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

AB-9121
File: 21-407142 Reg: 08068544

RALPH'S GROCERY COMPANY, dba Food 4 Less #778
13525 Lakewood Boulevard, Downey, CA 90242,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: August 4, 2011
Los Angeles, CA

ISSUED AUGUST 29, 2011

Ralph's Grocery Company, doing business as Food 4 Less #778 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its off-sale beer and wine license for 30 days, with 15 days thereof conditionally stayed, subject to one year of discipline-free operation, for its clerk having sold an alcoholic beverage (a 30-pack of Bud Light beer) to an 18-year-old non-decoy minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Ralph's Grocery Company, appearing through its counsel, Carrie L. Bonnington, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated June 30, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

On August 25, 2007, at approximately 1:20 a.m., Frank Mora, 18 years of age, finished an evening and early morning episode of beer-drinking and marijuana-smoking with teen-age friends by driving his Ford Ranger pick-up truck into a concrete center divide on Interstate 605 North, resulting in the death of the front seat passenger of his vehicle and injuries to two passengers riding in the truck's cargo bed. A preliminary blood alcohol screening of Mora's blood alcohol content shortly after the collision measured .10, which is above the legal limit for driving a motor vehicle.

The Department's investigation established that appellant's clerk, Rebecca Gomez, had sold Mora a 30-pack of Bud Light beer at approximately 11:45 p.m. on August 24. The Department filed a one-count accusation against appellant charging a violation of Business and Professions Code section 25658, subdivision (a).

An administrative hearing was held on August 4 and 5 and December 10, 2009, following which the administrative law judge (ALJ) issued a proposed decision which sustained the charge of the accusation, rejected appellant's claim of an affirmative defense based on Business and Professions Code section 25660,[2] rejected

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[2] Business and Professions Code section 25660, provides:

(a) Bona fide evidence of majority and identity of the person is any of the following:
(1) A document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a valid motor vehicle operator's license, that contains the name, date of birth, description, and picture of the person.
(2) A valid passport issued by the United States or by a foreign government.
(3) A valid identification card issued to a member of the Armed Forces that includes a date of birth and a picture of the person.

(continued...)

Department counsel's recommendation of a stayed order of revocation and a 60-day suspension, and ordered a 15-day suspension of appellant's license.

The Department rejected the proposed decision. Acting pursuant to its powers under Government Code section 11517, subdivision (c), it adopted from the proposed decision the findings of fact and legal bases for the decision, added two additional factual findings and an additional determination of issues, and entered its own order imposing a 30-day suspension with 15 days thereof conditionally stayed for one year.

Appellant has filed a timely notice of appeal. In its brief, appellant has focused on two issues: (1) whether it established a bona fide defense pursuant to section 25660; and (2) assuming no defense was established, whether the standard penalty should be mitigated or aggravated based on the facts of the case.

DISCUSSION

We preface our discussion by acknowledging the limits on our power as an appellate tribunal:

> Certain principles guide our review. ... We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor this court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to

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[2](...continued)

(b) Proof that the defendant-licensee, or his or her employee or agent, demanded, was shown, and acted in reliance upon bona evidence in any transaction, employment, use, or permission forbidden by Section 25658, 25663, or 25665 shall be a defense to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon.

The foregoing text reflects amendments effective January 1, 2010, and January 1, 2011, none of which bear on the issues in this case.

> reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for the consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826] (*Masani*).)

