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

AB-8992
File: 42-412584 Reg: 08068161

CYNTHIA D. and JOSÉ LUIS MALDONADO, dba La Coronita
3364 West Belmont Avenue, Fresno, CA 93722,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

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

ISSUED APRIL 21, 2010

Cynthia D. and José Luis Maldonado, doing business as La Coronita (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license, with revocation stayed during a probationary period of 24 months, and suspended the license for 60 days, for José Luis Maldonado willfully resisting or obstructing peace officers while they were carrying out their duties, a violation of Business and Professions Code section 24200, subdivision (a), and Penal Code section 148, subdivision (a)(1).

Appearances on appeal include appellants Cynthia D. and José Luis Maldonado, appearing through José Luis Maldonado, and the Department of Alcoholic Beverage Control, appearing through its counsel, Gerry Agerbek.

---

[1]The decision of the Department, dated December 29, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer and wine public premises license was issued on August 2, 2004. On March 13, 2008, the Department instituted a 7-count accusation against appellants charging that co-licensee José Luis Maldonado (hereafter "appellant") resisted or obstructed two peace officers in the course of their duties on November 30, 2006 (counts 1 & 2) and committed assaults on two individuals on November 1, 2007 (counts 4 & 5); and that appellants were keeping or permitting a disorderly house on November 30, 2006; November 1, 2007; and January 27, 2008 (counts 3, 6, & 7).

At the administrative hearing held on October 21 and 22, 2008, documentary evidence was received and testimony concerning the violations charged was presented by 11 witnesses for the Department.[2] Appellants presented no witnesses and appellant questioned only the first Department witness before voluntarily walking out of the hearing.[3] The Department then chose to proceed to present its evidence and the hearing continued "with the licensee in absentia." [RT 60.]

Subsequent to the hearing, the Department issued its decision which determined that only counts 1 and 2, charging appellant with resisting the officers, had been proved

---

[2]Seven of the witnesses were Fresno County Sheriff's deputies who had responded to the incidents charged in the accusation; two were private security guards who worked at the premises and were injured in a shooting incident in the parking lot; one was a customer who was seriously injured in the shooting incident; and one was the Department's district administrator, who testified about conversations she had with co-licensee José Luis Maldonado about the incidents that gave rise to the accusation.

[3]Before leaving, appellant indicated his belief that the Sheriff's deputies were not telling the truth, that he was being "framed" by them and he was "not going to play this little game." [RT 47.] He said he was not given the opportunity to defend himself because he could not obtain the surveillance tapes that he said would prove that the deputies were not being truthful in describing what happened. Appellant walked out saying, "well, there is no need to waste everybody's time. You guys can go to lunch." [RT 49.]

and the remainder of the counts were dismissed. In formulating the penalty, the administrative law judge (ALJ) took into consideration prior discipline resulting from various violations, including appellant resisting or obstructing a peace officer.

Appellants have filed an appeal making the following contentions: (1) The statute of limitations had run on the incident involved before the Department issued its accusation; (2) the criminal charges against appellant for the incident were dismissed in August 2007; (3) a surveillance video exists that proves he did not resist the officers, but he has not been able to obtain it; and (4) the penalty imposed would cause financial hardship for his employees as well as himself.

DISCUSSION

I

Appellants contend the Department did not file the accusation in time with regard to the charges for resisting a peace officer because this violation must be charged within one year. The incident occurred on November 30, 2006, and the accusation was issued March 13, 2008, more than a year later.

Numerous cases have held that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; *Hooks v. California Personnel Board* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564,576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].)

In *Bohn v. Watson* (1954) 130 Cal.App.2d 24, 37 [278 P.2d 454], the appellant argued on appeal that one of the charges against her was barred by the statute of limitations. The court rejected this contention because it had not been raised at the administrative hearing. The court explained:

> The rule compelling a party to present all legitimate issues before the administrative tribunal is required in order to preserve the integrity of the proceedings before that body and to endow them with a dignity beyond that of a mere shadow-play. Had Bohn desired to avail herself of the asserted bar of limitations, she should have done so in the administrative forum, where the commissioner could have prepared his case, alert to the need of resisting this defense, and the hearing officer might have made appropriate findings thereon.

