**ISSUED OCTOBER 13, 1999**

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

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| QUIK STOP MARKETS, INC., MALMINDER MALHAN and ANITA RANI dba Quik Stop Market #57 1510 East Washington Street Petaluma, CA 94952, Appellant/Licensees, | ) | AB-7285 |
| | ) | File: 20-279237 |
| | ) | Reg: None assigned |
| | ) | Administrative Law Judge at the Dept. Hearing: None assigned |
| v. | ) | |
| | ) | Date and Place of the Appeals Board Hearing: July 22, 1999 San Francisco, CA |
| DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent. | ) | |

This is an appeal from an order of the Department revoking appellants' off-sale general license,[1] pursuant to Business and Professions Code §25658.1, subdivision (b).[2]

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[1] The record indicates that appellants' license was issued on December 17, 1992.

[2] Section 25658.1, subdivision (b), provides:

" Notwithstanding Section 24200, the department may revoke a license for a third violation of Section 25658 that occurs within any 36-month period. This provision shall not be construed to limit the Department's authority and

Appearances on appeal include appellant and co-licensee Quik Stop Markets, Inc., appearing through its counsel, Joshua Kaplan; appellants and co-licensees Malminder Malhan and Anita Rani, appearing through their counsel, John A. Hinman, Richard D. Warren and Beth Aboulafia; and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

On December 8, 1998, the Department of Alcoholic Beverage Control issued an order revoking appellants' off-sale general license. The order set forth a summary of three disciplinary proceedings, each of which resulted in determinations that appellants had violated Business and Professions Code §25658, subdivision (a)(unlawful sale to minor). The order also incorporated by reference the relevant accusations, stipulations, proposed decisions, decisions and appellate review documents relating to each of the three matters.[3] The order states that "[b]ased upon the violation of Business and Professions Code §25658.1(b) the license is hereby revoked."

Appellants promptly filed notices of defense and requests for hearing, but no

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discretion to revoke a license prior to a third violation when circumstances warrant that penalty."

[3] Two of the three accusations (Registration Nos. 96035145 and 96037393) were litigated, appealed, and, in relevant part, affirmed on appeal. The first (Registration No. 95033538) was resolved by a decision entered following the appellants' entry into a stipulation to the effect that an offense had been committed and all appeal rights were waived.

hearing took place. Instead, according to appellants, they were informed by District Administrator Manuel Diaz that "'there has not been and will not be a hearing set.'" (App.Br., page 3.)

Appellants thereafter filed a timely appeal, and now raise the following contentions: (1) they were denied procedural due process because the order was entered without their having been given notice and the opportunity to be heard prior to its entry; (2) revocation is precluded by the doctrines of collateral estoppel and res judicata; (3) the order is barred by laches and the statute of limitations; (4) the order constitutes discriminatory enforcement; and (5) the order constitutes cruel and unusual punishment.

We limit our review to the procedural due process issue.

DISCUSSION

Appellants contend that the Department denied them due process by arriving at its decision without having first filed an accusation, conducted a hearing, and afforded them an opportunity to be heard. Appellants point to the provisions of the Administrative Procedure Act (Government Code §§11503 and 11505, et seq.), and argue they mandate a hearing before the Department may take action suspending or revoking a license.

Government Code § 11503 states, in pertinent part:

> "A hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned shall be initiated by filing an accusation. The accusation shall be a written statement of charges which shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his

defense."

Government Code §11505 provides for service of the accusation upon the respondent, and permits a respondent to file a Notice of Defense and a request for a hearing, which respondents in this case did.

The Department argues in its brief that the requirements of Government Code §§11503 and 11505 were satisfied when appellants were afforded hearings with respect to the second and third violations. Although not disputing appellants' claims that they are entitled to due process, the Department argues that these code sections add nothing but pathways to be followed once an accusation is filed. It argues that the Legislature expressed a strong public policy in favor of revoking the licenses of irresponsible operators when it enacted §25658.1, and asserts that the plain meaning of the statute authorizes its action against these licensees.

