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

AB-9095
File: 20-469551 Reg: 09071827

MANUEL MARTINEZ, et al., Appellants/Protestants

v.

SOUTH EL MONTE SERVICE STATION L-Pship dba Arco AM/PM
2004 Rosemead Boulevard, South El Monte, CA 91733,
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: June 3, 2010
Los Angeles, CA

ISSUED AUGUST 12, 2010

Manuel Martinez, Michael Otaky, and Antonio Zepeda (appellants/protestants) appeal from a decision of the Department of Alcoholic Beverage Control[1] which granted the application of South El Monte Service Station L-Pship, doing business as Arco AM/PM (respondent/applicant), for an off-sale beer and wine license.

Appearances on appeal include appellants/protestants Manuel Martinez, Michael Otaky, and Antonio Zepeda, appearing through their counsel, Michael B. Montgomery; respondent/applicant South El Monte Service Station L-Pship, appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

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[1]The decision of the Department, dated January 14, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

In August 2008, respondent/applicant (hereinafter "applicant") petitioned for issuance of an off-sale beer and wine license. Protests were filed by protestants/appellants (hereinafter protestants), and an administrative hearing was held on November 17, 2009. At that hearing, oral and documentary evidence was presented concerning the application and the protests.

On January 14, 2010, the Department issued its decision which denied the protests and allowed the license to issue. The Certificate of Decision recited that it was adopted by the Department on that date. It also recited that the decision would become operative on March 1, 2010. The Board has been advised that the license was issued on March 3, 2010.

Government Code section 11521, subdivision (a) provides:

> The agency itself may order a reconsideration of all or a part of the case on its own motion or on petition of any party. *The agency shall notify a petitioner of the time limits for petitioning for reconsideration*. The power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to a respondent, or on the date set by the agency itself as the effective date of the decision if that date occurs prior to the expiration of the 30-day period or at the termination of a stay of not to exceed 30 days which the agency may grant for the purpose of filing an application for reconsideration. If additional time is needed to evaluate a petition for reconsideration filed prior to the expiration of any of the applicable periods, an agency may grant a stay of that expiration for no more than 10 days, solely for the purpose of considering the petition. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition shall be deemed denied. [Emphasis added.]

The Board received appellants' notice of appeal on March 16, 2010, and returned it that same day, its covering letter stating that "the appeal is untimely and the Board is without jurisdiction to consider it." By letter dated March 22, 2010, appellants' counsel asserted the Board is estopped from enforcing Government Code section 11521 because the Department failed to comply with the provision set out in italics in

the italicized text of section 11521, subdivision (a), above, added in 2004.

There appear to be no reported cases addressing the consequences of an agency's failure to furnish the notification required by the 2004 addition to the statute, or whether such a failure may impact an independent reviewing agency's jurisdiction to act. Consequently, the Board agreed to accept appellants' appeal conditionally, limiting its review in the first instance to the estoppel issue.

The Department's decision and order was mailed January 14, 2010. Business and Professions Code section 23081 provides that an appeal may be filed "on or before the tenth day after the last day on which reconsideration of a final decision of the department can be ordered." Under Government Code section 11521, subdivision (a), the Department's power to order a reconsideration expires 30 days after the delivery or mailing of a decision, unless an earlier effective date is set by the Department. Read together, the two statutes provided a maximum of 40 days for the filing of an appeal, or, in this case, until February 23, 2010. Appellants' notice of appeal was received by the Appeals Board on March 16, 2010,[2] 62 days after the date of the Department's decision.

The cases are uniform that the time within which an appeal must be filed is jurisdictional. But for the language added to Government Code section 11521 in 2004, appellants's appeal would clearly be time-barred. Only if appellants are correct that the Appeals Board is estopped from rejecting the appeal on jurisdictional grounds, as untimely, may their appeal be heard.

Applicant offers four reasons why the Appeals Board is not estopped from

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[2] A courtesy copy of the notice of appeal was provided to the Board by counsel for the applicant subsequent to March 8, 2010, and prior to March 16, 2010.

acting: the "notice" provision in section 11521 does not specify any particular manner of notification; the Certificate of Decision contains such notice when it recites that any appeal must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9 of the Business and Professions Code, and the Appeals Board's telephone number is provided if further information is needed;[3] there is nothing in section 11521 that excuses a late appeal; and, finally, under appellants' analysis, the time to file an appeal would never expire.

