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

AB-8959
File: 47-402563 Reg: 06064651

BF DEALINGS, dba Murphys Hotel
457 Main Street, Murphys, CA 95247,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: January 6, 2011
San Francisco, CA

ISSUED JANUARY 18, 2011

BF Dealings, doing business as Murphys Hotel (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 20 days, 10 days of which were conditionally stayed, subject to one year of discipline-free operation, for having carried on a "controlled game" without a gambling license, a violation of Penal Code section 337j, subdivision (a) ("section 337j(a)"), in conjunction with Business and Professions Code section 19850.[2]

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[1]The decision of the Department, dated September 24, 2008, is set forth in the appendix.

[2] Penal Code 337j provides, in pertinent part:

(a) It is unlawful for any person, as owner, lessee, or employee, whether for hire or not, either solely or in conjunction with others , to do any of the following without having first procured and thereafter maintained in effect all federal, state, and local licenses required by law.

(continued...)

Appearances on appeal include appellant BF Dealings, appearing through its counsel, Kenneth M. Foley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kelly Vent.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on October 15, 2003. In December 2006, the Department instituted an accusation against appellant charging violations of Penal Code section 337j on July 18 and August 6, 2006. The accusation alleged that the card game "Texas Hold'em" was played on

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[2](...continued)

> (1) To deal, operate, carry on, conduct, maintain, or expose for play in this state any controlled game.
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> 2. To receive, directly or indirectly, any compensation or reward or any percentage or share of the revenue, for keeping, running, or carrying on any controlled game.
> ...
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> (b) It is unlawful for any person to knowingly permit any controlled game to be conducted, operated, dealt, or carried on in any house or building or other premises that he or she owns or leases, in whole or in part, if that activity is undertaken by a person who is not licensed as required by state law, or by an employee of that person.
> [¶]
> (e)(1) As used in this section, "controlled game" means any poker or Pai Gow game, and any other game played with cards or tiles, or both, and approved by the Department of Justice, and any game of chance, including any gambling device, played for currency, check, credit, or any other thing of value that is not prohibited and made unlawful by statute or local ordinance.
> (e)(2) As used in this section, "controlled game" does not include any of the following:
> [¶]
> (D) Games played with cards in private homes or residences, in which no person makes money for operating the game, except as a player.

those dates in a portion of the premises licensed for the sale of alcoholic beverages. The players were alleged to have included an employee of the licensee, the president of the licensee, customers, and undercover agents for the Department of Justice's Division of Gambling Control.

An administrative hearing was conducted on July 26, 2007, following which the administrative law judge (ALJ) issued a proposed decision dismissing the accusation. The Department did not adopt that decision, stating that it intended to decide the case itself. It invited argument from the parties, following which, instead of deciding the case itself, it remanded the matter to the ALJ directing him to take additional evidence.[3]

A second administrative hearing was held on August 26, 2008, at which time documentary evidence was received and further testimony concerning the alleged violation was presented. The testimony was not directed at whether the gambling game of Texas Hold'em was played on the dates in question, but instead whether Texas Hold'em was a "controlled game" within the meaning of section 337j, and required a gambling license. Appellant stipulated it did not have a gambling license.

Subsequent to the second hearing, Judge Lo issued his proposed decision which determined that Texas Hold'em was a controlled game within the meaning of section 337j, and that appellant operated the game without the necessary state gambling license. The Department adopted the new proposed decision on September 24, 2008.

Appellant filed a timely notice of appeal in which it raises the following issues:

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[3] At the Board's request, and after the parties had filed their briefs on the merits, the Department furnished to the Board and to the parties documents generated as a result of this first hearing which had not previously been included in the appellate record. By letter dated September 20, 2010, the Board advised the parties that the matter would be continued to January 6, 2011, and that any briefs they wished to file must be filed on or before December 1, 2010. Neither party accepted the Board's offer.

(1) The Department abused its discretion when it remanded the case for an additional hearing after the ALJ filed his proposed decision; (2) the activity at the premises was not a "controlled game" requiring licensing; and (3) the penalty is excessive.

DISCUSSION

We agree with the Department that the game of Texas Hold'em being played in the licensed premises was a controlled game, one which required local, state, and/or federal gambling licenses pursuant to Penal Code Section 337j, subdivision (a). Poker is a controlled game. Texas Hold'em is a game of poker, despite its unique and widely popular format. In the end, it combines skill and chance to affect an outcome which is ultimately decided by the classic rules of poker, i.e., successive levels of value assigned to various combinations of number and face cards, with a ten through ace of the same suit having the highest value - "a royal flush." We also agree with the Department that the authorities relied upon by appellant in support of its argument that Texas Hold'em is not a controlled game are inapposite; the 1991 revision of section 337j was expressly aimed at all forms of poker.

Having said that, we part company with the Department. We believe the Department's decision sustaining the charge of the accusation is the product of and tainted by procedural abuse of discretion, and should be reversed. Our reasoning follows.

Judge Lo's initial proposed decision, dated August 21, 2007, ordered that the accusation be dismissed. He wrote, in Determination of Issues III:

> It is a basic rule of administrative law that findings of fact must be based on evidence presented. [See Topanga Association v. County of Los Angeles (1974) 11 C.3d 506.] At the hearing for this case, there was much discussion regarding whether Respondent's president knew the playing of Texas Hold'em at

> Respondent restaurant was illegal. *However, no evidence was presented to show that Respondent did not have the requisite license to operate/conduct a controlled game. Having failed to establish an essential element of the alleged violation, the Department did not meet its burden of proof in this case*. [Emphasis supplied.]

