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

AB-8435
File: 48-373236 Reg: 03055814

CLAUDIA C. and JOSE R. GUIZAR, dba Cazadores Bar Night Club
1621-A Almaden Road, San Jose, CA 95125,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: April 6, 2006
San Francisco, CA

ISSUED JULY 18, 2006

Claudia C. and Jose R. Guizar, doing business as Cazadores Bar Night Club (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license for permitting drug sales, drink solicitation, and lewd acts in the licensed premises, in violation of Business and Professions Code sections 24200, subdivisions (a) and (b); 24200.5, subdivisions (a) and (b); 25657, subdivision (a); and Department rules 143 and 143.2.

Appearances on appeal include appellants Claudia C. and Jose R. Guizar, appearing through attorneys Robert W. Lyons and Cindy A. Diamond,[2] and the

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[1]The decision of the Department, dated April 15, 2005, is set forth in the appendix.

[2]Neither of appellants' attorneys appeared at the hearing, nor could they be contacted by appellants or this Board. As a result, appellants were left to fend for themselves at the hearing. Co-appellant Claudia Guizar addressed the Board, articulately and with obvious emotion, regarding the penalty, but was unable to address the legal points raised.

Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises license was issued on March 12, 2001. On April 2, 2004, the Department filed a 17-count amended accusation against appellants charging drug sale, drink solicitation, lewd act, and sale-to-minor violations.

At the administrative hearing held on August 5, 2004, oral and documentary evidence was received. The Department's decision determined that 14 of the counts were established, the other three counts (counts 12 [loitering for the purpose of soliciting drinks], 16, and 17 [allowing minor to enter and remain in the premises and to consume an alcoholic beverage] were dismissed, and the license was ordered revoked.

Appellants appealed, contending that the Department failed to provide discovery to them in a timely fashion and failed to consider the innocent co-licensee's interest in the license separately.

DISCUSSION

I

Appellants contend that the Department violated their right to a fair hearing by failing to furnish discovery to appellants. They argue that their response to the Department's accusation, in which they indicated "they wanted to rely on 'all information'" that would be presented at the hearing "should have been interpreted as a lay-person's request for discovery." (App. Br. at p. 3.) The Department's failure to provide discovery, appellants assert, prevented them from deposing the waitress (Maria), who sold the narcotics, before she was deported, thus depriving them of the ability to defend their license.

The Department's decision addresses this issue, which was also raised at the hearing, in Determination of Issues XI:

> 1. Respondents note that they were informed of the allegations against them on September 23, 2003, and were advised of their right to a hearing and discovery. By letter dated October 1, 2003, respondents requested a hearing indicating an intention to represent themselves stating that "we can prevail when all information is presented at the hearing." Attached to this letter was an executed Notice of Hearing dated October 1, 2003. Respondents assert that the Department should have interpreted this statement as a lay person's request for discovery.
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> Attached to the pleadings served upon respondents was a document detailing respondents' rights to discovery. It was not until a letter dated January 27, 2004, received from Padilla/Associates on behalf of respondents, was a formal request made to the Department for discovery. Clearly, there was nothing that could be considered as a request for discovery made in the respondents' letter of October 1, 2003. The Department's failure to consider the single statement "we can prevail when all information is presented at the hearing" as a request for discovery is not unreasonable.
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> 2. Maria was arrested on March 28, 2003. Co-licensee Jose Guizar concedes that he learned of her activities after she was arrested and fired her. She was sentenced on October 14, 2003 and two days later released to the Bureau of Citizenship and Immigration Services. It appears that respondents had sufficient time in which to preserve Maria's anticipated material testimony.
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> 3. The evidence does not support respondents['] assertions that the Department delayed the filing of the accusation unnecessarily; nor does the evidence establish that respondents made a timely demand for discovery.

Discovery in administrative proceedings is governed by Government Code sections 11507.5 through 11507.7. These sections "provide the exclusive right to and method of discovery" for such proceedings. (Gov. Code, § 11507.5.) There are time limits on requests for discovery, and only those items enumerated in the statute are discoverable. (*Id.*, § 11507.6.) If a party fails or refuses to comply with a discovery request, the requesting party may file a motion to compel discovery. (*Id.*, § 11507.7.)

Appellants made the same arguments at the hearing that they make here. The ALJ concluded that "there was nothing that could be considered as a request for discovery" in appellants' letter. We agree.

The fact that appellants had chosen not to be represented by an attorney at that time does not excuse them from the procedural rules set out in the APA.

