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

AB-8790
File: 21-413762 Reg: 07066529

DEEPAK KUMAR and SUKHDEEP KAUR, dba Pacific Liquor & Food
198 East Pacific Avenue, Fairfield, CA 94533,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: January 15, 2009
San Francisco, CA

ISSUED JUNE 4, 2009

Deepak Kumar and Sukhdeep Kaur, doing business as Pacific Liquor & Food (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license for their 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 appellants Deepak Kumar and Sukhdeep Kaur, 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, Dean R. Lueders.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 27, 2004. The

[1]The decision of the Department, dated November 29, 2007, is set forth in the appendix.

Department filed an accusation against appellants on July 25, 2007, charging that appellants' clerk, Prabodh Kumar, sold an alcoholic beverage to 18-year-old Edder Botello on April 11, 2007. Botello was working as a minor decoy for the Fairfield Police Department at the time.

At the administrative hearing held on October 26, 2007, documentary evidence was received and Botello testified about the clerk's sale to him of a six-pack of Budweiser beer. He testified that the clerk did not ask his age or for identification before selling the beer to him. Testimony was also presented by Gurjinder Singh, manager of the licensed premises; Sukhdeep Kaur, co-licensee and Singh's wife; Vijay Kumar, who worked in the store and is the mother of co-licensee Deepak Kumar and sister-in-law of the clerk, Prabodh Kumar; and Pradeep Kumar, former licensee at this premises (1988--2004) and father of co-licensee Deepak Kumar.[2]

The Department's decision determined that the violation charged was proved and no defense was established. Appellants then filed an appeal contending: (1) The penalty is excessive; (2) it was error to prevent appellants from introducing evidence of their business debt; (3) the Department engaged in improper ex parte communications; and (4) the Department did not have screening procedures in place to prevent its attorneys from acting as both prosecutors and advisors to the decision maker and from engaging in ex parte communications. Issues 1 and 2 will be discussed together, as will issues 3 and 4.

In addition, appellants have requested that the Board reserve judgment in this appeal until the California Supreme Court issues its decision in *Morongo Band of*

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[2]Co-licensee Deepak Kumar attends medical school and does not participate in the daily operation of the store.

Mission Indians v. State Water Resources Control Board, S155589 (*Morongo*). They have also filed a motion to augment the record with a variety of documents in the possession of the Department.

DISCUSSION

I and II

Appellants contend the penalty of outright revocation is excessive, and the Department abused its discretion in adopting the penalty proposed by the administrative law judge (ALJ). They argue the ALJ erred in failing to consider evidence of mitigation and not allowing appellants to present evidence of their business debt. Appellants assert that the ALJ did not consider the more appropriate penalty of a stayed revocation because of these errors.

The penalty is discussed in the decision in Determination of Issues II:

> The Department recommended that Respondents' license be revoked, the "standard" penalty for a licensee's third violation of Business and Professions Code Section 25658(a) in a thirty-six month period. Title 4, California Code of Regulations, Section 144. See also Business and Professions Code Section 25658.1(b). Considering that 1) at the time of the present violation, Respondents had been licensed for only thirty-one months, 2) the present violation was Respondents' third violation of Business and Professions Code Section 25658(a) in only twenty-eight months, and 3) the same clerk committed the second violation and the third violation, mitigation of Respondents' penalty is not warranted.

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 assert that the Board must assume the Department failed to consider all the evidence because the decision contains no discussion or analysis of the mitigating evidence they presented at the hearing. They list seven items of mitigation which they say the Department failed to consider. While it is true that most of these "mitigating factors" were not discussed or analyzed in the Department's decision, we hardly find that surprising, since only a few have any substance, and the ones with substance do not provide mitigation. We set out below, in italics, the "mitigating factors" listed by appellants, and follow each one with the reason it cannot be considered as mitigation in this case:

1) *The clerks who made the three illegal sales were fired* – Although the clerks may have been fired, there was no evidence that they were fired because of the illegal sales; indeed, Prabodh Kumar was not fired after he committed the second violation, and he went on to make the third illegal sale.

2) *They did not sell to a minor during a decoy operation several months after the third violation* – There is no evidence to show that the store's success during the subsequent decoy operation was due to any "corrective measures" as alleged by appellants.

