

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

AB-8835

File: 21-371408 Reg: 07066090

LUCIA PENILLA, dba Cal Vine Market
429-431 West California Street, Ontario, CA 91762,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: February 5, 2009
Los Angeles, CA

ISSUED JUNE 3, 2009

Lucia Penilla, doing business as Cal Vine Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended her license for 25 days, with 10 of those days stayed, for a violation of Business and Professions Code section 25658, subdivision (a). The Department determined that appellant's clerk, Josefina Sandoval, sold a six-pack of Bud Light beer, an alcoholic beverage, to Samantha Reyes, a 19-year-old minor working as a decoy for Ontario police officers.

Appearances on appeal include appellant Lucia Penilla, appearing through her counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

¹The decision of the Department, dated February 20, 2008, is set forth in the appendix.

PROCEDURAL HISTORY

Appellant's off-sale general license was issued on November 2, 2000. On June 18, 2007, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor on April 19, 2007.

An administrative hearing was held on October 17, 2007, at which time documentary evidence was received and testimony concerning the violation charged was presented. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proven.

Appellant filed a timely notice of appeal and contends that the Department failed to operate according to law by allowing her to be represented at the administrative hearing by her son, a non-attorney, non-licensee.

DISCUSSION

Appellant does not contest the underlying violation. The only issue she raises is whether the Department improperly allowed her to be represented in a disciplinary proceeding by her adult son. Appellant suggests that, "if the Department routinely permits the designation of an unlicensed practitioner to represent a licensee in administrative hearings" (App. Br., p. 2), doing so constitutes action pursuant to an underground regulation. Appellant asserts (App. Br., p. 3) that "[I]licensees should not be allowed to be victimized by a process employing non-lawyers in the practice of law."

Appellant was present at the hearing, and represented at the hearing by her adult son, Saul Penilla. Both Saul Penilla and his brother Elias were active in the family business. The license had originally been held jointly by both parents, and held by

appellant following the death of her spouse. There is nothing in the record that suggests that Saul was compensated in any manner for his efforts at the hearing.

The case was defended on the theory that the undercover police had engaged in tactics designed to distract the clerk while she was examining the decoy's identification. The defense, based on the testimony of Elias Penilla, was rejected by the administrative law judge.

Appellant relies on Business and Professions Code section 6125, which states: "No person shall practice law in this State unless the person is an active member of the State Bar," and section 6126, subdivision (a), which states: "Any person advertising or holding himself or herself out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar, or otherwise authorized pursuant to statute or court rule to practice law in this state at the time of doing so, is guilty of a misdemeanor" Appellant cites and quotes from *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 543 [86 Cal.Rptr. 673], in which the Court, in a general discussion of what constitutes the practice of law, said this:

Less perplexing is the determination of whether participation on behalf of another in hearings and proceedings before a board or commission constitutes the practice of law. The cases uniformly hold that the character of the act, and not the place where it is performed, is the decisive element, and if the application of legal knowledge and technique is required, the activity constitutes the practice of law, even if conducted before an administrative board or commission.

Appellant also cites the much more recent case of *Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61 [38 Cal.Rptr.3d 759], for the proposition that "state administrative proceedings do, in fact, constitute the practice of law." However, the

court in *Benninghoff* carefully limited its holding to the facts of that case.

We decline to resolve this issue [whether laypeople may represent parties in administrative proceedings]. To decide this case, we need not resolve the broad question of whether laypeople in general may represent parties in state administrative agencies. Rather, we will assume that laypeople may do so, and turn to the specific question of whether Benninghoff may do so, too.

Our specific question arises because Benninghoff is not the typical layperson - he used to be a lawyer. The statute prohibiting the unauthorized practice of law treats true laypeople differently than lawyers who have lost their bar membership. Section 6126, subdivision (a) addresses true laypeople. It provides that "any person ... practicing law who is not an active member of the State Bar, *or otherwise authorized pursuant to statute or court rule to practice law in this state* at the time of doing so, is guilty of a misdemeanor." (Italics added.) Section 6126, subdivision (b) addresses lawyers like Benninghoff. It provides that "[a]ny person who ... has resigned from the State Bar with charges pending, and thereafter practices or attempts to practice law ... is guilty of a crime punishable by imprisonment in the state prison or county jail." Thus, a true layperson may practice law when "authorized pursuant to statute or court rule"; a defrocked lawyer like Benninghoff may not practice law at all. (§6126, subs. (a) & (b).)

