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

AB-9268
File: 20-477083 Reg: 11074097

ANTONE ELIAS NINO, dba Northridge 76 Service Center
19301 Nordhoff Street, Northridge, CA 91324-2416,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: February 7, 2013
Los Angeles, CA

ISSUED MARCH 11, 2013

Antone Elias Nino, doing business as Northridge 76 Service Center (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license, with the revocation stayed for 180 days to allow the licensee to obtain a conditional use permit from the City of Los Angeles, and suspended the license indefinitely until such time as a conditional use permit is obtained, for failure to comply with the zoning ordinance of the City of Los Angeles, a violation of Business and Professions Code section 23790.

---

[1]The decision of the Department pursuant to Government Code section 11517, subdivision (c), dated May 21, 2012, is set forth in the Appendix, as well as the proposed decision of the ALJ, dated November 28, 2011, which the Department rejected on January 13, 2012.

Appearances on appeal include appellant Antone Elias Nino, appearing through his counsel, Kamal A. Bilal, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on May 5, 2009. On January 11, 2011, the Department instituted an accusation against appellant charging that the license had been issued in error, without appellant having obtained a conditional use permit as required by the City of Los Angeles and in violation of Business and Professions Code section 23790, and that continuation of the license would be contrary to public welfare and morals.

At the administrative hearing held on October 26, 2011, documentary evidence was received and testimony concerning the violation charged was presented by Armando Gonzalez, a District Administrator for the Department of Alcoholic Beverage Control; and Ricardo Torres, an employee in the Planning Department for the City of Los Angeles. Appellant presented no witnesses.

Testimony established that appellant applied for an off-sale beer and wine license on April 2, 2009. An investigative report was prepared by a licensing representative of the Department, and approval was recommended by the licensing representative, his supervisor, and the District Administrator on May 4, 2009. On the attachment to the licensing report (Form ABC-220, Exhibit A) a "no" box was checked in regards to whether a conditional use permit was required, and a "yes" box was checked in regards to whether the premises complied with local zoning ordinances. The license was issued on the following day, May 5, 2009. Appellant has no record of disciplinary action, and no evidence was submitted that the premises present a nuisance or law

enforcement problem. There was also no evidence that the City of Los Angeles has initiated any type of action regarding the conditional use permit or the operation of appellant's business.

Subsequent to the hearing, the administrative law judge (ALJ) issued a proposed decision which concluded that cause for suspension or revocation of appellant's license did not exist, and that the accusation should be dismissed. The Department rejected the ALJ's proposed decision, and issued its own decision pursuant to Government Code section 11517, subdivision (c), which determined that the charge of the accusation had been established.

Appellant filed a timely appeal raising the following issues: (1) no evidence was presented that appellant violated any law or caused any nuisance problem; (2) continuation of the license would not be contrary to public welfare or morals; (3) Business and Professions Code section 23790 does not give a statutory basis to revoke a license once it has been issued; (4) the penalty is excessive; and (5) the Department should be estopped from revoking the license. Issues one and two will be discussed together.

DISCUSSION

I

Appellant contends no evidence was presented that appellant violated any law or caused any nuisance problem. Appellant also contends that continuation of the license would not be contrary to public welfare or morals.

The Department argues that "the license should not have been issued in the absence of a conditional use permit. Therefore, each day the appellant has exercised or will exercise license privileges is *inherently contrary to public welfare and morals* in

that the appellant has not met the legal requirements for holding such license." (Dept. Br. at p. 6, emphasis added.)

The California Supreme Court has addressed the question of whether something can be inherently contrary to public welfare and morals:

> In the first place, we confess some difficulty in apprehending how the Department could consider something to be per se contrary to public welfare. It seems apparent that the "public welfare" is not a single, platonic archetypal idea, as it were, but a construct of political philosophy embracing a wide range of goals including the enhancement of majority interests in safety, health, education, the economy, and the political process, to name but a few. In order intelligently to conclude that a course of conduct is "contrary to the public welfare" its effects must be canvassed, considered and evaluated as being harmful or undesirable. Ordinarily it is delusive to speak in terms of conduct which is per se contrary to public welfare. Additionally, to permit such "per se" determinations to be made by regulatory agencies would insulate them from effective judicial review. The courts would have no indication of the reasons supporting administrative actions and would be forced either passively to accept the pronouncements of the agency or simply to substitute their notion of the "public welfare."
>
> [¶ . . . ¶]
>
> There may be cases in which the conduct at issue is so extreme that the Department could conclude that it is per se contrary to public morals. By this we mean that it is so vile and its impact upon society is so corruptive, that it can be almost immediately repudiated as being contrary to the standards of morality generally accepted by the community after a proper balance is struck between personal freedom and social restraint. . . .

