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

AB-7832
File: 20-226476 Reg: 00050146

PNS STORES, INC. dba MacFrugals
2055 Mendocino Avenue, Santa Rosa, CA 95401,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: February 14, 2002
San Francisco, CA

ISSUED APRIL 18, 2002

PNS Stores, Inc., doing business as MacFrugals (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked its license for its cashier having sold an alcoholic beverage to a minor, 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 appellant PNS Stores, Inc., appearing through its counsel, Kathleen C. Miller, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on January 31, 1989. Thereafter, on December 27, 2000, the Department instituted an accusation against

---

[1]The decision of the Department, dated May 29, 2001, is set forth in the appendix.

appellant charging that appellant's agent, employee, or servant, Lisa Marie Pimentel, sold an alcoholic beverage (wine) to Marina Price, who was then approximately nineteen years of age. Although not stated in the accusation, Price was acting as a decoy for the Santa Rosa Police Department.

An administrative hearing was held on April 4, 2001, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been sustained, that no defenses had been established, and that revocation was the appropriate penalty.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant asserts the following grounds for reversal: (1) the Department failed to exercise its discretion in recommending the revocation of appellant's license; (2) issues raised in the course of the hearing entitled appellant to the opportunity to present additional evidence by way of documents and testimony; and (3) the Department erred in determining that Business and Professions Code §25658.1 applied to this matter.

DISCUSSION

I

Appellant claims that the Department abused its discretion when it recommended to the Administrative Law Judge (ALJ) that appellant's license be revoked. Appellant argues that the Department's policy is to recommend revocation unless it decides to exercise discretion to consider mitigating factors. Appellant further argues that the Department improperly relied upon Business and Professions Code §25658.1 despite the fact that the "third strike" was not final.

The Appeals 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, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

Appellant contends that the Department "automatically" invokes §25658.1, subdivision (b), in every instance where the sale-to-minor violation is the third within a 36-month period. That subdivision 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 to revoke a license prior to a third violation when the circumstances warrant that penalty."

The Department denies that it pursues such a policy. However, other than assertions by opposing counsel, the record is devoid of evidence on the issue.

The problem with this argument is that, at least in this case, it is clear that the ALJ did not consider himself obligated to order revocation simply because of Business and Professions Code §25658.1, subdivision (b). The decision acknowledges that the subdivision, although "a strong statement of public policy" from the Legislature, does not mandate revocation.

It is apparent from the record that the violation was the result of the absence of any meaningful training given to the cashier, initially hired as a part-time stock person but pressed into service as a cashier because the store was short-handed on the night in question. It is apparent from the decision that the failure of appellant to provide such training, especially in light of its record of two prior violations within the past two and

one-half years, was considered a serious aggravating factor.

Appellant's alternative argument, that the violation treated as the "third strike" for purposes of §25658.1, subdivision (b), was not final, is based upon the language of subdivision (c) of that section, added by the Legislature in 1999. Subdivision (c) states:

> "for purposes of this section, no violation may be considered for purposes of determination of the penalty until it has become final."

Appellant contends that subdivision (c) must be read literally, and that it means that, until the decision of the Department becomes final, by reason of appeal or otherwise, appellant has not committed the third sale-to-minor violation essential to the invocation of subdivision (b).

The Department, in turn, asserts that the legislative history and a reasonable reading of the added subdivision show that subdivision (c) was added to ensure that there could be no penalty enhancement based on subdivision (b) until and unless the prior one or two disciplines on which the penalty enhancement was based were final at the time an enhanced penalty was ordered. The Department also points out that it has the broad authority to order revocation even in the absence of three violations within a 36-month period.

While it is true that the Department's decision is not final, it is equally true that the order of revocation is itself not operative until the decision is final. Only if and when the decision is affirmed on Appeals Board and appellate review, or by a failure to seek review within the prescribed times, may the revocation order be enforced.

We have considered the legislative history provided by the parties In response to the Board's request. Appellant's reading of subdivision (c) would require either a new

accusation where the Department would be required to prove there were three violations within the 36-month period - a given - or, alternatively, would transform the statute from "three-strikes" to "four."

Under appellant's interpretation of the amendment, a licensee who committed three violations within a 36-month period could continue in business until the Department had filed a fourth accusation, which a licensee could then contest through appeals to the Appeals Board and even beyond. We seriously doubt the Legislature ever so intended, and our own review of the legislative history of the amendment reinforces those doubts. We see nothing in that history that prevents the Department from enforcing an order of revocation, otherwise proper, once the decision finding the underlying violation has become final.

II

Appellant argues that the Department's last minute production of documents to which appellant was entitled in response to its discovery request prevented it from offering documents and testimony evidence to the effect that Manuel Diaz, a Department District Administrator, followed a policy of always seeking revocation in a "third strike" case. Appellant asserts that it would have called Diaz to testify to that effect had the discovery documents been produced in a more timely fashion. Appellant further argues that it was entitled to present documentation to impeach Pimentel's testimony that she returned to work after the violation and prior to her being fired. Appellant contends it had no reason to suspect Pimentel might commit perjury, so did not have those records with it at the hearing.

There are at least two reasons why this contention should be rejected. First,

and, perhaps, most persuasive, appellant's counsel did not ask the ALJ to continue the hearing so that such evidence could be obtained. A search of the record reveals only that, with the claim relating to the prospective testimony of District Administrator Diaz, appellant's counsel was critical of the eleventh hour production of three pages of documents. Although counsel commented on the need for his testimony, no request was made that Diaz be produced at the then on-going hearing or at some future date.[2] Similarly, while appellant's counsel bemoaned the absence of Pimentel's work records, no request was made that the hearing be continued to permit them to be placed into evidence. In the absence of any such request, the ALJ would have been entitled to assume that appellant did not consider either issue of sufficient importance as to warrant a continuance.

Second, it is not apparent from the decision that Diaz's position with respect to how third strike cases should be treated was given any weight, since the ALJ based his order on his own view of the evidence.

The decision does not make any reference to the issue of whether Pimentel returned to work on days following the day of the violation. While it is conceivable that the ALJ believed her testimony on this point - he deemed her testimony "highly credible" - it is equally possible that he did not consider the issue of any real significance. Speculation that he might have is unwarranted, especially in light of the failure to ask that the hearing be continued in order to obtain the employment records.

---

[2] Appellant's counsel conducted an extensive examination of Diaz's successor as District Administrator, and may well have believed she had made her point that revocation was routinely sought by the Santa Rosa district office.

Finally, once appellant's counsel had completed her examination of her last witness, the ALJ specifically asked if she had any further exhibits or witnesses. Her response was only that she "would like to talk to her about cashier training... ."[3]

We believe appellant's failure to seek a continuance is a bar to any relief.

ORDER

The decision of the Department is affirmed.[4]

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

---

[3] Counsel was apparently referring to Heather Gutierrez, an associate manager of appellant, who, on grounds or relevancy, was not permitted to testify about her own cashier training. (See RT 135, 149.)

[4] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.