(136 Cal.App.4th at pp.67-68, fn. omitted.)

The Department cites sections of the Administrative Procedure Act (APA) for its contention that lay representatives may represent licensees in administrative proceedings: section 11440.20 (service on a "party with an attorney or other authorized representative"); section 11440.60, subdivision (c) ("a state agency may refuse or ignore a written communication submitted by an attorney or any other authorized representative on behalf of a client in a quasi-judicial proceeding unless ...;" section 11455.30 ("The presiding officer may order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses ... incurred by another party as a result of bad faith actions or tactics ...;" section 11520, subdivision (b) ("The administrative law judge may order the respondent, or the respondent's attorney or

other authorized representative ... to pay reasonable")

Appellant, in her reply brief, counters with Law Revision Commission comments to section 11440.20 to the effect that the section does not apply at all to formal hearings. She stresses the fact that none of the references to "other authorized representative" state that the representative may not be a non-attorney.

While Business and Professions Code section 6126, incompletely quoted in appellant's opening brief, does contain an "authorized representative" exception, it is narrowly written to require statutory or rule authority to engage in the practice of law, so is of no help to the Department. And we do not find support for the Department's position in the APA provisions it cites. Nonetheless, we are inclined to agree with the assumption in *Benninghoff, supra*, that a lay person may represent a party in an administrative hearing, at least in the narrow circumstances of this case

It is the utter simplicity of the factual situation in this case that persuades us that we must reject the broad position taken by appellant. Indeed, the result we reach, accepting the Department's position, better reflects the reality and history of proceedings before the Department and this Appeals Board. Many of the licensees who appear before the Appeals Board are accompanied by a family member, relative, or close friend who, in varying degrees, represents them before the Board without compensation. There are a number of reasons why this happens. Often there is a language barrier. Sometimes, economics prevent the hiring of an attorney familiar with ABC practice. In other cases, like this one, the license is held in the name of one or both parents, but the adult (and, often, even minor) children are immersed in the operation of the business and equally or sometimes even more capable than the

named licensee to address the Appeals Board. This is particularly true, where, as in this case, the dispute involves no more than competing versions of the facts.

This is not a case where a licensee hired a layperson passing himself off as an attorney or one intending to provide legal services. This is a case where a family member involved in a family business acted as a spokesperson for the family. We think it exalts form over substance to say that a family business operated as a sole proprietorship cannot enjoy the same opportunities afforded an incorporated family business, that is, to be able to choose one of the family members to speak on its behalf. And, certainly, we do not think it in the interest of this licensee to avoid a suspension by winning a ruling that her son engaged in the illegal practice of law.

In the absence of any direct contrary authority, this Board is unwilling to tell the Department it should not have permitted lay representation by an "authorized representative" in this case. It is clear that the "authorized representative" layperson had such a close relationship with the licensee, family or otherwise, as to negate the danger that the unlicensed practice of law was being encouraged. Unlike defrocked attorney Benninghoff, Saul Penilla was not "masquerading as a lay representative" in this case. (See *Benninghoff, supra*, 136 Cal.App.4th at 71.) He truly was a lay representative. While his representation may not have been equal to what an experienced practitioner might have provided, we cannot say it was so inept as to have any more adverse effect on the case than the facts of the violation.

Because of the unique and limited facts of this case,² we decline to address the

² Experienced counsel for appellant acknowledged during argument that this case was probably "one in one thousand." Counsel also enumerated a large number of agencies which have adopted rules permitting lay representation in their administrative hearings. That the Department lacks such a rule is, perhaps, a mere oversight.

question whether the Department acted in this case pursuant to some underground regulation of undefined content.

ORDER

The decision of the Department is affirmed.³

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

³ 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.