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

AB-9590
File: 20-502027; Reg: 15082302

KAJLA PETROLEUM, INC.,
dba Jackson Shell
9701 Jackson Road, Sacramento, CA 95827-9273,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: David W. Sakamoto

Appeals Board Hearing: June 1, 2017
Los Angeles, CA

ISSUED JUNE 29, 2017

Appearances: *Appellant:* Melissa Gelbart, of Solomon Saltsman & Jamieson, as counsel for Kajla Petroleum, Inc., doing business as Jackson Shell,

Respondent: Sean Klein, as counsel for Department of Alcoholic Beverage Control.

OPINION

Kajla Petroleum, Inc., doing business as Jackson Shell, appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for 15 days (with 5 days conditionally stayed subject to one year of discipline-free operation) and, concurrently, suspending its license for 10 days (with 5 days conditionally stayed subject to one year of discipline-free operation) because it violated two conditions on its

[1]The decision of the Department under Government Code section 11517, subdivision (c), dated May 19, 2016, is set forth in the appendix, as is the Proposed Decision of the administrative law judge (ALJ), dated December 24, 2015. Section 11517, subdivision (c)(2)(E) permits the Department to reject the proposed decision, as it did here, and decide the case upon the record, including the transcript of the hearing.

license, in violation of Business and Professions Code section 23804.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on September 29, 2010. The license includes the following conditions:

> 2. There shall be no exterior advertising of any kind or type, including advertising directed to the exterior from within, promoting or indicating the availability or alcoholic beverages.
>
> 3. 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.

(Exh. 2.)

On April 16, 2015, the Department instituted a four-count accusation against appellant charging that on three separate occasions it violated condition #3 on its license, and that on one occasion it violated condition #2 on its license.

At the administrative hearing held on December 16, 2015, documentary evidence was received and testimony concerning the violation charged was presented by ABC Agent Dustin McLaughlin. Steven Ernst, a retired Department employee, testified on behalf of appellant.

Testimony established that Agent McLaughlin visited the licensed premises on three different dates:

Count 1:

On February 19, 2015, he purchased an individual 24-ounce can of Tecate Beer (exh. 9) which was available for single sale at the premises, and was not part of a six-pack or other pre-packaged multi-can unit. He believed this violated condition #3 on appellant's license. (Finding of Fact, ¶ 8.)

Count 2:

On February 20, 2012, he purchased an individual 40-ounce bottle of Mickey's Malt Liquor (exh. 9) which was available for single sale at the premises, and was not part of a six-pack or other pre-packaged multi-bottle unit. He believed this violated condition #3 on appellant's license. (Finding of Fact, ¶ 9.)

Count 3:

On February 24, 2015, he purchased an individual 25-ounce can of Bud Light beer (exh 9.) which was available for single sale at the premises, and was not part of a six-pack or other pre-packaged multi-can unit. He believed this violated condition #3 on appellant's license. (Finding of Fact, ¶ 10.)

Count 4:

Also on February 24, 2015, he observed advertising posted to the right of the premises' front door depicting 18-pack cartons of beer available for sale for $13.99. (Exhs. 8A and 8B.) He believed this violated condition #2 on appellant's license. (Finding of Fact, ¶ 11.)

Following the hearing, the ALJ prepared a proposed decision, dismissing counts 1 through 3 because the items purchase were offered for sale as such, and were not otherwise pre-packaged by the factory in six-packs or otherwise. He cited the Board's decision in *Chevron Stations* (2013) AB-9326 (*Chevron*) for his reasoning and result on these three counts. Count 4 was sustained by the ALJ.

The Department considered but rejected the ALJ's decision, and issued its own decision pursuant to Government Code section 11517, subdivision (c)(2)(E). The Department adopted Findings of Fact 1 through 11 of the ALJ's decision, and added two

additional Findings of Fact. It found that no evidence was introduced to establish that the alcoholic beverages sold were *not* available in factory-packed six-packs, and firmly rejected the ALJ's decision to adopt the reasoning and result in *Chevron.* The Department sustained all four counts of the accusation, imposing a 15-day suspension for counts 1 through 3 (conditionally stayed for 5 days) and imposing a 10-day suspension for count 4 (conditionally stayed for 5 days) with the suspensions imposed concurrently.

Appellant then filed a timely appeal asserting that the Department's decision is contrary to prior decisions of the Board.

DISCUSSION

Appellant contends that the Department's imposition of discipline in this matter is unreasonable and contrary to prior decisions from this Board addressing similar conditions. It maintains it was error for the Department to reject the ALJ's proposed decision. (App.Op.Br. at p. 2.)