I

Appellant contends that it established a defense under section 25660, based on its clerk's reasonable reliance on a California Driver's License or California Identification Card that Mora presented showing that Mora was over the age of 21. The ALJ concluded that the defense was unavailable (Findings of Fact IV: Findings re Section 25660 of the Business and Professions Code):

> A. The preponderance of the evidence did not establish a defense under Section 25660 of the Business and Professions Code. The Respondent did not establish by a preponderance of the evidence that its clerk was shown and acted in reliance upon bona fide documentary evidence of majority and identity prior to selling alcoholic beverages to Mora.
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> B. Although the Respondent's clerk did ask Mora for identification, the clerk testified that she could not recall anything specific about the identification presented by Mora except that it was from the State of California and that it was a California ID Card or a driver license. Since the clerk was found to be a more credible witness than Mora, the credible evidence established that Mora presented a false identification to the clerk which contained a date of birth establishing that Mora was over the age of twenty-one. However, because the false identification presented by Mora was not available at the hearing, the Administrative Law Judge was unable to make a determination as to whether the false identification presented by Mora looked and felt authentic or as to whether the photograph or the descriptors on the identification closely resembled Mora's appearance. Consequently, the Administrative Law Judge was unable to make a determination that the clerk reasonably relied upon bona fide documentary evidence of majority and identity prior to selling alcoholic beverages to Mora. [Fn. omitted.]

Appellant states that "it is unaware of <u>any</u> precedential or controlling decision"

that requires that the identification be introduced into evidence in order to establish a bona fide defense under section 25660. (App. Br., p. 17.) To the contrary, appellant argues, a bona fide defense was found in *Keane v. Reilly* (1955) 130 Cal.App.2d 407 [279 P.2d 152] (*Keane*), despite the fact the identification involved in that case was not placed in evidence.

Keane involved the sale of alcoholic beverages to three minors without identification having been requested on the day of the sale. The evidence established that two of the minors had on prior occasions displayed to the bartender drivers' licenses purporting to show both were over 21. One of the minors, Lundy, testified he had found a wallet containing the license, the other, Mango, had used the license issued to a friend. The third minor, Espinoza, had displayed an identification card he had prepared himself. The Board of Equalization found that no defense had been established under section 25660 as to any of the three.

The superior court, on writ of mandate, held that a defense had been established with respect to Lundy and Mango, but not as to Espinoza.[3]

The court of appeal summarized the facts relating to the Espinoza identification as follows:

> Espinoza testified that in August or September, 1952, upon [the bartender's] request, he had submitted to him an identification card. This card he himself had prepared from a blank identification card of the type that is usually found in billfolds; that the card as prepared by him had his picture, his fingerprints, his name, address and telephone number, his height and weight, the name of his employer, and his age, which he misrepresented to be 21. He had secured the fingerprints from his employer's place of business. He had inserted this simulated card in a

[3]Appellant acknowledges that the record does not reveal whether the licenses used by Lundy and Mango were introduced into evidence in the court proceeding. (App.Br., p. 17.)

> cellophane jacket. He also testified that in making up this identification card he had tried to make it look bona fide and official in order to fool bartenders and to induce them to serve him drinks. This simulated identification card was not produced at the hearing or trial.

(130 Cal.App.2d at pp. 408-409.)

The decision in *Keane* does not support the proposition that a bona fide defense can be established without corroborating evidence or testimony concerning what was supposedly bona fide evidence of identity and majority. In *Keane*, the person who manufactured the false identification described it in detail, detail sufficient to persuade the court that a diligent seller of alcoholic beverages might have accepted it in good faith.

It is the importance of such corroborating evidence that has led the Appeals Board to rule consistently that, when the false or spurious identification can not be produced, the section 25660 defense must fail. (See, e.g., *Circle K Stores, Inc.* (2001) AB-7701; *Fulton & Fulton, Inc*. (2008) AB-8638; *Station 81 Holdings* (2009) AB-8822*; 7-Eleven/Waraic*h (2010) AB-9055; *NAV Food Store* (2011) AB-9071.)

> Even if the minor had admitted that he possessed false identification, the absence of any evidence of what it might have been dooms appellant's section 25660 defense. With no opportunity to view the supposed false identification, neither the ALJ nor this Board could make any assessment whatsoever as to whether a clerk may have reasonably relied upon it.

(Circle K Stores, Inc. (2003) AB-8116.)

