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

AB-8494
File: 12-317872 Reg: 05059515

FATIN E. ZAWAYDEH, dba Liquid Experience
1589 Haight Street, San Francisco, CA 94117,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Arnold Greenberg

Appeals Board Hearing: October 5, 2006
San Francisco, CA

ISSUED MARCH 23, 2007

Fatin E. Zawaydeh, doing business as Liquid Experience (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended her license for 25 days, 5 of which were stayed for a probationary period of 2 years, for her clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Fatin E. Zawaydeh, represented at the hearing by her husband, Emad Zawaydeh, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

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[1]The decision of the Department, dated October 27, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on May 29, 1996. On April 27, 2005 the Department filed an accusation against appellant charging that her clerk, Firras Zawaydeh,[2] sold beer to 18-year-old Mick Wasco. Wasco was acting as a minor decoy for the San Francisco Police Department at the time.

At the administrative hearing held on August 16, 2005, documentary evidence was received and testimony concerning the violation charged was presented by Wasco (the decoy) and by San Francisco police officer Robert Ziegler. Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as charged and appellant did not establish a defense to the charge. Appellant then filed a timely appeal contending that the penalty is excessive.[3]

DISCUSSION

Appellant states in her appeal letter that:

> Upon meeting with the Department of Alcoholic Beverage Control's administrative officer, we were given a $12,000-$13,000 penalty. Our other option is to close for approximately a 3 week period. The number of days specified by the judge is well over the amount to be penalized.

Appellant also asks the Board to give consideration to the fact that the premises is the family's only source of income.

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[2]Firras Zawaydeh is also appellant's son. Both her husband, Emad Zawaydeh, and her son help her run the store.

[3]In her appeal letter, Appellant also contends that her son "states that the decoy in the picture does not match the description of the person who made the purchase at the time. He also recalls this person wearing a hood over his head, and observed his nervous demeanor."

This does not raise an issue that this Board has the authority to consider. Firras did not testify at the hearing; indeed, appellant presented no evidence whatsoever. She may not come in now on appeal and attempt to present evidence that she could have presented at the hearing but did not.

The Appeals Board may examine the issue of excessive penalty if it is 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].)

Although it is not entirely clear, it appears that appellant's statement that she was "given a $12,000-$13,000 penalty" may refer to meeting with a Department representative in which she was offered a chance to settle the case by paying a fine. This type of offer is usually conditioned on the licensee stipulating to the violation and waiving any right to a hearing or appeal.

Appellant apparently rejected the settlement offer, and chose to have a hearing. Now that the hearing is over, it appears that she is arguing that the number of days of suspension is a greater penalty than the fine she would have paid had she agreed to the Stipulation and Waiver.

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.

The sole question here is whether the Department abused its discretion in imposing the penalty. It is clear to us that it did not. The 25-day suspension recommended by the Department at the end of the hearing is the usual penalty imposed for a second sale-to-minor violation within three years. In this case, the present violation was the second within just one year. In addition, the ALJ gave appellant a lesser penalty than that recommended by the Department, because he stayed five days of the suspension, provided appellant has no violations in the next two years. We cannot say that this penalty was in any way an abuse of the Department's discretion.

ORDER

The decision of the Department is affirmed.[4]

TINA FRANK, ACTING CHAIRPERSON
SOPHIE C. WONG, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[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.