(*Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85, 100-101 [84 Cal.Rptr. 113].) The court in *Boreta* went on to say that the employment of topless waitresses did not rise to the level of being per se contrary to public welfare and morals. We fail to see how the failure to acquire a conditional use permit can be said to rise to this level, absent any evidence of misconduct or wrongdoing on the part of the licensee or his employees.

The Department relies on Business and Professions Code section 24200, subdivision (a)[2] for its authority to take disciplinary action against this license. In Conclusions of Law (CL) 5-6, the Department acknowledges that actions taken under this section are ordinarily disciplinary in nature, but that this action was taken to correct an error made by the Department. They conclude "[i]f the Department was without authority to issue the license in the first place, it is axiomatic that continuation of the license is in fact contrary to public welfare and morals." (CL 6.) We disagree with both the Department's logic and their conclusion, and believe it is an abuse of discretion for the Department to discipline a licensee for its own error.

Abuse of discretion has been defined as follows:

> "Abuse of discretion" in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. (*Sharon v. Sharon*, 75 Cal. 1, 48 [16 P. 345]; *Kalmus v. Kalmus*, 103 Cal.App.2d 405, 415 [230 P.2d 57]; *Schaub's Inc. v. Department of Alcoholic Beverage Control*, 153 Cal.App.2d 858, 866 [315 P.2d 459]; *Crummer v. Beeler*, 185 Cal.App.2d 851, 858 [8 Cal.Rptr. 698].)

(*Brown v. Gordon*, 240 Cal.App.2d 659, 666-667 (1966) [49 Cal.Rptr. 901].)

> Where . . . the trial court has discretionary power to decide an issue, its decision will be reversed only if there has been a prejudicial abuse of discretion. "'To be entitled to relief on appeal . . . it must clearly appear that the injury resulting from such wrong is sufficiently grave to amount to a manifest miscarriage of justice. . . . [Citations.]'" (6 Witkin, Cal. Procedure, *supra*, Appeal, § 242, at p. 4234.)

(*Mission Imports, Inc. v. Superior Court* (1982) 31 Cal.3d 921, 932 [647 P.2d 1075].)

We believe the Department has abused its discretion by revoking this license for its own error, without grounds for disciplinary action against this licensee, or any

---

[2]Section 24200, subdivision (a) provides in pertinent part: "The following are the grounds that constitute a basis for the suspension or revocation of licenses: (a) When the continuance of a license would be contrary to public welfare or morals. . . ."

evidence of harmful or undesirable effects on the public.

II

Appellant contends Business and Professions Code section 23790 does not give a statutory basis to revoke a license once it has been issued.

The ALJ concurred with this contention during the administrative hearing, when he said: "23790 states the department shall do things, it does not indicate that it's a code section that provides independent action for the department to take disciplinary matters against a license." [RT 71.] We agree.

Section 23790 of the Business and Professions Code states in pertinent part: "No retail license shall be issued for any premises which are located in any territory where the exercise of the rights and privileges conferred by the license is contrary to a valid zoning ordinance of any county or city." (Unless the premises had been used for the exercise of such rights and privileges at a time prior to the effective date of the zoning ordinance.) It contains no provisions addressing disciplinary action.

The decision of the Department states "[s]ection 23790 is a clear statement of public policy, giving, as it does, authority to local governments the ability to prohibit the Department from issuing retail licenses, except as indicated, by the adoption of valid zoning ordinances." (Decision, CL 4.) The decision fails, however, to explain how the failure of local government to require a conditional use permit empowers the Department to take disciplinary action.

The ALJ, in the proposed decision (P.D.) which the Department did not adopt, makes the following observation:

> This section is not directed at applicants or licensees, but the Department. It is the Department's responsibility to ensure that the premises sought to be licensed complies with all local zoning ordinances before it issues a

> license. In other words, this is not a section which the Respondent could violate and, therefore, does not provide a basis for disciplining the Respondent's license. The Department, apparently recognizing this fact, did not allege a violation of section 23790. Rather, it alleged that continuance of the licence would be contrary to public welfare or morals under section 24200(a).

