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

AB-7869

FAREED ODEH SAPHIEH dba La Carniceria Michoacana
1333-39 East Manning Avenue, Reedly, CA 93654,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 20-357928 Reg: 01050240

Administrative Law Judge at the Dept. Hearing: M.J. Fine

Appeals Board Hearing: April 11, 2002
San Francisco, CA

ISSUED MAY 31, 2002

Fareed Odeh Saphieh, doing business as La Carniceria Michoacana (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license for misrepresenting a material fact on his application for an alcoholic beverage license, 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 §§23950, 24951, and 24200, subdivision (c).

Appearances on appeal include appellant Fareed Odeh Saphieh, appearing through his counsel, Roger K. Vehrs, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

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[1]The decision of the Department, dated July 26,2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on September 30, 1999. Thereafter, the Department instituted an accusation against appellant charging that he had not disclosed in his application for an alcoholic beverage license his two criminal convictions (Counts 1 and 2) and that he had conspired to manufacture methamphetamine and to purchase ephedrine or pseudoephedrine with intent to manufacture methamphetamine (Count 3).

An administrative hearing was held on June 12, 2001, at which time documentary evidence was received and testimony concerning the counts of the accusation was presented. Subsequent to the hearing, the Department issued its decision which determined that counts 1 and 2 were proven, but count 3 was not proven.

Appellant thereafter filed a timely notice of appeal in which he raises the following issues: (1) he was denied due process by the failure of the ALJ to provide an interpreter at the hearing; (2) the evidence was insufficient to support the finding of misrepresentation; and (3) the Department is estopped from asserting a misrepresentation in the application.

DISCUSSION

I

At the hearing, appellant's limited English skills made it apparent that he needed an interpreter. Department counsel said that an interpreter was available, but the Department was not obligated to pay for the interpreter unless the ALJ so directed. The ALJ then questioned appellant to determine his ability to pay for an interpreter, and concluded that, since appellant had the ability to pay for the interpreter, there was not good cause to order the Department to pay. Appellant chose to have his cousin

interpret for him, rather than to pay for the certified interpreter. The ALJ then provisionally qualified appellant's cousin as an interpreter to translate for appellant at the hearing.

Appellant contends that his due process rights were violated when he was not provided with an interpreter. The ALJ, appellant argues, denied appellant his right to an interpreter during his initial questioning to determine which party should pay for the interpreter, even though he knew of appellant's need and desire for an interpreter. Further, appellant asserts, the Department was required to provide him with a certified interpreter instead of giving him the choice of using a family member as an interpreter. Appellant contends that the ALJ was legally required to order appellant to pay the cost of the certified interpreter available at the time, and, if appellant refused to pay, to conduct the hearing in English, without any interpreter for appellant.

The Department argues that it is not required to provide language assistance at all, since it is not one of the agencies listed in Government Code §11435.15, subdivision (a). In spite of this, the Department asserts, "the Department took all steps as if such a duty did exist," thus exceeding the mandate of the statute to ensure that appellant's interests were protected.

The legislature has provided for language assistance at administrative hearings in Government Code §11435.05 et seq. Section 11435.15 lists, in subdivision (a), the agencies that are required to "provide language assistance . . . to the extent provided in this article." Subdivision (b) provides that an agency not listed in subdivision (a) is not prevented from choosing to adopt any of the procedures provided in the article.

Pursuant to the language assistance statutes, an agency shall provide an interpreter if requested by a party or witness who is not proficient in English. (Gov. Code §11435.20.) Subdivisions (a) and (b) of Government Code §11435.25 address payment for the interpreter in this situation:

> "(a) The cost of providing an interpreter under this article shall be paid by the agency having jurisdiction over the matter if the presiding officer so directs, otherwise by the party at whose request the interpreter is provided.
> (b) The presiding officer's decision to direct payment shall be based upon an equitable consideration of all the circumstances in each case, such as the ability of the party in need of the interpreter to pay."

Section 11435.55, subdivision (a), provides:

> "An interpreter used in a hearing shall be certified pursuant to Section 11435.30. However, if an interpreter certified pursuant to Section 11435.30 cannot be present at the hearing, the hearing agency shall have discretionary authority to provisionally qualify and use another interpreter."

Since the Department is not one of the agencies listed in subdivision (a) of §11435.15, it is not required to provide language assistance as provided in this article of the Government Code. However, the Department does notify each licensee, in the notice of hearing, that it will provide "the necessary information to obtain the services of an interpreter" if the licensee asks for language assistance. It also states that the licensee "may have to pay the cost of providing an interpreter."

The Department, in the present case, was willing, even though not requested to do so beforehand, to locate a certified interpreter who could be used at the hearing. The Department did not object to the ALJ following the procedure outlined in the Government Code for determining which party should pay for the interpreter and in provisionally qualifying appellant's cousin as an interpreter when appellant chose to use her rather than pay for the certified interpreter.

While there may be situations in which a licensee would be so clearly unable to speak or understand English that it would be patently unfair to question him about his ability to pay for an interpreter without using an interpreter, this is not one of those situations. The ALJ apparently believed that this licensee was sufficiently able to speak and understand English that an interpreter was not necessary during this questioning. Our review of the transcript convinces us that it was not unreasonable for the ALJ to question appellant on this subject without the aid of an interpreter.

The ALJ's first questions were about the licensee's familiarity with English. He testified that he had studied English for four years in school in his native country and had lived in the United States since 1989. The licensee demonstrated no difficulty in comprehending the ALJ's questions with regard to his income and expenses nor in answering the questions clearly in English. There was no unfairness in this limited questioning without the aid of an interpreter.

