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

AB-9546b
File: 21-479658 Reg: 14081196

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store #9104
2427 East Valley Parkway,
Escondido, CA 92027,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: February 1, 2018
Los Angeles, CA

ISSUED FEBRUARY 27, 2018

Appearances: *Appellants*: Ralph Barat Saltsman and Donna J. Hooper as counsel for Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy store #9104.
Respondent: Kerry K. Winters as counsel for the Department of Alcoholic Beverage Control.

OPINION

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy store #9104 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 15 days, with five days stayed, because their clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

1. The decision of the Department, dated August 3, 2016, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' type 21 license was issued on September 10, 2009. On September 16, 2014, the Department filed an accusation charging that appellants' clerk, Rosie Shramek (the clerk), sold an alcoholic beverage to 16-year-old Ryan M.[2] on February 5, 2014. Although not noted in the accusation, Ryan M. was working as a minor decoy for the Escondido Police Department at the time.

At the administrative hearing held on July 29, 2015, documentary evidence was received and testimony concerning the sale was presented by Ryan M. (the decoy) and by Officer Albert Estrada of the Escondido Police Department.

After the hearing, the Department issued a decision determining the violation charged was proved and no defense was established.

Appellants then appealed to this Board and raised two issues. First, appellants argued the ALJ failed to proceed in the manner required by law when he sustained the accusation despite "finding that the violation took place on a different date than the date alleged in the Accusation." (App.Br., *Garfield Beach CVS/Longs Drug Stores Cal.* (2016) AB-9546, at pp. 2-7.) Second, appellants argued it was error to grant a continuance in order to accommodate the decoy's absence. (*Id.* at pp. 9-11.)

On June 6, 2016, this Board issued a decision affirming the Department on the second issue. On the first issue—involving inconsistencies in the date of the violation—the Board reversed. Despite the preponderance of the evidence supporting a violation date of February 5, 2014, the ALJ found, throughout the decision, that the violation took place on February 1. Given the repetition, this Board rejected the Department's

2. Because Ryan M. was a minor at the time of the decoy operation, his full name is withheld.

contention that the error was merely clerical, and further found that the error was not harmless. We wrote:

> As noted, the Department characterizes the error as harmless. It contends that "[t]he record as a whole supports the fact that a violation of Business and Professions Code section 25658, subdivision (a) occurred at appellants' premises by appellants' clerk in February of 2014." (Dept.Br. at p. 7.)
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> As this Board has observed, however, multiple violations often take place at the same premises, occasionally within a single month. Having issued a decision finding that this violation took place on February 1, 2014, what was there to stop the Department from prosecuting a second violation with a date of February 5?[fn.] Moreover, appellants are correct that they were deprived of the opportunity to defend against a violation alleged to have taken place on February 1—a significant deprivation since, as the Department concedes in its brief, no violation actually took place on that date.
>
> Finally, we are not persuaded by the Department's contention that the error was merely clerical. We are, as the Department so often reminds us, bound to liberally construe the findings in favor of the judgment. We therefore assume that the ALJ intended to find that the violation took place on February 1, and not February 5, despite the weight of evidence suggesting otherwise. Based on the evidence available to this Board, it is very likely that appellants could have proven, conclusively, that no violation took place at their licensed premises on February 1, 2014. Whether the error was intentional or not, it was material and prejudicial and demands reversal.

(*Garfield Beach CVS, LLC/Longs Drug Stores Cal., LLC* (2016) AB-9546, at pp. 12-13.)

On June 16, 2016, the Department issued an order remanding the decision to the ALJ "to address the conflict between the decision and the evidence regarding the date of the violation, and to conduct further proceedings as may be necessary and appropriate." (Order, Decision Following Appeals Board Decision, Jun. 16, 2016.)

The ALJ in turn issued a new decision effectively supplementing the original decision. He wrote, in relevant part:

> This decoy operation and this violation took place on February 5th, 2014. The preponderance of the evidence, that being the credible

> testimony of Detective Estrada and his review of the police report he prepared and the citation issued to the clerk who sold the beer to the sixteen year old minor decoy, clearly established that the violation occurred on February 5th, 2014, not February 1st, 2014.
>
> Although this Administrative Law Judge was the only person to discover this difference during the hearing, the resulting Proposed Decision erroneously listed the date of the violation as February 1st, 2014, not February 5th, 2014. That was an error. The two dates somehow became transposed during the process of preparing the original proposed decision.
>
> The remainder of the original Proposed Decision (findings of fact, conclusions of law, and order) are unchanged. There is no need for any further proceedings.

(Proposed Decision After Remand, Jun. 29, 2016.) As this language suggests, no new administrative hearing was held and no additional evidence was taken.

