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

AB-8159b
File: 21-339987 Reg: 03054577

JAMES NUON, dba Circle D Liquors
2630 Geer Road, Turlock, CA 95382,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jerry Mitchell

Appeals Board Hearing: April 5, 2007
San Francisco, CA

ISSUED JUNE 8, 2007

James Nuon, doing business as Circle D Liquors (appellant), appeals from a Decision Following Appeals Board Decision of the Department of Alcoholic Beverage Control[1] which revoked his off-sale beer and wine license, but stayed the revocation for 180 days, conditioned on appellant's transfer of the license to a person and a place acceptable to the Department and suspension of the license for 30 days and indefinitely thereafter until transferred. Appearances on appeal include appellant James Nuon, appearing through his counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

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[1]The Department's Decision Following Appeals Board Decision dated May 26, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

This is the third appeal in this matter. In the original proceeding, the Department charged appellant with "knowingly permit[ting]" his employee, Kipp Murphy, to sell narcotics in the licensed premises, in violation of section 24200.5, subdivision (a), of the Business and Professions Code,[2] on various dates in November 2002. He was also charged with furnishing, through Murphy, drug paraphernalia, in violation of the Health and Safety Code. After a hearing, the Department issued its decision finding that the narcotics and drug paraphernalia sales had occurred as alleged and that the license should be revoked. Appellant appealed and the Appeals Board reversed the decision because there was no finding that appellant had "knowingly permitted" the violations, nor a determination that appellant had violated section 24200.5, as charged in the accusation. (*Nuon* (2004) AB-8159)

The Department remanded the matter to the administrative law judge (ALJ) and after hearing argument from both parties the ALJ submitted a Proposed Decision After Remand which the Department adopted as its decision. The new decision determined that grounds existed for discipline under the statutes charged in the accusation and again ordered the license revoked. Appellant appealed again to this Board, contending the Department improperly reimposed the penalty of revocation and denied appellant due process by allowing an ex parte communication between the Department's advocate at the hearing and the Department's decision maker. Because factors such as actual knowledge of the licensee or flagrant illegal transactions were not present, the Appeals Board concluded that the imposition of straight revocation was an abuse of the

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[2]Unless otherwise indicated, statutory references in this opinion are to the Business and Professions Code.

Department's discretion, and remanded the matter to the Department for reconsideration of the penalty (*Nuon* (2006) AB-8159a).

Appellant petitioned the California Supreme Court to review the ex parte communication issue. The Supreme Court transferred the case to the Fifth Appellate District in June 2006. The appellate court denied the petition without opinion in November 2006, whereupon appellant once again petitioned the Supreme Court for review. The Supreme Court denied the petition without opinion in January 2007.

On May 26, 2006, the Department issued its Decision Following Appeals Board Decision which ordered appellant's license revoked, but stayed the revocation for 180 days on the following conditions:

> (a) That the license be suspended for a period of thirty (30) days, and indefinitely thereafter until the license is transferred;
> (b) During this period that the revocation is stayed, Respondents [*sic*] may transfer the license to a person(s) and a place (double transfer) acceptable to the Department. If the license has not been transferred prior to the expiration of the 180-day period, the Director of the Department may, without further notice or hearing, enter an order revoking the license; and
> (c)That should an accusation be filed against respondent alleging a violation to have occurred prior to or within 180 days from the effective date of this Decision, the stay imposed herein shall be extended until such time as that accusation is final, and the Department of Alcoholic Beverage Control shall retain jurisdiction over this matter until that time.

In this appeal, appellant contends that the penalty imposed was an abuse of discretion and that the Department violated the prohibitions against ex parte communications.

DISCUSSION

I

Appellant, in his third appeal, characterizes the stayed revocation imposed as "an exercise of administrative pique" that will "allow the Department to take this

business out of existence." (App. Br. at pp. 1, 8.) This penalty, appellant asserts, although worded differently, is the same "administrative death penalty" for his business as the former order of outright revocation. (*Id*., at p. 2.)

Once again, as he did in his two previous appeals, appellant contends that the penalty is excessive. We review this appeal guided by the same rules that guided our review in the two previous appeals: The Appeals Board will not disturb the Department's penalty order in the absence of an abuse of discretion. *(Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "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 Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

Appellant insists that the present penalty is no different from the outright revocation imposed before because either penalty will cause appellant to lose his business. However, the penalties are inherently different. With outright revocation, appellant would have no chance to recoup his investment; with the revocation stayed to allow sale of the license, he has an opportunity to recover some of that investment. Despite appellant's hyperbole, these penalties are not the same.

While the stayed revocation and sale is not the only penalty that might reasonably be imposed in the present situation, it is clearly within the Department's discretion to impose.

II

Appellant contends that a report of hearing was prepared by the Department's advocate after the original administrative hearing in May 2003, that another report of

hearing "could have also been and likely was" prepared by the Department's advocate following the hearing after remand held on September 15, 2004. The report or reports would have been available to the Department's decision maker before the Department issued its decision dated May 26, 2006, the subject of the present appeal.[3] This procedure violates the principles enunciated by the California Supreme Court in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*), appellant asserts, and, therefore, the Department's decision must be reversed.

In its reply brief, the Department concedes that a report of hearing was in the file[4] and there is no way of determining with certainty whether or not the report was reviewed by the Department Director or the Chief Counsel before the May 26, 2006, decision at issue here. The Department offers to make the report part of the record[5] and to allow appellant to submit a response to the report. The Director would then review the entire record, including the report and appellant's response, and either affirm or modify the decision of May 26, 2006. This procedure, the Department says, would comport with the dictates of both the Administrative Procedure Act and fairness to both parties.

The court in *Quintanar*, *supra*, discussed the appropriate remedy for the Department's violation of the ex parte communication rules. It gave two reasons it was

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[3]The parties agree that the issue of ex parte communication was decided adversely to appellant by the California Supreme Court with regard to the Department's April 15, 2005, decision. They also appear to agree that this is an extant issue as to the Department's decision of May 26, 2006.

[4]Interestingly, the Department's answer to appellant's petition for review in both the appellate court and the Supreme Court is based on its assertion, supported by a "Verification" signed under penalty of perjury by the Department's chief counsel, John Peirce, that *no report of hearing was in the Department's file* for this case. It would be rank speculation, of course, to think that this may have been why the Supreme Court denied appellant's petition.

[5]A copy of the report is attached to the Department's brief.

not persuaded by the Department's position that any submission was harmless and no remedy was warranted. The first reason was the impossibility of determining the import of the reports because the Department refused to provide copies of them to review. The court went on:

> Second, although both sides no doubt would have liked to submit a secret unrebutted review of the hearing to the ultimate decision maker or decision maker's advisers, only one side had that chance. The APA's administrative adjudication bill of rights was designed to eliminate such one-sided occurrences. We will not countenance them here. Thus, reversal of the Department's orders is required.

(40 Cal.4th at page 17.)

As the Supreme Court recognized in *Quintanar*, an ex parte communication violates the APA simply by occurring, regardless of whether it gave some actual advantage to the party making it. The Department's proposed remedy attempts to "un-ring the bell," but that is not possible. The time for allowing appellant the opportunity to see the report and respond to it was in 2003. Four years, three appeals, and three petitions for writ of review later is too late for that. This is a wrong that can be remedied only by dismissal of the accusation.

ORDER

The decision of the Department is reversed.[6]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[6]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.