Section 11435.55, subdivision (a), provides that if a certified interpreter "cannot be present at the hearing, the hearing agency shall have discretionary authority to provisionally qualify and use another interpreter." Appellant contends that his cousin could not be provisionally qualified because a certified interpreter was available. Therefore, he asserts, the ALJ was required to proceed in English, without an interpreter of any kind, if appellant refused to pay for a certified interpreter, even though appellant had available, and was willing to use, his cousin to interpret for him.[2]

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[2]We are somewhat puzzled by the apparent assertion that the Department erred in allowing appellant to have an interpreter at all. Had there been no interpreter, we think it probable that appellant would now be pursuing an appeal arguing that the Department should have allowed appellant to have his cousin interpret for him. We can only interpret appellant's present argument as a desperate attempt to find error in whatever position the Department might take, even one beneficial to appellant.

Appellant's argument depends upon the Department being subject to this Government Code provision, a position which we reject. However, even if the Department were subject to this section, we do not believe that appellant's position is well taken. A certified interpreter would, in effect, not be available if a licensee could not, or would not, agree to pay for the interpreter. It is clear to this Board, as it apparently was to the ALJ at the hearing, that appellant not only was willing, but wanted, to have his wife or cousin interpret for him. When asked if he could afford to pay for the certified interpreter, appellant answered "No need, my wife or - - " [RT 18]. The ALJ did not simply allow appellant's cousin to act as interpreter, but went through the process of provisionally qualifying her. He was satisfied that the cousin, who is fluent in both Arabic and English, was capable of interpreting and had no involvement in the issues of the case, and explained to her the necessity of translating, word for word, only what was said. [RT 25-27.] It appears from the transcript that the cousin was able to provide satisfactory translation for appellant.[3]

In such circumstances, we cannot conceive of the Government Code language assistance provisions prohibiting use of an appropriately qualified relative or friend to act as an interpreter. In any case, the Department was not bound by these provisions, so it could not violate these statutory provisions. The Department and the ALJ assisted appellant in having an apparently adequate interpreter even though the Department was not required to provide one. We conclude that, rather than denying appellant the ability to participate effectively in the hearing, the Department went beyond any mandated duty to ensure that appellant was not hindered by his lack of fluency in English.

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[3]Appellant has not pointed to any instance of misunderstanding or unfairness resulting from the cousin's translation.

II

Appellant contends there is no evidence in the record that supports finding a violation of Business and Professions Code §24200, subdivision (c), which provides that a license may be suspended or revoked for "The misrepresentation of a material fact by an applicant in obtaining a license." Appellant argues that the evidence does not show a misrepresentation on the application, but merely a misstatement made by the bookkeeper who prepared and submitted the application for appellant.

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals. The Appeals Board's review of Department decisions is limited by the California Constitution, by statute, and by case law. The Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but must determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[4]

When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire

[4]The California Constitution, article XX, § 22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].) "Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].) Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Appellant differentiates a "misrepresentation" from a "misstatement," referring to the case of Jack P. Meyers, Inc. v. Alcoholic Beverage Control Appeals Board (1966) 238 Cal.App.2d 869, 876. In that case, the court said that the word "misrepresentation" in the statute meant that one made a representation with "a dishonest state of mind or an intention to mislead and deceive," while "misstatement" usually connoted "an inaccurate or wrong statement which may or may not be inadvertent." (Ibid.)

The misrepresentation alleged here was that appellant had no convictions for criminal violations, when in fact he had two previous convictions, one in 1996 for petty theft and one in 1991 for battery. Appellant does not deny that the information on the application was incorrect, but excuses it on the theory that the bookkeeper who prepared the form simply assumed that appellant had no prior convictions and was careless in completing the forms. Appellant contends he should not be held vicariously responsible for his agent providing incorrect information to the Department, since there is no evidence that either appellant or his agent acted with an intention to mislead.

The short answer to appellant's argument is found in the Jack P. Meyers, Inc. case, supra, cited by appellant. The court said, in rejecting the argument in that case that the omission of prior convictions was simply inadvertent as a result of misunderstanding what was required by the application form:

> "Moreover, there is substantial evidence to support such findings. It was uncontradicted that Cook had been arrested and convicted a number of times, that the affidavit required the disclosure of such arrests and convictions, and that Cook omitted them from the affidavit. As in Count I, Cook's defense, while not improbable, was merely evidence which the department could have legally disbelieved."

Substantial evidence in the present case consists of the uncontested documents showing appellant's declaration, under penalty of perjury, that he had never been convicted of any violation of law (Exhibit 2), and appellant's convictions for battery and petty theft (Exhibits 3, 4, and 5). Appellant's testimony that an agent carelessly and incorrectly filled out the application form is merely evidence that the ALJ rejected. Just as a licensee cannot absolve himself of wrongdoing by saying that the wrongful acts were committed by an agent to whom the licensee had entrusted the operation of his licensed

premises, appellant, even if his testimony were true, cannot be relieved of responsibility for his agent's careless acts, where he failed to read and understand the form he signed.

III

Appellant contends the Department is estopped from revoking his license because the Department incorrectly assessed appellant's qualifications to hold a license. Appellant asserts that the Department, as part of its investigation of the application, discovered appellant's criminal convictions, and issued the license knowing that those convictions were not reported on the application.

Appellant overlooks, we will assume inadvertently, the dates involved on the relevant documents. Exhibit 1 shows that appellant submitted his application on August 25, 1999. Exhibit 1 shows appellant's license was issued on September 30, 1999. But the first of the two Department of Justice reports (Exhibit 3) showing appellant's convictions was not received by the Department until October 12, 1999, and the second, not until February 22, 2000. The Department was not aware of the convictions, and thus, of the misrepresentation, until after the license was issued. No estoppel can apply in this circumstance.

ORDER

The decision of the Department is affirmed.[5]

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

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[5]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.