

ISSUED AUGUST 3, 2010

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

AB-9036

File: 21-396672 Reg: 08069465

KABIRUDDIN K. HIRANI and MUNIRA K. HIRANI, dba Morgan Hill Liquors
16935 Monterey Street, Morgan Hill, CA 95037,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: July 1, 2010
San Francisco, CA

AB-9041

File: 21-307809 Reg: 08069883

DAFULLA and NATHRAH ALDABASHI, dba Mullen Liquors
4001 Broadway, Oakland, CA 94611,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: July 1, 2010
San Francisco, CA

The above matters were heard together and have been consolidated for decision. The Board, on its own motion, limited argument in these matters to the issue of the timeliness of appellants' Motions to Augment the Record. The facts of the two cases, for purposes of considering the issue of timeliness, are virtually identical, and we

reach the same result in each case, namely, that the motions to augment the record filed by appellants should be stricken as untimely, and the decisions of the Department in each case should be affirmed.

DISCUSSION

It is settled law that issues not raised at an administrative hearing (or court trial) may not be raised on appeal. The reasons for this rule are several, most importantly grounded on fairness to the opposing party and to the judge presiding over the hearing. It is also the general rule that arguments first raised in a reply brief will not be considered by a court, because to do so would unfairly deny to the other party the ability to respond. (See *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 482, fn. 10 [66 Cal.Rptr.2d 319]. Appellants' filings violate this established principle.

In *Kabiruddin and Munira Hirani* ("*Hirani*"), the Department's pre-hearing settlement offer gave them the choice of agreeing to outright revocation or risking that penalty after an administrative hearing. Not surprisingly, they chose to litigate. At the hearing, Mr. Hirani admitted the theft of a winning lottery ticket worth \$25,000 on or about March 6, 2008, and a winning lottery ticket worth \$1,000 on or about May 7, 2008. His plea for leniency was rejected, and the off-sale license was revoked. A timely appeal was filed, but appellants did not file a brief, submit any other document, or make any contact with either the Department or this Board until the filing of the Motion to Augment only two days before the Board hearing.

In *Dafulla and Nathrath Aldabashi* ("*Aldabashi*"), the charges of the accusation included the sale of counterfeit goods and various Labor Code violations. The Department made a pre-hearing settlement offer similar to that made in *Hirani*. The

Aldabashis also chose to litigate rather than agree to outright revocation. The Department proved its case, the Aldabashis' pleas for leniency were rejected and the off-sale license was ordered revoked. A timely appeal was filed, but, as in *Hirani*, appellants did not file a brief, submit any other document, or make any contact with the Department or the Board, until the afternoon before the Board hearing.

Despite having failed to file a brief in two separate appeals, appellants' attorney filed Motions to Augment the Record in each of the cases, together with points and authorities, less than 48 hours before the scheduled oral arguments. The motions seek to add to the records on appeal certain documents which, appellants contend, demonstrate that the Department arbitrarily accorded disparate treatment with respect to settlement opportunities to licensees charged with similar violations. Appellant argues that a settlement proposal made in a third case (*Aslam Hussain Ali* (File No.21-395084, Registration No. 09071311)) afforded that licensee more favorable terms of settlement than those offered to the present appellants, even though the violations charged in *Aslam Hussain Ali* were more egregious than in either of appellants' cases. In that case, the pre-hearing offer of settlement, although also calling for revocation, permitted transfer of the license, thereby allowing the licensee to recoup some of his investment through sale of the license.

In the circumstances of the two cases, we can only conclude that the question of disparate treatment was not timely raised in either case, and we decline to consider it.

Appellants' attorney argued that he did not raise the issues at an earlier date because the information concerning the settlement offer in *Aslam Hussain Ali* had come to him in a confidential manner, and he was unable to use that information on behalf of

the Hirani's or the Aldabashis until his client in the *Aslam Hussain* case consented to his doing so. That did not happen until Monday, June 28, 2010.

The opening brief in *Hirani* was due April 26, 2010, and the reply June 9, 2010. No briefs were filed, and there was no request to extend the time for the filing of briefs or to continue the hearing date of July 1, 2010.

Appellant's opening and reply briefs in *Aldabashi* were also due on April 26, 2010, and June 9, 2010. Once again, no briefs were filed, and there was no request to extend the time for the filing of briefs or to continue the hearing date of July 1, 2010.

Were this Board to condone the eleventh hour filings of the Motions to Augment and the briefs addressing the newly-raised issues in these cases, well after the date briefs on the merits were due, it would be grossly unfair to the Department, as well as set a precedent that would make it difficult if not impossible for the Board to exercise any effective control over its briefing and hearing schedules in future cases. Although we might have sympathy for counsel's dilemma, we can only conclude that he waived the issues of disparate treatment by his failure to raise them in timely fashion.

ORDER

The decision of the Department in each of these cases is affirmed.¹

SOPHIA C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE
CONTROL APPEALS BOARD

¹ 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.