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

AB-8301
File: 20-192146 Reg: 03054867

CIRCLE K STORES, INC., dba Circle K # 1103
315 South Jackson Street, Red Bluff, CA 96080,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: July 7, 2005
San Francisco, CA

ISSUED SEPTEMBER 29, 2005

Circle K Stores, Inc., doing business as Circle K # 1103 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked its license for committing three violations of Business and Professions Code section 25658, subdivision (a), within a 36-month period, a violation of Business and Professions Code sections 24200, subdivisions (a) and (b).

Appearances on appeal include appellant Circle K Stores, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean R. Lueders.

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[1]The decision of the Department, dated June 10, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on September 3, 1986. On April 15, 2003, the Department filed an accusation against appellant charging that three sale-to-minor violations had been committed in a period of 36 months, and that decisions in all three cases were final.

An administrative hearing was held on December 10, 2003, at which time documentary evidence was received and testimony concerning the Department's recommendation of revocation was presented by Robert Farrar, a district supervisor for the Department, who was called to testify by appellant. No other witnesses were called. The matter was continued to allow the parties to meet and confer and to file briefs regarding the legal issues raised. The matter was submitted after the briefs were filed, with no further hearing.

The Department's decision adopted the proposed decision of the administrative law judge (ALJ) revoking the license. Appellant filed an appeal contending: 1) The Department is estopped from filing a fourth accusation in this matter; 2) the findings are not supported by substantial evidence; 3) relevant evidence exists which could not have been produced, in the exercise of reasonable diligence, at the hearing before the Department; 4) the penalty imposed was based on an "underground regulation"; and 5) appellant was denied the opportunity to be heard by an impartial decision maker. In addition, appellant filed a Motion to Augment Record, asking that a document called a Report of Hearing be included in the record. Contentions 2 and 3 are related and will be discussed together.

DISCUSSION

I

Appellant contends the Department is estopped by the doctrines of collateral estoppel and res judicata from filing a fourth accusation in this matter.

In *Mycogen Corp. v. Monsanto Co*. (2002) 28 Cal.4th 888, 896-897 [51 P.3d 297; 123 Cal.Rptr.2d 432], the court gave this explanation of res judicata and collateral estoppel:

> "Res judicata" describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. Collateral estoppel, or issue preclusion, "precludes relitigation of issues argued and decided in prior proceedings." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 [272 Cal.Rptr. 767, 795 P.2d 1223].)[n7] Under the doctrine of res judicata, if a plaintiff prevails in an action, the cause is merged into the judgment and may not be asserted in a subsequent lawsuit; a judgment for the defendant serves as a bar to further litigation of the same cause of action.
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> [n7] While the term "res judicata" has been used to encompass both claim preclusion and issue preclusion, we here use the term "res judicata" only to refer to claim preclusion. As we have noted, "The doctrine of collateral estoppel is one aspect of the concept of res judicata. In modern usage, however, the two terms have distinct meanings." (*Lucido v. Superior Court*, *supra*, 51 Cal.3d at p. 341, fn. 3.)

Appellant argued for the application of collateral estoppel and res judicata at the administrative hearing. The ALJ addressed these issues in Conclusions of Law 5 and 6 of the decision:

> 5. "Collateral estoppel precludes a party to an action from re-litigating in a second proceeding matter[s] litigated and determined in a prior proceeding". Takahashi [v.] Board of Education [(1988)] 202 Cal.App.3d 1464[, 1473-1474 [249 Cal.Rptr.2d 578].]
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> Four requirements must be met in order for collateral estoppel to apply: (1) the same issue was presented and decided in a prior adjudication[;] (2) there was a final judgment; (3) there was a final decision made on the merits; and (4) the party against whom collateral estoppel is to be applied must be in privity with a party in the prior adjudication.

