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

AB-9449a
File: 48-281451 Reg: 13079043

HA PENNY BRIDGE TRADING COMPANY, INC.,
dba McGovern's Bar
215 East 4th Avenue, San Mateo, CA 94401,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: October 1, 2015
Sacramento, CA

ISSUED OCTOBER 22, 2015

Appearances: Rebecca Stamey-White, of Hinman & Carmichael LLP, for appellant Ha Penny Bridge Trading Company, Inc., doing business as McGovern's Bar. Sean Klein, for respondent Department of Alcoholic Beverage Control.

OPINION

This appeal is from a decision of the Department of Alcoholic Beverage Control[1] suspending appellant's license for 20 days, with 10 days conditionally stayed subject to one year of discipline-free operation, for permitting a person under the age of 21 years to enter and remain in the licensed premises without lawful business therein, a violation of Business and Professions Code section 25665.

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[1]The decision of the Department, dated April 9, 2015, is set forth in the appendix together with the Department's original decision of May 28, 2014, and the proposed decision of the administrative law judge (ALJ).

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on May 10, 1993. On August 14, 2013, the Department filed an accusation against appellant charging that, on January 26, 2013, appellant permitted Amanda Harper, someone who was then only twenty years old, to enter and remain in appellant's bar without lawful business therein, a violation of Business and Professions Code section 25665.[2]

At the administrative hearing held on December 19, 2013, documentary evidence was received and testimony was presented by Harper (the minor); Colby Darrah, a police officer for the City of San Mateo; Garrett Agie, a doorman who worked at appellant's bar on the date of the violation (the doorman); and James McGovern, the owner of the licensed premises.

The administrative hearing essentially boiled down to two questions of fact: (1) did the minor show false proof of majority to the doorman prior to entering the establishment on the evening in question; and (2) did police officers search the minor for identification during the ensuing investigation?

Testimony from the witnesses on these matters was a vague, unsubstantiated, and largely self-serving mess. The minor testified that she neither was asked for nor produced proof of majority on the evening in question, and that the police officers had

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[2]Section 25665 states:

> Any licensee under an on-sale license issued for public premises . . . who permits a person under the age of 21 years to enter and remain in the licensed premises without lawful business therein is guilty of a misdemeanor. Any person under the age of 21 years who enters and remains in the licensed public premises without lawful business therein is guilty of a misdemeanor and shall be punished by a fine of not less than two hundred dollars ($200), no part of which shall be suspended.

searched her for identification that evening and found none. The doorman, on the other hand, testified that the minor had shown him false proof of majority to gain entry to the licensed premises. Also, both the doorman and the officer testified that the officer had not searched the minor for identification that night, even though the doorman requested that he do so in order to turn up the alleged false identification. Finally, there was testimony that the officer's partner stood with the minor while the officer tried to verify her identity, but there was no testimony as to whether the officer's partner was the one who searched the minor for identification.

Following the hearing, the administrative law judge (ALJ) sorted through the hodgepodge of conflicting testimony, and issued a proposed decision in which he assigned little credibility to the minor's testimony, and determined that the minor had shown the doorman identification on the night in question, but that no search to turn up the alleged identification was performed. The ALJ concluded that the failure to search for the identification had in effect made the defense to the violation provided by Business and Professions Code section 25660[3] meaningless for appellant, and thought to impose a penalty under such circumstances would be to allow the Department to improperly benefit from police inaction. Thus, the ALJ proposed a penalty of fifteen days' suspension with all fifteen days stayed subject to one year of discipline-free operation.

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[3]Section 25660, subdivision (b), states:

> Proof that the defendant-licensee, or his or her employee or agent, demanded, was shown, and acted in reliance upon bona fide evidence in any transaction, employment, use, or permission forbidden by Section . . . 25665 shall be a defense to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon.

Pursuant to Government Code section 11517(c)(2)(E), the Department declined to adopt the proposed decision and opted instead to decide the matter itself. In its final decision, the Department noted the conflict between the testimony of the minor and that of doorman, but found the minor to be more credible. It determined, based largely on the minor's testimony, that the minor *did not* show any identification to the doorman upon entry into the premises, and that she *had been* searched by one of the officers at the scene and no identification was found. In light of the fact that this was appellant's second violation of section 25665 within approximately 6 months, the Department imposed an aggravated penalty of 20 days' suspension.

