater than that proposed in its offer, a licensee has little to lose by rejection. Only the cost of a hearing is risked; he could not otherwise be harmed. In that situation, licensees would be induced to gamble on the chance of prevailing at the trial, while the department would lose much of its inducement to attempt settlement. The law should not permit that kind of tactic by an accused.
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> "It follows that the mere fact - if it be a fact - that the department had once offered a settlement more favorable than the discipline ultimately imposed is not, in and of itself, a ground for setting aside the penalty ultimately adopted."

The rationale behind the rule just stated is that the Department should not be bound by a pre-hearing offer because the hearing may reveal facts of which the Department was previously unaware, and which, when known, would call for an increased penalty. That rationale obviously cannot apply in the present case, since there was no hearing on the substantive matters alleged in the accusation; thus the Department was already cognizant of all the relevant facts when it made its recommendation to the ALJ. The matters raised by appellant at the hearing were collateral to the accusation and could not reasonably be seen as aggravating the penalty.

The Board has considered similar situations in prior appeals, where the Administrative Law Judge has ordered a penalty greater than that recommended by the Department at the hearing. In Jillian's Billiard Club of Pasadena (1998) AB-6868, a sale-to-minor case, the Department's penalty recommendation at the conclusion of the hearing was for a 15-day suspension, with 5 days stayed. The ALJ, however, ordered a

30-day suspension, which the Department then adopted. On appeal, the Appeals Board reversed the penalty determination and remanded the matter to the Department for reconsideration. The Board observed that the Department's penalty recommendation made at a hearing represents the Department's "best thinking" at that particular time, and where the ALJ departs from that recommendation the inquiry "is whether there is a rational basis in the record for the ALJ's determination of what he believed was an appropriate level of discipline." The ALJ indicated that the penalty he imposed was the result of three factors: the young age of the decoy (she was 15 years old at the time of the sale), the ease with which she was able to buy the beer, and the appellant's lack of remorse. The Appeals Board found that, while the first two factors were legitimate considerations, the ALJ erred in basing the increased penalty on the appellant's purported lack of remorse. The ALJ did not explain his basis for concluding that the appellant had not shown remorse, and the Board could find nothing in the record indicating either remorse or lack of remorse. The Board concluded that, "While the ALJ is not bound by the Department's recommendation, a departure from it invites an explanation. The explanation which has been given is not acceptable, since it assumes or speculates about a matter as to which the record is silent."

In Corona (2000) AB-7329, Department counsel recommended a suspension of 30 days with a 15-day stay, but the ALJ ordered a 40-day suspension with 15 days stayed. The Appeals Board noted that the ALJ did not provide any reasons for imposing a penalty greater than that recommended by the Department, and said,

> "Our review of the record does not reveal any unusual circumstance or matter of aggravation which would not already have been known to the Department. The Department's defense on this appeal of the increased penalty, that it reflects prior disciplines, is unpersuasive, since that same explanation was offered to Judge Lo with the Department's original recommendation."

With no obvious reason for the increase, the Appeals Board reversed the penalty and remanded it to the Department for reconsideration.

In the present appeal, the ALJ's decision includes a section entitled "Penalty Considerations" (Determination of Issues VIII):

> "Counsel for [the Department] requested that [appellant's] license be revoked, with the revocation stayed for three years on probationary conditions and that, in addition, the license should be suspended for a period of 30 days. She noted that based on the parties' stipulations as to facts, unlawful solicitation of alcoholic beverages admittedly took place at [appellant's] business, ranging from the simplest violation of Rule 143 to the most serious of the so-called 'bar-girl' offenses, that under Section 24200.5(b). Further, there was the less serious, but still important, matter of the adulterated beverages which were on hand and offered for sale. Additionally, [appellant] had prior knowledge as to both unlawful solicitation violations (Exhibits 2 and 3) and adulterated bottles (Exhibit 2).
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> "[Appellant] argued that in criminal court he was fined $270 for whatever citation was issued to him out of the August 26, 1999, investigation. In his notion of fair justice, he fails to understand the disparity between the fine he was given in criminal court and the recommendation for a 30-day suspension in this administrative matter. He estimated that a 30-day suspension would cost the business in the neighborhood of $3,000. In so arguing, Fees failed to note the most important portion of the recommended sanction, the stayed revocation.
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> "As counsel for [the Department] pointed out at the hearing, different interests and objectives are involved in these administrative matters from criminal cases. Further, different elements and levels of proof are required. Finally, the record here is devoid of any information which shows exactly what violation or violations resulted in the $270 fine [appellant] noted.
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> "Section 24200.5(b) is one of only two ABC Act provisions which, by its express terms, *requires* revocation of a license for its violation. To violate it and Section 25657(a) require intentional violative conduct. Those violations were established in this case. (Determination of Issues, ¶¶ I and II.) They outweigh the adulterated beverage counts and all the other variations of unlawful solicitation misconduct to which [appellant] has admitted. In further aggravation, [appellant] corporation was on notice from 1995 that unlawful drink solicitation activities would not be tolerated. (Exhibit 2.) The court is mindful that sanctions are not to be imposed or enhanced simply because the same incident of misconduct is pled to have violated alternate prohibitions. Still, the order which follows is necessary to protect the public health, safety, welfare and morals." [Emphasis in original.]