On July 27, 2016, the Department adopted the Proposed Decision After Remand.[3]

Appellants then filed this appeal contending the Department acted without jurisdiction and in violation of the law when it issued its Decision After Remand without first conducting an administrative hearing.

DISCUSSION

Appellants contend the Department lacked jurisdiction to issue a Decision After Remand without first conducting a new administrative hearing, and that in doing so, the Department failed to proceed in the manner required by law.

Appellants direct this Board to a number of court cases and one prior Board decision holding that the effect of an unqualified reversal is "to vacate the judgment, and to leave the case 'at large' for further proceedings *as if it had never been tried*, and as if

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3. In adopting the decision, the Department made a non-substantive editorial change to a single sentence in the ALJ's Proposed Decision After Remand. That change is not at issue in this case.

no judgement had ever been rendered." (App.Br., at p. 7, quoting *Regents of the Univ. of Cal. v. Public Employment Relations Bd.* (1990) 220 Cal.App.3d 346, 356 [269 Cal.Rptr. 563] [emphasis added by appellants].) According to these cases, an unqualified reversal restores the parties "to the position that they had before the reversed order was made and with the same rights that they originally had." (App.Br., at p. 7, quoting *Odlum v. Duffy* (1950) 35 Cal.2d 562, 565 [219 P.2d 785].) Appellants argue that because the Board's reversal returned the parties to their original positions, the Department was required to hold a new administrative hearing in order to impose discipline, and "[did] not have the jurisdiction nor the power nor the authority to sustain an accusation without an evidentiary hearing unless by stipulation and waiver." (App.Br., at p. 8.)

Appellants also point out that this Board, in its decision reversing the Department, explicitly rejected the Department's argument that the error was merely clerical. (*Id.* at p. 9.) Appellants contend that by treating the remand as a clerical correction, the Department "ignored its obligation to follow the opinion of the reviewing appellate authority." (*Ibid.*, citing *Odlum*, *supra*, at p. 565.) Appellants therefore ask the Board to reverse the Department's Decision After Remand.

The Department counters that because the error was merely clerical, a new hearing would be unnecessary and wasteful. (Dept. Br., at pp. 4-6.) The Department argues the Board did not and could not make a factual finding that the error was more than clerical. Additionally, the Department contends appellants were not prejudiced by the Department's actions. (*Id.* at p. 7.) It argues that "[t]he burden is on the party seeking reversal of an administrative agency's decision to affirmatively show the alleged

error was prejudicial, i.e., that it is reasonably probable the party would have received a more favorable result had the error not occurred," a burden it contends appellants have failed to meet. (*Ibid.*, citing *Citizens for Open Govt. v. City of Lodi* (2012) 205 Cal.App.4th 296, 308 [140 Cal.Rptr.3d 459].)

This Board must resolve two questions in this case. First, was it error for the Department to reach a Decision After Remand by simply substituting the date of the violation without conducting a new administrative hearing? Second, if the Department did proceed in error, should this Board reverse the Decision After Remand?

This Board's scope of review is limited by the California Constitution and by statute. The Constitution provides:

> Review by the board of a decision of the department shall be limited to the questions 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.

(Cal. Const., art. XX, § 22.) Additionally, the Constitution provides that "the board shall review the decision subject to such limitations as may be imposed by the Legislature." By statute, the Board's review is limited to the following questions:

> (a) Whether the department has proceeded without, or in excess of, its jurisdiction.
>
> (b) Whether the department has proceeded in the manner required by law.
>
> (c) Whether the decision is supported by the findings.
>
> (d) Whether the findings are supported by substantial evidence in light of the whole record.
>
> (e) Whether there is relevant evidence, which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department.

(Bus. & Prof. Code, § 23084.) It is therefore within this Board's authority to determine whether the Department acted without jurisdiction or in violation of the law.

Case law indicates that the effect of an "unqualified reversal"—that is, a reversal without specific directions from the ruling appellate court or board—is to "vacate the judgment, and to leave the case 'at large' for further proceedings as if it had never been tried, and as if no judgment had ever been rendered." (9 Witkin, Cal. Proc. (5th ed. 2008) Appeal, § 869, p. 928, citing *Central Savings Bank of Oakland v. Lake* (1927) 201 Cal. 438, 443 [257 P. 521] ["an unqualified reversal remands the cause for a new trial"]; *Odlum*, *supra*, at p. 564 [unqualified reversal restores parties to "position that they had before the reversed order was made and with the same rights that they originally had"]; *Rossi v. Caire* (1919) 39 Cal.App. 776, 777-778 [180 P. 58] [reversal "left the whole case to be tried anew, as if it had not been tried before"]; *Sichterman v. R.M. Hollingshead Co.* (1931) 117 Cal.App. 504, 506 [4 P.2d 181] [reversal "afforded the right to introduce any additional or new evidence upon the issues raised"]; *Lewis v. Upton* (1984) 151 Cal.App.3d 232, 236 [198 Cal.Rptr. 494]; *Regents of the Univ. of Cal.*, *supra*, at p. 356.)

