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

AB-8019
File: 21-366489 Reg: 02052697

JAMAL SHAMIEH dba California Grocery
123 Eddy Street, San Francisco, CA 94102,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: June 12, 2003
San Francisco, CA

ISSUED AUGUST 28, 2003

Jamal Shamieh, doing business as California Grocery (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license, the order of revocation conditionally stayed for 180 days to permit transfer of the license to persons and premises acceptable to the Department, for his store manager having purchased property he believed to have been stolen, in violation of Penal Code section 496, subdivision (a).

Appearances on appeal include appellant Jamal Shamieh, appearing through his counsel, Richard D. Warren, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on September 25, 2000.

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[1]The decision of the Department, dated August 29, 2002, is set forth in the appendix.

Thereafter, the Department instituted an accusation against appellant charging that, on seven occasions, appellant's employee[2] bought cigarettes and distilled spirits he believed to have been stolen.

An administrative hearing was held on July 30, 2002. At that hearing, counsel for appellant stipulated that the charges of the accusation were true. The violations began a little more than a month after the license issued. Subsequent to the hearing, the Department issued its decision, which ordered the license revoked.[3]

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant, represented by new counsel, contends that his former attorney did not inform him of the hearing, concealed that fact from the Administrative Law Judge, did not ask for a continuance, and instead stipulated to the charges of the accusation, as a result of which appellant was denied due process. Appellant represents that the May 29, 2002, notice of hearing was mailed to the premises and to his former attorney, but because the premises had been closed for seismic repairs from March 5, 2002, and no mail was being forwarded, he did not receive the notice mailed to the premises.

DISCUSSION

The issue of the appropriate penalty was the main subject of the hearing. The Department recommended that the license be revoked, with revocation stayed for 180 days to permit the transfer of the license to a person or persons and to premises

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[2] It was apparent from discussions at the hearing that the employee was the sole employee and manager of the store, one of two owned by appellant.

[3] In both his moving papers and his reply, appellant asserts that the penalty from which he seeks relief is "outright revocation." The Board has always understood that an order which provides a licensee the opportunity to transfer, meaning sell, the license is something more lenient than outright revocation. In the latter case, the licensee is unable to recoup any investment he may have made in acquiring the license.

acceptable to the Department. Appellant's counsel proposed, instead, that an order be issued which would prevent appellant from ever employing the offending employee in any capacity, at the pain of having his license revoked. He argued that, without the ability to sell alcoholic beverages, appellant would not be able to fulfill his obligations under a five-year lease on the premises.

Department counsel argued that the location and the immediate neighborhood were magnets for stolen property transactions, stressing the fact that the transactions occurred inside the premises shortly after issuance of the license.

The Administrative Law Judge spelled out his thinking that led to the order of revocation in the portion of his proposed decision entitled "Penalty Considerations:"

> Respondent's counsel noted in mitigation that Respondent had been licensed in the above referenced premises since September 25, 2000, with no other disciplinary history. It was contended, but not established, that Respondent was unaware of the illegal activities of his manager, Mr. Alshayan. It was also contended, but not established, that Respondent has a five-year lease on the premises and will incur an economic hardship if barred from selling alcoholic beverages at the premises.
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> In response, Department's counsel contended that the area where the premises is located is a magnet for stolen property transactions. In addition, counsel for the Department noted that the first of the seven criminal actions described in the Accusation took place six days after the license was issued[4] and that the money to pay for the purported stolen property was taken by the manager, Mr. Alshayan, from Respondent's cash register in six of the seven incidents, and that some of the "stolen" property was found by law enforcement officers on the shelves of the premises.
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> Although the Department's contentions were not established, it was noted that the law enforcement officers involved in the case were present and available to testify.
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> Mitigation was not established. The Department's recommended penalty appears appropriate and less harsh than sanctions imposed in similar situations.

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[4] This is incorrect, but of no consequence. The first transaction was one month and six days after the license issued.

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].)

But for the issues created by the conduct of appellant's attorney, an order affirming the Department's decision would seem certain. The question for the Board is whether, in light of that conduct, the case should be remanded for a hearing on the merits.

