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

AB-8528a
File: 20-237628 Reg: 05060335

7-ELEVEN, INC., and MUSSIE O. KIDANE dba 7-Eleven 2232-20364
15105 Hesperian Boulevard, San Leandro, CA 94577,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: January 10, 2008
San Francisco, CA

ISSUED MARCH 21, 2008

7-Eleven, Inc., and Mussie O. Kidane, doing business as 7-Eleven 2232-20364 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their off-sale beer and wine license for their clerk, Nana Agyemeg, selling a six-pack of Bud Light beer to Andrew Fischer, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a). The violation was appellants' third within a 36-month period, and the sixth since the license was issued in 1989. This is appellants' second appeal in this matter.

Appearances on appeal include appellants 7-Eleven, Inc., and Mussie O. Kidane, appearing through their counsel, Barry Strike, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

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[1]The decision of the Department, dated July 19, 2007, is set forth in the appendix.

PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 8, 1989. On July 26, 2005, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage (beer) to a minor on December 10, 2004. The accusation also alleged prior sale-to-minor violations in 1990, 1991, 1994, 2003, and 2004.

Following an administrative hearing on November 16, 2005, the Department issued its decision which determined that the charge of the accusation had been established, and ordered the license revoked.

Appellants then filed an appeal with this Board ("the first appeal"), contending that the findings were not supported by substantial evidence, the decision was not supported by the findings, the decision was an abuse of discretion, and the penalty was excessive. They did not contest the findings that there was a sale to a minor, or that the violation was the third in a 36-month period.

In the first appeal, the Board said:

> Appellants state that the key issue in this appeal is the timing and adequacy of the remedial steps taken by appellants following the three sale-to-minor violations - “It is apparent from the Decision that the fundamental consideration in imposing revocation in this case was the timing of steps taken by 7-Eleven to prevent further violations.” (App. Br., P. 3.) Appellants focus on portions of Determinations of Issues X and XI, contending they incorrectly state the evidence. They assert (App. Br. p. 3) that the ALJ’s finding “that no steps were taken until after the third violation” was erroneous, and suggest that 7-Eleven was limited by its franchise relationship with respect to the timing of the steps it took.
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> The Department, while arguing that the findings as a whole support the decision, concedes that the findings in question would benefit from further clarification by the administrative law judge upon a remand to the Department for further consideration, and suggests such a remand would be an appropriate way to deal with the issue. Appellants’ counsel agreed with the Department’s suggestion that the case be remanded to the Department. Therefore, we do not reach the merits of the appeal.

The Board remanded the matter to the Department, as the parties had suggested, for clarification of the findings that appellants challenged in the Department's original decision. The Department then remanded the case to the administrative law judge (ALJ) to provide clarification. Thereafter, the ALJ issued a second proposed decision in which he augmented his original proposed decision and again proposed revocation as the penalty. The Department adopted this as its decision on July 19, 2007. It is from this decision that appellants now appeal.

DISCUSSION

Appellants state, as they did in their first appeal, that the key issue in this appeal is the timing and adequacy of the remedial steps taken by appellants following the three sale-to-minor violations. They assert that the ALJ refused to regard the steps taken by 7-Eleven following the third violation as mitigating factors because they were not taken sooner. They contend the ALJ failed to consider limits on the franchisor/franchisee relationship imposed by California law. In their closing brief, appellants argue that revocation cannot be based on "7-Eleven's failure to take steps not available to it under California law."

Appellants' argument hinges on their insistence that the decision required 7-Eleven to terminate the franchisee after the second violation occurred, when it could not legally do so until that violation had been adjudicated. This argument is based on appellants' misreading, or at least misstatement, of the findings. The decision does not fault 7-Eleven for its failure to terminate the franchisee, but for its failure to take action sooner to prevent further sale-to-minor violations.

