

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

AB-9012

File: 20-388708 Reg: 08069205

7-ELEVEN, INC., FIROUZEH MEHRKHODAVANDI, and MEHRDAD MONGDEGARI,
dba 7-Eleven Store 2133 13901D
3309 Kimber Drive, Thousand Oaks, CA 91320,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: February 3, 2011
Los Angeles, CA

ISSUED MARCH 30, 2011

7-Eleven, Inc., Firouzeh Mehrkhodavandi, and Mehrdad Mongdegari, doing business as 7-Eleven Store 2133 13901D (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for ten days for their clerk, Ranasena Gamage, selling an 18-pack of Coors Light beer, an alcoholic beverage, to Morgan Solis, a 20-year-old non-decoy minor, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Firouzeh Mehrkhodavandi, and Mehrdad Mongdegari, appearing through their counsel, Ralph B. Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated March 4, 2009, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on October 7, 2002. On July 15, 2008 the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a person under the age of 21.

At the administrative hearing held on November 5, 2008, documentary evidence was received and testimony concerning the violation charged was presented by Leslie Pond, a Department District Administrator, and Morgan Solis, the minor. Mehrdad Mongdegari testified about training provided to appellants' employees, and steps taken after the sale in question to prevent future violations.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proved, and that appellants' motion to dismiss on the basis of res judicata and collateral estoppel should be denied.²

Appellants have filed an appeal making the following contentions: (1) the Department improperly had the case remanded and dismissed so that it could initiate a second accusation and try the case a second time; and (2) the decision failed to account for all mitigating factors presented through the testimony of co-licensee Mongdegari.

DISCUSSION

I

Appellants premise their attack on the Department's decision on four theories:

² The filing of the accusation giving rise to this appeal was preceded by an administrative hearing, a Department decision, an appeal to the Appeals Board, a request by the Department that the case be remanded to the Department, and a dismissal of the accusation after the Board-ordered remand. The law firm representing appellants in the present appeal also represented the parties which were named as respondents in the earlier appeal. Appellant 7-Eleven, Inc. is the only entity named as a party in both cases. (See Findings of Fact 1 through 6 of Department decision.)

(1) fundamental fairness should preclude the Department from relitigating the same case twice; (2) the doctrines of collateral estoppel and res judicata bar relitigation of issues argued and decided in prior proceedings; (3) principles underlying the double jeopardy clause support a reversal; and (4) the Department requested a remand of the case for an improper purpose

To address these more or less related theories, it is first useful to look at what actually happened.

In October 2007, the Department filed an accusation naming as respondents 7-Eleven, Inc., Suman H. Grewal, and Inderjitt Grewal, charging a sale by their clerk, Ranasena Akurativ Gamage, of an alcoholic beverage to Morgan Castro Solis, a minor. The sale was alleged to have taken place at premises located at 3309 Kimber Drive, Newbury Park, California.

An administrative hearing was held, following which Administrative Law Judge Rodolfo Echeverria issued a proposed decision sustaining the charge of the accusation. The Department adopted the proposed decision, and an appeal followed. The notice of appeal was filed on May 23, 2008, by the Solomon, Saltsman & Jamieson law firm ("SS&J"). A member of that firm had represented respondents at the administrative hearing.

The notice of appeal in that matter was captioned as follows:

IN THE MATTER OF THE ACCUSATION
AGAINST:

7-Eleven Inc. &
Mehrdad Mondehari [*sic*]
7-Eleven Store No. 2133-13901
3309 Kimber Drive
Newbury Park, CA 91320

ERRONEOUSLY FILED AGAINST

7-Eleven, Inc. &
Inderjit Grewal & Suman Grewal
7-Eleven Store No. 2133-13901
3309 Kimber Drive
Newbury Park, CA 91320

The notice of appeal, by its use of that caption, purported to demonstrate that individual licensees Inderjit Grewal & Suman Grewal were incorrectly charged, and that the licensee whose name should have appeared was Mehrdad Mongdegari.³

The Department responded to the notice of appeal by way of a letter dated June 11, 2008, from David W. Sakamoto to Del Haws, then Appeals Board Chief Counsel.

