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

AB-9326
File: 20-502105 Reg: 12076975

CHEVRON STATIONS, INC., dba Chevron
2700 Del Paso Road, Sacramento, CA 95834,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: July 11, 2013
Sacramento, CA

ISSUED JULY 31, 2013

Chevron Stations, Inc., doing business as Chevron (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for fifteen days, with five days conditionally stayed, for appellant's employee having, on three separate occasions, sold 24-oz cans of beer as single units, a violation of a license condition constituting grounds for disciplinary action under Business and Professions Code section 23804.

Appearances on appeal include appellant Chevron Stations, Inc., appearing through its counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Sean Klein.

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[1]The decision of the Department, dated October 22, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on November 9, 2010. The license includes the following condition:

> 2. Beer and/or malt beverages shall be sold in original factory packages of six-pack or greater, except malt-based coolers. At no time, shall a single unit be sold individually, or in conjunction with another brand/size of container of beer and/or malt beverage to constitute a six-pack or larger quantity.

(Exhibit 2.) Appellant accepted this condition without protest.

On May 18, 2012, the Department instituted an accusation against appellant charging that, on three separate occasions, appellant's employees permitted a Department investigator to purchase individual 24-oz. cans of either Pabst Blue Ribbon or Miller High Life, both of which are well-known brands of beer.

At the administrative hearing held on September 25, 2012, documentary evidence was received and testimony concerning the violation charged was presented by Kevin Highbaugh, the Department investigator who purchased the individual cans of beer. Appellant presented no witnesses.

At oral argument, the facts of the case were undisputed. Instead, questioning focused largely on whether individually packaged 24-oz. beers fell within the language of the condition.

Subsequent to the hearing, the Department issued its decision which determined that the language in the second sentence of condition 2 categorically prohibited the sale of individual units of beer.

Appellant filed a timely appeal asserting that the Department's interpretation of the condition is unreasonable.

DISCUSSION

Appellant contends that the Department's interpretation of condition 2 is unreasonable, in excess of the Department's jurisdiction, and contrary to prior decisions from this Board addressing similar conditions.

Business and Professions Code section 23800 empowers the Department to place reasonable conditions on retail licenses in certain situations. A violation of a condition is grounds for suspension or revocation under section 23804.

The Department reminds this Board that it is bound by the ALJ's findings of fact. (See *CMPB Friends Inc. v. Alcoholic Beverage Control Appeals Board* (2002) 100 Cal.App.4th 1250, 1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779].)

The facts of this case are undisputed. The case does, however, present a question of law. "Interpretation of a written instrument becomes solely a judicial function only when it is based on the words of the instrument, when there is no conflict in the extrinsic evidence, or when a determination was made based on incompetent evidence." (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 397 [75 Cal.Rptr.3d 333].) There is no question that appellant's employees did, in fact, sell an individual 24-oz. can of beer to a Department investigator on three separate occasions. The question instead is whether the plain language of the condition was sufficiently clear to put the appellant on notice that the sale of individual 24-oz. cans of beer was forbidden.

This Board reviews questions of law *de novo*.

> "It is well settled that the interpretation and application of a statutory scheme to an undisputed set of facts is a question of law [citation] which is subject to de novo review on appeal. [Citation.]

> Accordingly, we are not bound by the trial court's interpretation. [Citation.]" (*Rudd v. California Casualty Gen. Ins. Co.* (1990) 219 Cal.App.3d 948, 951-952 [268 Cal.Rptr. 624].) An appellate court is free to draw its own conclusions of law from the undisputed facts presented on appeal.

(*Pueblos Del Rio South v. City of San Diego* (1989) 209 Cal.App.3d 893, 899 [257 Cal.Rptr. 578].)

The condition before us entails two sentences: "Beer and/or malt beverages shall be sold in original factory packages of six-pack or greater, except malt based coolers. At no time, shall a single unit be sold individually, or in conjunction with another brand/size of container of beer and/or malt beverages to constitute a six-pack or larger quantity." (Exhibit 2.) The sentences are grouped together as a single condition, ostensibly addressing the same subject matter. (See *ibid.*)

In its brief and at oral argument, the Department insists condition 2 is intended to prohibit the sale of *any* single container of beer, regardless of size or factory packaging. (Reply Br. at p. 5.) It is worth noting that the Petition for Conditional License is unhelpful on this point – it gives no reason for the condition, and in no way illuminates our reading of it.[2] (See Exhibit 2.) This Board, like the licensee, is left to interpret the

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[2]At oral argument, counsel for appellants asserted that the condition itself is unreasonable and unenforceable. Business and Professions Code section 23800 states "[t]he Department may place *reasonable* conditions upon retail licenses" under specified circumstances. (Italics added.) There is ample authority that the corollary to this statutory permission is that the imposition of unreasonable conditions upon issuance of a license violates due process. (See, e.g., *Whitcomb v. Emerson* (1941) 46 Cal.App.2d 263.) We need not reach the issue of whether the condition in this case – assuming it had a clarity of meaning the Department ascribes to it, i.e., that the sale of a single can of 24 oz. beer is prohibited – is reasonable because it was not raised below. The Board instead decides this case on the narrower and properly raised ground that the peculiar wording of the condition militates against an interpretation that would make the licensee liable for its violation. We remain troubled, however, by the absence of any reasonable relationship the condition, as interpreted by the Department, has to the legitimate purposes of the Department in its licensing responsibilities.

condition's plain language with no guidance as to its purpose.