While this Board did not expressly direct the Department to conduct a new trial on remand, the unqualified reversal had that effect. (*Rossi*, *supra*, at p. 778 ["It was not necessary to give express directions that the cause be remanded for a new trial, since the unqualified reversal had that effect."].) Beyond dismissal or settlement, a new trial was the only option available to the Department in this case. The Department failed to proceed in the manner required by law when it issued a Decision After Remand without conducting a new administrative hearing.

The Department counters that the errors in its decision were merely clerical. As appellants point out, however, the Government Code limits the Department's ability to correct clerical errors in its decisions to "15 days after issuance of the decision." (Gov. Code, § 11518.5(d).) If, as the Department has repeatedly argued, the error was merely clerical, then the Department's ability to unilaterally correct the error expired in October of 2015—well before this Board heard appellants' original appeal. It had no authority to correct a purported clerical error nearly two and a half years after the fact, let alone do so in order to dodge the legal effect of a reversal on appeal.

The answer to our first question, then, is yes, the Department erred in producing a Decision After Remand by simply changing the date of the violation; by law, it should have conducted a new administrative hearing. The Department's error, while egregious, does not end our inquiry, however. The Board must determine whether, in light of the Department's error, it is appropriate to reverse the Decision After Remand.

Relief on appeal is limited to circumstances in which the appealing party suffered actual prejudice, also referred to as a "miscarriage of justice." The Constitution states:

> No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

(Cal. Const., art. VI, § 13.)

According to the courts, the phrase "miscarriage of justice" means that "the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*Conservatorship of Person & Estate of*

Maria B. (2013) 218 Cal.App.4th 514, 532 [160 Cal.Rptr.3d 269], citing *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800 [16 Cal.Rptr.3d 374].) "'[P]robability' in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.'" (*Ibid.*, emphasis in original.)

The burden is on appellants to "make an 'affirmative showing' the trial court committed error that resulted in a miscarriage of justice." (*Ibid.* at p. 533, citing *Century Sur. Co. v. Polisso* (2006) 139 Cal.App.4th 922, 962 [43 Cal.Rptr.3d 468] [appellate court "must presume the judgment is correct in the absence of an affirmative showing of prejudicial error"].)

If the Department's correction of its purported "clerical error" resulted in a miscarriage of justice, appellants neither allege it nor show it. Appellants complain that "[t]here was no further hearing" and "[n]o further evidence was taken," but do not reveal what new evidence they might have presented or how it could have changed the outcome of the case. (App.Br., at p. 3.) As in their first appeal, appellants voice no challenge whatsoever to the substance of the Decision After Remand. (See generally App.Br.) They do not contest the findings of fact or conclusions of law, and they do not dispute the validity of the substituted date of violation. Appellants have shown nothing to indicate that the issuance of the Decision After Remand resulted in a miscarriage of justice; indeed, for all intents and purposes, they concede the violation did occur, as alleged, on February 5, 2014. (See generally App.Br.; see also App.Br., *Garfield Beach CVS/Longs Drug Stores Cal.* (2016) AB-9546, at pp. 5-9 [disputing no part of the Department decision beyond the erroneous date].)

Stated in more practical terms, forcing the Department to retry a case in which the appellants neither argue nor establish prejudicial error is a waste of valuable state resources, to the tune of tens of thousands of dollars. (See *Garcia v. Rehrig Intern., Inc.* (2002) 99 Cal.App.4th 869, 875 [121 Cal.Rptr.2d 723] ["The grant of a new trial for harmless error violates the constitutional provision and wastes judicial time and resources to no purpose."].) Where a legitimate miscarriage of justice has occurred, such expense is justified, but not where, as here, appellants do not dispute the violation, and do not even *allege*—let alone *show*—that a new hearing might have resulted in more favorable outcome. To answer our second question, then: we decline to reverse, as a reversal would force California taxpayers to foot the bill for a new administrative hearing where no prejudicial error exists. We therefore affirm the Department's Decision After Remand.

To be clear, our affirmation of the Decision After Remand does not indicate we approve of the means by which it was obtained. Where the Board issues an unqualified reversal and the Department chooses to remand the case, the Department must conduct a new hearing.

The California Constitution, however, is clear that prejudicial error is required. In this case, appellants have shown error, but have shown no prejudice.

ORDER

The decision of the Department is affirmed.[4]

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
JUAN PEDRO GAFFNEY RIVERA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

4. 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.