3) *All employees receive constant training about checking identification* – The "constant training and re-training" was not shown to be anything more than periodic admonitions to "Check the ID."[3]

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[3]Appellants' citations to the record reveal the hyperbole used to turn testimony into this "mitigating factor":
[RT 45:22-46:3] ***Q***. But after the second violation, was [Prabodh Kumar] – you said earlier in direct examination you constantly trained him on checking –
A. Yes. ***Q***. – ID and things such as – ***A***. Yes, I constantly – I used to tell him not to – look at the ID. No ID, no sale.
[RT 47:17-20] ***Q***. Did you feel that you adequately instructed Mr. Kumar about checking the ID, in terms of the alcohol, after the second violation? ***A***. Yes.

(continued...)

4) *They have a policy prohibiting the sale of alcoholic beverages to anyone without valid identification showing they are at least 21 years old* – Appellants translate the testimony at RT 45:22-46:3, quoted in footnote 3, below – "No ID, no sale" – into a "policy."

5)*The clerk who committed the [second and] third violation[s] had four years of employment history without a sale-to-minor violation* – The four violation-free years were before appellants became the licensees.

6) *The licensees were not involved in any of the violations* – Whether or not the licensees were personally involved in the violations, it is settled law that the actions of their employees are imputed to the licensees.

7) *They have incurred substantial debt in this operation that they should be permitted to recoup* – This is simply appellants' opinion, not a factor in mitigation.

Clearly, there was no reason for the ALJ to discuss these items, even if they had been identified by appellants as their take on "mitigating evidence," which they were not. In any case, whether or not the decision includes a discussion of mitigating factors presented is irrelevant. The law does not require such a discussion, nor does appellant refer us to any authority mandating such a requirement. Where a penalty is involved, this Board looks only to see whether it can be considered reasonable, not what considerations or reasons led to it. If the penalty itself is reasonable, our inquiry ends there.

As the ALJ explained in Determination of Issues II, quoted above, this was a "third strike" case, the standard penalty for which is revocation. When the standard penalty is imposed, it seems to this Board that, absent extraordinary circumstances, the penalty should be considered reasonable. As there are no extraordinary circumstances pointed out to us by appellant, we conclude that revocation is reasonable and well

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[3](...continued)
[RT 60:9-14] ***Q***. And [Gurjinder Singh] is directly responsible for training these people, right? ***A***. Yes, he – he does everything. He run – when he – he just left the store like 3 o'clock, and every time he told the employees, "Just check the ID's," every time.

within the Department's discretion.

Appellants also contend the ALJ erred in disallowing evidence of the debt they incurred in purchasing the business. This evidence was relevant, they argue, in determining whether the appropriate penalty was outright revocation or a stayed revocation. They insist this "error" indicates the ALJ was unaware that under the Department's penalty guidelines, "revocation" includes not only outright revocation, but a period of stayed revocation as well. (4 Cal. Code Regs., § 144 [rule 144].)

This issue can hardly be said to have been raised at the hearing. Rather, one question was asked by appellant's counsel about the amount owed to the bank for the purchase of the business; the Department objected on the ground of relevance; the ALJ sustained the objection; and nothing else was said about the debt at the hearing, either in testimony or in argument. There was nothing said that would lead the ALJ to believe that appellants wanted this evidence to be considered in mitigation. It is too late to raise the issue for the first time on appeal.[4]

The Department is charged with protecting the public welfare and morals in California. Appellants have shown they pose a danger to public welfare and morals by their three illegal sales of alcoholic beverages to minors in only 28 months. The ALJ gave a reasonable explanation of the basis for the penalty of revocation. Appellants have not provided evidence that the Department abused its discretion in imposing that penalty.

III and IV

Appellants contend the Department did not adequately screen its prosecutors

[4]Most of appellants' argument on this point in their brief appears to address a case other than this appeal, and we disregard it.

from its decision maker and engaged in ex parte communications.