The facts in this case are not disputed. Appellant acknowledges that it sold individual cans of alcoholic beverages to the ABC agent. However, appellant maintains that the sales of singles in this case did not constitute a violation of condition #3 on its license because these singles were not part of an original six-pack or greater. (*Ibid.*, citing *Chevron, supra.*)

> The posture of a case in which the sufficiency of the evidence is not disputed is identical to that where the facts before the administrative agency are uncontradicted. In such a case the only issue concerns the conclusions to be drawn from the pertinent facts; the trial court's determination is therefore a question of law. [Citation.] On appeal the court's review is not circumscribed by the substantial evidence rule, but amounts to an inquiry of law.

(*Mixon v. Fair Employ. & Hous. Comm.*) (1987) 192 Cal.App.3d 1306, 1311 [237 Cal.Rptr. 884].)

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 question for the Board is whether, as a matter of law, the plain language of the condition was sufficiently clear to put the appellant on notice that the sale of individual cans of beer was forbidden—even if they were not originally part of a six-pack or greater unit.

The facts in this case are remarkably similar to *Chevron,* and the condition in question is identical. The condition 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." (Exh. 2.) The sentences are grouped together as a single condition, so we can assume they address the same subject matter.

The Department maintains the condition prohibits the sale of *any* single container of beer, regardless of size or factory packaging. 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. (See Exhibit 2.) This Board, like the licensee, is left to interpret the 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." (*Id.* at p. 3, fn. 3.) 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."
>
> (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:
>
> > "6. Beer and malt beverages shall not be sold in containers under one quart or less than six-packs."
>
> (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:
>
> > "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, as in *Chevron*, 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.

In *Chevron*, the Department attempted to differentiate that 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." The Board found, however, that it was impossible to read the two sentences separately. 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. 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, as the Board found in *Chevron,* 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.

As in *Chevron*, 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. We do not believe appellant violated the plain language of condition #3.

In a similar matter filed by the Department but not appealed to the Appeals Board (*Garfield Beach CVS* (2014) File: 21-477747, Reg: 14080725 (*CVS 9972*)) ALJ Echeverria determined, in a decision dated December 8, 2014, that the licensee had not violated a similar condition on its license by selling singles that were not originally part of a six-pack because the 25-ounce can of beer in question was not packaged and marketed in six-packs. The consensus in these opinions is that this conditional language prohibits only the sale of singles that have been severed from a six-pack or larger manufacturer packaging—not, as the Department alleges, as prohibiting the sale of any single.

Following the Board's decision in *Chevron,* reversing the Department's decision, the Department did not petition for a writ of review from the court of appeal. Following reversal, the accusation was dismissed. The Department acknowledges that it did not seek higher court review in that matter, but argues that "this does not mean that decision binds the Department's hands in future cases involving the subject condition." (Concl. of Law, ¶ 6.) It maintains that

> [w]hile Appeals Board decisions may be instructive in similar situations, they are not precedential. . . . As such, the Appeals Board has no legal authority to designate any of its decisions as precedential and the Department is not compelled to follow any Appeals Board decisions in subsequent cases.

(*Ibid*.)

ALJ Sakamoto addressed this point in his decision:

> 7. While there is no Court of Appeal or Supreme Court opinion directly stating that an Alcoholic Beverage Control Appeals Board Opinion is of binding and controlling legal authority on the Department when it comes to interpreting license conditions, the Legislature saw fit to establish the Appeals Board to formally review appeals regarding certain Department actions. (Business and Professions Code sections 23080-23089) As such, the Board's views, as expressed in their formal decisions, should be given due consideration by the Department and not simply ignored. Had the Department's interpretation regarding this condition prevailed in the *Chevron* case, it would no doubt be citing that to support their position in this case.

(Concl. of Law, ¶ 7.) We agree. If the Board's views can be ignored by the Department and other parties before it, what function does it serve? Clearly, the legislature did not create the Appeals Board to simply rubber stamp the actions of the Department.

The Department's decision goes on to distinguish *Chevron* from the instant case, and to explain why the reasoning in that case is inapplicable. First, it maintains that *Chevron* was wrongly decided because "the Appeals Board interposed its interpretation of the condition in question over the Department's." (Concl. of Law, ¶ 7.) It maintains the Board must defer to the Department's interpretation of its own rules. If this were a purely factual question this argument might be persuasive, but in both cases the issue (as explained above) is an issue of law, not of fact, and the Board considers such questions *de novo*. Furthermore, if the Department felt the Board erred in deciding *Chevron* it should have sought a writ of review, but it did not.

The Department cites *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Schieffelin*) (2005) 128 Cal.App.4th 1195, 1205 [27 Cal.Rptr.3d 766] to support its argument that the Board must defer to the judgement of the Department:

"Courts generally will not depart from the Department's contemporaneous construction of a rule enforced by the Department unless such interpretation is clearly erroneous or unauthorized." However, it has also been said:

> Regarding agency decisions, the California Supreme Court has noted that "[w]here the meaning and legal effect of a statute is the issue, an agency's interpretation is one among several tools available to the court. Depending on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth. [Citation.] Considered alone and apart from the context and circumstances that produce them, agency interpretations are not binding or necessarily even authoritative." [Citation.](*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*CVS 9174*) (2017) 7 Cal.App.5th 628, 639 [213 Cal.Rptr.3d 130].)