> Collateral estoppel is not applicable because it is a new issue presented in the instant case – what is the appropriate penalty now that Respondent has been determined with finality to have illegally sold alcoholic beverages three times in a 36 month period?
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> 6. Similarly, while Respondent correctly asserts the doctrine of res judicata precludes parties from relitigating the same cause of action, it is not the case here that the Department has sought to relitigate a previously litigated matter. Rather the Department contends, and has established that three violations of the law prohibiting sale of alcoholic beverages to minors have now become final adverse adjudications. That fact had not previously been considered in a Department disciplinary action. The evidence shows Respondent appealed both the second and third Department Decisions and thus the second matter was not final at the time the third case was heard, and in fact the third matter only became final approximately two months before the present Accusation was filed.

The ALJ correctly stated and applied the doctrines of res judicata and collateral estoppel. The present case involves both a new cause of action and a new issue; therefore, neither preclusion doctrine applies.

II

Appellant contends that it discovered "new evidence" after the hearing showing that one of the findings in the decision is erroneous and, therefore, not supported by substantial evidence. The finding challenged by appellant is the last sentence of Finding of Fact IV, which we quote in full (with the pertinent language italicized) to provide the context of the statement:

> IV. Department's counsel contends that now that each of the matters are [sic] final, the stage is set for the present Accusation in which the Department seeks to revoke Respondent's license based on California Business and Professions Code Section 25658.1. No evidence of mitigation was presented at the hearing. The Department's District Supervisor has met with Respondent's representatives and considered mitigating information. Such a "309" meeting usually precedes a hearing on an Accusation. In this case Respondent's Counsel contended that it appeared to Respondent the Department's intended course of action in this matter was a standard penalty precluding consideration by the District Supervisor of mitigation, so Respondent therefore did not meet with the District Supervisor before the hearing

> although notified of the opportunity to do so. At the hearing the Administrative Law Judge encouraged the parties to meet regarding mitigation. Following such a meeting *the Department's District Supervisor determined that mitigation did not exist and reaffirmed his original penalty recommendation of license revocation.*

The "new evidence" is a statement alleged to have been made by District Supervisor Farrar to attorney R. Bruce Evans during a telephone conversation on October 25, 2004. According to a declaration made by Evans and appended to appellant's opening brief:

> District Supervisor Farrar unambiguously stated during this conversation, just as I understood from our previous meeting on January 9, 2004 at the premises, that he was satisfied with the mitigation measures implemented by Appellant, and he did not believe revocation of Appellant's ABC license was necessary to protect the public.

Appellant argues that, since this statement directly contradicts the finding "that formed the basis of [the ALJ's] decision," the decision is "fatally flawed." Appellant asks the Board to reverse the decision or, alternatively, to remand the matter for further findings.

Appellant also argues that Farrar's "new evidence" allows the Appeals Board to remand this matter to the Department for reconsideration, pursuant to Business and Professions Code section 23085:

> In appeals where the board finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department, it may enter an order remanding the matter to the department for reconsideration in the light of such evidence.

Appellant's contention that the finding is erroneous depends on acceptance of Farrar's statement as "new evidence." However, if the Board accepts Farrar's statement as new evidence, section 23085 requires the Board to remand the matter to the Department for reconsideration in light of this evidence. Therefore, the Board is not authorized to consider appellant's contention that Finding IV is false; the most the

Board could do would be to remand the matter to the Department. Were the Board to consider the question of whether substantial evidence supports the challenged finding, however, we would have to conclude that it does.

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821, 826-827 [40 Cal.Rptr. 666].)

Farrar testified that, as District Supervisor, he recommended revocation when the accusation was filed and that remained his recommendation at the time of the

hearing. He also testified that he had, at some point, considered mitigation, but that no factors in mitigation were presented by appellant. Farrar met with Evans and appellant's corporate representatives in January 2004 to discuss mitigation and remedial measures, as suggested by the ALJ. As appellant points out in Evans' declaration and its exhibits, the Department sent a letter to appellant and the ALJ dated February 5, 2004, again recommending revocation. Finally, Evans and the Department's counsel had a telephone conference with the ALJ on February 23, 2004, during which, it appears, the ALJ was informed of Farrar's conclusion regarding mitigation and penalty after attending the January 9, 2004, meeting. Clearly, substantial evidence supports the ALJ's finding regarding the district supervisor's conclusion and recommendation.