The Department's Notice Concerning Proposed Decision, dated November 8, 2007, advised the parties that it did not adopt the proposed decision. Instead, the Department would decide the case itself pursuant to the provisions of subdivision (c) of Section 11517 of the Government Code. The Department told the parties that they had the right to submit written argument to the Department on any matters they felt should be argued, cryptically noting that, in not adopting the proposed decision, the Department had considered "[t]he findings of fact; the determination of issues; the penalty or recommendation."

A little over three months later, apparently after considering the submissions of the parties, the Department entered a new and different order entitled "Order Under Government Section 11517(c)." That order recited, in pertinent part:

> The above entitled matter is regularly before the Department on February 21, 2008, for action under Government Code Section 11517(c)(2)(D), the Department having previously not adopted the Proposed Decision of Administrative Law Judge Sonny Lo pursuant to Government Code §11517(c)(2). Complainant has made request for Judicial Notice of a declaration of Steven Giorgi, Executive Director of the California Gambling Control Commission to be admitted as Exhibit 8. The request for Judicial Notice was made pursuant to the provisions of California Evidence Code §452. Evidence Code §455 provides that parties shall be provided a reasonable opportunity to present relevant information relating [*sic*] the propriety of taking judicial notice and the tenor of the matter to be noticed.
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> ...
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> ORDER
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> The matter is remanded to Administrative Law Judge Sonny Lo pursuant to Government Code §11517(c)(2)(D) to take additional evidence.

Under section 11517(c)(2)(D), the Department is empowered to reject a proposed decision and refer the case to the same or another ALJ "to take additional evidence." Action taken pursuant to subdivision (c)(2)(D) is distinctly different from action which may be taken by the Department in deciding the case itself pursuant to subdivision (c)(2)(E). In this case, the Department, in an apparent about face, sent it back to the Judge Lo, and Judge Lo issued his proposed decision in the case after appellant conceded it had no license. The Department then simply adopted Judge Lo's proposed decision.

Appellant argues that, in the unique circumstances of this case, the remand order deprived appellant of due process. Analogizing to a motion for new trial, appellant argues that there is a required showing of due diligence before such an order should be entered, and the Department was not diligent. According to appellant, the Department had to know at the time of the initial hearing that it must prove appellant lacked a gambling license to make its case, because it alleged such in both counts of the accusation. Its failure to offer such evidence at the initial hearing, appellant asserts, was inexcusable neglect, and allowing it a second chance to prove its case a denial of due process.[4]

The Department's brief offers the Board no justification for the remand, even though its failure of proof at the initial hearing would seem to be only the result of inexcusable neglect on the part of counsel who tried the case. The accusation alleged that appellant lacked a gambling license, yet, despite such implied knowledge or belief,

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[4] Appellant casts the Department's action as a failure to proceed according to law, citing Business and Professions Code section 23084. We agree that the Department did not proceed according to law, but we focus more narrowly on what we see as procedural maneuvering to salvage a mishandled case.

the Department presented no proof of that fact at the first hearing.

Concededly, the Department has the power under section 11517, subdivision (c)(2)(D), to remand a matter for the taking of additional evidence. As with any power, without any limitation on its exercise, it can be abused. In this case, the exercise of that power gave the Department a "second bite at the apple," the equivalent of a new trial, without any showing that the Department's initial failure of proof was excusable.

This is not a case where the admission of additional evidence would simply have served a useful purpose of clarifying other evidence in the record, or supplementing evidence relating to collateral issues, as subdivision (c)(2)(D) would seem to permit. Here the effect of the remand order, if not its purpose, was to give Department counsel a second chance at victory.

Since the Department knew that the record was devoid of evidence on a critical element of the case, it was unable to decide the case itself, unless to rule for the licensee. The remand order, and the Department's internal maneuvering to get a mishandled case in a posture where a decision could be made sustaining the charge of the accusation, raises questions of fundamental fairness.

Administrative disciplinary hearings are burdensome and costly to licensees, and an ability to grant the equivalent of a new trial without some showing of good cause is simply unfair. While there is nothing in the language of section 11517(c) that requires findings of diligence as a condition precedent to the Department's exercise of 11517(c)'s powers, reason tells us that where, as here, the record demonstrates unfairness and abuse of discretion, relief is warranted.

We have reviewed the authorities cited by the Department (*Whitlow v. Bd. of Medical Examiners* (1967) 248 Cal.App.2d 478, 489 [56 Cal.Rptr. 525]), and appellant

(*Broden v. Marine Humane Society* (1999) 70 Cal.App.4th 1212 [83 Cal.Rptr.2d 235]; *Guardianship of Phillip B*. (1983) 139 Cal.App.3d 407, 429 [188 Cal.Rptr. 781]; and *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.app.4th 81 [133 Cal.Rptr.2d 234]), and do not find them helpful.

Finally, we reject the Department's suggestion in its brief that to sustain appellant's appeal requires a holding that Business and Professions Code section 11517 is unconstitutional. This Board is well aware of the constitutional limitations on its power; it does not question the constitutionality of the statute. It questions only the manner in which the Department has exercised, and abused, its discretion in invoking the powers of the statute in this particular case.

In light of the above discussion, we see no need to address the remaining issues raised by appellant.

ORDER

The decision of the Department is reversed.[5]

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

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[5] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.