To determine whether an agency interpretation is entitled to deference, courts consider whether the agency has consistently followed its putative interpretation, and how long it has done so. (*Tower Lane Properties v. City of Los Angeles* (2014) 224 Cal.App.4th 262, 276 [168 Cal.Rptr.3d 358].) As discussed above, the Department has not decided these cases consistently, as evidenced by the differing Department decisions in *Chevron* (before it was reversed by the Board) and *CVS 9972.* An agency's undisclosed unilateral interpretation is not entitled to deference. (*Id*. at p. 278.)

Here, as in *Chevron,* we consider neither a rule nor a statute, but the legal interpretation of the meaning of a condition on a license. The Board's previous decisions—while admittedly not precedential in the classic sense that higher court decisions are precedential—nevertheless give guidance to licensees in attempting to know the exact parameters of what is proscribed by the conditions on their licenses. As the court in *CVS 9174* recently noted, regarding the proper use of Appeals Board decisions: "[t]hus, although we are not bound by the Appeals Board's decisions, we take

judicial notice of the cited decisions and consider their reasoning for persuasive value." (*CVS 9174, supra* at 7 Cal.App.5th 628, 639.) If licensees cannot rely upon the reasoning in the Board's decisions for guidance going forward, as we said recently: "the only potential beneficiary in a world where prior decisions of the Board must be ignored and the Department has issued no precedential decisions itself, is the Department." (*BMVG* (2016) AB-9568 at p. 25.)

The Department goes on in its decision to maintain that even if the Board's reasoning in *Chevron* were correct, that the argument must fail because it is premised on the fact that the single units purchased by the ABC agent are not actually sold in factory-packed units of six-pack or greater. The Department contends there is no evidence in the record to support this contention, and that the burden of proof was on appellant to establish this defense during the administrative hearing but that it failed to do so. (Concl. of Law, ¶ 7.) This is factually incorrect. Agent McLaughlin testified that the beers he purchased were *not* part of six-packs. (RT at pp. 30-32.) Furthermore, the findings of fact made by ALJ Sakamoto, and adopted by the Department, include Findings of Fact paragraphs 8, 9, and 10—each of which states that the item purchased was not part of a six-pack or any other manufacturer pre-packaged multi-container offering. (Findings of Fact ¶¶ 8-10.) The burden of proof was on the Department to establish a violation of condition #3, and at no time did the burden shift to appellant to prove that the alcoholic beverages sold were *not* available in factory-packed six-packs. This simply misstates the law.

Finally, appellant argues that the conditions on its license are unreasonable. The conditions currently in place were attached to a previous license at this same

location, and were then transferred to appellant via a person-to-person transfer of that license. (Exh. A.) The conditional public convenience or necessity determination from the original issuance of the previous license in 2001, however, has been purged from the Department's files and is unavailable for explaining why the conditions were imposed.

Appellant argues that an unreasonable condition is unenforceable as a matter of law, citing the Board's decision in *Dirty Bird Lounge* (2014) AB-9401 at p. 4. In that case, the Board reversed the Department's decision because a condition which had been imposed on the license cited no grounds for its imposition and thus failed to inform the licensee of the problem the condition was designed to mitigate. (*Id*. at p. 8.) The Board found that "it is the antithesis of 'reasonable' to impose on a licensee a specific condition that lacks any logical nexus to an expressly articulated ground for its existence." (*Id.* at p. 11.)

Appellant argues that the "Whereas" clauses on its Petition for Conditional License (exh. 2) offer no insight or guidance as to why conditions #2 and #3 were imposed. (App.Op.Br. at p. 8.) The Department adopted the ALJ's finding that the Petition for Conditional License cites undue concentration of licenses in this census tract as the grounds for imposing these conditions. (Concl. of Law, ¶¶ 10, 12.)

It is unclear to us, and the Department does not explain, how the conditions at issue here (regarding the sale of beer in pre-packaged factory units and exterior advertising) mitigate undue concentration in any way—particularly in a situation where the licensee directly across the street from appellant has no conditions on its license regarding single sales or advertising. (See: RT at p. 98; Exh. A.) We therefore follow

our decision in *Dirty Bird Lounge* and find that conditions #2 and #3 fail to cite sufficient grounds for their imposition to inform the licensee of the problems the conditions are designed to mitigate. Without such a nexus, the conditions are unreasonable as a matter of law.

All four counts must be reversed.

ORDER

The decision of the Department is reversed.[2]

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

[2]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.