The administrative hearing in this case took place on August 16, 2007, after the adoption by the Department of General Order No. 2007-09 (the Order) on August 10, 2007.[5] The Order sets forth changes in the Department's internal operating procedures which, it states, the Director of the Department has determined are "the most effective approach to addressing the concerns of the courts and to avoid even the appearance of improper communications," changes which consist of "a reassignment of functions and responsibilities with respect to the review of proposed decisions." The Order, directed to all offices and units of the Department, provides, in relevant part:

> Effective immediately, the following protocols shall be followed with respect to litigated matters:
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> 1. The Department's Legal Unit shall be responsible for litigating administrative cases and shall not be involved in the review of proposed decisions, nor shall the Chief Counsel or Staff Counsel within the Legal Unit advise the Director or any other person in the decision-making chain of command with regard to proposed decisions.
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> 2. The Administrative Hearing Office shall forward proposed decisions, together with any exhibits, pleadings and other documents or evidence considered by the administrative law judge, to the Hearing and Legal Unit which shall forward them to the Director's Office without legal review or comment.
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> 3. The proposed decision and included documents as identified above shall be maintained at all times in a file separate from any other documents or files maintained by the Department regarding the licensee or applicant. This file shall constitute the official administrative record.
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> 4. The administrative record shall be circulated to the Director via the Headquarters Deputy Division Chief, the Assistant Director for Administration and/or the Chief Deputy Director.
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> 5. The Director and his designees shall act in accordance with Government Code Section 11517, and shall so notify the Hearing and Legal Unit of all decisions made relating to the proposed decision. The

[5]A copy of the Order is attached to the Department's brief as an exhibit.

Hearing and Legal Unit shall thereafter notify all parties.

6. This General Order supersedes and hereby invalidates any and all policies and/or procedures inconsistent to [*sic*] the foregoing.

The obvious purpose of the Order is to amend the internal operating procedures of the Department that have resulted in more than 100 cases having been remanded to the Department by the Appeals Board for evidentiary hearings regarding claims of ex parte communications between litigating counsel and the Department's decision makers.[6] The Order refers to "appellate decisions" which are not identified, but undoubtedly include in their numbers the decision by the California Supreme Court in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1 [50 Cal.Rptr.3d 585] *(Quintanar)*, and Court of Appeal decisions in *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board* (2007) 149 Cal.App.4th116 [57 Cal.Rptr.3d 6] (*Chevron*), and *Rondon v. Alcoholic Beverage Control Appeals Board* (2007) 151 Cal.App.4th 1274 [60 Cal.Rptr.3d 295] (*Rondon*), case authorities routinely cited in appellate briefs asserting that the Department engaged in improper ex parte communications.

The Order effectively answers the question raised in earlier appeals, i.e., whether the Department's long standing practice of having its staff attorneys submit ex parte recommendations in the form of reports of hearing, has been officially changed to comply with the requirements of *Quintanar* and the cases following it. It replaces an earlier, less formal procedure used by the Department to address the problems of ex parte communications, one which the Appeals Board found was not an effective cure for the problem endemic within the Department, with one intended to isolate the

[6]We understand that these cases were ultimately dismissed by the Department.

Department decision maker from any potential advice or comment not only from the attorney who litigated the administrative matter, but from the Department's entire Legal Unit as well.

Appellants have not affirmatively shown that any ex parte communication took place in this case. Instead, they have relied on the authorities cited above *(Quintanar, supra; Chevron, supra; Rondon, supra*), for their argument that the burden is on the Department to disprove the existence of any ex parte communication.

We are now satisfied, by the Department's adoption of General Order No. 2007-09, that it has met its burden of demonstrating that it operated in accordance with law. Without evidence that the procedure outlined in the Order was disregarded, we believe it would be unreasonable to assume that any ex parte communication occurred.

While the Order does not specifically address the question whether there was an adequate screening procedure to prevent Department attorneys who acted as litigators from advising the Department decision maker in other matters, by its terms it appears to resolve that issue by effectively removing the litigating attorneys from the review process entirely.[7]

In light of the result we reach, we see no need augment the record as requested by appellants.

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[7]Appellants asked the Appeals Board to refrain from deciding this issue until it was resolved by the California Supreme Court in *Morongo*, *supra*, but the Board had no reason to delay. As explained in the text, the Department's Order effectively prevents the issue from arising, so the Court's decision could have no effect on this Board's analysis. On February 9, 2009, the Court issued its decision in *Morongo*, rejecting the position espoused by appellants by holding that the separation of prosecutorial and advisory functions within an administrative agency may be made on a case-by-case basis.

ORDER

The decision of the Department is affirmed.[8]

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

[8]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.