The letter stated:

With respect to the above matter, the licensee recently filed a Notice of Appeal. The Department is electing to dismiss the accusation, without prejudice, and therefore it requests the Appeals Board to return this matter back to the Department for that further action.

The letter does not indicate that a copy was served on SS&J or the Grewal individuals. The Board construed the Department's letter as a request for a remand pursuant to Business and Professions Code Section 23085, and entered an order on June 19, 2008, remanding the matter to the Department "for such further proceedings as it deems appropriate." The Department then dismissed the accusation without prejudice and filed a new accusation. Its order following an administrative hearing on that accusation is the subject of the present appeal.

Appellants assert that the Department "improperly and surreptitiously" (App. Br., p.10) requested that the case be remanded to the Department, apparently referring to

³ In addition to the erroneously named individual licensees, the correct city location of the Kimber Drive premises should have been Thousand Oaks, CA 91320. This information became known when the present appeal was filed. (See caption.)

Mr. Sakamoto's letter. Appellants' use of the word "surreptitiously" implies they were unaware of the letter, but there is no express claim to that effect. The Appeals Board may have been at fault in failing to note the absence of any evidence that the Sakamoto letter had also gone to opposing counsel (SS&J), and that failure may have contributed to the confusion that was generated. However, a copy of the Appeals Board order of remand entered on June 19, 2008, was served on SS&J on that same date. The accusation which is at the heart of the present appeal was not filed until July 15, 2008, nearly a month after the Board's remand order, yet there is no indication of any complaint by SS&J concerning the remand order during that time. Not until the present matter went to administrative hearing was any issue raised related to that remand order or the earlier proceeding.⁴ It could be said, as with so many things in life, timing can be almost everything.

That having been said, it is our view that none of the four theories asserted by appellants for reversal have merit.

A. Claim of fundamental unfairness

Appellants assert that it is fundamentally unfair for the Department to pursue a second accusation after failing to sustain its burden of proof "despite the fact that it already had a full and fair opportunity to marshal [sic] its best evidence at the first hearing" sustaining the accusation against persons who were not and are not licensees." (App. Br., p.7.) In fact, the charge of the accusation was sustained against all named licensees, one of which happens to be 7-Eleven. The second accusation

⁴ SS&J filed a notice of defense dated July 31, 2008, and a special notice of defense setting forth 16 different demurrers and objections to the accusation, both documents completely silent as to any issue involving the earlier proceeding or its remand to the Department.

does name 7-Eleven as a respondent, but what is unfair about that? 7-Eleven was not exonerated by the Department's dismissal without prejudice. It simply had to face a second hearing joined with the appropriate licensees.

We find the Department's argument both provocative and persuasive:

Although a hearing was conducted on the initial accusation, clearly the wrong set of franchisees-co-licensees were named. Why this was not mentioned by co-licensee's counsel at that initial hearing is somewhat of a mystery. One wonders exactly who licensee's counsel in that case thought he was actually representing. Was he representing 7-Eleven, as franchisor, or the Grewals, apparent non-co-licensee-franchisees, or Mr. Mehrdad Mondegar *[sic]*, an un-named but actual co-licensee? This confusion could have been addressed by licensee's *[sic]* counsel at that hearing, but apparently it never was. As such, counsel and co-licensee's *[sic]* herein should not benefit by confusion which was in their power to clear up at the initial accusation hearing, especially as to 7-Eleven, Inc. as common franchisor and common co-licensee. ... It would have been a futile gesture for ABC to proceed with that accusation and a waste of this Appeal Board's time to review its merits.

(Dept. Brief, pp. 5-6.)

In addition to the questions raised by the Department as to counsel's role in the confusion, we have some of our own. SS&J represented the respondents in both cases. Are we to assume that appellants' attorneys were unaware at the outset of the first case that the individual licensees named in the accusation were not the actual individual licensees? Did experienced counsel fail to make the connections between the registration number assigned to the matter, the address of the premises and the true franchisees? Is it reasonable to assume that, in their preparation of their defense against the charge, they would have interviewed the clerk, or her employers, and have learned of the Department's drafting mistakes? Why did counsel remain silent until nearly a month went by before the second accusation was filed? Are appellants entitled to benefit from that silence?