Appellant also suggests that the Board should remand the matter to the Department in light of the "relevant and exculpatory" "new evidence" appellant has discovered. A remand to consider new evidence is only available for relevant evidence that either could not have been produced in the exercise of reasonable diligence, or that was improperly excluded at the hearing. (Bus. & Prof. Code, § 23085; cf. *State of California v. Superior Court* (1974) 12 Cal.3d 237, 257-258 [115 Cal.Rptr. 497, 524 P.2d 1281] [applying Code Civ. Proc., § 1094.5].) Even if evidence meets these criteria, however, we are not required to remand the matter for reconsideration in light of that evidence.

In *Department of Parks & Recreation v. State Personnel Bd*. (1991) 233 Cal.App.3d 813 [284 Cal.Rptr. 839], the Department of Parks and Recreation (DPR) dismissed an employee (Duarte) who appealed the dismissal to the State Personnel Board (SPB). The SPB reduced the dismissal to a suspension without pay, and the

DPR petitioned for a writ of administrative mandate, seeking an order directing SPB to set aside its decision. The appellate court upheld the trial court's refusal to remand the case to SPB for reconsideration of its order in light of new evidence pursuant to Code of Civil Procedure section 1094.5, subdivision (e), which contains essentially the same language as section 23085.[2]

DPR alleged that a declaration Duarte filed in a related action after the SPB administrative hearing constituted new evidence demonstrating that several of the premises upon which a determination of rehabilitation had been made no longer existed. The court acknowledged that "it has been held in some circumstances that relevant evidence of events transpiring after the date of the agency's decision may be considered under [subdivision (e) of Code of Civil Procedure section 1094.5]." (*Department of Parks & Recreation v. State Personnel Bd.*, *supra*, 233 Cal.App.3d 813 at p. 837.) After discussing the requirement that the evidence be relevant, and not speculative or conjectural, the court went on to explain that relevance is not enough:

> That leaves the portion concerning [Duarte's] discontinuation of therapy. Although this evidence appears relevant, the trial court did not abuse its discretion in refusing to remand the matter. Not every relevant piece of evidence occurring after the administrative hearing and relating to mitigation justifies a remand. Even weak and discredited evidence may meet the test of relevancy if it tends to prove some fact if believed. "Evidence is relevant when[,] no matter how weak it may be, it tends to prove the issue before the [fact finder]." (*People v. Slocum* (1975) 52 Cal.App.3d 867, 891 [125 Cal.Rptr. 442].) If the Department's position

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[2]Compare Code of Civil Procedure section 1094.5, subdivision (e), which provides:

> Where the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent, it may enter judgment . . . remanding the case to be reconsidered in the light of that evidence . . . ."

with Business and Professions Code section 23085, quoted *ante*, page 5.

> were adopted, then trial courts in administrative mandamus proceedings would be compelled to remand every case to the administrative tribunal each time some posthearing evidence, no matter how weak or discredited, was presented on the question of punishment. That exaggerated position is undermined by the wording of the statute itself. By its terms the statute does not compel the trial court to remand the case simply because some posthearing but marginally relevant evidence has come to light. Instead, it authorizes but does not mandate the court to remand the case when it finds relevant evidence which, in the exercise of reasonable diligence, could not have been produced at the administrative hearing. In such a case, the court "*may* enter judgment . . . remanding the case to be reconsidered in the light of that evidence." (Code Civ. Proc., § 1094.5, subd. (e), italics supplied.) As we did in *City of Sacramento v. Drew*, *supra*, 207 Cal.App.3d 1287, we read the use of the permissive "may" in the statute as conferring discretion upon the court to remand the matter in an appropriate case. (Id. at p. 1297, fn. 3.) In order to avoid fruitless remands with their attendant delay and cost, such a remand would be appropriate only when there is a reasonable possibility that the new evidence of mitigation would change the decision of the tribunal.