Appellant appealed the Department's decision before this Board raising the following issues: (1) the Department abused its discretion by making its own credibility determinations and relying on facts not in evidence; and (2) the penalty imposed by the Department was excessive.

The Board issued its decision on the appeal on January 30, 2015. After considering the woefully deficient record in this case, the Board ordered as follows:

> To the extent that it held (1) the minor did not show proof of majority to the doorman, and (2) the minor was searched by officers for said proof of majority, the decision of the Department is not supported by substantial evidence and is therefore reversed. This matter is remanded to the Department for a redetermination of the penalty in light of this opinion. In imposing the penalty, the Department is advised to take into consideration, not only the aggravating *and* mitigating evidence, but also the gross inadequacy of the record below, and that it cannot be definitively established whether the doorman requested or was shown proof of majority by the minor.

(*Ha Penny Bridge Trading Company, Inc*. (2015) AB-9449, at p. 25, emphasis in original.)

The Department took into consideration the Board's decision and subsequently

issued the following order in this matter:

> Considering the totality of the record, including aggravating and mitigating factors, that this was respondent's second violation of Business and Professions Code section 25665 within approximately 6 months, and specifically the poor record below, respondent's license is hereby ordered suspended for a period of 20 days, with 10 days stayed for one year upon condition that no cause for disciplinary action occurs within the stayed period. If cause for disciplinary action occurs during the stay period, the Director of the Department of Alcoholic Beverage Control may vacate this order and impose the stayed penalty; should no such cause for disciplinary action occur, the stayed portion of the penalty shall become permanent.

(Order of Apr. 9, 2015.)

Appellant filed a timely appeal from the Department's April 9, 2015 decision, making the following contentions: (1) The Department abused its discretion by imposing a substantially similar penalty after the Board remanded the Department's original decision; and (2) reconsideration of the penalty is required given newly discovered evidence related to the Department's investigations at the premises during the appeal process.

DISCUSSION

I

Appellant claims the penalty imposed by the Department's April 9, 2015 order is "not reasonable because it does not clearly take into consideration the inadequacy of the record or the mitigating factors" appellant implemented following the subject violation. (App.Br. at p. 3.)

The Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of Cal. v. Alcoholic Bev. 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 Bev. 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 its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Rule 144 provides that "[d]eviation from [the Penalty Guidelines] is appropriate where the Department *in its sole discretion* determines that the facts of the particular case warrant such deviation — such as where facts in aggravation or mitigation exist." (Cal. Code Regs., tit. 4, § 144, emphasis added.) Among the aggravating factors listed in the rule is the licensee's prior disciplinary history, while mitigating factors include positive action by the licensee to correct the problem, documented training of the licensee and employees, and cooperation by the licensee in the investigation. (*Ibid*.)

The Penalty Policy Guidelines for rule 144 further address the discretion involved in the Department's penalty determination:

> **Penalty Policy Guidelines:**
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> The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

Appellant is unhappy with the Department's modified penalty determination because, appellant believes, it reflects that the Department took into consideration the aggravating factors without properly considering the mitigating factors. In actuality, nothing could be further from the truth.

First, appellant is correct that the Department obviously imposed an aggravated penalty. The penalty guidelines of rule 144 establish that the recommended penalty for a violation of section 25665 is a 10-day suspension, so the Department's imposition of 20 days' suspension shows that the Department took into consideration the fact that this was appellant's second violation of section 25665 within six months.[4] What appellant fails to consider, however, is that following the Board's decision in *Ha Penny*, *supra*, the Department conditionally stayed 10 days from the original 20-day suspension. The Department's decision to cut the penalty in half from a practical perspective[5] establishes that, in accordance with the Board's ruling, it properly considered both the mitigating factors in this case and the deficient record below. Because the Department's April 9, 2015 order reflects that the Department considered all of the factors the Board advised it to consider in imposing the penalty, the Board cannot say that the modified penalty is an abuse of discretion, regardless of appellant's dissatisfaction with it.