California law is clear that, in form contracts, ambiguities are to be construed against the drafter. (*Victoria v. Superior Court of Los Angeles* (1985) 40 Cal.3d 734, 739 [222 Cal.Rptr. 1]; *Cohen v. Five Brooks Stable* (2008) 159 Cal.App.4th 1476, 1485 [72 Cal.Rptr.3d 471].) While the Department's issuance of an alcoholic beverage license is not identical to a private contract, the transaction is analogous. Most importantly, the licensee – like a private party to a contract – must be able to comprehend and comply with the terms, lest it inadvertently commit a breach.

In *Hawamdeh* (1995) AB-6518, this Board held a condition ambiguous and defective which stated: "Malt beverages shall not be sold in units less than a six pack." This Board observed that the language of the condition raised the question of whether it applied to containers that "are not marketed or sold in six packs at any time." (*Id.* at p. 5.) The Board noted that to extend the language of the condition to encompass products not marketed in six-packs would "be beyond the perimeters of reason." (*Ibid.*) This Board added that "[i]f the department wished to exclude such containers, from kegs to containers not marketed in six-pack groupings, the department needed to specifically state that variation from reasonable interpretation." (*Ibid.*)

In *Naemi* (1996) AB-6566, this Board adopted and extended the reasoning in *Hawamdeh*. The condition at issue stated "[n]o malt beverage products shall be sold in less than six-pack quantities." As in the earlier case, this Board held that the language addressed only containers pre-packaged as six-packs:

> The wording of the condition clearly prohibits breaking a six-pack to sell individual containers, but there is no reference to containers other than those sold in six-packs. Such wording cannot reasonably be extended by unilateral interpretation to include all other containers that

> might be marketed from time to time. [Citation.]

This Board observed that "the Department, when it deems it necessary, is clear and specific about the containers that are restricted by the condition." (*Id.* at p. 8.) The *Naemi* decision referred to three separate examples, each affirmed on appeal, in which the Department's condition unambiguously restricted sales by container size:

> (a) *Boonjaluska* (1995) AB-6453--the Board sustained a decision of the Department that the sale of a 22-oz. bottle of beer violated a condition which provided that "no beer or malt beverage under one quart shall be sold in less than six pack quantities."
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> (b) *Grace Kim* (1994) AB-6383--the Board sustained the addition, after an appeal from an order conditioning the transfer of a license, of conditions limiting the sale of certain sizes of alcoholic beverages:
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> > "6. Beer and malt beverages shall not be sold in containers under one quart or less than six-packs."
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> (c) *Hill v. Boys Market, Inc.* (1992) AB-6204--the Board rejected protestant's appeal from the Department's issuance of a license subject to a large number of conditions, one of which stated:
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> > "8. No beer or malt beverages under one (1) quart shall be sold in less than six-pack quantities."

(*Ibid.*) The Board noted that the ultimate question was "whether the Department may attach a condition that is 'container-specific,' (referring specifically to six-packs) and later interpret it to be 'container-general' (referring to all possible containers)." (*Id.* at p. 10.) The Board held that it could not:

> We have been given no reason, and can see none, for assuming in this case that the Department used "container-specific" language to indicate a "container-general" meaning. We must assume that, as in other cases, the Department used "six-pack" advisedly to refer to containers that come in six-packs and that the condition did not apply to other containers not specified and not customarily sold in six-packs.

(*Ibid.*)

In the present case, we are presented with a condition in which the first sentence is equally container-specific: "Beer and/or malt beverages shall be sold *in original*

factory packages of six-pack or greater, except malt-based coolers." (Exhibit 2, emphasis added.) This first sentence, as in *Naemi*, clearly precludes breaking up factory-packaged six-packs, but in no way restricts the sale of products factory-packaged individually or in any other grouping of less than six.

The Department differentiates this case from *Naemi* by pointing to the condition's second sentence: "At no time, shall a single unit be sold individually, or in conjunction with another brand/size container of beer and/or malt beverage to constitute a six-pack or larger quantity." (Reply Br. at pp. 3-4.) This reflects the reasoning adopted below. (See Determination of Issues II.)

It is impossible to read the two sentences separately, however. Both are constructed around the same subject: the "single unit" that forms the subject of the second sentence can only be interpreted with reference to the subject matter of the first sentence. The Department argues that the subject is beer generally. However, because the first sentence is container-specific, the second sentence could equally be interpreted as container-specific – that is, as applying only to beer and/or malt-based coolers in original factory-packaged six-packs.

Moreover, the phrase "single unit . . . sold individually" is redundant, unless we assume that the "single unit" was originally part of a larger grouping – specifically, the original factory-packaged six-packs addressed in the first sentence. This lends credence to the latter construction.

This interpretation is bolstered by the fact that the Department drafted the two sentences as a single condition. We are satisfied that the condition, taken as a whole, is container-specific and limited to original factory-packaged six-packs, and that the Department may not unilaterally extend it to be container-general. Appellants did not

violate the condition's plain language

ORDER

The decision of the Department is reversed.[3]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, 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.