(233 Cal.App.3d 813 at p. 838.)

We conclude that we need not decide whether Farrar's statement qualifies under section 23085, since remand in this matter would be fruitless and inappropriate. We do not believe there is a reasonable possibility that the "new evidence" would cause the ALJ or the Department to change the decision: Farrar's alleged statement was four and one-half months after the Department's decision was issued; if this statement was made, it contradicted all the evidence in the record on this issue; there is no indication that Farrar's statement reflected the official Department's position; Farrar's statements about the adequacy of the measures taken by appellant are not inconsistent with a position that no mitigation existed for this penalty, since it appears that many of the measures were not taken until after the fourth accusation was filed, and some not until after the hearing on this accusation.

The Department is charged with protecting the public welfare and morals of the citizens of the State of California. Considering the threat to the public welfare posed by

appellant's three sales to minors in 36 months and its belated attention to the problem, it is not reasonable to think that the Department, even if it believed the statement attributed to Farrar, would change the penalty imposed.

III

Appellant contends the Department impermissibly based the penalty in this case on an "underground regulation," that is, a guideline not adopted as a regulation pursuant to chapter 3.5 of the Administrative Procedure Act. (Gov. Code, § 11340.5, subd. (a).) Government Code section 11425.50 states that a penalty may not be based on such a guideline.

In *Vicary* (2003) AB-7606a, the Board determined that the penalty guidelines found in the Department's Instructions, Interpretations and Procedures Manual at pages L225 through L229 were "underground regulations." Appellant alleges that these same penalty guidelines were the basis for the penalty imposed in the present case.

Appellant bases this contention on the fact that the penalty shown in the guidelines for three sales to minors within 36 months is revocation, and on the form 309 signed by Farrar, the penalty recommended is revocation and the box labeled "standard penalty" is checked.

There is no evidence in the record to support a determination that the penalty imposed was pursuant to the guidelines. In fact, the evidence shows precisely the opposite: Farrar testified over and over again that he based his recommendation of revocation on section 25658.1, not on the guidelines. The ALJ made no reference to any guidelines in his proposed decision, nor did Department counsel when making the penalty recommendation on behalf of the Department. Hence, it would be unwarranted for the Board to assume that the penalty order was based upon the guidelines, and

appellants have offered nothing to support their argument that any guidelines were followed. We cannot assume, simply because penalty guidelines existed, that they controlled the penalty imposed by the Department.

IV

Appellant contends that the ALJ was not impartial, and asks "[W]hy go through the farce of the administrative hearing if the ALJ gives the Department unfettered discretion to unilaterally review the facts, mitigating factors, and then determine the penalty[?]" Appellant's diatribe is the result of the ALJ's ruling that there would not be another hearing after the first hearing was continued to allow the meeting between Farrar and appellant's representatives.

Appellant complains that it was "robbed of due process," that the Department's findings "are pure fiction," and that "relevant and exculpatory evidence" was not produced at the hearing "*because there was no further hearing*." (Emphasis in original.) Appellant requests this Board to make clear that "the Department's shenanigans in this case will not be tolerated, and dismiss the accusation."

Appellant's argument appears to be based predominantly on the ALJ's rejection of appellant's arguments during the February 23, 2004, telephone conference. Appellant urged that another hearing was needed so that appellant could argue that the Department did not follow its new penalty policy in this case and could have judicial review of the Department's determination that no mitigation existed.[3]

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[3]Appellant also wanted to have admitted into evidence a declaration describing the "mitigation measures" it had taken; when the ALJ refused to admit the declaration, appellant appended the declaration to a letter "memorializing" the telephone conference and requested it be made a part of the administrative record. Appellant also listed the alleged mitigation measures in a footnote in its brief.