A declaration of appellant's former attorney contains a factual recital consistent with the arguments in the brief. In that declaration the attorney admits that he failed to inform his client of the hearing; concealed that fact from opposing counsel and the ALJ; failed to ask the ALJ for a continuance; was unprepared to challenge the Department's evidence; neglected to arrange for witnesses, including appellant, to be present at the hearing; and stipulated without authority to the charges in the accusation. The declaration states, in pertinent part:

> 3. Soon after May 29, 2002, I received in the mail a Notice of Hearing setting the hearing of the Department's accusation for July 30, 2002 at 10:00 a.m. I never notified my client, directly or indirectly, of that hearing. I attended the hearing, but I had not notified my client of the hearing, and so I attended the hearing without my client and without his knowledge that the hearing was set for the July 30th. I asked the Department's attorney before the start of the hearing if the hearing could be continued because my client was not present. I did not explain that Mr. Shamieh was not present because I had failed to tell him about the hearing, or otherwise communicate with him regarding the hearing. The Department's attorney said he would not stipulate to a continuance of the hearing.
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> 4. When the hearing began, I neglected to request a continuance from the

> Administrative Law Judge and my client was not present because I had failed to tell him that a hearing was set for that date and time or that a hearing was set at all. I was not authorized by Mr. Shamieh in any manner, directly or indirectly, to attend the hearing without notifying about the hearing.
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> 5. At the hearing I was unprepared to challenge the Department's evidence and I neglected to arrange for witnesses, including Mr. Shamieh, to attend. I was not authorized by Mr. Shamieh in any manner, directly or indirectly, to make any such admissions or to appear at the hearing.
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> 6. At the hearing, based upon my failure to notify my client, I argued that the penalty should be less than the outright revocation that the department requested. That was not authorized by Mr. Shamieh.

Appellant cites and quotes from *Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 Cal.App.3d 725, 739 [216 Cal.Rptr. 300], a case in which the court of appeal affirmed a lower court's order granting a motion to vacate a previously filed order of dismissal:

> Where a client is unknowingly deprived of effective representation by counsel the client will not be charged with responsibility for misconduct if the client acts with due diligence in moving for relief after discovering the attorney's neglect and if the other side will not be prejudiced by the delay.

Appellant argues that the neglect of his former attorney not only deprived appellant of his rights, his silence regarding his neglect also constituted a fraud on the Department and on the ALJ, because they were led to infer that appellant's failure to appear was voluntary.

The Department says that appellant has not told the Board the full story. It points out that the accusation package, which included the partially completed notice of defense form, was mailed on April 12, 2002, via certified mail, to the address from which appellant claims no mail was being forwarded after March 5, 2002. Yet the notice of defense form was signed by appellant's then attorney on May 10, 2002, and returned to the Department. This suggests that appellant received the accusation

package despite his claim that no mail was being forwarded after March 5, 2002.

The Department also represents in its brief that its counsel engaged in settlement discussions with appellant's counsel prior to the hearing, and that, on two occasions during those discussions, appellant's counsel contacted appellant by telephone. In a reply declaration, appellant's former counsel states there was only one call, and that to inform appellant he was at the hearing.

The Department also contends that, even if appellant did not get notice of the hearing, it was his own fault. It points out that Department Rule 145 provides that a licensee wishing notices mailed to an address other than that of the licensed premises must file a specific request for that purpose. Appellant did not provide the Department with a different address.

The Department poses the question: "If, as licensee claims, he was (on about August 31, 2002) 'shocked to learn that Mr. Martin had admitted the allegations, it is reasonable to ask why he did not pursue more diligently an appropriate avenue of relief." It suggests that appellant's remedy was to move for relief from a default pursuant to Government Code section 11520, subdivision (a).

Appellant has filed supplemental declarations asserting that the subject of Mr. Martin's phone calls to appellant prior to the hearing were to inform him, for the first time, that the hearing was that day.

The Appeals Board does not sit as a fact-finding agency. The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial

evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[5]

There is nothing in the record that suggests the Department did not proceed in the manner required by law, nor without or in excess of its jurisdiction. Indeed, but for the willingness of appellant's attorney to stipulate to the charged violations, the Department was prepared with its witnesses to go forward with proof. In a way, it, too, was victimized by appellant's former attorney.

In the *Aldrich* case, *supra*, Aldrich's attorney had been suspended from the practice of law, so was in no position to provide any legal representation to Aldrich before Aldrich's case was dismissed. Aldrich had filed declarations in support of his motion to vacate the judgment of dismissal sufficient to establish that he had a meritorious case. In the present case, appellant claims he should not be held responsible for the conduct of his manager because he was unaware of it and did not profit by it.

We have reluctantly concluded that the decision should be reversed and the case remanded to the Department for a hearing on the merits. There seems little doubt but that appellant was deprived of effective representation by his attorney. The conduct of the attorney was so egregious as to constitute a fraud upon appellant. We believe

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[5]The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

the case should be decided on its merits.

ORDER

The decision of the Department is reversed, and the matter is remanded to the Department for further proceedings in accordance with our comments herein.[6]

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

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[6] 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.