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

AB-8538
File: 20-403494 Reg: 05060755

KAYO OIL COMPANY, dba Circle K # 76-2705217
12512 Knott Avenue, Garden Grove, CA 92841,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: February 1, 2007
Los Angeles, CA

ISSUED APRIL 26, 2007

Kayo Oil Company, doing business as Circle K # 76-2705217 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days, with 5 days stayed on the condition that appellant operate without a violation for one year, for appellant's clerk selling an alcoholic beverage to a person under the age of 21, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Kayo Oil Company, appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, R. Bruce Evans, and Michael Akopyan, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated March 9, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on October 15, 2003. On September 21, 2005, the Department filed an accusation against appellant charging that, on June 10, 2005, appellant's clerk sold an alcoholic beverage to 17-year-old Rodolfo Cruz, a non-decoy "minor."

At the administrative hearing held on January 20, 2006, documentary evidence was received and testimony concerning the sale was presented. The Department's decision determined the violation charged was proved and no defense was established. Appellant then filed an appeal contending that the Department had not proceeded in the manner required by law because its decision is based on facts not in evidence. The Department moved to dismiss the appeal when appellant's brief was not filed until a month after its due date.[2] Thereafter, appellant filed a motion to augment the 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 *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*).

DISCUSSION

I

Appellant contends that the Department has not proceeded in the manner required by law by adopting a decision that is based on facts that were not presented as evidence at the administrative hearing. It argues that the decision to apply only "[s]ome

[2]In this case, we do not see any significant prejudice to the Department arising from appellant's opening brief being so late. The Department filed both a reply brief and a supplemental brief addressing the issues. While the conduct of appellant's counsel caused some inconvenience, it does not merit dismissing the appeal.

slight mitigation" in determining the penalty resulted from the ALJ's conclusion that appellant's training for its employees "was not shown to go beyond that normally offered by a licensee of similar size and scale" (Concl. of Law 5), but that no evidence was presented at the hearing regarding the training normally offered by licensees of similar size and scale.

Conclusion of Law 5 states:

> Complainant requested a 15-day license suspension, indicating no factors in aggravation or mitigation existed. Respondent argued the evidence regarding training of its employees, the termination of the offending employee and its cooperation in the investigation merit a mitigated penalty pursuant to section 144 of Chapter 1, title 4, California Code of Regulations [Rule 144]. Department's Penalty Policy Guidelines include as possible mitigating factors, "[p]ositive action to correct problem . . . , [d]ocumented training of . . . employees . . . , [and c]ooperation by licensee in investigation." (Rule 144.) In this case, the evidence shows that there was in existence a routine training program for new cashier employees with monthly follow-up, that the offending employee received the training, the termination from employment of the offending employee and no evidence one way or the other about licensee involvement in the investigation. On the one hand, the sort of training employed by Respondent here was not shown to go beyond that normally offered by a licensee of similar size and scale. The remedial action taken, termination of the employee, would seem to solve Respondent's immediate problem even if it could not actually be classified as "positive." On the other hand, if the language contained in Rule 144 is to have meaning at all, it likely encompasses the actions taken in this case by this Respondent. Some slight mitigation appears in order.

Although appellant refers to a "decision" based on "facts not in evidence," it is really complaining about the *penalty* being too harsh. When an appeal is made because of an allegedly excessive penalty, the standard of review is not whether substantial evidence supports the findings, but only whether the penalty imposed is an abuse of the Department's 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].)

The penalty was reduced from that usually imposed for a first sale-to-minor violation by staying five days of the penalty on the condition that appellant operate violation-free for one year. Appellant has not shown any abuse of discretion here.

Although there was no evidence presented at the hearing about typical training programs of other licensees, we believe the ALJ was entitled to rely on his own knowledge of training programs that he has accumulated over time as an ALJ. Even if the ALJ’s statement about other training programs were wrong, and appellant has not alleged that it was, the reduced penalty adopted by the Department cannot be said to be an abuse of discretion.

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, appellant contends 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.[3]

ORDER

The decision of the Department is affirmed as to all issues raised other than that

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[3]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.

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.[4]

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

[4]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.