

ISSUED APRIL 18, 2000

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

KHALED MARWA	)	AB-7255
dba Milkman Market)	
6104 Mission Boulevard	)	File: 21-188864
Rubidoux, CA 92509,	)	Reg: 98043937
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Sonny Lo
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	March 2, 2000
	)	Los Angeles, CA

Khaled Marwa, doing business as Milkman Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked his license for appellant's clerk accepting food stamps in payment for beer and for appellant himself purchasing food stamps for cash, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of §7 U.S.C. §2024 and 7 C.F.R. §278.2.

¹The decision of the Department, dated October, 22, 1998, is set forth in the appendix.

Appearances on appeal include appellant Khaled Marwa, appearing through his counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on December 28, 1988. Thereafter, the Department instituted an accusation against appellant charging that, on May 27 and June 5, 1997, appellant's clerk, Najieh A. Omrou, accepted food stamps in payment for beer from a confidential informant working for the United States Department of Agriculture, and, on July 31, September 9, and September 18, 1997, appellant paid cash to the informant for food stamps, these transactions being in violation of Federal law.

An administrative hearing was held on September 2, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Belinda Myers ("Myers"), senior investigator with the U.S. Department of Agriculture; by Julio Virquez ("Virquez"), an investigator with the U.S. Department of Agriculture and the "confidential informant" referred to in the Department's decision; and by the appellant, Khaled Marwa.

The Department of Agriculture investigators testified as to how the investigation was conducted and the events of the transactions alleged in the accusation. Appellant agreed with the testimony of the investigators [RT 44] and admitted knowing that it was illegal to buy food stamps for less than their value [RT 46, 48]. However, he testified that at the time he was sick and recovering from surgery and didn't know what he was doing [RT 44-47]. He also said he

purchased the food stamps to help the informant, who cried and said he needed money for his (the informant's) children [RT 45-47].

Subsequent to the hearing, the Department issued its decision which determined that all counts² of the accusation were proven, and ordered the license revoked.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) Appellant was denied due process at the administrative hearing; (2) the decision is not supported by the findings and the findings are not supported by substantial evidence; (3) the penalty is excessive and constitutes "cruel and/or unusual punishment"; and (4) due process and equal protection were denied by virtue of the unconstitutionality of Business and Professions Code §24210.³

DISCUSSION

I

Appellant contends he was denied due process at the administrative hearing because he was not advised of the potential consequences of proceeding without legal counsel, he did not knowingly or intelligently waive the presence of counsel, he proved incompetent to represent himself, and he was adversely cross-examined by the Administrative Law Judge.

² The accusation consisted of five counts. However, the counts were numbered 1, 2, 3, 5, and 6.

³ This Board, as are all administrative agencies, is precluded by article 3, §3.5, of the California Constitution from declaring a statute unconstitutional or unenforceable. Therefore, the Appeals Board declines to consider this contention.

While licensees are entitled to due process at administrative hearings affecting their licenses, they are not entitled to the same due process rights afforded criminal defendants.

The case of Borrer v. Department of Investment (1971) 15 Cal.App.3d 531, 543-544 [92 Cal.Rptr.525], discussed the right to counsel in administrative proceedings:

“[I]n a proceeding to revoke or suspend a license or other administrative action of a disciplinary nature the licensee or respondent is entitled to have counsel of his own choosing, which burden he must bear himself, and that he is not denied due process of law when counsel is not furnished him, even though he is unable to afford counsel. Such a proceeding does not bear a close identity to the aims and objectives of criminal law enforcement, but has for its objective the protection of the public rather than to punish the offender. There is no constitutional requirement, therefore, that the hearing officer or the agency advise a party that he is entitled to be represented by counsel and that if he cannot afford counsel one will be afforded him. In proceedings under the Administrative Procedure Act there is a statutory requirement, however, that a party be advised that he is entitled to be represented by counsel chosen and employed by him. . . .”

“Since the requirements of due process are satisfied in a proceeding under the Administrative Procedure Act, insofar as representation by counsel is concerned, if a party is advised that he is entitled to be represented by counsel employed by him and such attorney is permitted to represent him in the proceeding, there is no requirement, in the event that the party does not choose to be represented by counsel, or does not have the funds with which to hire an attorney, that the analogies of the criminal law be followed in ascertaining whether there has been an intelligent waiver of counsel. Accordingly, there is no requirement that the hearing officer determine whether the accused understands the nature of the charge, the elements of the offense, the pleas and defenses which may be available, or the punishment or penalty which may be exacted. In this regard, we apprehend that as to all of the elements, other than the last mentioned, these are adequately specified under the Administrative Procedure Act in the accusation (§1 1503) and the notice of defense (§1 1506). As to the penalties involved, it is inconceivable that a licensee is not aware by virtue of the licensing procedures of the sanctions which may be imposed for violation of his duties and obligations as such licensee. . . .”

Appellant contends that the present case is distinguishable from Borrer, supra, because of appellant's difficulty with English and the "obvious lack of neutrality of the Administrative Law Judge." (App.Br. at 12.)

Although appellant appeared to have some difficulty with English, he also appeared to understand what the ALJ and the witnesses said. Appellant has not indicated his basis for concluding that the ALJ exhibited an "obvious lack of neutrality." The ALJ did exhibit some impatience with appellant's non-responsive answers to questions, but nothing indicates that he was biased. The ALJ's questioning of appellant appears to be simply an attempt by the ALJ to clarify the testimony of appellant. In fact, far from being "adversarial," the ALJ stated that he was "trying to understand [appellant's] state of mind in September of 1997" in what appears to be an attempt to ascertain if appellant's health situation might be a cause for mitigation. There is not a real basis for distinguishing this matter from Borrer, supra.