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[4]The penalty guidelines of rule 144 do not provide a recommended penalty for multiple violations of section 25665. But, given the rule's recommendation of a 10-day suspension for the first violation, a standard of 10 days *per violation* of section 25665 within a short period of time seems reasonable.

[5]Assuming, of course, that appellant can manage to operate discipline-free for one year.

II

Appellant alleges that, since the Board's decision in *Ha Penny*, *supra*, was issued on January 30, 2015, the Department has conducted two investigations at appellant's premises, and that Officer Darrah — the officer who testified at the administrative hearing — has since been fired from the San Mateo County Sheriff's office. (App.Br. at pp. 3-4, citing Decl. of Rebecca Stamey-White (hereafter Stamey-White Decl.), Jul. 24, 2015, ¶¶ 4-6.) Appellant maintains that these facts suggest that the Department is targeting the licensed premises for discipline, which in turn suggests that the revised penalty is meaningless because, once cause for discipline is ascertained, the full 20-day suspension would go into effect. (*Id*. at p. 4.)

The Board derives its authority from the California Constitution, which provides:

> When any person aggrieved thereby appeals from a decision of the department ordering any penalty assessment, issuing, denying, transferring, suspending or revoking any license for the manufacture, importation, or sale of alcoholic beverages, the board shall review the decision subject to such limitations as may be imposed by the Legislature.

(Cal. Const., art. XX, § 22.) The Board's review is not, however, unlimited. In fact, it is quite clearly applicable only to decisions of the Department, in which case the Board may inquire only

> whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record.

(*Ibid*.; see also Bus. & Prof. Code § 23084.)

The term "decision," as used in this context, is also carefully prescribed by statute:

> As used in this article "decision" means any determination of the department imposing a penalty assessment or affecting a license which may be appealed to the board under Section 22 of Article XX of the Constitution.

(Bus. & Prof. Code § 23080.)

These authorities establish that the Board is not authorized to review the investigative procedures of the Department until such time as the Department renders a decision, and an appellant perfects appeal of that decision. (See Bus. & Prof. Code § 23081.)

Moreover, this Board has previously noted that

> the process whereby the Department investigates possible unlawful conduct is within the exercise of its discretion to suspend or revoke an alcoholic beverage license if it shall determine for good cause that the continuation of such license would be contrary to public welfare and morals. That process should not be disturbed except upon a showing of illegal, arbitrary or abusive conduct on the part of the Department. [Citation.]

(*Chavez* (1998) AB-6788, at p. 9.)

Here, in her declaration in support of appellant's opening brief, appellant's counsel alleges:

> 4. The first visit by the Department to Appellant's premises occurred on March 26, 2015. According to the Evidence/Property Receipt/Report (which would be an additional exhibit for the record, supported by testimony from owner James McGovern), the Department was investigating a possible violation of Business and Professions Code Section 23402, for selling alcohol that had not been purchased from Appellant's wholesaler. According to Appellant, he was able to provide the Department with invoices from his wholesaler, Southern Wine & Spirits, for all of the alcohol seized. To this date, according to Appellant, the Department has not returned the alcohol inventory (twelve bottles of various brands) and three funnels seized, nor filed an accusation related to any violations of Section 23402.
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> 5. The second visit by the Department to Appellant's premises occurred a month later on April 24, 2015, four days after the Department served its AB-9449 Decision. According to the Evidence/Property Receipt/Report

> (which would be an additional exhibit for the record, supported by testimony from owner James McGovern), the Department was investigating a possible violation of Penal Code Section 347(b), for poisonous alcoholic solutions. The Department again seized nine bottles of alcohol, and, according to Appellant, has yet to file an accusation or return the inventory seized. During this visit to the premises, the Department served Appellant with a notice to appear on June 24th, 2015, at which he appeared and was told that the Department had not filed a complaint with the Superior Court of California for the County of San Mateo.

(Stamey-White Decl., ¶¶ 4-5.)