It is probably no coincidence that the "operative" date of the decision was March 1, 2010, only a few days after the 40-day appeal period would have expired, or that the license issued two days later.

Taking appellants' assertions at face value, they appear to have mistaken the "operative date," a date set by the Department for its scheduling convenience, for the decision's "effective date," which is determined automatically by statute. Applicant, on the other hand, asserts this is a case of "attorney error," arguing that a prudent attorney would have known from Business and Professions Code section 23081 that there were time limits that could affect an appeal.[4]

We find guidance in *Lentz v. McMahon* (1989) 49 Cal.3d 393, 401-402 [261 Cal.Rptr. 310], a case which held that equitable estoppel against a welfare agency may be appropriate when a government agent has negligently or intentionally caused a

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[3] The Board's records do not reflect any inquiry by appellants prior to the filing of their notice of appeal.

[4] Section 23081 provides: "On or before the tenth day after the last day on which reconsideration of a final decision of the department can be ordered, any party aggrieved by a final decision of the department may file an appeal with the board from such decision."

claimant "to fail to comply with a *procedural* precondition to eligibility, and the failure to invoke estoppel would cause great hardship to the claimant." (Emphasis in original.) Before reaching this holding, the Supreme Court made it clear its ruling was more narrow than it might appear:

> 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.' " [Citation.]
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> 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. [Citation.] In *Mansell* [*City of Long Beach v. Mansell* (1970)] 3 Cal.3d 462 [91Cal.Rptr. 23] 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." [Fns. omitted.]

(*Id*. at pp. 399-400.)

The public interest and policy to be protected in the present case is the "recognized policy of expeditious determination of administrative proceedings." (*Reimel v. Alcoholic Beverage Control Appeals Board* (1967) 254 Cal.App.2d 340, 347 [62 Cal.Rptr.54].)

We start with the premise that under the test described by the Supreme Court, the Appeals Board has done nothing that would justify it being estopped from applying the established rule that it does not have jurisdiction to hear an untimely filed appeal. The question, then, is whether the Department's failure to include a reference to the

Government Code section 11521 time limits is so inequitable that the Appeals Board must hear the appeal regardless of how untimely it was.

Reason and common sense tell us that it is not. Section 11521 does not say what consequences flow from any failure to refer to that section, nor does it prescribe any sanction. We know from common experience that there are time limits for filing appeals. Appellants were represented at the administrative hearing by the same attorney who now asserts the defense of equitable estoppel on their behalf. It is fair to assume he is, and was, knowledgeable that an appeal must be timely filed, and would or should have advised his clients that there was a deadline for the filing of an appeal. The Department's addendum to its decision put appellants on notice that any further information they needed was only a phone call away.[5] It was unreasonable for appellants to delay filing an appeal simply because the Department did not include a reference to Government Code 11521, without at least asking the Appeals Board what their deadline was.

"How long do we have to file an appeal?" This is one of the first questions an unsuccessful litigant will ask his attorney. It is safe to assume, if he was asked, appellants' eminent counsel would not have said, "We do not have to do anything because the Department has not told us about section 11521." We do not know if he was asked, or when, or what he may have said. It does not matter. Any unsuccessful

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[5] A paragraph at the very bottom of the Certificate of Decision explained:

> Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9 of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 300 Capitol Mall, Suite 1245, Sacramento, CA 95814.

litigant expecting to appeal must make some reasonable inquiry as to what his or her appeal obligations are, not the least of which would be when it must be filed. It was simply unreasonable for appellants to take no action until learning that a license had issued, an inference reasonably drawn from the fact that their first notice of appeal, not even filed with the Appeals Board, followed the issuance of the license by only five days.

For all these reasons, we must conclude that there is no basis for the assertion of an equitable estoppel against the Appeals Board or the Department.

ORDER

The appeal is untimely and must be dismissed.[6]

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

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[6] 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.