The Department cites People v. Snook (1997) 16 Cal.4th 1210 [69 Cal.Rptr.2d 615, in which the California Supreme Court construed a statute providing for enhanced penalties for multiple offenses of driving under the influence of alcohol or drugs to permit the enhanced penalties to be applied regardless of the sequential order in which the offenses were established. In that case, the enhancement was effected in connection with the first offense in point of time, even though the last offense adjudicated. The Court reached the result it did primarily upon its belief that the Legislature's substitution of the words "separate violations" for "prior offenses" in the revised statute, along with other indications of legislative intent, showed that the Legislature intended to punish repeat DUI

offenders with enhanced penalties, regardless of the order of the offenses and the convictions.

The Department's brief states that the Legislature "surely was aware of the possibility that three sales to minors violations, and the final decisions imposing discipline, might not occur in neat chronological order," and goes on to assert that the Department's interpretation "of its own statute" is entitled to great respect, and must be followed unless it appears to be clearly erroneous. It further argues that it could not control the timing of the three decisions, so that the second violation in the sequence, which had not become final because it was still pending on appeal, could not have been used as a basis for an order of revocation when the third violation was adjudicated, and that, as a result of a further appeal, the third violation did not become final until May 4, 1998. The Department argues that the urgency of the situation entitled it to proceed summarily, citing the section of the Alcoholic Beverage Control Act ("the Act") which recites its purpose:

> "This division is an exercise of the police powers of the State for the protection of the safety, welfare, health, peace and morals of the people of the State, to eliminate the evils of the unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages. It is hereby declared that the subject matter of this division involves in the highest degree the economic, social and moral well-being and the safety of the State and of all its people. All provisions of this division shall be liberally construed for the accomplishment of these purposes."

Claiming that appellants will be afforded their opportunity to be heard in this appeal to the Appeals Board, the Department argues that appellants have not been prejudiced by its action.

The Department's reach exceeds its grasp. There is nothing in the "three strikes law' contained in §25658.1 that authorizes the Department to dispense

with rudimentary elements of due process. We find the notion that the Department may dispense with the requirement of notice and hearing in the interest of expediency intolerable.

The issue is not the Department's power to revoke the license of a third-time offender. It is the procedural steps which must precede that decision, steps intended to ensure that substantive rights are not sacrificed in the interest of procedural expediency, which must be the focus of this appeal.

We think the Government Code provisions discussed above require that some sort of notice be given, such as an accusation charging that a licensee has acquired the status of a third-time offender, and the Department proposes to exercise its discretion to revoke its license, as authorized by §25658.1

The California Supreme Court has made it clear in a number of cases that a licensing agency must provide notice and an opportunity to be heard when a license is to be suspended or revoked.

In Fascination, Inc. v. Hoover (1952) 39 Cal.2d 260 [246 P.2d 656, 662], the California Supreme Court cited a number of its earlier decisions in support of its statement that:

> "[I]t has been held that unless the statute expressly provides to the contrary a license cannot be revoked without a hearing where the statute contemplates a quasi judicial determination by the administrative agency that there be cause for the revocation; that because of reasons of justice and policy, the statute will be interpreted to require a hearing."

Among the cases cited by the Court was Carroll v. California Horse Racing Board (1940) 16 Cal.2d 164 [105 P.2d 110, 111], in which the Court rejected an

argument that the need for summary action justified a suspension without a hearing, stating:

> "This argument, while not without persuasive force, fails to give effect to the provision in section 3, that no license may be revoked 'without just cause.' This phrase is familiar in licensing statutes, and has generally been recognized as implying a right to notice and hearing. It would be difficult to give it any other interpretation, for the determination of 'just cause' necessarily requires a fair consideration of any evidence offered by the accused."

In Endler v. Schutzbank (1968) 436 P.2d 297 [65 Cal.Rptr. 297, 304], the Court reaffirmed the principle that "[p]rocedural due process requires notice, confrontation and a full hearing whenever action by the state impairs an individual's freedom to pursue a private occupation."

We do not know what appellants might offer at the hearing they demand in their effort to stave off revocation, aside from the contentions they have presented to this Board. Nor do we suggest avenues for them to pursue. We are only saying that, at this juncture, the Department may not take appellants' license without first giving them an opportunity to tell it why they believe it neither may nor should do that.

We are confident that the remaining issues raised by appellants, which, in the absence of a hearing, were not fully developed and, thus, are not ripe for review, will be considered by the Department in the hearing we expect to be held upon remand.

ORDER

The decision of the Department is reversed, and the case is remanded to the

Department for further proceedings in accordance with the views expressed herein.[4]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4] This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.