Findings of Fact XIII through XVI describe appellants' responses to the sale-to-minor violations:

XIII

Co-licensee 7 Eleven Inc. was aware of the possible discipline resulting from a third violation of Business and Professions Code section 25658 within a three-year period (see Business and Professions Code section [25658].1(b)). Following the first violation within the three-year period (May 30, 2003), co-licensee 7 Eleven Inc. issued a breach of contract notice to franchisee Kidane. The evidence established that it is 7-Eleven Inc.'s practice to issue up to three such notices to franchisees for violation [of] Section 25658. The first notice requires the franchisee to train employees. The evidence did not clearly establish that, after receipt of his first breach of contract notice, co-licensee Kidane did, in fact, provide such training.

XIV

The second violation within the three-year period occurred on June 11, 2004 as determined by a hearing on December 21, 2004. The Department issued its decision effective April 7, 2005 resulting in a 20-day suspension. Co-licensee 7 Eleven Inc. issued a second breach of contract notice to franchisee Kidane. He was asked to sell the store because co-licensee 7 Eleven Inc. believed there was a serious problem at the premises that required an immediate solution. In addition, further training of Kidane and employees was required. The evidence did not establish that this latter requirement was, in fact, fulfilled. The franchisee did find a potential buyer. However, the Department refused to permit a transfer of the license because of this pending third violation.

XV

The third violation within the three-year period allegedly occurred on December 10, 2004. At some point after receiving knowledge that a third violation was pending, co-licensee 7 Eleven Inc. assigned a store manager and an assistant store manager to operate the premises. The store manager worked 50 hours weekly at the premises, the assistant manager worked 20 hours weekly and Kidane's hours were reduced to 20 hours weekly. The manager had been through a one year training program and had prior experience in operating a store. The purpose of this arrangement was to assure that no further similar violations would occur at the site.

XVI

The new management team removed the visual identification button from the register so that employees were required to enter into the machine the actual date of birth of the customer as indicated on the identification. In addition, sufficient employees were hired to assure that

> at no time would there by [*sic*] only one clerk on duty. Clerks are now required to ask all purchasers of alcoholic beverages and tobacco products for their identification regardless of appearance. The manager can verify on a daily basis that employees are entering the date of birth for such transactions. A video camera can be reviewed to check on requests for identification. A shopping service is utilized twice monthly for a limited period.

Paragraphs VIII and IX of the Determination of Issues explain why appellants' actions following the third violation were not considered mitigating factors:

> VIII
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> Following the first violation, co-licensee 7 Eleven Inc. served upon its franchisee a notice of breach of contract, in accord with its franchise agreement, that required the franchisee to retrain his employees. Following the second violation, a second breach of contract notice was served upon the franchisee, who was asked to sell the store. He was also required to undergo training and provide further training to his employees. It was not until after co-licensee 7 Eleven became aware of the third pending violation that it undertook the measures set forth in Findings XV and XVI hereinabove. These steps are certainly commendable and have been thus far successful in preventing further alcoholic beverage sales to minors at this site.
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> IX
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> The question that arises, however, is why they were not instituted earlier. According to co-licensee 7 Eleven Inc.'s Field Consultant, the franchisee was asked to sell the store following the second violation because 7 Eleven "saw that there was a bigger probem [*sic*] at that particular location that needs to be taken care of." Had the measures imposed at the premises after the third violation been adopted following the second violation, it is quite possible no further violations would have occurred, and the franchisee could have sold the store with no further actions pending. Even if one had occurred, the strong and prompt efforts taken by co-licensee 7 Eleven Inc. to prevent the third violation would demonstrate that the franchisor was focusing primarily on the elimination of the problem it was aware of and preventing it from recurring (see *Laube* [*v. Stroh* (1992) 2 Cal.App.4th 364, 379]) rather than the loss of the license.

It is clear that what the Department found to be belated were the preventive actions taken by 7-Eleven after the third violation, not the removal of the franchisee.

Appellants complain that the ALJ "failed to consider" certain provisions of California law governing the franchisor/ franchisee relationship. The ALJ, not being

clairvoyant (presumably), could not know that appellants wanted that issue addressed because they did not raise it at the hearing. The failure was on the part of appellants, not the ALJ. This Board has addressed raising an issue for the first time on appeal, pointing out in the appeal of *Islam* (2000) AB-7442 :

> Numerous cases have held that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; *Hooks v. California Personnel Board* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564,576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].)

