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

AB-7652
File: 47-126770 Reg: 99046669

EDWARD, GENARD, and JOSE L. ZENDEJAS dba Zendejas Restaurant
12811 Mountain Avenue, Chino, CA 91710,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: May 3, 2001
Los Angeles, CA

ISSUED NOVEMBER 13, 2001

Edward, Genard, and Jose L. Zendejas, doing business as Zendejas Restaurant (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license for appellants' waitress selling an alcoholic beverage to a minor decoy, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellants Edward, Genard, and Jose L. Zendejas, appearing through their counsel, Lawrence V. Harrison, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

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[1]The decision of the Department under Government Code §11517, subdivision (c), dated June 7, 2000, and the proposed decision of the Administrative Law Judge are set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public eating place license was issued on September 14, 1982. Thereafter, the Department instituted an accusation against appellants charging that, on December 4, 1998, appellants' waitress, Nancy Romero, sold an alcoholic beverage (beer) to 18-year-old John Cardenas. At the time of the sale, Cardenas was acting as a minor decoy for the Chino Police Department.

An administrative hearing was held on December 17, 1999, at which time documentary evidence was received and testimony was presented by Cardenas ("the decoy"), Chino police officer Scott Jarrett, and Eduardo Zendejas, one of the licensees. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proven.

Appellants thereafter filed a timely appeal in which they contend that the Department abused its discretion in ordering outright revocation.

DISCUSSION

Appellants contend the Department did not establish that good cause existed for revocation of this license. They argue the Department must show how, why, and based on what evidence it reached its determination that continuance of the license would be contrary to public welfare and morals. They contend the decision is defective because it does not show the Department's reasoning "in the exercise of its discretion[,] . . . used to get from the finding to the order . . . ." (App.Br. at 17.) Specifically, appellants find the decision lacks consideration of their measures to deter criminal activity and an explanation of the Department's reasoning in determining that revocation was the only effective discipline in this case.

This Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, we will examine that issue. (Joseph's of Calif. v. Alcoholic Bev. Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

Appellants' first contention, that the Department failed to consider the measures appellants took to prevent sales to minors, is simply wrong; the Department's decision *did* address those measures. Finding VI of the Department's decision states:

> "The licensed premises is owned by two brothers and their father. Brother Eduardo Zendejas operates this business as a Mexican restaurant and grill. Eduardo Zendejas learned of the sale of beer by waitress Romero to decoy Cardenas on December 4, 1998, and he immediately terminated the employment of both Romero and the premises' manager.
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> "Licensees committed two sales to minors violations in fairly quick succession, on February 20, 1997, and December 12, 1997. Only after those two violations did licensees take some precautionary steps: off-duty police officers as security in the evenings; sending employees to Department LEAD class; and interior cameras, with video recordings, to monitor and review employee actions. The camera monitoring is installed so that co-licensee Eduardo Zendejas can monitor the premises from his home. But no evidence established how many or which particular hours Eduardo spends at the premises, how many or which hours Eduardo spends monitoring the premises from his home, how far away Eduardo Zendejas' home is from the premises, or how long it would take him to respond in person to the premises if he saw a violation or other problem on the camera monitor."

Determinations of Issues II.B. and II.C. state:

> "B. The remedial measures instituted by licensees, but taken apparently only after two sales to minors violations in 1997, did not prevent the third violation about one year later. Waitress Romero, despite training and about one year's experience, served the minor in the erroneous belief that another server had checked his identification earlier in the evening. This explanation is weak, especially in light of the totality of Romero's service to this customer, from taking the order for the beer, to returning with the beer, taking the $10.00 bill and making change.

"C. Whatever good faith was offered by respondents did not prevent the third sale to minor after the precautionary measures were put in place. Respondents admitted that some of the precautions 'came late.' They have shown an inability to make their employees understand the importance of not selling alcoholic beverages to underage persons."

Obviously, the Department considered what appellants did to prevent further sales, but found the measures to be too little, too late.

Appellants also assert that the Department should have explained how it determined that revocation was the proper penalty. The Department did this in its Determination II:

"A. Licensees' discipline-free operation from licensure in 1982 to their violation in February of 1997 is off-set by three sales to minors violations in approximately 22 months.

"D. The Department's legal power and discretion regarding penalties come from Article XX, section 22 of the California Constitution which provides: ['']The Department shall have the power, in its discretion, to deny, suspend, or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals . . . .['] Business & Professions Code Section 24200 parallels the constitutional provisions.

"E. Pursuant to Section 25658.1, the Department may revoke a license for a third violation of Section 25658 that occurs within any 36-month period. Section 25658.1 does not mandate revocation under those circumstances, but it is an expression of legislative support for Department discretion in the area of sales to minors. In the present matter, evidence has established that the violation of Section 25658(a) described in Determination of Issues No. I above is Respondents' third violation of Section 25658(a) within approximately 22 months, well within the 36-month period.

"F. Reasonable minds may differ about the propriety of the discipline ordered below. The fact that reasonable minds may differ fortifies the conclusion that the Department acts here within the area of its discretion. Harris v. Alcoholic Bev. etc. Appeals Board (1965) 62 Cal.App.2d 589, 594, 43 Cal.Rptr. 633, 636.

"G. Some may argue that the discipline ordered herein is too harsh. The purpose is not to punish respondent, but to insure [sic] compliance with laws and protection of the public, and to act as a deterrent to other licensees in this extremely important area of sales to minors violations. The discipline ordered is within the Department's discretion and the permissible range of options set by the legal criteria. MacFarlane v. Dept. Alcoholic Bev. Control (1958) 51 Cal.2d 84, 91, 330 P.2d 769; Department of Parks & Recreation v. State Personnel

Board (1991) 233 Cal.App.3d 813, 831. The fact that the penalty may have severe economic consequences for respondents does not take it beyond the Department's discretion. Rice v. Alcoholic Beverage etc. Appeals Board. (1979) 89 Cal.App.3d 30, 39; Brown v. Gordon (1966) 240 Cal.App.2d 659, 667. The penalty is not clearly excessive. Skelly v. State Personnel Board. (1975) 15 Cal.3d 194, 218."

Appellants assert that the Department's decision must include its reasons for concluding "that revocation was its only course, and that no other 'alternate remedies' existed" (App.Br. at 16) to protect the public welfare and morals. This is incorrect. The Department is not required to find that revocation is the *only* remedy available to address the problem before it may impose such a penalty. The standard for review of Department penalties is "abuse of discretion," that is, the Department's determination of penalty will not be disturbed on review unless there is a clear abuse of discretion. (Martin v. Alcoholic Beverage Control Appeals Board. (1959) 52 Cal.2d 287, 291, 293-293 [341 P.2d 296].)

Revocation is a harsh penalty, but no abuse of discretion has been shown here.

ORDER

The decision of the Department is affirmed.[2]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[2]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.