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

AB-8578
File: 21-387328 Reg: 05059466

YAMA HASHEMI, dba Ricky's Liquor
18520 West Soledad Canyon Road, Units M-N, Santa Clarita, CA 91351,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

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

ISSUED MAY 16, 2007

Yama Hashemi, doing business as Ricky's Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 25 days for selling alcoholic beverages to two persons under the age of 21, violations of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Yama Hashemi, appearing through his counsel, Ralph B. Saltsman, Stephen W. Solomon, and Michael Akopyan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

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[1]The decision of the Department under Government Code section 11517, subdivision (c), dated June 9, 2006, is set forth in the appendix, as is the Proposed Decision of the administrative law judge, dated November 29, 2005.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on September 11, 2002. On April 26, 2005, the Department filed a three-count accusation against appellant charging that, on January 7, 2005, he sold alcoholic beverages to three individuals under the age of 21: Carlos J. Cordero, Serge K. Damirjian, and Joshua A. Bernd.

At the administrative hearing held on November 4, 2005, documentary evidence was received and testimony concerning the sale was presented by Department investigator Ricardo Carnet; by two of the underage purchasers, Cordero and Damirjian, and by appellant. Private investigator Lawrence Murillo also testified. The third underage purchaser, Bernd, did not appear, and the count with regard to him was dismissed. During closing argument, the Department recommended an "aggravated" penalty of 25 days' suspension because of a prior sale-to-minor violation and because one of the purchasers was only 17 years old.

Subsequent to the hearing, the administrative law judge (ALJ) submitted his proposed decision to the director of the Department. In it, the ALJ found that the two remaining counts of the Accusation were proved and imposed a 15-day suspension, rejecting the greater penalty proposed by the Department at the hearing. The Department did not adopt the ALJ's proposed decision but issued its own decision pursuant to Government Code section 11517, subdivision (c). The Department's decision adopted the entirety of the Findings of Fact, the paragraph entitled "Special Notice of Defense," and all the Conclusions of Law; omitted the section entitled "On Penalty"; and substituted a new "Order" suspending the license for 25 days.

Appellant filed an appeal contending: (1) The penalty is excessive, (2) the ALJ erred in allowing counsel for the Department to see a document protected from

disclosure by the attorney work product privilege, and (3) the Department violated provisions of the Administrative Procedure Act (APA) prohibiting ex parte communications and appellant's right to due process.[2]

DISCUSSION

I

Appellant contends that the "aggravated penalty" imposed by the Department has no factual or legal basis, does not take into consideration the evidence of mitigation presented, and violates due process because the Department did not provide notice it intended to seek an aggravated penalty.

Appellant's contention that the penalty has no factual or legal basis is simply a misunderstanding, or misstatement, of the standard used to review a penalty determination. 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 argues using principles related to factual issues, but it is the *decision* that must be supported by substantial evidence, not the penalty. Appellant's statement that *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11

[2]Appellant also filed a motion asking the Board to augment the record with any Report of Hearing in the Department's file for this case. Our decision on the ex parte communication issue makes augmenting the record unnecessary, and the motion is denied.

Cal.3d 506, 516 [113 Cal.Rptr. 836] (*Topanga*) requires an "analytical bridge" between the evidence and the conclusions, is similarly misplaced. *Topanga* simply requires that the agency make findings; it has no applicability to a penalty determination.

Appellant contends the decision fails to consider the mitigation evidence offered. He bases this contention on the failure of the decision to mention the evidence about appellant's attendance at the Department's LEAD training. The failure to mention appellant's testimony at pages 82 and 83 of the Reporter's Transcript is hardly surprising, since it really showed only how little appellant learned at the training. This does not, by any stretch of the imagination, constitute "mitigation."

Appellant's contention about lack of notice has to do with the wording of the accusation. The accusation originally stated, after the three sale-to-minor counts:

> Licensee(s) Previous Record: Licensed as above since September 11, 2002, with the below record of disciplinary action:

DATE	VIOLATION	PENALTY	REG. NO
12-06-04	25658(a) B&P-Sale-to-Minor	15 days suspension (Pending)	040558441

At the beginning of the hearing, the Department moved to amend the accusation, changing the text above the information on disciplinary action to read: "For the purpose of imposition of penalty, if any, the Respondent licensee has been licensed since September 11th, 2002, with the following record of disciplinary action." No objection was made to this amendment or to the later admission into evidence of Exhibit 1, which consisted of the documents evidencing the prior disciplinary action.