In *Masani, supra,* the court reversed a decision of the Appeals Board which had, in turn, reversed a decision of the Department which had held that the seller of alcoholic beverages did not reasonably rely on false identification presented by a 19-year-old minor. "[T]he Department ALJ found, as a question of fact, there was no reasonable reliance on the particular ID in this case. In reaching the contrary conclusion the Board

impermissibly reweighed the evidence and substituted its independent judgment for the Department's." (118 Cal.App.4th at p. 1437).

Appellant now asks the Board to do what the *Masani* court said it should not.

II

Appellant contends that the penalty constitutes an abuse of discretion.

At the administrative hearing, Department counsel recommended that appellant's license be revoked, the order to be stayed for one year, plus a 60-day suspension, citing the accident as an aggravating factor. The ALJ rejected this recommendation, noting the Department's failure to cite any authority indicating that a penalty against a licensee should be aggravated because a minor who purchased alcohol was subsequently involved in a fatal accident. He wrote that Department Rule 144 does not delineate this type of subsequent occurrence as an aggravating factor, and explained at some length why he thought a 15-day suspension (the Rule 144 standard penalty for a first sale-to-minor violation) was appropriate.

The Department rejected this aspect of the proposed decision pursuant to its powers under Government Code section 11517, subdivision (c), and made its own penalty determination. Appellant's license was ordered suspended for 30 days, with 15 of those days conditionally stayed subject to one year of discipline-free operation.[4] The Department explained its action in its Decision Under Government Code Section 11517(c), Findings of Fact V.A and V.B:

> A. After considering all of the evidence, a determination has been made that the purchase of alcoholic beverages at respondent-licensee's store was one of several factors that contributed to the subsequent fatal

[4]The net effect of the Department's order was to preclude appellant from the ability to pay a fine in lieu of serving a suspension. (See Bus.& Prof. Code, § 23095.)

collision. The Department's attorney recommended an aggravated penalty consisting of a revocation stayed for one year and a sixty day suspension based upon the fact that the minor who purchased the beer at the premises was subsequently involved in an automobile collision in which a passenger of the vehicle he was driving was killed. While Rule 144 does not specifically delineate this type of subsequent occurrence as an aggravating factor, the rule is not all-inclusive. The degree of harm to the public of such a catastrophic end-result, to which the sale of alcoholic beverages to the minor was a contributing factor, is sufficient to justify an aggravated penalty. Indeed, in its brief on review of the proposed decision, respondent-licensee acknowledges that the Department may consider factors in addition to those identified in the rule to aggravate the penalty where the facts support such aggravation (arguing that such facts do not exist in this case).

B. This is not a straight-forward case of the minor purchasing alcohol at respondent-licensee's store, consuming such alcohol, and thereafter causing some alcohol-related harm or injury. While the alcohol purchased at respondent-licensee's store was certainly a contributing factor in the fatal collision, the minor involved consumed alcoholic beverages both before and after the purchase in question, as well as smoked marijuana at some point following the purchase. In addition, respondent-licensee has been licensed at this location since January 8, 2004, a little over 3 ½ years prior to the instant sale, without prior discipline; respondent-licensee has a training program which includes forty-five minutes to one hour devoted to alcoholic beverage training, and records show that the selling clerk did attend training; the minor did use a fake or false identification, which was checked by the selling clerk (although there was insufficient evidence to establish reasonable reliance on such identification); and respondent-licensee fully cooperated in the investigation. These factors in mitigation must be weighed against the aggravation, and the penalty adopted herein gives full consideration to all factors on both sides.

Appellant contends that the Department abused its discretion by adopting a penalty that is not justified by the facts, and which, on the basis of mitigating factors in evidence, should be even less than the standard 15-day suspension called for where there has been a first sale-to-minor violation.

