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

AB-7856
File: 20-291320 Reg: 01050274

KWANTA CHUENMEESRI, dba 109 Discount Store
10760-62 Vanowen Street, North Hollywood, CA 91605,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: August 15, 2002
Los Angeles, CA

ISSUED OCTOBER 3, 2002

Kwanta Chuenmeesri, doing business as 109 Discount Store (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked her license for appellant and her clerk selling ineligible items for food coupons and for appellant purchasing discounted food stamp coupons, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, section 22, arising from violations of Business and Professions Code section 24200, subdivision (a), and part 278.2(a) of the United States Department of Agriculture regulations (7 C.F.R. §278.2(a)).

Appearances on appeal include appellant Kwanta Chuenmeesri, appearing through her counsel, Ralph B. Saltsman, Stephen W. Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

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[1]The decision of the Department, dated July 5, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on November 2, 1994. Thereafter, the Department instituted a six-count accusation against appellant charging that, on December 13 and 22, 1999, and February 11, 2000, appellant and her employee sold ineligible items (beer) for food stamps, and on February 22, March 2, and March 8, 2000, appellant and her employees or agents accepted discounted food coupons for cash, in violation of the federal food stamp program regulations.

An administrative hearing was held on May 1, 2001, at which time documentary evidence was received and testimony concerning the charged violations was presented by Julio Virgues, a Department of Agriculture undercover operative, and by appellant. Several of appellant's customers testified as character witnesses.

Subsequent to the hearing, the Department issued its decision which determined that the charges of the accusation had been established as to counts 1, 2, 3, and 6.

Appellant thereafter filed a timely notice of appeal. In her appeal, appellant raises the following issues: (1) the Administrative Law Judge (ALJ) did not make proper findings regarding the credibility of the witnesses, and (2) the penalty is excessive.

DISCUSSION

I

Appellant contends that the ALJ must explain in a finding why he chose to accept the testimony of Virgues as credible even though the testimony was contradictory and inconsistent. She bases her contention that the ALJ committed reversible error in not making explicit findings regarding the credibility of Virgues's testimony on Government Code section 11425.50 and on federal case law.

Government Code section 11425.50, subdivision (b), provides:

> The statement of the factual basis for the decision may be in the language of, or by reference to, the pleadings. If the statement is no more than mere repetition or paraphrase of the relevant statute or regulation, the statement shall be accompanied by a concise and explicit statement of the underlying facts of record that support the decision. If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it.

Section 11425.50 is silent as to the consequences which flow from an ALJ's failure to articulate the factors mentioned.[2] However, we do not think that any failure to comply with the statute means the decision must be reversed. It is more reasonable to construe this provision as saying simply that a reviewing court may give greater weight to a credibility determination in which the ALJ discussed the evidence upon which he or she based the determination. We do not think it means the determination is entitled to no weight at all.

Having reviewed the decoy's testimony, we cannot say the ALJ's determination was in any way unreasonable or that, even if the decision fails to fully comply with Government Code section 11425.50, any such failure would warrant reversal.

This Board has consistently rejected counsel's insistence, in other appeals, that the federal appeals court case of *Holohan v. Massanari* (9th Cir. 2001) 246 F.3d 1195, requires reversal of a decision that does not explicitly explain the basis of a credibility determination. (See, e.g., *7-Eleven/Huh* (2001) AB-7680.) There is no reason to decide differently in the present appeal.

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[2] The Law Revision Comments which accompany this section state that it adopts the rule of *Universal Camera Corp. v. Labor Board* (1951) 340 U.S. 474 [71 S.Ct. 456], requiring that the reviewing court weigh more heavily findings by the trier of fact (here, the administrative law judge) based upon observation of witnesses than findings based on other evidence.

This Board rejected, in *7-Eleven/Huh*, *supra*, the argument that a deficiency in explanation regarding a credibility determination required reversal. What the Board said in that earlier case applies equally well here:

> While it may be true that a statement of the factors behind a credibility determination may be of considerable assistance to a reviewing court, and is welcomed by this Board, we are not prepared to say that a decision which does not set forth such considerations is fatally flawed.

II

Appellant contends that the penalty imposed, revocation, is excessive and an abuse of discretion. She argues that the ALJ erred in imposing a greater penalty than that recommended by the Department for counts 1, 2, and 3 (all involving the sale of ineligible items for food stamps), and that the penalty of outright revocation cannot be based solely on count 6, a single incident of discounted food stamp purchase by the licensee.

The ALJ's order, adopted by the Department, states that the "The license is revoked as to each cause in Determination of Issues No. 1 [i.e, counts 1, 2, 3, and 6] and for all of them." Thus, it effectively ordered revocation for each count individually *and* for all of them collectively.

Counts 1, 2, and 3 involved the acceptance of food stamps for ineligible items, in this case, beer. Department counsel, in closing argument, stated that the standard penalty for such a violation was 10 days' suspension. He recommended that the standard penalty be imposed for each of the counts, but that the suspensions should run concurrently. This would result in one 10-day suspension for the three counts.

Department counsel also stated that the standard penalty imposed for a discounted purchase of food stamps by *a licensee*, as opposed to the licensee's

employee or agent, is revocation. This was the penalty the Department recommended with regard to count 6, which charged that appellant herself made such a purchase on March 8, 2000.

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].)

Appellant is correct in saying that this Board has reversed penalties and remanded matters to the Department for reconsideration in cases where the penalty has strained the bounds of reason and where the ALJ imposed a greater penalty than that recommended at the hearing by the Department without explaining why. If the penalty of revocation in the present matter had been imposed based solely on the first three counts involved here, this Board might well consider remanding the matter to the Department for reconsideration, since a greater penalty than that recommended by the Department would have been imposed, without a specific explanation given by the ALJ justifying that upward departure from the Department's recommendation.

However, the revocation in the present case was not based simply on the first three counts, but also on count 6, for which the Department did recommend revocation. Since the violation charged in count 6 was found to have occurred, and revocation was recommended and imposed for that count, the recommendation of a lesser penalty and imposition of a greater penalty for the other counts becomes moot. Even if the ALJ had

imposed the lesser recommended penalty for the first three counts, no suspension would have been served, because the license would still be revoked based on count 6.

Even if appellant is technically right about the penalty for the first three counts, the Board will only remand a matter to the Department for reconsideration if there is a real possibility that the Department would change the penalty imposed. We have no "real doubt that the license would and should be revoked." *(Byrd v. Savage* (1963) 219 Cal.App.2d 396, 402 [32 Cal.Rptr. 881].)

Appellant notes the apparent absence of any cases decided by this Board where the penalty of outright revocation was imposed by the Department and upheld by the Board based on a single instance of a licensee purchasing discounted food stamps. She argues that the lesser penalty of revocation stayed with a period of time allowed to sell the license has been imposed in some cases of multiple violations by the licensee. (See, e.g., *Esmail* (2001) AB-7609; *Wanis* (2000) AB-7553.)

Although appellant may be accurate in her statements regarding other appeals heard by this Board, that does not mean that the Department is bound to follow those cases in this appeal. In the present case, although some might believe, as does appellant, that a lesser penalty would be appropriate, we cannot say that the Department has acted unreasonably in imposing the penalty of outright revocation. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Board* (1965) 62 Cal.App. 2d 589, 594 [43 Cal.Rptr. 633, 636].)

ORDER

The decision of the Department is affirmed.[3]

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

[3]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.