It appears the ALJ, at the hearing, created the impetus behind appellant's position. When appellant's counsel, Ryan Kroll, was about to start his closing argument after the Department had asked for an aggravated penalty based on the prior discipline, the ALJ asked him to address whether, assuming the two sale-to-minor counts were

established, an enhanced penalty should be considered. When Kroll began to speak of the clerk's credibility, the ALJ interrupted him, and this dialogue followed [RT 110-111]:

> THE COURT: No. No. No. I said assuming [the violation] was established. Just for the purpose of discussion – to argument [*sic*]. Is there – is there a legal basis for an enhanced penalty?
>
> MR. KROLL: Base [*sic*] upon this being a second –
>
> THE COURT: Based upon the pleadings, based on the evidence. I'm not going to – I don't want to lead the – a horse to water. But I just want to raise an issue with you, and see if you – how you address it, or if you wish to address it.
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> MR. KROLL: Well, I don't really see any reason for it. I mean – you can find a violation on this.
>
> THE COURT: Okay. Let me – let me – let me cut to the chase. Okay. It's been my policy in the past basically that since these are noticed pleadings, and noticed pleadings requires [*sic*] the parties be apprised prior to entering the hearing room, what they will be facing at the hearing in terms of the Complainant's accusation.
>
> That it is required, or should it be required, that in order to request an enhanced penalty there ought to be a notice of pleading to the effect that the Respondent is advised in the accusation that an enhanced penalty is being sought in order for an enhanced penalty to be considered.
>
> Okay. I'll lead you right to the issue.
>
> MR. KROLL: So focus on that? I believe absolutely, Your Honor. This accusation came out several months ago, and the Department has had every opportunity up until now to supplement it. To make any modifications it needed to. Instead it waited until today, the very last second to spring this up [*sic*] – the new enhanced penalty – upon us at this exact moment.
>
> This hearing was set approximately about a month ago. Maybe a little bit more. Counsel knew right then and there what accusation it held right then. It knew what's – what the accusation stated before today, yet it waited until this hearing, at this moment, to bring on the idea of an enhanced penalty.
>
> I think that is a clear violation of my client's due process rights. If you're going to accuse someone of something, you must give them notice. It's fundamental due process law right there.
>
> THE COURT: Okay. Thank you. . . .

When the Department issued its decision, it omitted that part of the ALJ's proposed decision entitled "On Penalty." In the first paragraph of that section the ALJ rejected the Department's "untimely request" made at the hearing for enhancement of the penalty because of the prior sale-to-minor violation. He based his rejection on "lack

of fairness" because "nothing in the accusation with respect to the prior violation . . . gave notice that the complainant was seeking an enhanced penalty in the event the principal allegation was proved up." He continued in the second paragraph of the section:

> In past practice, when seeking an enhanced penalty, the complainant set forth an allegation in the accusation stating that it is seeking such a penalty. This affords the licensee an opportunity to shape its defense by having notice of the ramifications associated with the charges in the accusation. There was no allegation in the instant accusation seeking an enhancement of penalty and therefore, the prior violation will not be considered for purposes of assessing penalty.

Appellant takes the argument even farther, alleging that the Department violated due process by imposing an aggravated penalty when it did not give notice of its intent to do so until the hearing. In support of this position, appellant cites cases stating the general principle that procedural due process requires, at a minimum, notice and an opportunity for a hearing. (*In re Joshua M.* (1998) 66 Cal.App.4th 458, 471 [78 Cal.Rptr.2d 110]; *Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1189 [52 Cal. Rptr. 2d 518].) However, appellant has provided no authority indicating that the requirements of notice and opportunity for a hearing extend to penalty determinations or enhancements.