There is no dispute that the propriety of a penalty, including whether aggravating or mitigating factors in a particular case justify a higher or lower penalty, is vested in the Department's discretion. But the Department "does not have absolute and unlimited

power. It is bound to exercise legal discretion, which is, in the circumstances, judicial discretion." (*Harris v. Alcoholic Beverage Control Appeals Board* (1965) 62 Cal.2d 589, 594 [400 P.2d 745].) Legal or judicial discretion

> 'is not capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.'

(*Id*. at pp. 594-595.)

We are satisfied that, in this case, the Department has abused its discretion by ignoring fixed legal principles and enhancing a penalty solely because of a tragic event occurring hours after the transaction at issue, a transaction which was only one of a number of factors contributing to the event.

The Department's Rule 144 Penalty Guidelines (4 Cal. Code Regs., §144) list specific factors that it may consider in determinating whether a higher or lower penalty may be recommended "based on the facts of individual cases where generally supported by aggravating or mitigating circumstances." Although the Department is not limited by its guidelines to the specific aggravating or mitigating factors there listed, it is telling that each of the factors that is listed is closely related to the dynamics of the transaction constituting the violation, and there are none that bear on post-transaction events. The aggravating factors listed in the rule -- licensee's prior disciplinary history; warning letters to the licensee; the licensee's personal involvement; the lack of cooperation in the investigation; the premises' location in a high crime area (presumably calling for greater vigilance); the appearance and actual age of the minor (in a sale to minor violation); and the existence of a pattern of conduct -- all appear to rest on the premise that the **licensee's** behavior is or has been such that an enhanced

penalty is appropriate. Similarly, the mitigating factors -- length of licensure without prior discipline or problems; positive action to correct problems; documented training of licensees and employees; and cooperation by licensee in investigation -- are also based on behavioral actions of the **licensee**.

It is illogical and inconsistent with a disciplinary process intended to encourage licensee compliance to consider as an aggravating factor a post-transaction event beyond the control of a licensee. The Department's reasoning in support of the enhanced penalty rests on its view that "the degree of harm to the public of such a catastrophic end-result, to which the sale of alcohol to the minor was a contributing factor, is sufficient to justify an aggravated penalty." It could be said that such a response smacks more of an emotional response rather than the application of a fixed legal principle.

When Mora left the store with his beer purchase, there was nothing to which the Department could point that could fairly be considered an aggravating factor under Rule 144. Appellant was no different at that moment than any other licensee whose employee was duped by false identification. Only the tragedy that occurred several hours later made things different. It is irrational to enhance a penalty based on the irresponsible behavior of the minor hours after the transaction.

Every time an alcoholic beverage is sold, there is the possibility that its consumption could result in harm. It is precisely that possibility that warrants the very strict regulation of the sale and distribution of alcoholic beverages. Rule 144's enumeration of factors to be weighed in the determination of an appropriate penalty is the best guide to "fixed legal principles" for the Department to consider (see *Harris v. Alcoholic Beverage Appeals Board, supra*, 62 Cal.2d at 594-595), and none of them

justify the action the Department has taken. It is noteworthy that the Department cites no authority for its view that unforeseeable post-transaction events are reason to aggravate a penalty.

In any other case involving a licensee without prior discipline and without aggravating facts, the penalty, in all likelihood, would have been no more than a standard 15-day suspension. We agree with appellant that the imposition of an enhanced penalty in this case is inconsistent with the Department's announced goal of encouraging and reinforcing voluntary compliance with the law,[5] departs from its Rule 144 guidelines, is punitive, and constitutes an abuse of discretion.

ORDER

The decision of the Department as it relates to the claim of a defense under Business and Professions Code section 25660 is affirmed; its decision with respect to penalty is reversed, and this matter is remanded to the Department for such further action as may be required consistent with the foregoing discussion.[6]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[5] Department rule 144 Penalty Guidelines Appendix - Policy Statement: "It is the policy of this Department to impose administrative, non-punitive penalties in a consistent and uniform manner with the goal of encouraging and reinforcing voluntary compliance with the law."

[6] This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.