II

Appellant contends there is not substantial evidence to support the allegation of Count 6 of the accusation that appellant accepted food coupons in exchange for cash on September 18, 1997.

Investigator Myers testified that Virguez had entered the premises, with food stamps she had supplied, on five occasions in 1997: May 27, June 5, July 31, September 9, and September 18. On the first two occasions, according to Myers, Virguez bought beer with the food stamps, and on the latter three occasions, he

sold food stamps for cash equaling approximately 50 percent of the face value of the food stamps. [RT 11-12, 13-14, 15-18, 19-22.]

Myers testified that on September 9, she gave Virguez food stamps worth \$195. She instructed him to buy food with some of the stamps and then to attempt to sell food stamps worth \$130. Virguez returned having sold the \$130 worth of food stamps to appellant for \$60 in cash. [RT 19-20.] On September 18, 1997, Myers gave Virguez \$218 worth of food stamps with instructions to buy food and then attempt to sell \$195 worth of the food stamps. When Virguez came out of the premises, he reported to Myers that he had sold \$195 worth of food stamps to appellant for \$90 in US currency. [RT 20-22.]

Virguez testified that he entered the premises on September 9, 1997, and, after purchasing food with food stamps, offered appellant three \$65 booklets of food stamps. Appellant purchased the three booklets for \$90. [RT 37-38.] When questioned again regarding the date of the transaction involving the three booklets, Virguez reiterated that the transaction occurred on September 9, 1997 [RT 39]. Upon further questioning, Virguez affirmed that he had gone into the premises with food stamps on five occasions and had sold food stamps to appellant on each of the last three times [RT 39, 40-41]. He stated that the last time he went into the premises, he sold appellant three booklets of food stamps, worth a total of \$195, for \$90 in cash, and that the he did not go back to the premises after going there on September 18, 1997 [RT 40-42].

Appellant is correct that Myers could only testify from personal knowledge as to what happened before and after Virguez went into the premises each time, since

she waited outside and did not see the transactions. She had to rely on what Virguez told her regarding what occurred in the premises. The ALJ objected on appellant's behalf to this hearsay testimony, but allowed it when assured that the Department would be presenting the percipient witness, Virguez, to substantiate what had occurred [RT 19].

It is also true that Virguez did not, in so many words, testify that he sold food stamps to appellant for cash on September 18, 1997, as charged in Count 6 of the accusation. However, as appellant points out, the substantial evidence rule requires that this Board consider all relevant evidence in the record. Putting together the pieces of Virguez's testimony, he clearly affirmed that he had gone to appellant's premises on September 18, 1997, that September 18 was the last time he went there, and that on that date, he sold food stamps worth \$195 to appellant for \$90 in cash. Therefore, there is substantial evidence to support the allegation in Count 6 of the accusation.

III

Appellant contends that the penalty imposed, revocation, is excessive and "constitutes cruel and/or unusual punishment." Appellant argues that revocation is out of all proportion to the offense, and is not fair or reasonable "on a record replete with constitutional defects and with an unblemished license history. This is especially glaring in light of the highly technical violation alleged." (App.Br. at 16-17.)

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage

Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].)

However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

Although the licensee, licensed since December 28, 1988, had no record of prior discipline, the licensee's wife illegally accepted food stamps in payment for beer on two occasions, and the licensee himself illegally purchased food stamps on three occasions, paying a total of \$180 for food stamps with a face value of \$389.

The Department contends "[t]he penalty in this case is consistent with that of similar violations." (Dept.Br. at 4.) However, the Department provides no further information to support that statement. We have found a few appeals involving food stamps:

- The Southland Corporation & Reddy (1994) AB-6405 - food stamps were accepted as payment for alcoholic beverages on three occasions; the Board upheld a 10-day suspension
- San Joaquin Display, Inc. (1996) AB-6515 - a clerk, who was the cousin of the licensee, on one occasion, gave excess change for food stamp transactions and on three additional occasions purchased food stamps for less than their face value; the licensee stipulated to the violations; the Board upheld a 10-day suspension
- Ayesh (1998) AB-6903 - on two occasions, a co-licensee purchased food stamps which he believed to be stolen, and on a third occasion, a clerk purchased food stamps believed to be stolen; on appeal, the matter turned on the issue of the purchase of stolen property; the Appeals Board affirmed the penalty of unconditional revocation
- Chowdhury (1998) AB-6925 - the Department imposed a two-year stayed revocation, with a 60-day suspension, for appellant's clerk (who was a cousin of appellant's wife), on two occasions, purchasing food stamps for less than their face value; on appeal, only the 60-day suspension was contested, not the conditional revocation; the Appeals Board reversed and remanded the penalty, finding it excessive in light of the Department's "standard" penalty in such cases

The Department has presented no evidence of other cases with similar violations or of its “standard” penalties in food stamp cases.⁴ However, we cannot say that it is unreasonable to revoke this license where there were multiple violations of trafficking in food stamps by the licensee himself. Therefore, it appears that this penalty, under these circumstances, is within the Department’s discretion and should be upheld.

ORDER

The decision of the Department is affirmed.⁵

TED HUNT, CHAIRMAN
 RAY T. BLAIR, JR., MEMBER
 E. LYNN BROWN, MEMBER
 ALCOHOLIC BEVERAGE CONTROL
 APPEALS BOARD

⁴ However, the Department’s “Instructions, Interpretations and Procedures Manual [12/4/96],” lists the following on page L229 in its “Penalty Schedule”:

Food Stamp Violations

- | | |
|--|---|
| 1. Allowing purchases of alcoholic beverages with food stamps | 10 days |
| 2. Food stamp trafficking (i.e. purchasing stamps at discount) | |
| By licensee | Revocation |
| By employee | Revocation/ stayed with 20 day suspension |

⁵This 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.