(P.D., CL 4.)

As discussed above, the Department relies not on section 23790 for its authority, but on section 24200(a), and on its assertion that failure to obtain a conditional use permit is inherently contrary to public welfare and morals. It should be noted that the City of Los Angeles has brought no action against the licensee for failure to obtain this conditional use permit in the three years and nine months the licensee has operated.

We agree with the ALJ that "it is not clear that there is any legal basis for 'recalling' a license. In fact, the case law under section 24200(a) focuses on licensee misconduct." (P.D., CL 8.) As he goes on to say:

> Cause for suspension or revocation of the Respondent's license does **not** exist under section 24200(a) since the Respondent has not engaged in any misconduct which is actionable under that section. Section 24200(a) does not allow the Department to take action against a license for its own errors. Even if that section could be read so broadly, the Department should be estopped from unfairly penalizing the Respondent for its own mistakes, particularly after the passage of so much time. (Finding of Fact ¶¶ 4-8.)

(P.D., CL 9.) The issue of estoppel is discussed in section 5, herein.

III

Appellant contends that the penalty is excessive. 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. & Halley*

(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.

"Although the Department's discretion with respect to the penalty is broad, it does not have absolute and unlimited power. It is bound to exercise legal discretion, which is, in the circumstances, judicial discretion. [Citation.]" (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

The Order adopted by the Department acknowledges that it was the Department's error that caused the license to be issued, in spite of no conditional use permit having been issued, and that the licensee should be afforded an opportunity to resolve the situation. However, the Order then goes on to both revoke the license, staying the revocation for only 180 days – when counsel for appellant indicates that the process of obtaining a conditional use permit takes at least twice that long – and suspend the license indefinitely.

We believe this penalty is punitive and an abuse of discretion. We agree with the ALJ that it is the epitome of unfairness to penalize the licensee for the Department's error. (see P.D., CL 7.)

IV

Appellant maintains that the Department should be estopped from revoking the license.

We find guidance on this subject from the California Supreme Court:

> The modern doctrine of equitable estoppel is a descendent of the ancient equity doctrine that "if a representation be made to another who deals upon the faith of it, the former must make the representation good if he knew or was bound to know it to be false." (Bigelow on Estoppel (6th ed.

> 1913) p. 603; see *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 488-489 [91 Cal.Rptr. 23, 476 P.2d 423].) We have described the requirements for the application of equitable estoppel as follows: "'Generally speaking, four elements must be present . . . : (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.'" (*Mansell, supra*, 3 Cal.3d 462, 489, quoting *Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305 [61 Cal.Rptr. 661, 431 P.2d 245].)
>
> At common law, estoppel was unavailable against the government. We have long held, however, that estoppel may be asserted against the government "where justice and right require it" (*City of Los Angeles v. Cohn* (1894) 101 Cal. 373, 377 [35 P. 1002]), and we have applied the doctrine against government entities in a variety of contexts. At the same time, our cases recognize the correlative principle that estoppel will not be applied against the government if to do so would effectively nullify "a strong rule of policy, adopted for the benefit of the public." (*County of San Diego v. Cal. Water etc. Co*. (1947) 30 Cal.2d 817, 829-830 [186 P.2d 124, 175 A.L.R. 747].) In *Mansell, supra*, 3 Cal.3d 462, we adopted a balancing approach to accommodate these concerns: "The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." (*Mansell, supra*, 3 Cal. 3d 462, 496-497.)

(*Lentz v. McMahon* (1989) 49 Cal.3d 393, 398-400 [261 Cal.Rptr. 310] (*Lentz*).)