Apart from mere speculation, appellant has offered no evidence that these alleged investigations are in any way linked to the Department's penalty determination in the instant matter. Because, to our knowledge, the Department has yet to issue a decision as a result of either investigation, the Board simply lacks authority at this juncture to disturb the Department's exercise of its discretion in conducting such investigations.[6] That being said, we expect that the Department would not abuse its discretion by unfairly targeting a licensee who is the beneficiary of a favorable ruling by this Board, and we are prepared to enforce that expectation under the appropriate factual circumstances when and if either or both of the above-referenced cases come before us on appeal. Moreover, we advise the Department to tread cautiously when conducting investigations under such circumstances. While it is not our intention that licensees be given some sort of "free pass" to commit violations of the ABC Act while there is a pending appeal or after they have received a favorable ruling, it would behoove the Department to be wary of creating the appearance of what could

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[6]See also Business and Professions Code Section 25753, which provides "The department may make any examination of the books and records of any licensee or other person and may visit and inspect the premises of any licensee it may deem necessary to perform its duties under this division."

potentially be interpreted as unfair targeting.

Next, the Board is convinced that appellant's concern that Darrah is "no longer employed by the San Mateo County Sheriff" (Stamey-White Decl., ¶ 6; App.Br. at p. 3) is nothing more than a red herring for three reasons. First, there is no evidence in the record that Darrah was ever employed by the San Mateo County Sheriff's Office to begin with. Rather, the evidence established that Darrah was working as a police officer for the City of San Mateo on the date of the alleged violation and up to and including the date of the administrative hearing. (See RT at p. 30.) Second and most importantly, neither the Department nor this Board has any jurisdiction whatsoever over the hiring and firing practices of local (i.e., city or county) law enforcement agencies. Hence, the suggestion that the Department somehow conspired with such an agency — regardless of any "elderly abuse complaint" appellant filed against Darrah in an unrelated incident (Stamey-White Decl., ¶ 6) — to secure the termination of one of the agency's sworn officers is offensive and baseless.

Additionally, the insinuation that the Department would have a motive to seek Darrah's termination as a result of this Board's decision in *Ha Penny*, *supra*, is logically without merit. As the Board stated in its decision, not only was it *not* holding that officers had a duty to search the minor for exculpatory evidence, but, even if such a duty did exist, the ambiguous record made it impossible for the Board to resolve the issue of whether the duty had been breached. (*Id*. at p. 22.) The Board clearly attributed the deplorable deficiencies in the record from the administrative hearing to the parties' respective counsel, not the witnesses. (See, e.g., *id*. at p. 13 ["Neither counsel for appellant nor counsel for the Department made any additional efforts to

clarify the minor's testimony, or to have her attribute specific acts to a specific officer."].) Thus, the notion that the Department would, as a result of this Board's decision to remand the case in light of said deficiencies, wish harm upon the proceeding's "most credible witness" (*id*. at p. 12) makes no practical sense.[7] All in all, the Board is convinced that Darrah's alleged termination — if it did indeed occur — had absolutely nothing to do with the instant matter, and appellant has provided neither solid evidence nor a logically coherent argument to the contrary.

Finally, the Board would like to thank counsel for the Department for clarifying during oral argument a critical point in this appeal. Specifically, the Department's most recent penalty determination reads "[appellant's] license is hereby ordered suspended for a period of 20 days, with 10 days stayed for one year upon conduction that *no cause for disciplinary action* occurs within the stayed period." (Order, Apr. 9, 2015, emphasis added.) However, counsel for the Department quite clearly asserted that the 10-day stay in the instant penalty would be lifted only if the licensee is charged with *another violation of section 25665* within the stated time frame. Thus, even if either or both of the subsequent investigations alleged in this appeal result in further discipline of appellant's license, such discipline would not affect the penalty or stay in the instant matter.

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[7]This is not to mention the logical shortcoming in appellant's position that the Department, with its hellbent, nefarious intent to tack an additional 10 days' suspension onto appellant's license, would align its interests against those of Darrah, another of appellant's foes, particularly after appellant filed a complaint for "elderly abuse" against Darrah in another incident. (Stamey-White Decl., ¶ 6.) After all, as the ancient proverb goes, "the enemy of my enemy is my friend." (See Kautalya, The Arthashastra (1987) p. 520 ["A king whose territory has a common boundary with that of an antagonist is an ally."])

ORDER

The decision of the Department is affirmed.[8]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[8]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.