> "When a litigant is appearing in propia persona, he is entitled to the same, but no greater, consideration than other litigants and attorneys. . . . Further, the in propia persona litigant is held to the same restrictive rules of procedure as an attorney." (*Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 638, 639 [178 Cal.Rptr. 167], citations omitted, questioned on another ground in *Dumas v. Stocker* (1989) 213 Cal.App.3d 1262, 1267, fn. 13 [262 Cal.Rptr. 311].)

(*Bianco v. California Highway Patrol* (1994) 24 Cal App.4th 1113, 1125-1126 [29 Cal.Rptr.2d 711].)

When appellants retained an attorney and a request for discovery was made, the Department noted that the time for discovery had passed. Appellants' counsel apparently was allowed to view the discoverable documents at a Department office, but was not allowed to copy them.[3]

However, at the hearing on June 22, 2004, the Department provided appellants' counsel with copies of all the reports the Department intended to use as exhibits. The

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[3]We must agree with the sentiment expressed by the ALJ regarding the Department's refusal to provide discovery [RT 22]:

> I don't understand why the department wouldn't give you discovery. I understand what the discovery section says but on the other hand, I don't understand the department's view in not wanting to give you discovery when you requested it.
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> It doesn't make sense to me. It's sort of look, this is what it is, you do it this way and if you don't do it this way, you're not going to do it at all. This isn't a game we're playing. That's the department's attitude and I can't do much about it.

hearing was continued and appellants had from June 22 to August 5 to review the reports and prepare their defense. At the hearing on August 5, appellants' counsel acknowledged that appellants had not requested discovery before they hired him and also that the Department provided discovery on June 22, 2004. [RT 22-23.]

As to appellants' inability to find and depose the waitress, the ALJ found, and the evidence clearly shows, that it was not the actions of the Department that prevented them from finding her. The Department failed to provide discovery at an early date because appellants did not request discovery in a timely manner, and appellants had a reasonable opportunity to attempt to find the waitress. In addition, appellants failed to show that the waitress had been deported. (Finding of Fact XIV.)

II

Appellants contend that the Department should have considered the hardship that license revocation will cause co-licensee Claudia Guizar. Since she was not involved with the business at the licensed premises, appellants argue, the Department should have allowed her time to sell the license.

This issue was addressed in Determinations of Issues XIV through XVI:

> XIV - Respondents urge that there is no evidence establishing knowledge on the part of co-licensee Claudia Guizar and that she "should not be rationally imputed with knowledge of what other employees did in a crowded bar when she was not present." In fact, there was no evidence at all establishing her presence in the premises during any of the activity found hereinabove.
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> XV - Leaving aside the issue of presumption of knowledge [citations], in *Coletti* v. *State Board of Equalization* (1949) 94 Cal.App.2d 61, the Court held: "Revocation of a partnership license brings about a harsh result as to an innocent partner, but this result cannot be avoided in the present circumstances. The innocent partner must suffer unless the guilty one goes unpunished. Certainly the board does not act arbitrarily in revoking a partnership license where one partner has been found guilty of violations of law which call for revocation."

> This issue resurfaced in *Rice* v. *Alcoholic Beverage etc. Appeals Board* (1979) 89 Cal.App.3d 30. The Appeals Board took the position that, in the absence of any history of prior discipline by either licensee coupled with the economic hardship resulting from outright revocation, the penalty (outright revocation) constituted an abuse of discretion. The Board and the licensees also argued that [in] the absence of any evidence of culpability on the part of the wife, revocation should be tempered by allowing the licensees to sell the license within a reasonable time.
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> XVI - The Court observed that "the propriety of the penalty to be imposed rests solely within the discretion of the Department whose determination may not be disturbed in the absence of a showing of palpable abuse." The Court also noted that "forfeiture of the interest of an otherwise innocent colicensee does not sanction a different and less drastic penalty, citing *Coletti*. The Court annulled the Board's findings regarding the Department's penalty.

The Appeals Board may examine the issue of excessive penalty if raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but 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].)

As the court acknowledged in *Coletti*, *supra*, revocation in an instance such as this "brings about a harsh result." However, "forfeiture of the interest of an otherwise innocent colicensee [does not] sanction a different and less drastic penalty." (*Rice v. Alcoholic Beverage etc. Appeals Board*, *supra*, 89 Cal.App.3d at p. 39.) The Appeals Board has great sympathy for the co-licensee and her family, but has no basis to interfere with the Department's imposition of revocation in this instance.

ORDER

The decision of the Department is affirmed.[4]

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

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[4]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.