Even if the issue had been raised, it is unlikely appellants would prevail. The Board addressed the relationship between franchisor and franchisee at some length in *The Southland Corporation (Sukhija)* (1998) AB-6930, and *The Southland Corporation (Tolentino)* (1998) AB-7035, making it clear that such a relationship was no barrier to Department disciplinary action. The Board said in *Sukhija*, and reiterated in *Tolentino:*

> While Southland's relationship with its franchisee may be in the nature of an independent contractor relationship, that is a function of the contract between them. The Department is not a party to that agreement, and is not bound by it. . . .
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> Here, the Department issued its license to Southland and the franchisees. It is entitled to look to either or both for compliance with the obligations assumed by the acceptance of that license. Whether they be considered partners or joint venturers or something else, the clear fact is that they jointly obligated themselves to comply with all the laws applicable to one who holds a license to sell alcoholic beverages. That a separate agreement between the co-licensees allocates those responsibilities to one or the other has no binding force insofar as the Department is concerned.
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> [¶]. . . . [¶]
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> 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. We are aware of nothing in the Department's charter that mandates it to accord special consideration or more lenient treatment to a person or firm merely because that person or firm does business in the mode of a franchisor or franchisee. To the extent the Department chooses to do so, that is a function of its exercise of discretion, based upon "good cause."

At best, 7-Eleven is in the position of an innocent licensee, and suffers the same fate as its guilty co-licensee. Both *Coletti v. Bd. of Equalization* (1949) 94 Cal.App.2d 61 [209 P.2d 984], and *Rice v. Alcoholic Bev. Control* Appeals Bd. (1979) 89 Cal.App.3d 30, 39 [152 Cal.Rptr. 285], dealt with the unitary, non-severable nature of an alcoholic beverage license. In *Rice*, the court stated:

> [T]he propriety of the penalty to be imposed rests solely within the discretion of the Department whose determination may not be disturbed in the absence of a showing of palpable abuse. [Citations.] The fact that unconditional revocation may appear too harsh a penalty does not entitle a reviewing agency or court to substitute its own judgment therein [citations]; nor does the circumstance of forfeiture of the interest of an otherwise innocent colicensee sanction a different and less drastic penalty.

Appellants have not shown that the findings lack the support of substantial evidence, that the decision is not supported by the findings, or that the Department abused its discretion in this case.

As for the penalty, the ALJ spent two paragraphs in the Determination of Issues explaining why the penalty of revocation is not excessive in this case:

> XIII
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> There is no question but that revocation is the harshest discipline that can be meted out to a licensee. The Department, in making its discipline recommendation, does not question the methods imposed by co-respondent 7 Eleven Inc. following the third violation but rather its belated reaction to what obviously was a "big problem" at this site that needed swift correction. From the Department's viewpoint, the efforts taken by co-licensee 7 Eleven Inc., limited to retraining and asking franchisee Kidane to sell the premises, were simply and obviously ineffective in resolving the problem. The steps taken after the third violation, while commendable,

were belated. They were taken some six months after the second violation. Three violations within a 19-month period is a serious matter. "The propriety of the penalty to be imposed rests solely within the discretion of the Department whose determination may not be disturbed in the absence of a showing of palpable abuse (*Rice v. Alcoholic Beverage etc. Appeals Board* (1979) 89 Cal.App.3d 30).

XIV

Given the facts of the violation as found hereinabove, the relatively short period of time in which the three recent violations occurred, the failure of the licensees promptly to take strong steps to resolve what co-respondent 7 Eleven Inc. recognized as a serious problem after the second violation and the licensees' overall disciplinary history, it cannot be said that the Department's recommendation constitutes a palpable abuse of discretion. "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. ABC Appeals Board* (1965) 62 Cal.2d 589).

The penalty may be harsh, but it appears to be one well within the Department's broad discretion in a case such as this.

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.