In its decision, the Department maintains, in Conclusions of Law 8, that the elements of estoppel have <u>not</u> been proved:

> Although asserting that the Department should be estopped from taking action here, Respondent has not presented any argument in support of the application of equitable estoppel and the record does not support the application of estoppel here. It appears that the Department was unaware that no conditional use permit had been issued at the time the Department issued the license. Whether that was a simple mistake or a failure in the investigation is irrelevant. (Respondent thus fails to prove the first element of equitable estoppel.) By issuing the license, it is apparent that the Department did indeed cause Respondent to reasonably believe that it could rely on the issuance of such license. (Respondent thus establishes

> the second element.) Because Respondent did not testify and no evidence was presented on his behalf, there is no evidence as to whether or not Respondent was aware of the need to obtain a conditional use permit prior to the Department issuing its license. (Respondent thus fails to prove the third element.) Again, no evidence was presented by Respondent to show any damage because of the erroneous issuance of the ABC license. This is probably because, if anything, Respondent actually benefitted from the Department's error by being able to sell alcoholic beverages when otherwise he couldn't and by avoiding the costs to obtain a conditional use permit in the first place. Thus respondent has failed to establish the fourth element.)

We consider each of the elements of equitable estoppel:

Element One: the party to be estopped must be apprised of the facts.

While the Department maintains that it was unaware that no conditional use permit had been issued at the time it issued the license, the fact is that the Department's *own licensing report* states that no conditional use permit is required and that the premises are in compliance with local zoning requirements. (See Exhibit A at p. 3.) This report is signed by three individuals: the investigator, the supervisor, and the district administrator, and would lead any reasonable person to believe that the Department knew, or should have known, the facts to be true if they signed such a report.

As the court states in *Mansell, supra*, in footnote 28:

> The requirement of actual knowledge of the true facts on the part of the party to be estopped applies in its full force only in cases where the conduct creating the estoppel consists of silence or acquiescence. *It does not apply where the party, although ignorant or mistaken as to the real facts, was in such a position that he ought to have known them, so that knowledge will be imputed to him. In such a case, ignorance or mistake will not prevent an estoppel. . . .* (3 Pomeroy, Equity Jurisprudence (5th ed. 1941) § 809, pp. 217-219, fns. omitted.) [Emphasis added.]

We believe element one has been established.

Element Two: he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended.

The Department concedes that it did indeed cause the appellant to reasonably believe that it could rely on the issuance of such license, and conduct his business accordingly.

Element Three: the other party must be ignorant of the true state of facts.

The Department maintains that since the licensee did not testify, and there was no evidence presented on whether or not the appellant knew a conditional use permit was required, that this element is not satisfied. However, the Department seems to jump to the conclusion that he must have known a conditional use permit was required simply because he did not testify. One can just as easily conclude that the appellant did not know about the conditional use permit and that he relied on the investigator's report for the information that one was not required. We believe that a reasonable person in the licensee's shoes would assume he could rely on the Department's issuance of a license as evidence that nothing more was required.

Element Four: he must rely upon the conduct to his injury.

The Department's assertion that appellant suffered no damage as a result of the erroneous issuance of the license is disingenuous. Appellant has expended time and money in reliance upon the license, and has built up three years and nine months of good will in the community, all of which he will forfeit if the license is revoked. He has made an investment of capital by purchasing equipment for the premises, and will suffer a major loss of income if his license is revoked and/or suspended indefinitely.

The Department has failed to support its argument that estoppel should not be applied because it is a governmental agency. In its decision, it maintains that "Section

23790 represents a strong rule of policy, adopted for the benefit of the public, that would effectively be nullified if the Department were prevented from correcting its error." (Decision, CL 9.) We disagree. The Department has not shown any evidence that the public has been or would be endangered by the continuation of this license without a conditional use permit.

To repeat what the court said in *Lentz, supra,*

> The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel.

We believe that this case has reached a point where the balancing of equities requires the Department to be estopped from revoking or suspending this license to correct its own mistake. Had this licensee been in operation a matter of days or weeks it might be a different case. As it is, this licensee has been in operation for nearly four years without cause for discipline. We decline to speculate on whether the City of Los Angeles may still have remedies available to it to require appellant to obtain a conditional use permit, but revocation or indefinite suspension of the license by the Department cannot be those remedies.

In sum, we believe that the Department has abused its discretion in this matter, that the elements of equitable estoppel have been satisfied, and that the Department is estopped from revoking the license, or suspending it indefinitely, as a matter of law.

ORDER

The decision of the Department is reversed.[3] We believe no remand is warranted as we are ruling as a matter of law that the Department's Decision was incorrect. The accusation should be dismissed, and ALJ Ainley's Proposed Decision should be accepted as correct and final in accordance with the discussion herein.

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

---

[3]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.