The statute of limitations is an affirmative defense and the party asserting it must prove the facts existed establishing that defense. According to the case law cited above, this must be done at the administrative hearing where evidence can be presented by both sides, not held in reserve until an appeal is filed. Appellants had the opportunity to raise and prove this defense at the administrative hearing, but did not do so. Under the circumstances, we consider that appellants have waived the defense and may not assert it now in this appeal.

II

Appellants appear to contend that the Department should not have proceeded with the counts for resisting a peace officer, or should not now impose a penalty, because the criminal charges arising from that conduct were dismissed by the court before the administrative hearing.

Exhibit 2[4] shows that appellant entered a plea of nolo contendere to the charge on February 28, 2007. The court, finding there was a factual basis for the plea,

---

[4]Docket Report, Superior Court of California, County of Fresno.

accepted it. On August 28, 2007, at a sentencing hearing, the Deputy District Attorney requested dismissal of the case. The motion was granted and the case was dismissed.

Whether the subsequent dismissal nullifies the effect of the original nolo contendere plea for purposes of establishing grounds for discipline under Business and Professions Code section 24200, subdivision (d), is open to question. The Board need not reach that question, however.

It has long been settled that, because the standard of proof in a criminal matter – beyond a reasonable doubt – is higher than the preponderance-of-the-evidence standard applicable in a license disciplinary matter, dismissal or acquittal in a criminal proceeding is not a barrier to further administrative proceedings involving the same conduct. "The well-established rule in California is that a prior acquittal in a criminal proceedings does not have res judicata effect in a later civil proceeding or administrative disciplinary proceeding. [Citations.]" (*Lofthouse v. Department of Motor Vehicles* (1981)124 Cal.App.3d 730, 736-737 [177 Cal.Rptr. 601].) Dismissal of the criminal charges against appellant does not alter the decision or penalty in the Department's case against appellants.

III

Appellant contends a surveillance video from the premises supports his assertion that he did not resist the officers. The ALJ denied appellants' motion to compel made at the hearing because it was too late and it was against the Department, which did not have possession of the video. The Fresno County Sheriff's Department had the video.

On appeal, appellant says that he has tried to obtain the video from the Sheriff's Department, but has been unsuccessful.

If appellants mean to assert that the Department violated their due process rights by not providing the video, the assertion fails. The Department is not required to obtain discovery material for an appellant that is in a third party's hands.

Appellants may be trying to convince the Board to remand the case to the Department and have the video considered as evidence. The Board may remand for reconsideration where an appellant can show there is "relevant evidence, which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department." (Bus. & Prof. Code, §§ 23084, subd. (e), & 23085.)

However, appellants have not shown that the video could not have been produced earlier. Appellants requested discovery from the Department, but there is no indication that they served the Sheriff's Department with a subpoena duces tecum requesting the video. Since they did not serve a subpoena, appellants cannot say that they used reasonable diligence in attempting to obtain the video. There is no basis for remanding the matter.

IV

Appellants contend that the penalty will cause financial hardship for their employees as well as themselves and ask the Board for leniency.

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].)

The penalty imposed, a stayed revocation and a 60-day suspension, is not a light one. There is no doubt that appellants and their employees will suffer financial hardship as a result of such a lengthy suspension. However, financial hardship, to a greater or lesser degree, is a natural consequence of disciplinary proceedings in which violations are established. Without some negative effect, penalties would have little deterrent effect.

The standard the Board must use is simply whether the Department has abused its discretion in imposing the penalty. Certainly, reasonable minds could differ about the appropriateness of the penalty imposed here. This, however, is a hallmark of the discretion granted to the Department in imposing penalties. We cannot say, under the circumstances, that the Department has abused its discretion here.

ORDER

The decision of the Department is affirmed.[5]

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

---

[5]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.