There was no due process violation or unfairness in the ALJ's decision not to hold a further hearing; appellant's arguments for a further hearing were properly rejected. The Department's new penalty policy was irrelevant, since it was not in effect when this penalty was recommended. As for appellant's purported lack of opportunity to present evidence of mitigation in opposition to the Department's conclusion that none existed, appellant simply did not take advantage of the several opportunities to do so.

Appellant could have presented evidence of mitigation upon receipt of the 309 form and/or the accusation, at any time during the months leading up to the hearing, or at the hearing itself. Appellant's counsel had no good explanation for waiting to present such evidence until after the ALJ denied a second hearing. It may well be that appellant had no evidence to present earlier, since the information available in the record and the briefs strongly suggests that some, if not most, of the measures addressing the sales to minors were not undertaken until *after the hearing in this case*, almost three years after the third sale-to-minor violation, and almost eight months after notice that the Department was recommending appellant's license be revoked.

V

Appellant filed a Motion to Augment Record, asking that a document entitled Report of Hearing be included in the administrative record. Appellant alleges that the document requested will show "the written communication available to the [Department's] decision maker from [the Department's hearing] advocate." Such communication, appellant asserts, constitutes an unfair administrative process and a denial of due process.

The Appeals Board considered virtually identical motions and allegations of due process violations, and reversed the Department's decisions, in three appeals:

Quintanar (AB-8099), *KV Mart* (AB-8121), and *Kim* (AB-8148), all issued in August 2004 (referred to here collectively as "*Quintanar*" or "the *Quintanar* cases").[4]

The Board held that the Department violated due process by not separating and screening the prosecuting attorneys from any Department attorney, such as the chief counsel, who acted as the decision maker or advisor to the decision maker. A specific instance of the due process violation occurs when the Department's prosecuting attorney acts as an advisor to the Department's decision maker by providing the report before the Department's decision is made.

Although the legal issue here is the same as that in the *Quintanar* cases, there is a factual difference that requires a different result. In each of the three cases involved in *Quintanar*, the ALJ had submitted a proposed decision to the Department that dismissed the accusation. In each case, the Department rejected the ALJ's proposed decision and issued its own decision with new findings and determinations, imposing suspensions in all three cases. In this appeal, however, the Department adopted the proposed decision of the ALJ in its entirety, without additions or changes.

Where, as here, there has been no change in the proposed decision of the ALJ, we cannot say, without more, that there has been a violation of due process. Any communication between the advocate and the advisor or the decision maker after the hearing did not affect the due process accorded appellant at the hearing. Appellant has

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[4]The Department filed petitions for review with the Second District Court of Appeal in each of these cases. The cases were consolidated and the court affirmed the Board's decisions. In response to the Department's petition for rehearing, the court modified its opinion and denied rehearing. The cases are now pending in the California Supreme Court and, pursuant to Rule of Court 976, are not citable. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 127 Cal.App.4th 615, review granted July 13, 2005, S133331.)

not alleged that the proposed decision of the ALJ, which the Department adopted as its own, was affected by any post-hearing occurrence. We see no basis for concluding that the ALJ was not an impartial adjudicator, and since it was the ALJ's decision alone that determined whether the accusation would be sustained and what discipline, if any, should be imposed upon appellant, it appears to us that appellant received the process that was due to it in this administrative proceeding. Under these circumstances, and with the potential for an inordinate number of cases in which this due process argument could possibly be asserted, this Board cannot expand the holding in *Quintanar* beyond its own factual situation.

Under the circumstances of this case and our disposition of the due process issue raised, appellant is not entitled to augmentation of the record. With no change in the ALJ's proposed decision upon its adoption by the Department, we see no relevant purpose that would be served by the production of any post-hearing document. Appellant's motion is denied.

ORDER

The decision of the Department is affirmed.[5]

FRED ARMENDARIZ, ACTING CHAIRMAN
SOPHIE C. WONG, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[5]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.