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

AB-8410
File: 04058118 Reg: 45/58/77-343069

THOMAS CLIFFORD MATHER, JR., dba Tommy T's Sports Bar
117-A East Ridgecrest Boulevard, Ridgecrest, CA 93555,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: November 3, 2005
Redeliberation: January 5, 2006
Los Angeles, CA

ISSUED MAY 4, 2006

Thomas Clifford Mather, Jr., doing business as Tommy T's Sports Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license pursuant to Business and Professions Code section 24200, subdivisions (a) and (d), based on his pleas of nolo contendere to criminal charges that he violated Penal Code sections 245, subdivision (a)(1), and 422.

Appearances on appeal include appellant Thomas Clifford Mather, Jr., appearing through his representative, Russell Bloom, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

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[1]The decision of the Department, dated February 17, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on July 14, 1994. On September 30, 2004, the Department filed an accusation against appellant charging that he pled nolo contendere to charges of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)) and threatening another with death or great bodily harm (Pen. Code, § 422). At the administrative hearing held on January 12, 2005, documentary evidence was received and testimony concerning the Penal Code violations, appellant's good character, and possible transfer of the license was presented by appellant and his father, Thomas C. Mather, Sr.

Subsequent to the hearing, the Department issued its decision which determined that nolo contendere pleas were established as charged and that transfer of the license to appellant's sister in lieu of revoking the license would not be in the best interests of the consuming public. Appellant appealed, contending that he was deprived of due process because the administrative law judge (ALJ) did not continue the hearing when he said he had not received the accusation packet, and that the order was not based on substantial evidence.

DISCUSSION

I

Appellant contends he told the ALJ he had not received the accusation packet, and the ALJ should have continued the hearing at that time; to not do so, appellant alleges, denied him due process.

At the hearing, appellant stated that he did not have a copy of the accusation, that he had only received a letter, which turned out to be the notice of hearing. [RT 6.] Department counsel provided appellant with a copy of the accusation at the hearing.

Appellant acknowledged receiving and signing the notice of defense sent to him by the Department. [RT 7-8.] The Department introduced into evidence a copy of the signed notice of defense and a declaration of service stating that, along with the notice of defense, appellant had been served with the accusation, a statement re discovery, and the Department's request for discovery. (Exhibit 1.) The ALJ ascertained that the documents were addressed correctly, to appellant's business post office box. [RT 9.] Appellant acknowledged receiving and seeing the other documents listed in the declaration of service, but said he "[didn't] remember the Accusation being in there." [RT 12.]

Counsel for the Department asked the ALJ to proceed with the hearing based on the declaration of service sent to a valid address. The ALJ reasoned that, since appellant did not deny he had received the accusation, but only that he did not remember receiving it, the presumption that appellant received the properly addressed accusation packet was still effective. [RT 12.] The ALJ concluded that the service was proper and that the hearing should continue. [RT 13.] There was then a pause in the proceedings, after which the ALJ asked appellant whether he had looked at the accusation:

> MR. MATHER: Yeah. I mean, I know what the Accusations are for.
> THE [ALJ]: Are you familiar with the Accusation?
> MR. MATHER: Yes, sir.
> THE [ALJ]: Okay. Do you have any questions about it?
> MR. MATHER: No.
> THE [ALJ]: Okay. All right. Mr. Logan, you may proceed. [RT 13.]

The Department complied with the requirements of Government Code section 11505, subdivision (c), for service of the accusation documents, as evidenced by the declaration of service. (Ex. 1.) This was sufficient to satisfy due process even if

appellant did not actually receive the accusation. (See *Evans v. Department of Motor Vehicles* (1994) 21 Cal.App.4th 958 [26 Cal.Rptr.2d 460].)

From a practical standpoint, it appears that there was no unfairness in proceeding with the hearing, even though appellant said he didn't remember seeing the accusation. Appellant admitted receiving the other documents that must accompany the accusation; signed and returned one of those documents, the notice of defense; appeared at the hearing; was provided a copy of the accusation at the hearing; admitted being familiar with the charges of the accusation; and presented evidence. The ALJ satisfied himself that the accusation packet had been properly addressed and that appellant was fully aware of the contents of the accusation before proceeding.

The ALJ described his reasoning process out loud, making clear the distinction between appellant denying receipt of the accusation and appellant not remembering if he received the accusation. Appellant had the opportunity to deny receipt, but did not.

Pursuant to Government Code section 11524, the ALJ has the right to grant a request for continuance for good cause. There is no absolute right to a continuance; one is granted or denied at the discretion of the ALJ, and a refusal to grant a continuance will not be disturbed on appeal unless it is shown to be an abuse of discretion. (*Cooper v. Board of Medical Examiners* (1975) 49 Cal.App.3d 931, 944 [123 Cal.Rptr. 563]; *Savoy Club v. Board of Supervisors* (1970) 12 Cal.App.3d 1034, 1038 [91 Cal.Rptr. 198]; *Givens v. Department of Alcoholic Beverage Control* (1959) 176 Cal.App.2d 529, 532 [1 Cal.Rptr. 446].)