All these questions, and more, are relevant to a determination whether the

Department has acted with fundamental unfairness. Confusion there may have been. Unfairness, we think not. All concerned may have some egg on their faces, but there is no reason to set aside the Department decision on the ground of unfairness.

B. Doctrines of collateral estoppel and res judicata.

Appellants misstate the grounds upon which they base their theory that the charges of the second accusation are barred by the doctrines of collateral estoppel and res judicata. An essential element in the application of either of the doctrines is the presence of a final judgment. There was no final judgment, as pointed out by Judge McCarthy in his proposed decision in this case (Concl. of Law, ¶1(a) :

As to claims of *res judicata* and/or collateral estoppel, there was no **final** decision in Reg. No. 07067022. The combined acts of (1) Respondents' Notice of Appeal, (2) the Appeals Board remand of the appealed case to the Department and (3) the Department's dismissal of the earlier case, **without prejudice**, ensured there was no final decision in the earlier case. Since a final decision in the former case is a requirement for finding *res judicata* or imposing collateral estoppel, and since no final decision ever existed, those grounds for dismissal of the within matter have not been shown to exist.

C. Principles of double jeopardy.

The California Constitution provides that "persons may not twice be put in jeopardy for the same offense. (Cal. Const., art. I, §15.) This provision, commonly referred to as "the double jeopardy clause" is peculiarly a creature of criminal jurisprudence, and has no application in administrative law proceedings

D. The claim that the remand request was improper.

Appellants argue that the remand was sought for an improper purpose, seizing on the Appeals Board's treatment of the Department's request as having been pursuant to Business and Professions Code section 23085. The Department's letter made no mention of section 23085, and if counsel in that case believed the remand order

defective, why did they not challenge it, either formally, by an appeal, or informally, by complaint to the Appeals Board?

Had the Sakamoto letter explained in greater detail why a remand was sought, it would have been readily apparent that no one on the licensee side of the case had grounds to object. The Grewals were being exonerated, Mehrdad Mongdegari and 7-Eleven faced the possibility of a new, corrected accusation, and Firouzeh Mehrkhodavandi would be charged for the first time.

As for 7-Eleven, it is hard to see how it is prejudiced, and what prejudice there might be is as much the fault of the attorneys who represented all of the respondent parties in each of the cases as of anyone. We cannot help but be left with the impression that appellants' attorneys hoped their clients would benefit from their strategic silence. Their brief has not convinced us otherwise.

II

Appellants contend that the Department's decision failed to properly consider all the mitigating factors established at the hearing and through the testimony of their witness.

The administrative law judge (ALJ) specifically referred to three of the mitigating factors cited in appellants' brief: appellants' employee training program, their successful passage of many decoy operations, and the length of licensure without discipline. He deemed these factors worthy of a reduction in the standard first-offense penalty.

We do not find any abuse of discretion in the ALJ's failure to list all of the factors relied on by appellants. First, we do not think it necessary for an ALJ to refer to everything a party claims as a mitigating factor, so long as it is apparent that he or she considered the issue. Second, we are not convinced that the factors not mentioned by

the ALJ were such as to mandate an even more lenient penalty. For example, the removal of an override button from the cash register, thereby requiring the clerk to enter date of birth, provides no assurance that a lazy or irresponsible clerk will not simply invent a birth date so he or she can proceed with the sale.

The only other factor not specifically mentioned by the ALJ, the regular reminding all staff of the laws, rules and regulations governing the sale of alcoholic beverages in California, is no more than any reasonable licensee would do simply as part of his or her duty to operate a lawful business.

Appellants' argument is without merit.

ORDER

The decision of the Department is affirmed.⁵

FRED ARMENDARIZ, CHAIRMAN
MICHAEL A. PROSIO, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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.