We fail to see any inherent unfairness in the Department's failure to spell out in the accusation the possibility that it might consider a prior violation when imposing a penalty. The generally accepted policy of progressive discipline, in which subsequent violations demand greater penalties, would put any reasonable person on notice that a prior violation might well make for a more severe penalty when a subsequent violation occurred.

Reflective of the Department's long-standing policy of progressive discipline are the provisions of Department rule 144 (4 Cal. Code Regs., § 144). In the introductory

paragraph of the Penalty Policy Guidelines, the Department states: "The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation." There follows a list of factors that, among others, may be considered aggravating circumstances. First on the list is "Prior disciplinary history."

Appellant's counsel has handled a plethora of sale-to-minor cases before the Department over the years, and is certainly aware of the Department's progressive discipline policy. We find it impossible to believe that appellant's counsel was surprised by the Department's seeking an aggravated penalty in this instance. Kroll was more surprised, it appears, by the ALJ making an issue of this.

We do not believe there is any requirement that the Department specify its intention to seek an aggravated penalty where prior violations are clearly shown in the accusation. Even if such a requirement existed, it would not be a basis for reversal where, as here, the failure to comply has not been shown to have resulted in any surprise or substantial prejudice to appellant.

II

Appellant contends the ALJ erred in allowing counsel for the Department to see a document prepared by a private investigator because it was protected from disclosure by the attorney work product privilege.

Lawrence Murillo was hired by appellant's counsel to do further investigation of this case. In the course of his investigation, he prepared a written report of conversations he had with two of the underage purchasers and the older brother of one of them. He used this report to refresh his recollection and it was the basis for his testimony. When Kroll finished his direct examination of Murillo, Department counsel

Matthew Ainley asked to see the report. Kroll objected, saying it was privileged from disclosure under the attorney work product doctrine. Ainley responded that the privilege was waived once Murillo used it to refresh his recollection. The two attorneys and the ALJ discussed the issue for several minutes and then the ALJ overruled the objection, allowing Ainley to review the report.

In this appeal, appellant urges that the privilege is waived only by its disclosure to a third party who has no interest in maintaining the confidentiality.

Appellant cites the case of *Mize v. Atchison, Topeka, and Santa Fe Ry. Co.* (1975) 46 Cal.App.3d 436 [120 Cal.Rptr. 787] (*Mize*) for the proposition that "even when a witness on the stand, is allowed to refresh his recollection from a privileged document, it does not necessarily mean that the privilege is thereby waived." (App. Br. at p. 10.) Although appellant did not provide a citation to the page on which he relied, perusal of the case shows this language occurs on page 449. The privilege referred to in connection with the language cited, however, is the *attorney-client privilege*.

Looking at the paragraphs preceding the cited language, we find the court discussing the *attorney work product privilege*, which was the basis of appellant's counsel's objection at the hearing:

> It seems doubtful if the alleged work product privilege can ever be claimed at the time of trial. It is not one of the privileges enumerated in the Evidence Code. Provisions as to work product found in Code of Civil Procedure section 2016 [now §§ 2018.10-2018.80] do not use the work [*sic*] privilege and are in the nature of statutory limitations on pretrial discovery. Also it may well be that even if it be deemed there is in fact a work product privilege concerning a report of an investigator it ceases the moment it is determined to use him as a witness, just as it does with the report of an expert. (*Bolles v. Superior Court* (1971) 15 Cal.App.3d 962 [93 Cal.Rptr. 719].) In any event it ceases when the witness uses the report to refresh his recollection and then is called and testifies. (*Kadelbach v. Amaral* (1973) 31 Cal.App.3d 814, 821-822 [107 Cal.Rptr. 720]; *Kerns Constr. Co. v. Superior Court* (1968) 266 Cal.App.2d 405 [72

> Cal.Rptr. 74]; and see generally Jefferson, Cal. Evidence Bench Book, § 41.1.) As was stated in *Kerns*, "The attorney cannot reveal his work product, allow a witness to testify therefrom and then claim work product privilege to prevent the opposing party from viewing the document from which he testified;" such a use of the work product rule would be unconscionable.

(*Mize*, *supra*, 46 Cal.App.3d at p. 449.]

Appellant is simply wrong.

III

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. (*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*).) 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 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

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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.

[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.