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

AB-8524
File: 21-412051 Reg: 04058501

MOHINDER and SATYA PAL, dba Chima Liquor Store
5049 Franklin Boulevard, Sacramento, CA 95820,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: January 11, 2007
Sacramento, CA
Redeliberation: February 1, 2007

ISSUED MAY 30, 2007

Mohinder and Satya Pal, doing business as Chima Liquor Store (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license, with revocation stayed for 180 days to permit the sale of the license to a person and at a location approved by the Department, for co-licensee Mohinder Pal pleading nolo contendere to the crime of attempting to receive stolen property in violation of Penal Code sections 664/496.

Appearances on appeal include appellants Mohinder and Satya Pal, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Ryan M. Kroll, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

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[1]The decision of the Department, dated February 2, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on May 3, 2004. In an amended accusation dated August 25, 2005, the Department charged that, on January 27, 2005, co-licensee Mohinder Pal pleaded nolo contendere to the crime of attempting to receive stolen property in violation of Penal Code sections 664/496.

At the administrative hearing held on October 19, 2005, documentary evidence was received and co-licensee Mohinder Pal testified concerning his history and his arrangement to sell the license and business.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was established. Appellants filed an appeal contending the penalty is excessive. Thereafter, they filed a motion to augment the administrative record with any Form 104 (Report of Hearing) included in the Department's file, along with a supplemental brief regarding the recent decision of 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*).

DISCUSSION

I

Appellants contend the penalty requiring a "double transfer," that is, transferring the license to both another person and to another location, is punitive and, therefore, an abuse of the Department's discretion.

The Department's recommended penalty at the end of the hearing was for outright revocation. However, Department counsel noted, if the administrative law judge (ALJ) found mitigation, the Department then recommended revocation stayed for 180 days to allow a person-to-person and premises-to-premises transfer acceptable to

the Department, along with a 30-day suspension to continue indefinitely until expiration of the stay period or transfer of the license.

The ALJ rejected both outright revocation and the revocation stayed to allow a double transfer with indefinite suspension. Instead, he recommended a stayed revocation to allow a double transfer, but with no suspension during the stay. The Department adopted the ALJ's proposed decision and penalty.

Appellants' allegation that the penalty imposed here is punitive is based on a statement made by the ALJ during his discussion with Department counsel about the various penalties available. What appellants quote in their brief is the ALJ saying, "I understand your only reason here to be seeking the double handcuff, in effect, is to punish the licensee." [RT 29.] Immediately following that statement, however, the ALJ asked, "Is there another reason? Does it have to do with deterrence?" [*Ibid*.] The extensive discussion about the penalty was summarized by the ALJ in Finding of Fact 7 of the proposed decision:

> Complainant's counsel noted that revocation is the standard sanction for the violation charged but that the Department has discretion in deciding the appropriateness of alternative action. Counsel for Respondents contends Mr. Pal and his wife arrived in this country hoping to achieve "the American dream" and found the financial burden of achieving it more than anticipated which led to the misdemeanor violation by Mr. Pal. It was also argued that the punishment of outright revocation outweighs the crime.
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> Complainant's counsel countered that the Department does not consider financial hardship in recommending penalties but if a lesser penalty is considered appropriate, then the penalty should be revocation of the license with 180 days stayed to permit transfer of the license to a person and to a location acceptable to the Department with 30 days of actual suspension, and indefinitely thereafter, until the license is transferred or revoked if such transfer is not accomplished within 180 days. It was mentioned that the dual nature of such a penalty is appropriate in cases where a single transfer is likely to create future issues of alter ego control of the licensed premises. No evidence was introduced in support of such concern in this case.

> The penalty recommended below achieves the Department's historical purpose in imposing a penalty on a license holder. In addition to protecting the public and deterring others from similar transgressions, the proposed penalty is a more proportionate response to the criminal activity of Mr. Pal.

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].)

Appellants object to the penalty as punitive. Every penalty, however, is punitive to some extent. Were that not the case, a penalty would have no deterrent value. The "standard" penalty listed in Department rule 144 for conviction of a crime involving moral turpitude is revocation. The penalty imposed here is less severe than either the outright revocation or the "double transfer" with an indefinite suspension penalty recommended by the Department.

Although the ALJ found no aggravation or mitigation, he stated that the penalty he proposed was "a more proportionate response" to the circumstances of the violation. Rather than punitive, this penalty is tailored to be appropriate to the circumstances.

In the present case, we cannot say the reduced penalty was excessive.

II

On November 13, 2006, the California Supreme Court held that the provision of a Report of Hearing by a Department "prosecutor" to the Department's decision maker (or the decision maker's advisors) is a violation of the ex parte communication prohibitions found in the APA. (*Quintanar*, *supra*, 40 Cal.4th 1.) In *Quintanar*, the Department conceded that a report of hearing was prepared and that the decision maker or the decision maker's advisor had access to the report of hearing, establishing, the court held, "that the reports of hearing were provided to the agency's decision maker." *(Id.* at pp. 15-16.)

In the present case, appellants contend a report of hearing was prepared and made available to the Department's decision maker, and that the decision in *Quintanar*, therefore, must control our disposition here. No concession similar to that in *Quintanar* has been made by the Department.

Whether a report was prepared and whether the decision maker or his advisors had access to the report are questions of fact. This Board has neither the facilities nor the authority to take evidence and make factual findings. In cases where the Board finds that there is relevant evidence that could not have been produced at the hearing before the Department, it is authorized to remand the matter to the Department for reconsideration in light of that evidence. (Bus. & Prof. Code, § 23085.)

In the present case, evidence of the alleged violation by the Department could not have been presented at the administrative hearing because, if it occurred, it occurred *after* the hearing. Evidence regarding any Report of Hearing in this particular case is clearly relevant to the question of whether the Department has proceeded in the manner required by law. We conclude that this matter must be remanded to the

Department for a full evidentiary hearing so that the facts regarding the existence and disposition of any such report may be determined.[2]

ORDER

The decision of the Department is affirmed as to all issues raised other than that regarding the allegation of an ex parte communication in the form of a Report of Hearing, and the matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing opinion.[3]

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

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[2]The Department has suggested that, if the matter is remanded, the Board should simply order the parties to submit declarations regarding the facts. This, we believe, would be wholly inadequate. In order to ensure due process to both parties on remand, there must be provision for cross-examination.

The hearing on remand will necessarily involve evidence presented by various administrators, attorneys, and other employees of the Department. While we do not question the impartiality of the Department's own administrative law judges, we cannot think of a better way for the Department to avoid the possibility of the appearance of bias in these hearings than to have them conducted by administrative law judges from the independent Office of Administrative Hearings. This Board cannot, of course, require the Department to do so, but we offer this suggestion in the good faith belief that it would ease the procedural and logistical difficulties for all parties involved.

[3]This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.