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

AB-8895
File: 21/42-429527 Reg: 08069021

JUG SHOP, INC., dba The Jug Shop
1590 Pacific Avenue, San Francisco, CA 94109,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: none

Appeals Board Hearing: October 7, 2010
San Francisco, CA

ISSUED NOVEMBER 22, 2010

Jug Shop, Inc., doing business as The Jug Shop (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for the sale of an alcoholic beverage to a person under the age of 21, a violation of Business and Professions Code section 25658(a).

Appearances on appeal include appellant Jug Shop, Inc., appearing through its counsel, Richard D. Warren, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

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[1]The decision of the Department, dated June 17, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general and on-sale beer and wine public premises licenses, at the current location, were issued on August 18, 2006. Appellant was previously located across the street, at 1567 Pacific Avenue, San Francisco, CA 94109, and licensed at that location since April 6, 1979, under file number 70786. The move in 2006 was necessitated by the landlord's decision not to renew the lease, in order to be able to build a much larger structure on the property. Aside from the move, there were no other changes; the corporate officers, directors and shareholders remain the same.

The Department instituted an accusation against appellant, which appellant does not dispute, that appellant's clerk sold an alcoholic beverage to a person under the age of 21. On June 12, 2008, appellant's general manager, Phillip Priolo, met with a District Administrator, and signed a Stipulation and Waiver, acknowledging receipt of the accusation and other forms, waiving all rights to a hearing, reconsideration, and appeal, and requesting the imposition of a fine in lieu of suspension. Mr. Priolo was not aware, nor was he informed, of the possibility of an all-stayed suspension, based on a lengthy period of penalty-free operation, so he did not request or discuss this possibility with the District Administrator.

No administrative hearing was held, and thereafter, on June 17, 2008, the Department issued its decision which determined that appellant's license should be suspended for 15 days.

Subsequently, on June 18, 2008, appellant informed the District Administrator of appellant's long history without violations and requested that the Department agree to allow an all-stayed penalty, based on 28 years of penalty-free operation. This request was rejected on the grounds that the transfer to a new location wiped out the license

history; appellant was treated as though it had only been licensed since 2006.

On June 19, 2008, appellant submitted a rescission of the Stipulation and Waiver, which was rejected by the Department as untimely because the decision had been issued on the 17th of June.

Appellant filed a timely appeal raising a single issue: that it was an abuse of discretion to deny a mitigated penalty, based on numerous years of discipline-free operation.

DISCUSSION

The issue on appeal is whether it was an abuse of discretion to deny appellant a mitigated penalty, based on 28 years of discipline-free operation, where the licensee was compelled to move its location two years prior to the violation, causing all but two years of its license history to be at a different location than the current premises.

In *Sood* (1999) AB-7404, the Appeals Board said: "It has been the Board's position in all cases previously decided, that appellants may not, in matters where a stipulation and waiver form waives appeal, raise substantive issues on the merits of the facts of the case. However, appellants may raise the narrow issues of due process and substantial justice: has the appellant been dealt with fairly . . . ." In the instant case, even though ordinarily the matter would be closed following the signing of a stipulation and waiver, we address the question of fairness in the underlying matter.

Appellant contends that the District Administrator abused his discretion, and treated appellant unfairly, when he failed to mitigate the penalty for a sale-to-minor violation, by refusing to include the penalty-free years of operation at the location

across the street from appellant's current location. Appellant maintains that it would be entitled to a penalty of 10-days' suspension, all stayed, if this information had been considered.

The Appeals Board may not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. *(Martin v. Alcoholic Beverage Control Appeals Board & Haley* (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

The Department's standard penalty for a sale-to-minor violation is 15 days. (4 Cal. Code Regs., §144.) However, Rule 144 also sets out a number of circumstances that may be considered as mitigating factors by the Department, one of which is the "length of licensure at [the] subject premises without prior discipline or problems."

Appellant maintains that the suspension should be stayed in its entirety, pointing to the fact that it has operated free of discipline since April 1979, with the period from 1979 to 2006 being at a location across the street from the current location.

The fact that appellant was free of discipline for 28 years suggests that something appellant was doing has been quite effective. The Board must consider whether it was unfair, or an abuse of discretion by the District Administrator, to ignore this lengthy discipline-free period, simply because it occurred at a different address, across the street from appellant's present location.

In previous cases, the Department has considered the disciplinary history of the licensee's former license in formulating the penalty. In *Yakow* (2000) AB-7268 at pages 18 -19, the Department treated a violation under a previous license as constituting a

second violation under a current license. And in *Hawamdeh* (2000) AB-7393 at page 5, the Department argued that "the mere fact that he moved his store to another location should not reduce his accountability for prior violations." We said in that case:

> We are not aware of any rule which dictates that in all circumstances the Department is precluded from continuing a disciplinary order to a newly-issued license, especially where there is no change in the identity of the licensee or the privileges for which the license is issued, and all that is involved is a simple geographical relocation.

(*Id*. at p. 6.)

We believe it is an abuse of discretion for the Department to insist on consideration of the disciplinary history of a licensee's previous license only for the purpose of aggravating the penalty, and not for mitigation.

> On many occasions the courts have attempted to define "abuse of discretion." In *Sharon v. Sharon*, 75 Cal. 1, 48 [16 P. 345], the court had this to say: "In a legal sense, discretion is abused whenever, in its exercise, a court exceeds the bounds of reason, -- all the circumstances before it being considered." Bouvier's Law Dictionary, Volume I, page 94, defines "abuse of discretion" as "A discretion exercised to an end or purpose not justified by and clearly against reason and evidence."

(Schaub's, Inc. v. Department of Alcoholic Beverage Control (1957) 153 Cal.App.2d 858 [315 P.2d 459].)

As the court said in *Harris v. Alcoholic Beverage Control Appeals Board* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633]: "Although the Department's discretion with respect to the penalty is broad, it does not have absolute and unlimited power."

Reason and evidence dictate that appellant should have been afforded some recognition of its extraordinary period of licensure without discipline or problems, the move across the street notwithstanding. It was an abuse of discretion for the District

Administrator to not consider this information in making a penalty recommendation to the Department, and it was an abuse of discretion for the Department to deny a mitigated penalty in this case.

ORDER

The decision of the Department is remanded for reconsideration of the penalty in light of the above comments.[2] It is not necessary to reach the issues raised in the Motion to Augment the Record for Appeal to reach this decision.

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

[2]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.