Although lengthy, the "Penalty Considerations" section does not explain why the ALJ felt an increase in the penalty was necessary. It recites that, as noted by

Department counsel in her penalty recommendation, appellant stipulated to drink solicitation violations and to having "buggy bottles," and was aware that these activities were unlawful. The next paragraph repeats Fees' objection to the disparity between the small fine imposed in his criminal case and the $3,000 that the Department's proposed penalty would cost, and stated that Fees' argument ignored "the most important portion of the recommended sanction, the stayed revocation." In the third paragraph, the ALJ reiterated the distinctions made by Department counsel between the respective interests and objectives of the criminal law and the administrative disciplinary proceedings.

The final paragraph notes, correctly, that §24200.5, subdivision (b), requires revocation of a license if violated. It then states that violations of both that section and §25657, subdivision (a), "require intentional violative conduct." This latter statement is patently wrong. A licensee may be held liable under either of these two sections for the conduct of others even if he or she has no actual knowledge of that conduct. (Karides v. Dept. of Alcoholic Beverage Control (1958) 164 Cal.App.2d 549 [331 P.2d 145].)

The ALJ goes on to say that appellant's violations of §§24200.5, subdivision (b), and 25657, subdivision (a), "outweigh" all the other violations in this case. He then finds "further aggravation" in appellant's being aware, from a prior discipline, that drink solicitation was not allowed. The reference to "further aggravation" is puzzling, since the ALJ has stated no other aggravating factors; he has merely reiterated the parties' arguments. The ALJ acknowledges that penalty enhancements may not be based simply on the fact that the same misconduct may be charged as violations of multiple statutes or regulations, but then concludes that revocation "is necessary to protect the public health, safety, welfare and morals." The ALJ does not explain, however, *why* outright revocation is necessary to protect public welfare and morals even though the

"best thinking" of the Department was that stayed revocation and a suspension were adequate to protect public welfare and morals. The ALJ's bald statement of the necessity of revocation is not a "rational basis in the record for the ALJ's determination . . ." (Jillian's Billiard Club of Pasadena, supra.)

Not one factor is mentioned in the four paragraphs of the ALJ's "Penalty Considerations" that was not known to the Department when it formulated its penalty recommendation. The only factors not known until the hearing were Fees' objections to the conduct of the plainclothes Department "investigator" at the conclusion of the investigation and to the disparity in the respective penalties imposed by the criminal law and by the Department.

The ALJ dismissed the first objection in the four paragraphs entitled "Alleged Investigatory Misconduct" (Determination of Issues VII), by calling the actions complained of "poor manners," "poor practice," and "slights." He found that these actions did not amount to misconduct, or, even if they did, the administrative hearing was not the proper forum in which the allegations could be considered.

The ALJ appeared to disparage Fees' objection as to the penalty, saying,

> "In [Fees'] notion of fair justice, he fails to understand the disparity between the fine he was given in criminal court and the recommendation for a 30-day suspension in this administrative matter. . . . In [arguing that a 30-day suspension would cost the business about $3,000], Fees failed to note the most important portion of the recommended sanction, the stayed revocation."

Did the ALJ find something about Fees' objections offensive? Did he think that Fees would not take a stayed revocation seriously enough? Was he under the erroneous impression that §§24200.5, subdivision (b), and 25657, subdivision (a), require outright revocation? Was there some other factor that he considered? We do not know, because the ALJ did not give any rational reason for his imposition of the most serve penalty in contravention of the Department's explicit recommendation.

The Appeals Board may not disturb a Department penalty order unless the Department has abused its discretion in making the order by acting in an arbitrary or capricious manner. That the Department acted arbitrarily or capriciously in imposing this penalty under the circumstances of this appeal, is undeniable. The Department's initial judgment as to appropriate disciplinary measures was made based on the facts alleged in the accusation, and no other facts regarding the violations were adduced at the hearing. The Department abused its discretion in adopting the ALJ's imposition of a harsher penalty than the Department recommended at the conclusion of the hearing in this case, and the matter must be remanded to allow the Department to correct this abuse.

ORDER

The decision of the Department is affirmed insofar as it deals with the matters stipulated to; it is reversed as to the remainder of the decision, and the penalty is reversed and remanded to the Department for reconsideration in light of the preceding opinion.[2]

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

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[2]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.