In the present case, appellant did not even request a continuance. The ALJ was not obligated to offer one to appellant, particularly since there was no showing of good cause.

> It is the duty of a trial judge to see that a cause is not defeated by "mere inadvertence" (*Hellings v. Wright*, 29 Cal.App. 649 [156 P. 365]) or by "want of attention" (*Bare v. Parker*, 51 Cal.App. 106 [196 P. 280]) and "to call attention to omissions in the evidence or defects in the pleadings" which are likely to result in a decision other than on the merits (*Farrar v. Farrar*, 41 Cal.App. 452 [182 P. 989]) and "within reasonable limits" by proper questions "to clearly bring out the facts so that the important functions of his office may be fairly and justly performed" (*Estate of Dupont*, 60 Cal.App.2d 276 [140 P.2d 866]). He is not, however, required to act as counsel for a litigant in the presentation of his evidence.

(*Lombardi v. Citizens National Trust and Savings Bank* (1955) 137 Cal.App.2d 206, 209 [289 P.2d 823].)

From our reading of the transcript, it appears that the ALJ was reasonable and conscientious about ensuring that appellant was not denied due process at the hearing. Appellant argues that "[c]ommon courtesy" demanded that the ALJ ask him if he wished to have the hearing continued. Even if the ALJ transgressed the rules of common courtesy (and we do not believe that he did), that can hardly be equated with a deprivation of due process.

The fact that appellant was not represented by legal counsel at the hearing is mentioned several times in appellant's brief, with the implication that the ALJ should have been more helpful or more lenient with appellant because of this. However, the notice of hearing explains clearly that a licensee may hire an attorney to appear at the hearing, and appellant chose instead to represent himself. A litigant appearing in propia persona is not entitled to any greater consideration than other litigants and attorneys, and must follow the same rules of procedure that are imposed on attorneys. (*Bianco v. California Highway Patrol* (1994) 24 Cal App.4th 1113, 1125-1126 [29 Cal.Rptr.2d 711].)

II

Appellant contends the order was not based on substantial evidence, but on speculation concerning the role appellant's sister would play if the license were transferred to her instead of being revoked.

The ALJ addressed appellant's request for the opportunity to transfer the license to his sister in Findings of Fact 7 and 8 and Conclusion of Law 4:

> 7. The licensee recognizes that his criminal convictions involving moral turpitude disqualify him from continuing to hold an Alcoholic Beverage Control license at the current time. He and his family are requesting that as a condition of an order revoking the license that the Department grants [sic] the respondent an opportunity to transfer the license to his sister. As the licensed premises is in fact a family-run entity, such a transfer would allow the respondent's family to continue the licensed operation as before, without any undue disruption.
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> 8. All that would change is that the respondent would not be directly involved in running the establishment or making decisions associated with the operations of the premises. Further, assuming that this arrangement would pass muster with the Department, it is highly unlikely that the respondent's sister as a licensee would be directly involved in the day-to-day operations or decisions of the premises. She resides in Costa Mesa, approximately 170 miles away from the premises, and according to the evidence she would basically discharge her duties by telephonic communication. If this is not a recipe for failure, it is hard to imagine what is.
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> 4. With respect to the respondent's request to permit a license transfer to his sister, there is no merit to this request. The respondent is in effect asking to do indirectly what he will not be permitted to do directly. Substantively, nothing would change, as this would become a game of musical chairs with each family member moving over a chair, but in substance the premises would remain what it is currently, that is, a family run business with basically the same actors. Further the findings of fact in nos. 7 & 8 are incorporated at this point.

Appellant argues that the Alcoholic Beverage Control Act does not require licensees to be day-to-day operators of a premises, and that the ALJ's conclusions

regarding the ability of appellant's sister successfully to operate the premises are mere conjecture. Therefore, he concludes, the decision is not based on substantial evidence.

Appellant is actually arguing that the penalty is excessive. It is the *decision* that must be supported by the findings, and the findings that must be supported by substantial evidence. The decision in this case is that there are grounds for discipline. This is supported by the findings that appellant pled nolo contendere to criminal charges involving moral turpitude. The findings are supported by the evidence of the convictions.

The penalty of revocation is a result of the decision, and there is no need for substantial evidence to support the penalty because the penalty is imposed as an exercise of the Department's discretion. The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. *(Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

Although revocation is a severe penalty, we cannot say in this case that it is unreasonable. The Department is charged with protecting the welfare and morals of the people of the state, and it is not unreasonable for it to decide that appellant poses too great a risk to be entrusted with sales of alcohol. Nor is it unreasonable for the

Department to conclude that shifting the license to appellant's sister, who is too far away to be in touch with day-to-day operations of the premises, presents the real risk that appellant's removal would be only temporary or just "window dressing." Under the circumstances, we cannot say that the Department has abused its discretion in ordering revocation of the license.

ORDER

The decision of the Department is affirmed.[2]

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

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[2]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.